

SEC

About the SEC Volume

We are pleased to publish the 2023 edition of PwC's SEC Volume – our primary source of written guidance on the registration and reporting requirements of the U.S. Securities and Exchange Commission (SEC) and common SEC reporting matters.

The SEC Volume is not a substitute for reading the applicable material published by the SEC or its staff. When researching an issue, you should refer to the actual SEC rules and regulations, including the relevant registration and reporting forms and associated instructions. Readers should also consider resources published by the SEC staff, such as the Division of Corporation Finance Financial Reporting Manual, Staff Accounting Bulletins, and Compliance and Disclosure Interpretations.

The SEC Volume is not a substitute for the exercise of professional judgment and not a substitute for consulting with knowledgeable professionals.

The 2023 edition of the SEC Volume has been updated to provide clarifications and enhancements to the existing guidance on the registration and reporting requirements of the SEC and common SEC reporting matters. The content of the SEC Volume has also been reorganized to help with the identification of relevant guidance on SEC reporting matters.

Updates made in September 2023

- SEC 4400.213 was updated to provide guidance on the calculation of worldwide market value.
- SEC Volume 2 was updated to provide clarifications and enhancements to the existing guidance on the registration and reporting requirements of the SEC and common SEC reporting matters applicable to foreign private issuers.

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.1 GENERAL

.11 What is Form S-1 and where can I find it?

Form S-1 is the basic SEC registration form used to register the offer and sale of securities under the Securities Act. It is generally used when a domestic company undertakes an initial public offering of its common stock (commonly referred to as an IPO). Form S-1 is also used by existing SEC registrants when they don't meet the requirements for using another Securities Act registration form (e.g., Form S-3).

The disclosure requirements of Form S-1 are set forth under the various items within the body of the form and generally cross-reference to Regulation S-X and Regulation S-K for the specific requirements.

The text of Form S-1 is available on the SEC's website (<https://www.sec.gov/files/forms-1.pdf>).

Other sources that issuers should consider when preparing a Form S-1 include the General Instructions to Form S-1 and Regulation C, which contains the general requirements for preparing and filing a registration statement under the Securities Act. Additionally, the SEC staff has published extensive interpretive guidance including various Compliance & Disclosure Interpretations and Industry Guides.

.12 Will the SEC staff review a Form S-1 on a non-public basis?

Yes, under certain circumstances. Section 6(e) of the Securities Act provides that certain registration statements prepared by Emerging Growth Companies (EGCs) (as defined in Securities Act Rule 405) may be submitted to the SEC for non-public review. Additionally, the SEC's Division of Corporation Finance permits all issuers (i.e., not just EGCs) to submit certain registration statements for non-public review. Registration statements submitted for non-public review are referred to as draft registration statements.

The non-public review process is intended to facilitate the formation of capital by allowing companies to work through SEC comments before their registration statement is publicly available.

.121 What registration statements may be submitted on a draft basis for non-public SEC staff review?

Under Division of Corporation Finance policy, all issuers (including EGCs) may submit the following registration statements on a draft basis for non-public review:

- Draft registration statements (and related revisions) for IPOs and other initial registrations under the Securities Act;
- Draft registration statements (and related revisions) for the initial registration of a class of securities under Section 12(b) of the Exchange Act (see SEC 3110); and
- Draft registration statements (but not related revisions) submitted within 12 months after the effective date of one of the registration statements referred to above.

The SEC staff's non-public review is conditioned on the issuer providing a cover letter with the nonpublic submission indicating that the draft registration statement (and related revisions, as applicable) will be

made public prior to a road show or effectiveness (as appropriate) within the timeframes set forth by the Division of Corporation Finance. See Question 5 of the Frequently Asked Questions on Voluntary Submission of Draft Registration Statements available on the SEC website (<https://www.sec.gov/corpfin/voluntary-submission-draft-registration-statements-faqs>).

.122 Will draft registration statements and associated SEC staff comments and issuer responses remain non-public?

All draft registration statements and related amendments must be made publicly available before the offering is completed. SEC comment letters and issuer responses related to draft registration statements will also be made public according to the SEC staff's existing policies. See Question 11 of the Frequently Asked Questions on Voluntary Submission of Draft Registration Statements available on the SEC website (<https://www.sec.gov/corpfin/voluntary-submission-draft-registration-statements-faqs>).

.123 Where can I find additional information relating to draft registration statements and non-public SEC staff review?

The announcement of the Division of Corporation Finance policy for non-public review can be found at <http://www.sec.gov/corpfin/announcement/draft-registration-statement-processing-procedures-expanded>.

The SEC staff has published FAQs on voluntary submission of draft registration statements available at <http://www.sec.gov/corpfin/voluntary-submission-draft-registration-statements-faqs>.

The SEC staff has published Securities Act Forms CDIs 101.04 and 101.05.

SEC 2170 contains a discussion of requirements applicable to EGCs.

.13 Does Form S-1 permit issuers to incorporate information by reference?

Yes, under certain circumstances. Form S-1 allows registrants that meet the requirements in General Instruction VII to provide the information required by Items 3 through 11 of Form S-1 through incorporation by reference of previously filed Exchange Act filings (e.g., Form 10-K and Form 10-Q). This mechanism is sometimes referred to as "backward incorporation" because the documents that are incorporated by reference have been previously filed. If the registrant elects to incorporate information by reference, Item 11A of Form S-1 requires the registrant to describe all material changes in the registrant's affairs that have occurred since the end of the latest fiscal year and have not been described in a Form 10-Q or Form 8-K filed under the Exchange Act.

Form S-1 also permits a smaller reporting company (SRC) to incorporate by reference documents filed by the registrant pursuant to Sections 13(a), 13(c), 14 or 15(d) of the Exchange Act after the effective date of the registration statement and prior to the termination of the offering. This mechanism is sometimes referred to as "forward incorporation" because the documents to be incorporated by reference will be filed in the future. For an SRC to be eligible to use forward incorporation, it must comply with the eligibility requirements for an issuer to use incorporation by reference as set forth in General Instruction VII and Item 12 of Form S-1 for documents filed before the effective date of the registration statement.

[Editor's note: When a Form 10-K is incorporated by reference into a Form S-1, the SEC requires the financial statements to be current as of both the filing and effective dates of the registration statement. Therefore, separate financial statements may be required in a Form S-1 prospectus if the financial statements incorporated by reference do not reflect certain events subsequent to the date of those financial statements. SEC 2120.23 includes a discussion for the types of subsequent events that may require revised financial statements.]

See SEC 2110.901 for additional guidance.

.2 FINANCIAL STATEMENT REQUIREMENTS

.21 Where can I find the financial statements requirements applicable to Form S-1?

Item 11(e) of Form S-1 requires financial statements and financial statement schedules meeting the requirements of Regulation S-X as well as any financial information required by S-X 3-05 and S-X Article 11 (S-X 8-04 and S-X 8-05 for an SRC).

The periods to be covered in the issuer's financial statements and the associated age of financial statements requirements are generally driven by S-X 3-01, 3-02, 3-04 and 3-12 (S-X 8-02 and 8-08 for an SRC). See SEC 4600 for additional information on the SEC's age of financial statement requirements and SEC 2110.22 and .23 for a discussion of financial statements which may be omitted from a draft registration statement.

The required financial statements and related footnotes for a private company preparing a Form S-1 should be evaluated for compliance with relevant US GAAP requirements and accounting standards that apply specifically to public companies. Some standards which were not required to be applied as a private company may need to be applied in connection with preparing Form S-1. Additionally, transition provisions for some new accounting pronouncements can be different for a public business enterprise (PBE) and a non-PBE and may also depend upon EGC (SEC 2170) or SRC (SEC 2160) status. As such, the transition provisions related to new accounting standards can be a complex matter. See US In depth 2019-20.

In addition to consolidated financial statements of the issuer, Regulation S-X may require separate financial information in Form S-1 for one or more of the following situations:

1. The registrant (parent company) pursuant to S-X 5-04(c), S-X 7-05(c), and S-X 12-04 (see SEC 4510);*
2. Unconsolidated majority-owned subsidiaries pursuant to S-X 3-09 (see SEC 4520);*
3. Fifty percent or less-owned persons accounted for by the equity method pursuant to S-X 3-09 (see SEC 4520);*
4. Guarantors of registered securities pursuant to S-X 3-10 and S-X 13-01 (see SEC 4530);
5. Affiliates whose securities collateralize an issue of registered debt pursuant to S-X 3-16 or S-X 13-02 (see SEC 4540); and
6. Businesses acquired or to be acquired and real estate operations acquired or to be acquired pursuant to S-X 3-05 or S-X 3-14 (S-X 8-04 or S-X 8-06 for SRCs) (see SEC 4550, SEC 4555 and SAB Topic 1-J).

*Not required for SRCs.

[Editor's note: Special accommodations for EGCs which allow them to provide only two years of financial statements may apply to the separate financial information described above (see SEC FRM 10220.5).]

[Editor's note: Companies contemplating an IPO and auditors should evaluate the specific independence matters related to performing an audit in accordance with SEC independence requirements.]

See SEC 2110.903, SEC 2110.904, SEC 2110.905, SEC 2110.906, SEC 2110.907, SEC 2110.908, SEC 2110.909, and SEC 2110.910 for additional guidance.

.22 Will the SEC staff permit a non-EGC to omit certain financial statements otherwise required by Regulation S-X from a draft registration statement?

Yes. Securities Act Forms CDI 101.05 clarifies that a non-EGC that is permitted to submit a draft registration statement for non-public review may omit from its draft registration statement interim and annual financial information that the non-EGC reasonably believes will not be required to be “presented separately” at the time the non-EGC files its registration statement publicly. A non-EGC may not omit any required financial information from its publicly filed registration statements.

For example, consider a calendar year-end issuer that is a non-EGC (and does not qualify as an SRC) that submits a draft registration statement in November 2023 and reasonably believes it will first publicly file its registration statement in April 2024 when annual financial information for 2023 will be required. The non-EGC may omit from its draft registration statements its 2020 annual financial information and interim financial information related to 2022 and 2023 because this information would not be required at the time of its first public filing in April 2024.

.23 May an EGC preparing an initial public offering of its equity securities omit certain financial statements otherwise required by Regulation S-X from a draft registration statement or from a publicly filed registration statement?

Yes. An EGC that is submitting a draft registration statement for confidential review may omit financial information for historical periods (including audited financial statements) otherwise required by Regulation S-X if it reasonably believes the omitted information will not be required to be “presented separately” at the time of the contemplated offering.

An EGC that is filing (i.e., publicly) a registration statement may omit annual and interim financial information that “relates to” an historical period that the company reasonably believes will not be required to be included at the time of the contemplated offering. For purposes of making this assessment, interim financial information that will be included in a longer historical period “relates to” that period. Accordingly, interim financial information that will be included in an historical period that the issuer reasonably believes will be required to be included at the time of the contemplated offering may not be omitted from its filed registration statements.

For example, consider a calendar year-end EGC that submits a draft registration statement for its equity IPO in November 2023 and reasonably believes it will commence its offering in April 2024 when annual financial information for 2023 and 2022 (but not 2021) will be required. The EGC may omit from its November 2023 draft registration statement its 2021 annual financial information and interim financial information related to 2022 and 2023 because the company expects that information will not be required to be “presented separately” at the time of the contemplated offering. If the EGC were to file (i.e., publicly) its registration statement in January 2024, it may omit its 2021 annual financial information, but it must include its 2022 and 2023 interim financial information in that January filing because that interim information “relates to” historical periods that will be included at the time of the public offering (i.e., the 2023 and 2022 interim financial information form a part of the 2023 and 2022 annual periods which will be included in the registration statement at the time of the contemplated offering). See Securities Act Forms CDI 101.04.

Before distributing a preliminary prospectus, an EGC must amend its registration statement to include all financial information required by Regulation S-X at the time of the amendment.

SEC 2170 contains additional guidance applicable to EGCs.

.4 ACCOUNTANTS’ CONSENT

.41 Where can I find information relating to the SEC’s requirements for accountants’ consents?

See SEC 2400 for a discussion of accountants’ consents.

.5 EXPERTS LANGUAGE

.51 Where can I find information relating to experts language?

See SEC 2300 for a discussion of experts language.

.9 FREQUENTLY ASKED QUESTIONS

.901 Is a registrant required to file its Form 10-K for its most recently completed fiscal year before using incorporation by reference in connection with a Form S-1 even if that Form 10-K is not yet due and the Form S-1 is not required to include financial statements for the most recently completed fiscal year?

Yes. Condition C under General Instruction VII of Form S-1 requires that the registrant has filed an annual report for the most recently completed fiscal year. We understand that the SEC staff interprets this requirement to mean that the registrant must have filed its Form 10-K for the most recently completed fiscal year even if the Form S-1 is filed before the Form 10-K is due or before the Form S-1 would otherwise be required to include audited financial statements for the most recently completed fiscal year. For instance, if a calendar year-end registrant files a Form S-1 on January 17, 2023, it would be required to file its Form 10-K for the year ended December 31, 2022 before filing the Form S-1 in order to use the incorporation by reference method of providing information to investors in that Form S-1.

.902 Is a registrant required to provide the S-K 402 executive compensation disclosures for its most recently completed fiscal year in Form S-1 even if the registrant is not required to include audited financial statements for that recently completed fiscal year?

Generally, yes. See Regulation S-K CDI 217.11.

.903 Does S-X 3-06 permit a company preparing a Form S-1 in connection with its initial public offering of common stock to provide its audited financial statements for a nine-month period in lieu of its financial statements for a full a fiscal year even if there is no change in fiscal year-end?

No. S-X 3-06 only applies in connection with an issuer's change in fiscal year-end (S-X 3-06(a)) or financial statements required by S-X 3-05 (S-X 3-06(b)). If a company believes that it should be permitted to provide its audited financial statements for a nine-month period in lieu of its financial statements for a full fiscal year in other circumstances, then it should seek relief from the SEC staff as described in S-X 3-13. Relief from the SEC staff should be obtained prior to confidentially submitting the initial registration statement.

.904 Is a registrant required to provide additional disclosures and pro forma information when the offering proceeds may or will be used to finance an acquisition?

Reference should be made to S-K 504 (Instruction 6) if Form S-1 is used to raise funds that may or will be used to finance an acquisition of a business.

SEC 4550 and SEC 4560 contain a discussion of the requirements under S-X 3-05 and S-X Article 11 to include historical financial statements and pro forma financial information for the business to be acquired.

SRCs may look to S-X 8-04 and S-X 8-05 for guidance relating to the historical financial statements and pro forma financial information relating to the business to be acquired.

.905 Is a registrant required to provide pro forma earnings per share or pro forma financial information when the offering proceeds are used to retire debt or preferred stock?

In a registration statement, the SEC staff has indicated that disclosures of pro forma earnings per share (EPS) are important to investors when the proceeds will be used to extinguish preferred stock or debt and such extinguishments will have a material effect on EPS. See S-X 11-01(a)(8).

[Editor's note: The weighted average number of shares outstanding during the period must be adjusted to give effect to the number of shares issued or to be issued to extinguish the preferred stock or debt, or if applicable whose proceeds will be used to extinguish the preferred stock or debt as if the shares were outstanding as of the beginning of the period presented. See S-X 11-02(a)(9)(ii).]

.906 Is a registrant required to provide pro forma financial information when distributions at or prior to closing of an IPO are expected?

SAB Topic 1-B.3 and SEC FRM 3420 provide guidance on situations that would require the inclusion of an unaudited pro forma balance sheet reflecting a planned distribution to owners alongside the latest balance sheet included in the filing. SAB Topic 1-B.3 and SEC FRM 3420 were issued prior to the SEC's 2020 updates to S-X 11-02. S-X 11-02(a)(12)(i) states that a registrant must not present pro forma financial information on the face of the registrant's historical financial statements or in the accompanying notes, except where such presentation is required by US GAAP. Accordingly, companies may wish to discuss their presentations with the SEC staff.

.907 Is a registrant required to provide pro forma financial information when there is a change in capitalization at or prior to closing?

Oftentimes in an IPO, changes in capitalization will occur upon the effective date of the registration statement or completion (i.e., closing) of the IPO. Historical financial statements should not be revised to reflect modifications of the terms of outstanding securities that become effective after the latest balance sheet. For example, the conversion of securities on either the effective date of the registration statement or closing date of the IPO should not be reflected in the historical balance sheet. The security should be classified according to its nature in the historical balance sheet.

SEC FRM 3430.2 states that "If terms of outstanding equity securities will change subsequent to the date of the latest balance sheet and the new terms result in a material reduction of permanent equity or, if redemption of a material amount of equity securities will occur in conjunction with the offering, the filing should include a pro forma balance sheet (excluding effects of offering proceeds) presented alongside of the historical balance sheet giving effect to the change in capitalization."

The guidance in SEC FRM 3430.2 was issued prior to the SEC's 2020 updates to S-X 11-02. S-X 11-02(a)(12)(i) states that a registrant must not present pro forma financial information on the face of the registrant's historical financial statements or in the accompanying notes, except where such presentation is required by US GAAP. Accordingly, companies may wish to discuss their presentations with the SEC staff.

.908 Is incorporating by reference or cross-referencing to information outside of the financial statements permitted in financial statements?

Generally, no. Disclosure in the text of the prospectus does not eliminate the need for similar disclosure, when required by US GAAP or International Financial Reporting Standards as issued by the International Accounting Standards Board (IFRS as issued by the IASB), in the notes to the financial statements. In any financial statements, incorporating by reference or cross-referencing to information outside of the financial statements is not permitted unless otherwise specifically permitted or required by SEC rules, US GAAP or IFRS as issued by the IASB.

The non-financial statement portions of the Form S-1 may contain cross-references to the financial statements.

See General Instruction VII of Form S-1 and Securities Act Rule 411(a).

.909 Is a private company preparing an IPO registration statement required to apply the “dual approach” to quantifying financial statement errors if it had not done so previously?

Yes. A private company's initial registration statement must apply the "dual approach" of quantifying errors under SAB 108 (SAB Topic 1-N) to the financial statements that are included in the registration statement. If applying the "dual approach" indicates that there is a material misstatement in any of the financial statements included in the registration statement, then those financial statements need to be corrected (i.e., may not use the cumulative effect method of initially applying SAB 108). However, the initial application of SAB 108 should be treated similar to a change in accounting principle rather than the correction of an error for purposes of disclosure.

.910 Does Form S-1 specifically require disclosure of a selected financial data table?

No. In SEC Release No. 33-10890, *Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information*, the SEC eliminated the requirement for Selected Financial Data which was previously set forth in S-K 301.

Notwithstanding the elimination of the specific line-item requirement, some issuers voluntarily provide such information. As a general matter, that information is not required to be audited, nor is there a requirement for the information to be preceded by any introductory language. Although selected financial data is not required to be audited, issuers sometimes include introductory or “headnote” language preceding the information. The introductory language might indicate that the source of annual financial data is audited financial statements or, it might refer by name to the independent registered public accounting firm that audited the underlying annual financial statements. If the auditor is named, the SEC staff has historically required the registrant to provide an auditor's consent to the reference in the headnote to the selected financial data when that disclosure is included or incorporated by reference in a registration statement under the Securities Act (see SEC 2400.28).

If interim data is referred to as having been derived from unaudited financial statements, registrants generally also include the statement referred to in S-X 3-03(d).

If the auditor is named and its report on the source financial statements was based, in part, on the report of another auditor, reference to the other auditor is generally made. If the auditor is named and its report on the source financial statements contains an explanatory paragraph for matters other than consistency, the headnote language generally states that fact, indicating the nature of the explanatory paragraph.

If the amounts presented for any of the years included in any selected financial data have been revised, either as a result of the correction of an error, or due to the retrospective application of other matters (e.g., changes in accounting, presentation of discontinued operations, etc.) and full financial statements for those periods have not been reissued, together with an audit report, then the headnote does not describe the amounts for those periods as being derived from audited financial statements.

.911 Do the requirements of S-K 302(a) apply to a Form S-1?

Sometimes. S-K 302(a)(2) provides that S-K 302(a) is not applicable until after a company's initial registration under Sections 12(b) or 12(g) of the Exchange Act. In most IPOs, the company filing the Form S-1 does not have securities registered under Sections 12(b) or 12(g) of the Exchange Act. Accordingly, the requirements of S-K 302(a) generally are not applicable in connection with most Form S-1s filed in connection with an IPO.

However, in connection with most IPOs, the company also registers its securities under Section 12(b) of the Exchange Act (usually on Form 8-A) (see SEC 3120). If the company prepares a Form S-1 after it has registered securities under Section 12(b) or 12(g) of the Exchange Act (e.g., in connection with a subsequent "follow-on" offering), the company must consider the requirements of S-K 302(a) and, where applicable, provide the required disclosures unless the company is otherwise exempt from the scope of S-K 302(a). See S-K 302(a)(2) and (3) for specified entities which are exempt from the scope of S-K 302(a) (e.g., foreign private issuers and SRCs).

See SEC FRM 1620.1.

- .1 General
- .2 Financial statements and related requirements
- .7 Accountants' consent
- .8 Experts language
- .9 Frequently asked questions

.1 GENERAL

.11 What is Form S-3 and where can I find it?

Form S-3 is a short form Securities Act registration statement that can be used to register the offer and sale of many different types of securities, including common and preferred stock, options, warrants, debt (convertible and non-convertible) and debt guarantees. Form S-3 can be used to register primary offerings (i.e., when an issuer sells its own securities) and secondary offerings (i.e., the resale of securities by a selling security holder that is not the issuer). Form S-3 may be used to register a current sale of securities, a future sale of securities, or a continuous offering.

The disclosure requirements of Form S-3 are set forth under the various items within the body of the form and generally cross-reference to Regulations S-X or S-K for the specific requirements. One of the principal differences between Form S-3 and Form S-1 is that prospectus disclosure in Form S-3 is largely based on information that is incorporated by reference from previously filed Exchange Act reports and the prospectus is kept current through the automatic incorporation by reference of future Exchange Act reports, whereas disclosure in Form S-1 is generally based on disclosures included in the prospectus.

The text of Form S-3 is available on the SEC's website (<https://www.sec.gov/files/forms-3.pdf>).

Other sources that issuers should consider when preparing a Form S-3 include the General Instructions to Form S-3 and Regulation C, which contains the general requirements for preparing and filing a registration statement under the Securities Act. Additionally, the SEC staff has published extensive interpretive guidance including various Compliance & Disclosure Interpretations. See, for example, Securities Act Forms CDI Sections 114-124 and 214-224.

.12 Where can I find the eligibility requirements for using Form S-3?

The eligibility requirements for use of Form S-3 are set forth in General Instruction I to the form. To be eligible to use Form S-3, an issuer must meet the form's "Registrant Requirements" (included in General Instruction I.A) and the transaction must meet one of the form's "Transaction Requirements" (included in General Instruction I.B.). Majority-owned subsidiaries should refer to General Instruction I.C.

.13 What is a shelf registration statement?

A Form S-3 that registers the future sale of securities is commonly referred to as a shelf registration statement because all of the registration activity (including SEC staff review) takes place upfront, and then, when the decision is made to sell securities, they are "taken off the shelf" with no further review by the SEC staff. Securities are normally "taken off the shelf" by filing a prospectus supplement under Securities Act Rule 424(b) that describes the terms of the securities offered. The process of selling securities from an already effective shelf Form S-3 is also referred to as a shelf "takedown." See Securities Act Rule 415 for additional information.

.131 What is an automatic shelf registration statement?

The SEC permits companies that meet the definition of a well-known season issuer at the most recent determination date (see Securities Act Rule 405) to use Form S-3 as an "automatic" shelf registration statement (sometimes referred to as an ASR). The Form S-3 is referred to as an automatic shelf

registration statement because it becomes effective immediately (i.e., automatically) upon filing. See Securities Act Rule 462(e). The specific requirements relating to automatic shelf registration statements are set forth in General Instruction I.D of Form S-3.

By becoming effective automatically upon filing, the pre-effective SEC staff review and comment process has essentially been eliminated for well-known seasoned issuers. Accordingly, SEC staff reviews are almost entirely dependent on the Exchange Act reporting stream for these issuers.

Automatic shelf registration is essentially "company registration" (as compared to "transaction registration") because the base prospectus included in an automatic shelf registration statement may omit:

- information that is unknown or not reasonably available to the issuer (Securities Act Rule 409);
- information as to whether the offering is a primary offering, a secondary offering, or a combination of the two;
- the plan of distribution for the securities;
- a description of the securities registered (other than an identification of the name or class of such securities); and
- the identification of other issuers.

[Editor's note: See Securities Act Rule 430B for details regarding the permissible omission of information from the base prospectus in an automatic shelf registration statement.]

Just as with non-automatic Form S-3 shelf registration statements, the omitted information in an automatic shelf registration statement may be provided at the time of a takedown by a post-effective amendment to the registration statement, incorporation by reference of an Exchange Act report, or through a prospectus supplement (as appropriate).

.2 FINANCIAL STATEMENTS AND RELATED REQUIREMENTS

.21 Where can I find the financial statement requirements applicable to Form S-3?

Unlike Form S-1, which specifically calls for an issuer to provide the financial statements required by Regulation S-X, financial statement disclosure in Form S-3 principally relies on the incorporation by reference of financial statements from previously filed Exchange Act reports (e.g., Forms 10-K and 10-Q).

Item 12 of Form S-3 requires the prospectus to specifically incorporate by reference (i) the most recent annual report on Form 10-K and (ii) all other reports filed pursuant to Section 13(a) or 15(d) of the Exchange Act (e.g., Form 8-K and Form 10-Q) since the end of the fiscal year covered by that Form 10-K. See SEC 3150.13 for a discussion of the distinction between filing and furnishing a Form 8-K.

Accordingly, the principal mechanism for providing financial statements in Form S-3 at the time of filing and effectiveness is through incorporation by reference of the financial statements included in previously filed Forms 10-K and 10-Q. There are, however, certain instances in which the previously filed financial statements will need to be updated prior to filing a Form S-3. See SEC 2120.22 regarding the SEC's age of financial statements requirements and SEC 2120.23 regarding the requirements of Item 11(b) of Form S-3.

[Editor's note: In addition to requiring the incorporation by reference of previously filed Exchange Act reports, the Form S-3 prospectus must also include a statement that all documents filed subsequent to the initial offering (i.e., subsequent to the effective date of the initial Form S-3) pursuant to Sections 13(a) and (c), 14, or 15(d) of the Exchange Act

are deemed to be incorporated by reference into the Form S-3 as long as the offering is in process. This mechanism is commonly referred to as “forward incorporation” and is a means of keeping the Form S-3 current. See SEC 2120.908 for information relating to Exchange Act reports filed after the initial filing of Form S-3 but before the Form S-3 becomes effective.]

.22 Given that Form S-3 generally relies on incorporation by reference of previously filed Exchange Act reports for its financial statement requirements, does an issuer still need to consider the SEC's age of financial statements requirements prior to filing a Form S-3?

Yes. Even though Form S-3 doesn't specifically refer to the requirements of Regulation S-X, the SEC's age of financial statements requirements in S-X 3-12 (S-X 8-08 for a smaller reporting company) are applicable to a registration statement on Form S-3. That means the financial statements incorporated by reference in the Form S-3 from previously filed Exchange Act reports may need to be updated to a more recent date before the Form S-3 is filed or becomes effective. This is true whether or not the Form S-3 is an automatic shelf registration statement. See Securities Act Forms CDI 223.01. See also SEC 4600 (including SEC 4600.41 for SEC staff guidance with respect to interim financial statements).

For example, a calendar year-end registrant would need to provide its December 31, 2022 audited financial statements in connection with a Form S-3 filed after February 14, 2023 unless it meets the requirements of S-X 3-01(c) (S-X 8-08(b) for a smaller reporting company). This is true even though the December 31, 2022 Form 10-K isn't due until the 60th, 75th or 90th day after year end (depending on the issuer's accelerated filer status).

[Editor's note: A different analysis would apply to a registration statement on Form S-8. See SEC 2125.31.]

.23 Are there circumstances under which the financial statements incorporated by reference from previously filed Exchange Act reports would need to be updated prior to filing a new Form S-3?

Yes. If the financial statements incorporated by reference from the most recent Form 10-K do not reflect certain material events subsequent to the date of those financial statements, then they may need to be updated prior to filing the Form S-3. If the following financial statements or information are not included in the registrant's Exchange Act reports or in a prospectus filed in an effective registration statement incorporated by reference in the Form S-3, then Item 11(b) of Form S-3 requires the inclusion of revised financial statements or information in the Form S-3:

- (a) The financial information required by S-X 3-05 and S-X Article 11 (S-X 8-04 and 8-05 for a smaller reporting company) regarding businesses acquired or to be acquired (see SEC 4550 and 4560). See also S-K 504 (Instruction 6) when the proceeds of an offering will or may be used to finance the acquisition of another business.
- (b) Financial statements prepared in accordance with Regulation S-X if there has been a change in an accounting principle retrospectively applied or restatement for a correction of an error where such change or correction requires a material change to the financial statements.

[Editor's note: With respect to a retrospective change in accounting principle, the Form S-3 must include or incorporate by reference audited annual financial statements that give retrospective effect to the accounting change when previously filed interim financial statements included or incorporated by reference in the Form S-3 reflect the newly adopted accounting principle (assuming the adjustments to reflect the new accounting principle are material to the relevant financial statements). If the most recent interim financial statements included or incorporated by reference in the Form S-3 properly do not reflect the application of the new accounting principle, then the previously issued financial statements may not be retrospectively adjusted to reflect the newly adopted

accounting principle; however, S-X Article 11 pro forma information may be required. See SEC 2120.231 for an example.]

- (c) Retrospectively adjusted financial statements prepared in accordance with Regulation S-X if a combination of entities under common control has been consummated subsequent to the most recent fiscal year-end and the transferred business(es), considered in the aggregate, meet the test of a significant subsidiary. See SEC 4400 and SEC FRM 13410.1.

[Editor's note: The Form S-3 must include or incorporate by reference audited annual financial statements that give retrospective effect to the combination of entities under common control when previously issued interim financial statements included or incorporated by reference in the Form S-3 reflect the combination (assuming the adjustments to reflect the combination are material to the relevant financial statements). If the most recent interim financial statements included or incorporated by reference in the Form S-3 properly do not reflect the combination, then the previously issued financial statements may not be retrospectively adjusted to reflect the combination; however, S-X Article 11 pro forma information may be required.]

- (d) Financial information required because of a material disposition of assets outside the normal course of business.

[Editor's note: The Form S-3 must include or incorporate by reference audited annual financial statements that give retrospective effect to discontinued operations when the period covered by previously issued interim financial statements includes the date upon which discontinued operations reporting is required (assuming the adjustments to reflect the discontinued operation are material to the relevant financial statements). If the date upon which discontinued operations reporting is required is subsequent to the date of the most recently issued financial statements included or incorporated by reference in the Form S-3, then the financial statements may not be retrospectively adjusted to reflect the discontinued operations; however, S-X Article 11 pro forma information may be required. See SEC FRM 3120.1.]

Although not listed in Item 11(b) of Form S-3, retrospectively adjusted annual audited financial statements prepared in accordance with Regulation S-X are required when a registrant changes its reportable segments (assuming the effect on the previously issued annual financial statements is material). See SEC FRM 13110.2.

[Editor's note: The Form S-3 must include or incorporate by reference audited annual financial statements that give retrospective effect to the change in reportable segments when previously filed interim financial statements included or incorporated by reference in the Form S-3 reflect the new segment presentation (assuming the adjustments to reflect the new segment presentation are material to the relevant financial statements). If the most recent interim financial statements included or incorporated by reference in the Form S-3 properly do not reflect the new segment presentation, then the previously issued financial statements may not be retrospectively adjusted to reflect the new segment presentation; however, disclosure of the pending change may be required.]

Additionally, although not listed in Item 11(b) of Form S-3, stock splits and stock dividends also require retrospective presentation. Historically, the SEC staff has not required the retrospective adjustment of previously filed financial statements that are incorporated by reference into a registration statement or proxy statement for reasons solely attributable to a stock split or stock dividend. In lieu of revising the financial statements, the SEC staff has historically accepted inclusion or incorporation by reference of a summary or selected financial data table which includes revised per share information for all periods, with prominent disclosure of the stock split or stock dividend. See SEC FRM 13500.

[Editor's note: SEC Release No. 33-10890, *Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information* (SEC Release 33-10890) eliminated the selected financial data table requirements. The guidance included in SEC FRM 13500 has not been updated to reflect SEC Release 33-10890.]

[Editor's note: See SEC 2125.42 for a discussion of the analysis in connection with a registration statement on Form S-8.]

.231 How would the requirements of Item 11(b) work in the case of a retrospective change in accounting principle?

Assume that Registrant A adopts a new accounting standard on January 1, 2023 and that the new accounting standard requires retrospective application. The financial statements included in Registrant A's December 31, 2022 Form 10-K properly reflect application of the prior accounting standard. The financial statements included in Registrant A's March 31, 2023 Form 10-Q (including the 2022 comparative period financial statements) will properly reflect the application of the newly adopted accounting standard. Assume the impact of applying the new accounting standard is material to all periods.

If Registrant A were to file a new Form S-3 that incorporates by reference interim financial statements that reflect the application of the new accounting standard (i.e., after filing the March 31, 2023 Form 10-Q), then the prior period annual audited financial statements must be retrospectively adjusted to reflect the new accounting principle. Registrant A's auditor will likely dual date their audit report issued in connection with the revised annual financial statements.

Absent the Form S-3 filing, Registrant A's prior period annual financial statements may not need to be revised to reflect the retrospective adjustment until the next time they are filed (e.g., in connection with the filing of the December 31, 2023 Form 10-K). The Form S-3 filing may accelerate the need to complete the process of revising the prior period annual financial statements.

[Editor's note: The interim financial statements for the most recent year-to-date period (and the comparative periods of the prior year) must also give effect to the new accounting standard. However, interim financial statements covering periods other than the financial statements described in the preceding sentence are generally not restated in connection with a new or amended registration statement or proxy statement even if those prior period interim financial statements are incorporated by reference in a new or amended registration statement or proxy statement. We understand this is because S-X 3-02 only requires an interim income statement covering the year-to-date period from the date of the latest audited balance sheet up to the date of the most recent interim balance sheet being filed (together with the corresponding period in the preceding year).]

.232 How are revised financial statements typically made a part of the Form S-3?

Most companies file the revised financial statements and financial information in a Form 8-K (usually under Item 8.01). Companies should consult with their legal counsel about the proper mechanism to place revised financial statements and other financial information on file.

[Editor's note: The previously filed Form 10-K generally should not be amended unless that Form 10-K is otherwise being amended to correct a material error in previously issued financial statements. See SEC 3130.916 and also SEC FRM 13110.6. However, a registrant should consider if its MD&A needs to be revised in conjunction with the filing if it contains revised financial statements. The MD&A is usually revised when annual audited financial statements are updated for a change in segments. See SEC FRM 13310.1.]

.24 Are the considerations outlined in SEC 2120.22 and .23 applicable at the time of a takedown from an already effective Form S-3?

The considerations outlined in SEC 2120.22 and .23 are in the context of filing a registration statement on Form S-3. There are different considerations associated with a shelf takedown.

For instance, the SEC staff has indicated that S-X 3-01 does not prevent a shelf takedown from occurring and would not apply to a prospectus supplement as it is not for purposes of updating the prospectus under Section 10(a)(3) of the Securities Act. See Securities Act Rules CDI 212.13 and SEC 4600.803.

Most Form S-3 registration statements include the undertaking specified in S-K 512(a)(1)(ii). Accordingly, when preparing to take securities off the shelf by means of a prospectus supplement, the registrant will consider whether there have been any facts or events arising after the effective date of the registration statement (or most recent post-effective amendment thereof) which, individually or in the aggregate, represent a "fundamental change" in the information set forth in the registration statement. If there have been one or more fundamental changes, the registrant would need to consider whether a post-effective amendment must be filed prior to the takedown. The determination of what constitutes a "fundamental change" is a legal matter.

Generally, registrants and their legal counsel have concluded that discontinued operations, segment changes, and changes in accounting principle do not represent "fundamental changes" to the information set forth in the registration statement. Accordingly, those registrants generally do not retrospectively adjust their prior period annual financial statements in connection with a takedown, even if they would have been required to do so in connection with a new or amended registration statement (e.g., because the effects of changes on the previously issued financial statements are material).

.25 Are there any incremental financial statement requirements associated with a Form S-3 which registers guarantees or collateralized securities?

If the Form S-3 is registering securities (usually debt) that are guaranteed by one or more subsidiaries or a parent company, the guaranty is generally considered a security under US securities laws and, therefore, is also subject to the SEC's registration and reporting requirements. As a result, the Form S-3 may need to include or incorporate by reference additional information that was not previously required. See SEC 4530.

If the Form S-3 is registering securities that are collateralized by the securities of one or more of a registrant's affiliates (e.g., the stock of a consolidated subsidiary), then the Form S-3 may be required to include or incorporate by reference information that was not previously required. See SEC 4540.

.7 ACCOUNTANTS' CONSENT

.71 Where can I find information relating to the SEC's requirements for accountants' consents?

See SEC 2400 for a discussion of accountants' consents.

.8 EXPERTS LANGUAGE

.81 Where can I find information relating to experts language?

See SEC 2300 for a discussion of experts language.

.9 FREQUENTLY ASKED QUESTIONS

.901 How does the SEC define the phrase “twelve calendar months and any portion of a month” for purposes of assessing the timely filing eligibility criterion in General Instruction I.A.3(b) of Form S-3?

For purposes of Form S-3 eligibility, a calendar month begins on the first day of the month and ends on the last day of that month. Accordingly, if a registrant was not timely on a Form 10-Q due on August 9, 2023, but was timely thereafter, it would first satisfy the timely filer requirement of Form S-3 on September 1, 2024. See Securities Act Forms CDI 115.06. See SEC 3145 for information relating to non-timely filings.

.902 Would a real estate investment trust whose shares are not traded in a public market be considered to have a public float for purposes of determining eligibility to use Form S-3?

Certain REITs offer and sell shares of common stock through offerings registered under the Securities Act, but the shares are not publicly traded. The SEC staff has indicated that a REIT whose shares are not traded in a public market would not be considered to have a "common equity public float" for purposes of determining its accelerated filer status or for determining whether it is eligible to use Form S-3.

.903 How does the use of Form 12b-25 (Notification of Late Filing) impact an issuer’s eligibility to use Form S-3?

See SEC 3145.14 for discussion of eligibility when a registrant has filed a Form 12b-25.

.904 Can a registrant file or use an automatic shelf registration statement if the registrant filed its Form 10-K for its most recent fiscal year-end without the information called for by Part III of that Form and has not yet filed the Part III information?

As discussed more fully in SEC 3130.912, General Instruction G(3) to Form 10-K permits a registrant to file its Form 10-K without the information required by Part III of that form and file that information no later than 120 days after year-end. The SEC staff has stated that it will not object to either the filing or use of an automatic shelf registration statement by an issuer which has filed its Form 10-K but has not filed the Part III information for that year. However, the SEC staff has stated that “issuers are responsible for ensuring that any prospectus used in connection with a registered offering contains the information required to be included therein by Securities Act Section 10(a) and Schedule A.” See Securities Act Forms CDI 114.05.

Registrants that are not eligible to use an automatic shelf registration statement are usually not allowed to use the accommodation discussed in Securities Act Forms CDI 114.05. As such, issuers should discuss the need to file Part III of Form 10K before the registration statement is declared effective by the SEC with legal counsel.

.906 Can an issuer with an effective automatic shelf registration statement continue to use that registration statement if it does not meet the definition of a well-known seasoned issuer at the time the issuer files its Form 10-K?

The filing of an annual report on Form 10-K triggers a new determination date for well-known seasoned issuer status. If an issuer no longer meets the definition of a well-known seasoned issuer on the date it files its annual report on Form 10-K, then it would generally not be able to use a previously filed automatic shelf registration statement. Instead, the company would likely need to amend its previously filed registration statement to comply with a form that it is eligible to use (e.g., a Form S-1 or a non-automatic shelf registration statement such as Form S-3).

The SEC staff published guidance for a company that no longer meets the definition of a well-known seasoned issuer at the filing date of its current Form 10-K. This guidance provides certain steps that the company may be able to take in order to preserve its ability to readily access the capital markets. Some of these steps must be taken before the issuer files its Form 10-K. See Securities Act Rules CDI 198.06.

.907 Is Form SD (Specialized Disclosure) automatically incorporated by reference into Form S-3?

No. See General Instruction B.4. of Form SD.

.908 Is an issuer required to file a pre-effective amendment to Form S-3 to specifically incorporate by reference an Exchange Act report filed after the Form S-3 was filed but before it became effective?

The SEC staff has indicated that a registrant is not required to file a pre-effective amendment solely to incorporate an Exchange Act report filed prior to effectiveness, provided that the registrant includes a statement in its initial registration statement (in addition to the statement regarding incorporation after the date of the prospectus) that all filings filed by the registrant pursuant to the Exchange Act after the date of the initial registration statement and prior to effectiveness of the registration statement are deemed to be incorporated by reference into the prospectus. In the first prospectus used after effectiveness, a copy of which is required to be filed under Rule 424(b), the registrant should identify all Exchange Act reports filed prior to effectiveness. If the registration statement does not specifically incorporate reports filed during the waiting period, a pre-effective amendment would be required in order to incorporate the Exchange Act report. See Securities Act Forms CDI 123.05.

.909 Does the fact that an automatic shelf registration statement becomes effective immediately upon filing alter an auditor's responsibilities under PCAOB AS 4101?

No. Auditors must still perform their responsibilities under PCAOB AS 4101.

.910 Where can I find guidance on the required pro forma financial information requirements when the offering proceeds are used to (i) finance an acquisition, or (ii) retire debt or preferred stock?

See the guidance included in SEC 2110.904 and .905.

.911 Is incorporating by reference or cross-referencing to information outside of the financial statements permitted in financial statements?

Generally, no. See Item 12(d) of Form S-3 and SEC 2110.908 for additional guidance.

- .1 General
- .2 Information with respect to the registrant
- .3 Information with respect to the company being acquired
- .4 Pro forma financial information
- .5 Formation of a one bank holding company
- .6 Roll-up transactions
- .7 Accountants' consent
- .8 Experts language
- .9 Frequently asked questions

.1 GENERAL

.11 What is Form S-4 and where can I find it?

Form S-4 is a Securities Act registration form used to register securities in connection with business combination transactions and exchange offers. See General Instruction A.1 of Form S-4 for additional details regarding the types of transactions which may be registered using Form S-4.

[Editor's note: Form S-4 may be used as a proxy statement or information statement for the transaction as well as a registration statement. See SEC 7050 for information relating to reverse mergers.]

The disclosure requirements of Form S-4 are set forth under the various items within the body of the form. Many of the disclosures called for by Form S-4 cross-reference to Regulations S-X, S-K and 14A for the specific requirements. There are also some form-specific disclosure requirements set forth in the text of the form (e.g., Items 4 and 6).

Other sources of guidance that issuers should consider when preparing a Form S-4 include the General Instructions to Form S-4 and Regulation C, which contains the general requirements for preparing and filing a registration statement under the Securities Act. Additionally, the SEC staff has published extensive interpretive guidance including SEC FRM Topic 2200, which is focused on the financial statements of a target company in a Form S-4 and various Compliance & Disclosure Interpretations. See, for example, Securities Act Forms CDI Sections 125 and 225, and Topic I.H of the Division of Corporation Finance: Manual of Publicly Available Telephone Interpretations (Third Supplement, July 2001). Registrants should also consider whether the Form S-4 is subject to the requirements of Regulations 14A (proxy statements) or 14C (information statements) or Exchange Act Sections 13(e), 14(d) or 14(e) and the related rules and regulations (relating to tender offers and going-private transactions) or S-K Topic 900 (relating to roll-up transactions).

The text of Form S-4 is available on the SEC's website (<https://www.sec.gov/files/forms-4.pdf>).

.12 Does Form S-4 permit the issuer to provide information in Form S-4 using the incorporation by reference method?

The availability of the incorporation by reference method of providing disclosure in Form S-4 depends on whether the registrant and/or the company being acquired "meets the requirements for use of Form S-3." Form S-4 defines the phrase "meets the requirements for use of Form S-3" for purposes of Form S-4. See General Instruction B.1(a) for the definition with respect to the registrant and General Instruction C.1(a) with respect to the company being acquired. See General Instruction A.2 regarding timing considerations when information is incorporated by reference.

.13 Will the SEC staff review Form S-4 on a non-public basis?

Under certain circumstances, yes. Companies should consider discussing this situation with their legal counsel before submitting a draft registration statement to SEC staff for review.

.2 INFORMATION WITH RESPECT TO THE REGISTRANT

.21 Where can I find the Form S-4 disclosure requirements relating to the registrant?

The Form S-4 disclosure requirements (including the financial statement requirements) relating to the registrant are addressed in General Instruction B of Form S-4. If the registrant “meets the requirements for use of Form S-3” (see SEC 2121.12), it may provide the information required by:

- Items 10 and 11,
- Items 12 and 13, or
- Item 14.

If the registrant does not meet the requirements for use of Form S-3, it must provide the information required by Item 14.

Item 10(a) of Form S-4 requires disclosure in the prospectus of any material changes in the registrant's affairs which have occurred subsequent to the date of the most recent audited financial statements included in the latest annual shareholder report or Form 10-K, and which have not been described in a report on Form 10-Q or Form 8-K filed since the annual shareholder report. Item 12(a)(4) contains a similar requirement. Some subsequent events may be of such a nature that they must be disclosed in the financial statements to keep the financial statements from being misleading (see ASC 855-10-50 and PCAOB AS 2801).

Additionally, the registrant's most recent audited financial statements may need to be revised for certain subsequent events. See, for example, Item 10(b) and Items 12(b) and (c). Refer to SEC 2120.23 for a discussion of subsequent events that may require separate financial statements or other financial information and for a discussion of reporting post year-end stock splits, reverse splits and stock dividends.

See SEC 2121.903 and SEC 2121.908.

.3 INFORMATION WITH RESPECT TO THE COMPANY BEING ACQUIRED

.31 Where can I find the Form S-4 disclosure requirements relating to the company being acquired?

The Form S-4 disclosure requirements (including the financial statement requirements) relating to the company being acquired are addressed in General Instruction C of Form S-4. If the company being acquired “meets the requirements for use of Form S-3” (see SEC 2121.12), its information may be provided in accordance with:

- Item 15,
- Item 16, or
- Item 17.

[Editor's note: See the discussion in SEC 2121.21 regarding material changes and the potential need to revise financial statements for subsequent events.]

If the company being acquired does not meet the requirements for use of Form S-3, its information must be provided in accordance with Item 17.

[Editor's note: In order to meet the requirements for use of Form S-3, the company being acquired would need to have a class of securities registered pursuant to Exchange Act Section 12(b) or a class of equity securities registered pursuant to Exchange Act Section 12(g) or would need to be required to file reports pursuant to Exchange Act Section 15(d). Accordingly, the disclosure relating to a non-reporting target company would generally need to be provided pursuant to Item 17(b) of Form S-4.]

If a US registrant is acquiring a foreign private issuer (as defined in Securities Act Rule 405), the information about the foreign private issuer may be presented pursuant to Form F-4. See General Instruction F to Form S-4 and SEC 8135.

See SEC 2121.903 for additional requirements if the company being acquired is a real estate entity.

.32 Where can I find the financial statements and associated audit requirements applicable to a target company that is not an SEC reporting company?

[Editor's note: The guidance in this section is intended to be applied when the acquirer is not a shell company or special purpose acquisition company. Additional analysis would be required in those situations. See also SEC 7050 for information relating to reverse mergers.]

[Editor's note: See SEC FRM 2200 for guidance regarding financial statements of target companies in Form S-4.]

Item 17(b) of Form S-4 provides the general disclosure requirements applicable to a non-reporting target. Item 17(b)(7) of Form S-4 sets forth the financial statement requirements for a non-reporting target company.

If the target is a non-reporting company and either (i) the registrant's security holders are voting or (ii) the transaction is a roll-up transaction (as described in S-K 901), then the non-reporting target company's annual financial statements should be the same as those that would be required in an annual report sent to security holders under Exchange Act Rules 14a-3(b)(1) and (b)(2), if an annual report was required. See SEC FRM 2200.4.

If the target is a non-reporting company and (i) the registrant's security holders are not voting and (ii) the transaction is not a roll-up transaction (as described in S-K 901), then the non-reporting target company's financial statement requirements are determined based on its significance to the registrant and whether the Form S-4 will be used for resales by persons considered underwriters under Securities Act Rule 145(c):

- If (i) the non-reporting target company is significant to the registrant above the 20% level (as determined under S-X 3-05 or 8-04, as applicable) and (ii) the Form S-4 is not to be used for resales by persons considered underwriters under Securities Act Rule 145(c), then the target company's financial statements (prepared in accordance with GAAP) for the latest fiscal year and comparative year-to-date interim financial information as recent as would have been filed on Form 10-Q had the target been subject to the Exchange Act are required (see SEC FRM 2200.5). In addition, if the non-reporting target company provided its security holders with financial statements prepared in conformity with GAAP for either or both of the two fiscal years before the latest fiscal year, then those financial statements must be provided as well. See Item 17(b)(7)(i). See SEC 2121.906.
- If (i) the non-reporting target company is significant to the registrant above the 20% level (as determined under S-X 3-05 or 8-04, as applicable) and (ii) the Form S-4 is to be used for resales by persons considered underwriters under Securities Act Rule 145(c), then the target company's financial statements (prepared in accordance with GAAP) for the periods required by S-X 3-05(b)(2) or 8-04 should be presented. See Instruction 3 to Item 17(b)(7) and SEC FRM 2200.5. In addition, if the non-reporting target company provided its security holders with financial statements prepared in

conformity with GAAP for either or both of the two fiscal years before the latest fiscal year, then those financial statements must be provided as well.

- If the non-reporting target company is significant to the registrant at or below the 20% level, then no financial information for the target company is required. See Item 17(b)(7)(ii). The registrant should, however, consider the non-reporting target when evaluating aggregate significance under S-X 3-05 or 8-04. See SEC FRM 2200.5 and Division of Corporation Finance: Manual of Publicly Available Telephone Interpretations, Third Supplement (July 2001) Section H. Financial Statements, Question 2.

The audit requirement for a non-reporting target company in a Form S-4 depends on whether or not the Form S-4 will be used for resales by persons considered underwriters under Securities Act Rule 145(c) (without regard to whether the registrant's shareholders are voting). See SEC FRM 2200.7.

[Editor's note: The auditor will consider the appropriate auditing standards (AICPA standards, PCAOB standards, or both PCAOB and AICPA standards) to be applied when performing an audit of a non-reporting target company's financial statements included in a Form S-4.]

See also SEC 2121.901, .906 and .907.

.33 Is a non-reporting target company required to provide financial statements of its significant business acquisitions?

Item 17(b)(7) of Form S-4 does not specifically require a non-reporting target to furnish financial statements of its significant business acquisitions (e.g., S-X 3-05). However, when security holders of the acquirer are voting, the SEC staff has indicated that a non-reporting target company must furnish financial statements under S-X 3-05 or 8-04, as applicable in the Form S-4 if the omission of those financial statements renders the target company's financial statements substantially incomplete or misleading. See SEC FRM 2200.4(e) and Division of Corporation Finance: Manual of Publicly Available Telephone Interpretations, Third Supplement (July 2001) Section H. Financial Statements, Question 3.

.4 PRO FORMA FINANCIAL INFORMATION

The pro forma financial information relating to the transaction for which a Form S-4 is filed is only required if the acquisition is significant under S-X 3-05 or S-X 8-04, as applicable, individually or in the aggregate. See SEC FRM 2200.10.

Such pro forma financial information must be presented in the prospectus and may not be incorporated by reference (see SEC Financial Reporting Release No. 18). However, pro forma information relating to other business combinations of the registrant or target which had previously been consummated (or which are probable and the level of significance is greater than 50%) is treated as company information and, therefore, may be either presented in the prospectus or incorporated by reference if allowable for the registrant or acquiree. In circumstances where incorporation by reference of previously filed pro forma information is used, historical financial information in the columnar pro forma presentation would be replaced by pro forma information reflecting the pro forma effects of the consummated (or probable) other acquisition, as reflected in the form being incorporated by reference. A summary footnote explanation of the use of the pro forma column in lieu of historical data should be included.

The pro forma requirements for roll-up transactions (see SEC 2121.6) are set forth in S-K 914.

.5 FORMATION OF A ONE BANK HOLDING COMPANY

General Instruction G provides for automatic effectiveness on the 20th day after filing of Form S-4 registration statements filed for the sole purpose of the formation of a bank or savings and loan holding company where the provisions of the Instruction are satisfied.

Registrants must mark the box on the cover of Form S-4 and be in compliance with the Instruction to cause the automatic effectiveness. This instruction does not apply if there are other proposals involved (e.g., anti-takeover amendments to a corporate charter or authorization for a new issue of securities). Post-effective amendments become effective on filing. See SEC FRM 1150 and additional interpretive guidance in SAB Topic 1.F.

.6 ROLL-UP TRANSACTIONS

The SEC has adopted rules intended to enhance the quality of information provided to investors in connection with transactions involving roll-ups of limited partnerships or similar entities. S-K 901 defines a roll-up transaction, excluding certain transactions set forth in the rule, as a transaction involving the combination or reorganization of one or more partnerships, directly or indirectly, in which some or all of the investors in any of such partnerships will receive new securities, or securities in another entity.

The rules require disclosure with respect to the fundamental changes and potential adverse effects arising from roll-up transactions, and the conflicts of interest, reasons for, alternatives to and fairness of such transactions. The rules also call for disclosure concerning valuation methods and additional pro forma financial statements. In order to highlight for investors the differing effects that roll-up transactions may have on investors in various partnerships, the rules require delivery of individual partnership prospectus supplements highlighting, among other things, the effects of the roll-up transaction on investors in each partnership.

The disclosure requirements for roll-up transactions are set forth in S-K 901 through 915. General Instruction I to Form S-4 requires compliance with the disclosure provisions of S-K 901 through 915 for roll-up transactions in addition to the other requirements of Form S-4.

.7 ACCOUNTANTS' CONSENT

.71 Where can I find information relating to the SEC's requirements for accountants' consents?

See SEC 2400 for a discussion of accountants' consents.

.8 EXPERTS LANGUAGE

.81 Where can I find information relating to experts language?

See SEC 2300 for a discussion of experts language.

.9 FREQUENTLY ASKED QUESTIONS

.901 Is a private target company whose financial statements are included in a Form S-4 considered a public business entity under the FASB's definition?

Yes. The definition of a public business entity (PBE) includes business entities whose financial statements or financial information are required to be or are included in an SEC filing. A private target company included in a Form S-4 is generally considered a PBE.

[Editor's note: If an entity meets the definition of a public business entity solely because its financial statements or financial information are included in another entity's filing with the SEC, then entity is only a public business entity for purposes of financial statements that are filed or furnished with the SEC.]

.902 Are the financial statements of a target company provided in connection with the issuance of securities related to a merger transaction being registered on Form S-4 being provided pursuant to S-X 3-05?

Generally no. Although there are references to S-X 3-05 throughout Form S-4, the financial statements of the target are generally not being provided in the Form S-4 pursuant to S-X 3-05. Accordingly, various SEC rules that apply only to financial statements provided under S-X 3-05 would not be applicable to the target company's financial statements. See, for example, SEC 2121.905.

.903 Are there any incremental disclosure requirements if either the registrant or the company being acquired is a real estate entity?

Yes. Form S-4 specifies incremental disclosure requirements if either the registrant or the company being acquired are real estate entities of the type described in General Instruction A to Form S-11. See General Instruction B.2 of Form S-4 with respect to the registrant and General Instruction C.2 of Form S-4 with respect to the company being acquired.

.904 Is a registrant required to comply with the requirements of Items 2.01/9.01 of Form 8-K even if different (or no) financial statements for a non-reporting target were provided in connection with a Form S-4?

Registrants are still required to comply with the S-X 3-05 financial statement requirements of an acquired business in their Form 8-K filing, even if different (or no) audited financial statements of an acquired business are presented in the Form S-4. See SEC 3150. See SEC 2121.902.

.905 Do the provisions of S-X 3-06(a)(2) which permit the filing of financial statements covering a period of nine to 12 months to satisfy a one-year financial statement requirement for an acquired business apply to financial statements of a target company in a Form S-4?

No. The provisions of S-X 3-06(a)(2) permitting the filing of financial statements covering a period of 9 to 12 months to satisfy the one-year financial statement requirement for an acquired business do not apply to financial statements of target companies filed under Item 14(c)(2) of Schedule 14A. Target company financial statements, required to be provided in a proxy statement or Form S-4, are not provided pursuant to S-X 3-05. This is true even though the proxy statement and Form S-4 reference S-X 3-05 in some circumstances to determine the number of periods of target company financial statements to provide in the proxy statement or Form S-4. Because target company financial statements are not provided pursuant to S-X 3-05, the exception permitted in S-X 3-06(a)(2) is not available for purposes of providing target company financial statements in a proxy statement or Form S-4. See SEC FRM 1140.8.

.906 Is the reference to "GAAP" in Item 17(b)(7) of Form S-4 or the corresponding Item in Form F-4 limited to US GAAP?

No. The references to GAAP in that Item also include a comprehensive body of accounting principles other than US GAAP. See Instruction 2 to Item 17(b)(7) of Form S-4 and Division of Corporation Finance: Manual of Publicly Available Telephone Interpretations, Third Supplement (July 2001) Section H. Financial Statements, Question 12.

.907 Would financial statements that were previously audited only in accordance with non-US GAAS be considered "not previously audited" for purposes of Instruction 1 to Item 17(b)(7) of Form S-4 and the corresponding Item in Form F-4?

Not necessarily. Refer to the guidance in Division of Corporation Finance: Manual of Publicly Available Telephone Interpretations, Third Supplement (July 2001) Section H. Financial Statements, Question 14.

.908 Can a registrant that meets the requirements for use of Form S-3 incorporate by reference its risk factors from its latest Form 10-K?

In some cases, yes. The SEC staff has indicated that even though Item 3 of Form S-4 didn't contemplate incorporation by reference, a registrant that meets the requirements for use of Form S-3 may incorporate by reference the risk factors disclosed in its most recent Form 10-K. However, the SEC staff has also indicated that offering-specific risk factors would need to be disclosed in the Form S-4 itself. See Securities Act Forms CDI 125.12.

.909 How might the auditor approach references to the auditor in connection with a fairness opinion or other disclosures?

The auditor may encounter a situation in which an investment banker has issued a fairness opinion that contains a reference to the auditor which raises concern. For example, situations have arisen in which a fairness opinion issued in connection with an acquisition transaction included the following (or similar) language:

"...We have relied, with management's consent, on advice of the outside counsel and the independent accountants to the Company, and on the assumptions of the management of the Company, as to all accounting, legal, tax and financial reporting matters with respect to the Company and the Agreement...."

[Editor's note: It is important to note that the language referred to above may appear in more than one place in a set of transaction materials. For instance, the language may appear in a summary section of the proxy/registration statements and the full fairness opinion (with the same or similar language) will likely be included as an exhibit to the proxy/registration statements. The auditor works with the relevant parties to address all instance of similar disclosure.]

The language referred to above may raise concern because it could be read to suggest that the auditor has provided advice to the investment banker in connection with the fairness opinion.

If the auditor becomes aware of potentially concerning references to the firm in a draft fairness opinion, the auditor works with the relevant parties to ensure that satisfactory revisions are made.

If a fairness opinion has already been issued/used for its intended purpose before the auditor becomes aware of any potentially concerning references to the auditor, the auditor communicates its concern to the company, legal counsel, and to the investment bankers, and works with the relevant parties to develop a satisfactory solution and obtain an understanding of their intended course of action and rationale.

The auditor may also encounter situations in which the auditor and its reports are referenced outside of its role as independent auditors within the Form S-4. For instance, the draft Form S-4 may make reference to a due diligence report. The auditor will seek to gain an understanding as to the purpose of such a reference before agreeing to the reference and work with the relevant parties to ensure satisfactory resolution of any concerns.

.910 Is incorporating by reference or cross-referencing to information outside of the financial statements permitted in financial statements?

We understand that disclosure in the text of the Form S-4 does not eliminate the need for similar disclosure, when required by US GAAP or International Financial Reporting Standards as issued by the International Accounting Standards Board (IFRS as issued by the IASB), in the notes to the financial statements. In any financial statements, incorporating by reference or cross-referencing to information outside of the financial statements is not permitted unless otherwise specifically permitted or required by SEC rules, US GAAP or IFRS as issued by the IASB.

We understand that the non-financial statement portions of the Form S-4 may contain cross-references to the financial statements.

See Securities Act Rule 411(a).

- .1 General
- .2 Disclosure requirements
- .3 Financial statements requirements
- .4 Updating requirements
- .7 Accountants' consent
- .8 Experts language
- .9 Frequently asked questions

.1 GENERAL

.11 What is Form S-8 and where can I find it?

Form S-8 is the SEC registration form generally used to register (under the Securities Act):

1. securities of the registrant to be offered under any employee benefit plan to its employees, or employees of its subsidiaries or parent; and
2. interests in the plans specified in 1 above if such interests constitute securities and are required to be registered under the Securities Act (see SEC 2125.901).

General Instruction A.1(a) and (b) to Form S-8 include a detailed discussion of the types of securities that may be registered on Form S-8 and the definition of the term "employee" for purposes of Form S-8. See Securities Act Rule 405 for the definition of the term employee benefit plan.

Form S-8 becomes effective immediately upon filing. See Securities Act Rule 462(a) and General Instruction D to Form S-8.

The text of Form S-8 is available on the SEC's website (<https://www.sec.gov/files/forms-8.pdf>).

.12 Who can use Form S-8?

The Form S-8 may be used by any registrant if:

- (i) immediately prior to the Form S-8 filing, the registrant was subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act (see SEC 2125.902);
- (ii) the registrant has filed all reports and other materials required to be filed by Section 13 or 15(d) of the Exchange Act during the preceding 12 months (or such shorter period that the registrant was required to file such reports and materials) (see SEC 2125.903); and
- (iii) the registrant is not a shell company and has not been a shell company for the previous 60 calendar days (except as described immediately below) and, if it has been a shell company at any time previously, has filed current Form 10 information (as defined in General Instruction A.1(a)(6) to Form S-8) at least 60 calendar days previously reflecting its status as an entity that is not a shell company.

Registrants that are shell companies are not eligible to use Form S-8. See General Instruction A.1. to Form S-8. A business combination related shell company (as defined in Securities Act Rule 405) may use Form S-8 immediately after it ceases to be a shell company and files current Form 10 information (as defined in General Instruction A.1(a)(6) to Form S-8) reflecting its status as an entity that is not a shell company. See General Instruction A.1(a)(7) to Form S-8.

[Editor's note: In March 2021, the SEC staff issued Staff Statement on Select Issues Pertaining to Special Purpose Acquisition Companies (SPAC) in which it reminded issuers that following a SPAC combination "[t]he combined company will not be eligible to use Form S-8 for the registration of compensatory securities offerings until at least 60 calendar

days after the combined company has filed current Form 10 information.” [footnote omitted]]

.2 DISCLOSURE REQUIREMENTS

.21 What are the prospectus disclosure requirements of Form S-8?

The prospectus disclosure requirements of Form S-8 are set forth in Part I of Form S-8 and consist of two items: Item 1 - Plan Information, and Item 2 - Registrant Information and Employee Plan Annual Information.

Item 1 requires the registrant to deliver, or cause to be delivered to each participant, material information regarding the plan and its operations that will enable participants to make an informed decision regarding investment in the plan. This information must include, to the extent material to the particular plan being described, but is not limited to, the disclosures specified in (a) through (j) of Item 1 of Form S-8. Any unusual risks associated with participation in the plan not described pursuant to a specified item shall be prominently disclosed (e.g., if the plan imposes a substantial restriction on the ability of a participant to withdraw contributions, or if plan participation may obligate the participant's general credit in connection with purchases on a margin basis). The information may be in one or several documents, provided that it is presented in a clear, concise and understandable manner.

Item 2 requires the registrant to provide a written statement to participants advising them of the availability without charge, upon written or oral request, of the documents incorporated by reference in Item 3 of Part II of the registration statement and stating that these documents are incorporated by reference into the prospectus. The statement must also indicate the availability without charge, upon written or oral request, of other documents required to be delivered to employees pursuant to Securities Act Rule 428(b).

.22 How are the required prospectus disclosures generally provided to plan participants?

Form S-8 allows registrants to use existing employee communications as the base for the prospectus. Issuers may generally meet prospectus delivery obligations by providing plan participants one or more documents which contain the required plan information, updated as necessary (see SEC 2125.4), including the written statement required by Part I – Item 2 (described above). The delivered documents, together with the documents incorporated by reference, will constitute a prospectus meeting the requirements of the Securities Act. Issuers are generally not required to file the prospectus with the SEC.

The documents which constitute part of the prospectus must be dated and bear the legend specified in Securities Act Rule 428(b)(1)(iii) stating:

"This document [Specifically designated portions of this document] constitutes [constitute] part of a prospectus covering securities that have been registered under the Securities Act of 1933."

Unless a registrant clearly identifies the specific portions of a document which constitute part of the prospectus, the entire document will be considered part of the prospectus. See Securities Act Rule 428(b)(1)(ii).

Although issuers are generally not required to file the prospectus with the SEC, they are required to retain documents constituting part of the prospectus for five years after they are last used as part of the prospectus. Further, upon request, the registrant must furnish a copy of any or all of the documents constituting the prospectus to the SEC. See Securities Act Rule 428(a)(2).

See Securities Act Rule 428 for additional information.

.3 FINANCIAL STATEMENTS REQUIREMENTS

.31 What are the financial statements requirements applicable to Form S-8?

Form S-8 does not set forth any separate financial statements requirements. Rather, Form S-8 relies on the incorporation by reference of previously filed financial statements for the registrant (or the plan, as applicable).

For example, a Form S-8 relating to a new stock option plan to be filed by:

- a long-time SEC registrant will incorporate by reference the registrant's most recently filed annual report (e.g., Form 10-K), which would include its audited financial statements, as well as any subsequently filed Forms 10-Q and Forms 8-K.
- a company that recently completed an initial public offering of its common stock would likely incorporate by reference its IPO prospectus, which contains its most recently filed audited financial statements (and unaudited financial statements, if required), as well as any subsequently filed Forms 10-Q and Forms 8-K.
- a company that recently registered its common stock in connection with a spin-off transaction would likely incorporate by reference its Exchange Act registration statement (e.g., Form 10) filed in connection with the spin-off transaction, which contains its most recently filed audited financial statements (and unaudited financial statements, if required), as well as any subsequently filed Forms 10-Q and Forms 8-K.

Form S-8 is not subject to the same financial statement updating requirements as other registration statements. For example, the sponsor's financial statements incorporated by reference in a Form S-8 do not need to comply with the 45-day year-end rule specified in S-X 3-12. See SEC FRM 15120.4c.1.

See SEC 2125.904 regarding the SEC staff's position relating to a Form S-8 to be filed after the filing of a Form 10-K but before filing the Form 10-K Part III information.

.4 UPDATING REQUIREMENTS

.41 What are the Form S-8 prospectus updating requirements?

As specified in General Instruction G to Form S-8, updating of information constituting the Section 10(a) prospectus during the offering of the securities shall be accomplished as follows:

- (1) Plan information specified by Item 1 of Form S-8 required to be sent or given to employees shall be updated as specified in Rule 428(b)(1)(i). That information does not need to be filed with the SEC. Rule 428(b)(1)(i) requires that plan information shall be updated in writing, in a timely manner, to reflect any material changes during any period in which offers or sales are being made.
- (2) Registrant information shall be updated by the filing of Exchange Act reports, which are incorporated by reference in the registration statement and the Section 10(a) prospectus. Any material changes in the registrant's affairs required to be disclosed in the registration statement but not required to be included in a specific Exchange Act report shall be reported on Item 8.01 Form 8-K ("Other Events") (or, if the registrant is a foreign private issuer, on Form 6-K) (see SEC 2125.42).
- (3) An employee plan annual report incorporated by reference in the registration statement from Form 11-K or Form 10-K shall be updated by the filing of a subsequent plan annual report on Form 11-K or Form 10-K.

Updated plan information for material changes may be communicated to plan participants through letters, memoranda, or other documents, provided that the information is presented in a clear and organized

fashion. Such information will also have to be dated, include the appropriate legend, and be retained for a period of five years after last use. See SEC 2125.22.

.42 Is a registrant required to file revised financial statements to give effect to events like discontinued operations, segment changes or changes in accounting principle prior to filing a new or amended Form S-8?

Certain events that occur after the end of a fiscal year may require retrospective application to previously filed financial statements if they are reissued. Such events may include (but are not limited to) a discontinued operation, a change in reportable segments, or a change in accounting principle.

As noted in SEC 2125.41, General Instruction G to Form S-8 requires disclosure of any **material changes** in the registrant's affairs that are not otherwise required to be filed in an Exchange Act report. There is no specific, written definition of what constitutes a "material change" in the context of Form S-8. However, we understand that the term "material change" is generally interpreted similarly to the term "fundamental change" as described in S-K 512.

The determination of what constitutes a "material change" is a legal question that registrants should discuss with their legal counsel. In our experience, registrants and their legal counsel generally do not view retrospective changes to previously issued financial statements due to discontinued operations, changes in segments, or accounting changes as "material changes" for purposes of Form S-8. Accordingly, most registrants conclude that they can file a new or amended registration statement on Form S-8, even if they would have been required to revise previously issued financial statements for one of the reasons described above if, instead of filing Form S-8, they were filing a different registration statement form (e.g., Form S-3). See the note to SEC FRM 13100 and Securities Act Forms CDI 126.40. See also SEC 2120.23 for information regarding the need to revise previously issued financial statements in connection with Form S-3.

[Editor's note: Registrants should also consider whether a significant Type II subsequent event may be required to be disclosed in the financial statements (see ASC 855, *Subsequent Events*) and whether events subsequent to the date of original issuance of the financial statements indicate a substantial deterioration in the Company's financial condition.]

.7 ACCOUNTANTS' CONSENT

.71 Where can I find information relating to the SEC's requirements for accountants' consents?

See SEC 2400 for a discussion of accountants' consents.

.8 EXPERTS LANGUAGE

.81 Is experts language usually included in Form S-8?

No. Because securities offerings using Form S-8 are typically not underwritten, it would be unusual for a Form S-8 to include experts language. See SEC 2300.15.

.9 FREQUENTLY ASKED QUESTIONS

.901 What are some factors that an issuer might consider when evaluating whether interests in a plan constitute a security that is required to be registered under the Securities Act?

The determination of whether an interest in a particular plan constitutes a security as defined in Section 2(a)(1) of the Securities Act requires careful consideration by legal counsel. We understand that the Office of Chief Counsel to the SEC's Division of Corporation Finance has indicated that the SEC staff weighs the presence or absence in each plan of certain features in determining whether the interests therein should be registered. Although these features may not be conclusive individually, their presence in combination may suggest the existence of a "registerable interest." We understand that the features are as follows:

1. A continuing program - the plan would be one of indefinite duration and not limited to a specified term of existence. A plan of this type would generally operate in much the same way as an open-end mutual fund, with the contributions being invested in marketable securities and the participants' shares being valued on the basis of the market value of the portfolio. Another feature of these plans is their liquidity, with the participants usually permitted to withdraw all or some of their interest in the plan under certain specified conditions.
2. Administration - a separate administrative group would run the plan and generally be responsible to the trustee.
3. Registrant - the plan, as represented by the trustees, signs the registration statement used to register the shares offered.
4. Company contribution - a contribution would be made by the company, in most instances representing a prescribed percentage of the employee's compensation or contribution.
5. Employee contribution - the interests of employees in a plan are securities only when the employees voluntarily participate in the plan and individually contribute thereto. Thus, employee interests in plans which are not both voluntary and contributory may not be required to be registered under the Securities Act.

.902 Can a "voluntary filer" use Form S-8?

No. The SEC staff has stated that Form S-8 would not be available to a company that is not statutorily required to file reports under Section 13 or 15(d) of the Exchange Act (so-called voluntary filers). See Securities Act Forms CDI 126.01.

.903 Is a registrant's ability to use Form S-8 conditioned on having timely filed prior Exchange Act reports?

No. Although the registrant must have filed all reports and other materials required to be filed by Section 13 or 15(d) of the Exchange Act during the preceding 12 months (or such shorter period that the registrant was required to file such reports and materials), unlike certain other SEC registration forms (e.g., Form S-3), the availability of Form S-8 is not conditioned on the prior Exchange Act reports having been timely filed. See Securities Act Forms CDI 126.10.

.904 May a registrant file a new or amended Form S-8 after it files its most recent Form 10-K but before it files the information required by Part III of Form 10-K?

We understand the SEC staff would not object if a registrant files a new or amended Form S-8 when the Part III information relating to the most recent Form 10-K has not yet been filed as long as the issuer has determined that the prospectus satisfies the relevant requirements of the Securities Act. See Securities Act Forms CDI 126.11.

- .1 General
- .2 Financial statements and related requirements
- .7 Accountants' consent
- .8 Experts language
- .9 Frequently asked questions

.1 GENERAL

.11 What is Form S-11 and where can I find it?

Form S-11 is a Securities Act registration statement form used to register securities issued by (i) real estate investment trusts, as defined in Section 856 of the Internal Revenue Code, or (ii) other issuers whose business is primarily investing, either directly or indirectly, in real estate. Form S-11 is not for use by an issuer which is an investment company registered or required to register under the Investment Company Act.

The text of Form S-11 is available on the SEC's website (<https://www.sec.gov/files/forms-11.pdf>).

The disclosure requirements of Form S-11 are set forth under the various items within the body of the form. Many of the disclosures called for by Form S-11 cross-reference to Regulations S-X or S-K for the specific requirements, however, there are also a number of form-specific disclosure requirements set forth in the text of the form (e.g., Items 12-16, 24 and 25). Other sources that issuers should consider when preparing a Form S-11 include the General Instructions to Form S-11 and Regulation C, which contains the general requirements for preparing and filing a registration statement under the Securities Act. Additionally, the SEC staff has published extensive interpretive guidance including various Compliance & Disclosure Interpretations. See, for example, Securities Act Forms CDI Sections 127 and 227. Additionally, much of the interpretive guidance contained in the CDIs relating to Form S-1 is applicable to Form S-11.

[Editor's note: SEC 2130 was prepared from the perspective of a company that is neither a smaller reporting company (as defined in S-K 10(f)) nor an emerging growth company (EGC) (as defined in Securities Act Rule 405).]

.12 Will the SEC staff review a Form S-11 on non-public basis?

Under certain circumstances, yes. See SEC 2110.12 for a discussion of SEC staff reviews on a non-public basis.

.13 Does Form S-11 permit issuers to incorporate information by reference?

Form S-11 allows registrants that meet the requirements in General Instruction H to provide the information required by Items 3 through 28 of Form S-11 through incorporation by reference of previously filed Exchange Act filings (e.g., Form 10-K and Form 10-Q). If the registrant elects to incorporate information by reference pursuant to General Instruction H, Item 28A of Form S-11 requires the registrant to describe all material changes in the registrant's affairs that have occurred since the end of the latest fiscal year and have not been described in a Form 10-Q or filed Form 8-K.

Form S-11 does not allow the incorporation by reference of documents filed by the registrant pursuant to Sections 13(a), 13(c), 14 or 15(d) of the Exchange Act after the effective date of the registration statement and prior to the termination of the offering. This mechanism is sometimes referred to as "forward incorporation".

See SEC 2130.901 for additional guidance.

.14 Is there additional guidance available for a Form S-11 involving interests in a real estate limited partnership?

If the registration of securities on Form S-11 involves interests in a real estate limited partnership (such as an Umbrella Partnership Real Estate Investment Trust (UPREIT) structure), registrants should consider the guidance in Securities Act Guide 5, *Preparation of Registration Statements Relating to Interests in Real Estate Limited Partnerships* (Guide 5).

Guide 5 suggests that, where appropriate, the information in the prospectus should be presented in the same order as the items in Guide 5. Where the registrant believes that specific items are not relevant or are otherwise inappropriate, the registrant should bring this matter to the SEC staff's attention in a letter (see Guide 5).

The applicability of the various sections of Guide 5 is generally a legal matter that the issuer should discuss with its legal counsel.

.15 What additional SEC guidance should be referred to in connection with offerings involving real estate investment trusts?

The SEC staff issued CF Disclosure Guidance Topic No. 6: *Staff Observations Regarding Disclosure of Non-Traded Real Estate Investment Trusts*, which provides guidance regarding the application of Guide 5 by non-traded real estate investment trusts.

The Commission previously stated that Guide 5 should be considered, as appropriate, in the preparation of registration statements for real estate investment trusts.

.2 FINANCIAL STATEMENTS AND RELATED REQUIREMENTS

.21 Where can I find the financial statements requirements applicable to Form S-11?

Item 27 of Form S-11 specifies which financial statements and schedules must be included in the prospectus and which may be included in Part II of the registration statement. Regulation S-X governs the certification, form, and content of and requirements for financial statements, and the supplementary schedules. SAB Topic 7 discusses the views of the SEC staff on certain disclosures by real estate companies. Smaller reporting companies may look to the requirements of S-X Article 8.

In addition to financial statements of the issuer, Regulation S-X may require separate financial information in Form S-11 for one or more of the following situations:

1. Real estate operations acquired or to be acquired as required by S-X 3-14 (see SEC 4555). Smaller reporting companies may refer to S-X 8-06;
2. Businesses acquired or to be acquired as required by S-X 3-05 (see SEC 4550). Smaller reporting companies may refer to S-X 8-04;
3. Unconsolidated majority-owned subsidiaries pursuant to S-X 3-09 (see SEC 4520); *
4. Fifty percent or less-owned persons accounted for by the equity method pursuant to S-X 3-09 (see SEC 4520); *
5. Guarantors of registered securities pursuant to S-X 3-10 and S-X 13-01 (see SEC 4530). Smaller reporting companies may refer to S-X 8-01(c);
6. Affiliates whose securities collateralize an issue of registered debt pursuant to S-X 3-16 or S-X 13-02 (see SEC 4540). Smaller reporting companies may refer to S-X 8-01(d);

7. Properties securing mortgage loans as required by SAB Topic 1-I (see SEC FRM 2345);
8. Financial statements of significant lessees or guarantors of properties leased to a single lessee or guarantor on a long-term triple net-lease basis (see SEC FRM 2340); and
9. Balance sheet of the general partner of a limited partnership-registrant under certain circumstances (see SEC FRM 2805).

*Not required for SRCs.

S-X 3-15 requires disclosure of the tax status of distributions per unit (e.g., ordinary income, capital gain, or return of capital).

See SEC 4555.6 for financial statement requirements of "blind pool" offerings.

.7 ACCOUNTANTS' CONSENT

.71 Where can I find information relating to the SEC's requirements for accountants' consents?

See SEC 2400 for a discussion of accountants' consents.

.8 EXPERTS LANGUAGE

.81 Where can I find information relating to experts language?

See SEC 2300 for a discussion of experts language.

.9 FREQUENTLY ASKED QUESTIONS

.901 Is a registrant required to file its Form 10-K for its most recently completed fiscal year before using incorporation by reference in connection with a Form S-11 even if that Form 10-K is not yet due and the Form S-11 is not required to include financial statements for the most recently completed fiscal year?

Yes. See General Instruction H(3) of Form S-11 and SEC 2110.901 for additional guidance.

.902 Is incorporating by reference from or cross-referencing to information outside of the financial statements permitted in financial statements?

Generally, no. See General Instruction H of Form S-11 and SEC 2110.908 for additional guidance.

.903 Is the guidance in Securities Act Forms CDI 101.05 (with respect to omission of certain financial statements otherwise required by Regulations S-X in a draft registration statement) applicable to a draft Form S-11 submitted for non-public review?

We understand that the accommodations described in the Securities Act Forms CDI 101.05 would also be applicable to a non-emerging growth company submitting a draft Form S-11 for non-public review. See SEC 2110.22.

.904 Does Form S-11 require the presentation of a 5-year selected financial data table?

No. Although Item 9 of Form S-11 calls for the disclosure required by S-K 301, the SEC removed S-K 301 from its disclosure requirements in SEC Release 33-10890, *Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information*.

- .1 General
- .2 Regulation A offering statement
- .3 On-going reporting requirements
- .9 Frequently asked questions

.1 GENERAL

.11 What is Regulation A?

Regulation A is an exemption from the registration requirements of the Securities Act which allows certain issuers to offer and sell specified securities to the public using more streamlined disclosure requirements as compared to an offering registered under the Securities Act. Regulation A issuers may also be subject to more streamlined on-going reporting requirements as compared to an issuer that sold securities through an offering registered under the Securities Act.

Regulation A is set forth in Securities Act Rules 251 through 263.

You can find additional information on Regulation A offerings in:

- Amendments to Regulation A: A Small Entity Compliance Guide; and
- Securities Act Rules CDI Section 182.

.12 What are the dollar limits for offerings conducted under Regulation A?

Regulation A generally provides for two levels (referred to as “tiers”) of offerings:

- Tier 1 consists of securities offerings of up to \$20 million in a 12-month period including not more than \$6 million in offers by selling security-holders that are affiliates of the issuer;
- Tier 2 consists of securities offerings of up to \$75 million in a 12-month period including not more than \$22.5 million in offers by selling security-holders that are affiliates of the issuer.

.2 REGULATION A OFFERING STATEMENT

.21 Which SEC form is used to conduct a Regulation A offering, and where can I find it?

An issuer conducting an offering under Regulation A will use Form 1-A as the offering statement. The text of Form 1-A is available on the SEC’s website (<https://www.sec.gov/files/form1-a.pdf>).

.22 Where can I find the disclosure requirements applicable to Form 1-A?

The disclosure requirements applicable to Form 1-A are set forth in the form and related instructions. Form 1-A is organized in three distinct parts:

- Part I: Notification (certain basic information about the issuer, its eligibility, the offering details and the jurisdiction where the securities will be offered);
- Part II: Contents of the offering circular (analogous to a prospectus in a Securities Act registration statement); and

- Part III: Exhibits

See SEC 2155.902, SEC 2155.903, SEC 2155.904 for additional guidance.

.221 Are there different options for preparing the offering circular (Part II of Form 1-A)?

Yes. When preparing the offering circular (Part II of Form 1-A), an issuer may:

- follow the Offering Circular format (i.e., follow the specific disclosure requirements contained in Part II of Form 1-A); or
- provide the information required by Part I of Form S-1 or Part I of Form S-11 (see Part II(a)(1)(ii) of Form 1-A).

The cover page of the offering circular must identify which disclosure format is being followed.

An issuer choosing to follow the Form S-1 or Form S-11 format may follow the requirements for smaller reporting companies if it meets the definition of that term. An issuer may only use the Form S-11 format if the offering is eligible to be registered on that form.

.222 Where can I find the financial statement requirements associated with Form 1-A?

The financial statement requirements of Form 1-A are set forth in Part F/S of Form 1-A. The financial statement requirements of Part F/S apply to both Part II disclosure options (see SEC 2155.221).

Part F/S(a) sets forth the general rules for preparing and presenting financial statements for purposes of the offering statement and are considered for both Tier 1 and Tier 2 offerings.

Part F/S(b) sets forth the financial statement requirements for Tier 1 offerings.

Part F/S(c) sets forth the incremental (to Part F/S(b)) financial statement requirements for Tier 2 offerings.

The age of financial statements requirements for both Tier 1 and Tier 2 offerings are set forth in Part F/S(b)(3) and (4).

If the issuer is a U.S. company, the financial statements must be prepared in accordance with accounting principles generally accepted in the United States (US GAAP). If the issuer is a Canadian company, the financial statements must be prepared in accordance with either US GAAP or International Financial Reporting Standards as issued by the International Accounting Standards Board (IFRS as issued by the IASB). If the financial statements comply with IFRS as issued by the IASB, compliance must be explicitly and unreservedly stated in the notes to the financial statements and if the financial statements are audited, the auditor's report must include an opinion on whether the financial statements comply with IFRS as issued by the IASB. See Part F/S(a)(2) of Form 1-A.

See SEC 2155.905 for additional guidance.

.223 What are the financial statement audit requirements of Form 1-A?

The financial statements included in a Tier 1 offering statement can be unaudited. However, if an audit of these financial statements is obtained for other purposes and that audit was performed in accordance with either (i) AICPA standards or (ii) AICPA and PCAOB auditing standards by an auditor that is independent pursuant to either the independence standards of the AICPA or S-X 2-01, those audited financial statements must be filed, and an audit opinion complying with S-X 2-02 must be filed along with the financial statements. The auditor does not need to be registered with the PCAOB. See Part F/S(b)(2) of Form 1-A.

Financial statements (other than interim financial statements) included in a Tier 2 offering statement are required to be audited as described in Part F/S(c)(1)(ii)-(iii) of Form 1-A. The report and qualifications of the auditor must comply with the requirements of S-X Article 2. The auditor does not need to be registered with the PCAOB.

.23 Does Form 1-A need to be filed with the SEC?

Yes. Before an issuer can begin selling securities under Regulation A, the Form 1-A must be “qualified” by the SEC (analogous to being declared effective). The Division of Corporation Finance is generally responsible for qualifying Form 1-A pursuant to delegated authority.

.231 Will the SEC staff review Form 1-A on a non-public basis?

Yes, under certain circumstances. Securities Act Rule 252(d) provides that under certain circumstances Form 1-A may be submitted initially as a draft offering statement for non-public SEC staff review.

.232 Will the draft offering statement and related SEC staff comments and issuer responses remain non-public?

The initial non-public submission and all related amendments and correspondence must be filed publicly at least 21 days before the offering statement will be qualified. Comment letters and related registrant responses will be made public according to the SEC staff’s normal policies. See Section 3.d. of the Amendments to Regulation A: A Small Entity Compliance Guide available on the SEC website (<https://www.sec.gov/info/smallbus/secg/regulation-a-amendments-secg#3>).

.3 ON-GOING REPORTING REQUIREMENTS

.31 Are there any on-going reporting requirements applicable to Regulation A issuers?

Yes. The on-going reporting requirements depend on whether the issuer offered its securities as a Tier 1 or Tier 2 offering.

Issuers in Tier 1 offerings are required to file a Form 1-Z (Exit Report) no later than 30 calendar days after termination or completion of an offering. The text of Form 1-Z is available on the SEC’s website (<https://www.sec.gov/files/form1-z.pdf>). See Section 5 of the Amendments to Regulation A: A small Entity Compliance Guide available on the SEC website (<https://www.sec.gov/info/smallbus/secg/regulation-a-amendments-secg#3>).

Issuers in Tier 2 offerings are subject to on-going post-qualification reporting requirements including:

- Annual reports are filed on Form 1-K within 120 calendar days after the end of the fiscal year covered by the report and include two years of audited financial statements in addition to the other disclosures specified in Form 1-K. The text of Form 1-K is available on the SEC’s website (<https://www.sec.gov/files/form1-k.pdf>).
- Semi-annual reports are filed on Form 1-SA within 90 calendar days after the end of the first six months of the issuer’s fiscal year and include unaudited interim financial statements (which are not required to be reviewed by an auditor prior to filing) in addition to the other disclosures specified in Form 1-SA. The text of Form 1-SA is available on the SEC’s website (<https://www.sec.gov/files/form1-sa.pdf>).

- Current reports are filed on Form 1-U within four business days of the occurrence of one or more of the triggering events (e.g., change in auditor, non-reliance on previously filed financial statements) specified in Form 1-U. The text of Form 1-U is available on the SEC's website (<https://www.sec.gov/files/form1-u.pdf>).

The duty to file these reports with the SEC is deemed to have been met if the issuer is subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act and, as of each Form 1-K and Form 1-SA due date, has filed all reports required to be filed during the 12 months (or such shorter period that the registrant was required to file such reports) preceding such due date. See Securities Act Rule 257(b)(6).

.9 FREQUENTLY ASKED QUESTIONS

.901 Is a subsequent events review required in connection with a Form 1-A?

We believe that a subsequent events review should be performed when an issuer offers securities pursuant to Regulation A.

.902 Is an accountants' consent required to be included in a Form 1-A?

Yes, under some circumstances. See SEC 2400.44 for a discussion of accountants' consents in connection with Form 1-A. See also Part III-Item 17 (11) of Form 1-A and Securities Act Rule 252(f)(ii).

.903 Will the SEC staff object if a consent is not included in a Form 1-K?

No. See SEC 2400.441 for a discussion of accountants' consents in connection with Form 1-K. See also Securities Act Rules CDI 182.19.

.904 Is "Experts" language required in a Regulation A offering statement?

No. See SEC 2300.16 for a discussion of "Experts" language in connection with a Regulation A offering statement.

.905 May a company filing or non-publicly submitting an offering statement pursuant to Regulation A omit financial statements for historical periods if it reasonably believes that those financial statements will not be required at the time of the qualification of the Form 1-A?

Yes. See Securities Act Rules CDI 182.14.

- .1 General
- .2 Guidance for applying the definition of a smaller reporting company
- .9 Frequently asked questions

.1 GENERAL

.11 What is a smaller reporting company?

The term smaller reporting company (SRC) is defined in S-K 10(f) as an issuer that meets both (i) and (ii) below:

- (i) the issuer is not:
 - (a) an investment company;
 - (b) an asset-backed issuer; or
 - (c) a majority owned subsidiary of a parent that is not an SRC and
- (ii) the issuer either:
 - (a) had a public float of less than \$250 million or
 - (b) had annual revenues of less than \$100 million and:
 - (1) no public float or
 - (2) a public float of less than \$700 million.

However, once an issuer determines that it does not qualify for SRC status because it exceeded the relevant qualification threshold(s), it will remain unqualified unless, when making its annual determination, it meets one of criteria (i) or (ii) below:

- (i) the issuer determines that its public float was less than \$200 million; or
- (ii) the issuer determines that its public float and its annual revenues meet the subsequent qualification requirements included in the chart presented in S-K 10(f)(iii)(B).

You can find additional information in the SEC staff's "A Small Entity Compliance Guide for Issuers," which can be found at <https://www.sec.gov/corpfin/amendments-smaller-reporting-company-definition> and SEC FRM Topic 5000.

[Editor's note: SEC 2160 refers to S-K 10(f) for purposes of rule references. The SRC definition also appears in Exchange Act Rule 12b-2 and Securities Act Rule 405.]

[Editor's note: A foreign private issuer is not eligible to use the requirements for smaller reporting companies unless it uses the forms and rules designated for US domestic issuers and provides financial statements prepared in accordance with US Generally Accepted Accounting Principles. See, for example, Instruction 2 to S-K 10(f) and SEC FRM 5110.5. However, we understand the SEC permits a registrant that files its annual report on Form 20-F to apply the SRC test to determine the transition date for disclosures under Item 16J of Form 20-F.]

.111 What are some of the accommodations available to SRCs?

The SEC's rules and forms set forth a number of disclosure accommodations available to SRCs, including:

- SRCs are generally permitted to prepare their financial statements in accordance with S-X Article 8, which means, among other things, that they can present only two years of annual financial statements;
- SRCs are subject to reduced executive compensation disclosure requirements under S-K 402;
- SRCs may be able to use "forward incorporation" to keep the prospectus of a registration statement on Form S-1 current by incorporating by reference certain documents filed after the effective date of the registration statement (see Item 12(b) of Form S-1); and
- SRCs are exempt from the requirement to provide Risk Factor disclosure in annual and quarterly reports (see Item 1A of Forms 10-K and 10-Q).

[Editor's note: S-K 10(f) identifies the elements of Regulation S-K which contain scaled disclosure requirements applicable to SRCs.]

See SEC 2160.901 and .906 for additional guidance.

.2 GUIDANCE FOR APPLYING THE DEFINITION OF A SMALLER REPORTING COMPANY

.21 When and how does an issuer that is an existing SEC registrant determine its SRC status?

An issuer that has a reporting obligation under Exchange Act Section 13(a) or 15(d) generally determines its SRC status annually on the last business day of its most recently completed second fiscal quarter.

- Public float is measured as of the last business day of the most recently completed second fiscal quarter and is computed by multiplying:
 - (i) the aggregate worldwide number of shares of voting and non-voting common equity held by non-affiliates by
 - (ii) the price at which the common equity was last sold, or the average of the bid and asked prices of common equity, in the principal market for the common equity.

[Editor's note: The determination of public float is premised on the existence of a public trading market for the issuer's equity securities. Therefore, an entity with equity securities outstanding but not trading in any public trading market would not be able to qualify as an SRC on the basis of a public float test. See footnote 25 to SEC Release 33-10513, *Smaller Reporting Company Definition* (SEC Release 33-10513).]

- Annual revenue is revenue in the issuer's annual audited financial statements for its most recent fiscal year completed before the last business day of the second fiscal quarter (i.e., public float test date).

[Editor's note: A reporting company must assess the revenue test based on its annual audited financial statements as originally filed with the SEC for its most recent fiscal year (e.g., not restated for subsequent discontinued operations). See SEC FRM 5110.3a.]

See SEC 2160.902 -. 905 for additional guidance.

.211 When does an existing SEC registrant transition between SRC and non-SRC status in its SEC filings?

As noted above, an existing SEC registrant (i.e., a company that is required to file reports under Exchange Act Section 13(a) or 15(d)) will determine whether it qualifies as a smaller reporting company annually as of the last business day of its second fiscal quarter.

- If an existing reporting company newly qualifies as a smaller reporting company on the last business day of its second fiscal quarter, it may elect to reflect that determination and use the scaled disclosure accommodations in its subsequent filings, beginning with its second quarter Form 10-Q. A company must reflect its SRC status no later than its Form 10-Q for the first fiscal quarter of the next year.

For instance, if Company Q, a calendar year-end reporting company that previously did not qualify as an SRC determined that its public float was \$180 million as of June 30, 2023 (i.e., the last business day of its 2023 second fiscal quarter), then Company Q may begin to report as a smaller reporting company beginning with its Form 10-Q for the quarter ended June 30, 2023 (i.e., the Form 10-Q for the quarter that includes the determination date).

- If an existing reporting company ceases to qualify as a smaller reporting company on the last business day of its second fiscal quarter, then it must report as a non-SRC no later than the first fiscal quarter of its next fiscal year.

For instance, if Company X, a calendar year-end reporting company that previously qualified as an SRC, determined that its public float was \$280 million as of June 30, 2023 (i.e., the last business day of its 2023 second fiscal quarter) and that its revenue for the year ended December 31, 2022 was \$120 million, then Company X must begin to report as a non-SRC beginning no later than its Form 10-Q for the quarter ending March 31, 2024 (i.e., the first quarter of the next fiscal year).

Similarly, assume Company Y, a calendar year-end reporting company with \$0 public float, qualified as an SRC as of June 30, 2022 (i.e., the last business day of its 2022 second fiscal quarter) based on its 2021 annual revenues of \$20 million. If Company Y had annual revenues in 2022 of \$105 million and continued to have no public float as of June 30, 2023 (i.e., the last business day of its 2023 second fiscal quarter), then Company Y must begin to report as a non-SRC beginning with its Form 10-Q for the quarter ending March 31, 2024 (i.e., the first quarter of the next fiscal year).

In either of the two examples immediately above, the annual report on Form 10-K for the year ended December 31, 2022 may continue to include scaled smaller reporting company disclosure, the due date for the annual reports will be based on the respective registrant's accelerated filer status as of the last day of the fiscal year.

[Editor's note: A number of special considerations apply when an existing registrant no longer meets the definition of an SRC and subsequently files a new or amended registration statement or proxy/information statement before it is required to file its first Form 10-K as a non-SRC. See Topic IX.B from the Highlights of the March 2012 meeting of the CAQ SEC Regulations Committee.]

.22 When and how is SRC status determined by an issuer in connection with an initial registration statement?

A company filing its initial registration statement for shares of common equity will make its initial SRC determination in connection with the filing of its registration statement:

- Public float is measured as of a date within 30 days of the date of the filing of the initial registration statement and is computed by multiplying:

(i) the sum of:

- (a) the aggregate worldwide number of shares of the issuer's voting and non-voting common equity held by non-affiliates before the registration plus,
- (b) in the case of a Securities Act registration statement, the number of shares of its voting and non-voting common equity included in the registration statement, by

(ii) the estimated public offering price of the shares.

[Editor's note: In the case of an initial registration under the Exchange Act (e.g., Form 10) where there is no public float, or the public float cannot be calculated because there is no market price for the issuer's common equity securities, the SRC determination should be made by reference to the revenue test. See Section III.E.2(b) of SEC Release 33-8876, *Smaller Reporting Company Regulatory Relief and Simplification* (SEC release 33-8876).]

- Annual revenue is revenue in the issuer's most recent audited financial statements available on the initial public float calculation date.

[Editor's note: If consideration of the pro forma effect of (i) businesses acquired during the latest fiscal year and (ii) consummation of business combinations identified as probable at the time of filing the initial registration statement would result in the issuer exceeding the revenue threshold, then the company would not qualify as a smaller reporting company based on the revenue test. See SEC FRM 5110.3b.]

.221 What happens if a public float calculation performed in connection with the filing of an initial registration statement changes during the registration process?

A bona fide calculation made in connection with the initial filing will govern the company's SRC status through the completion of the offering. This is true even if the company's status would have changed if the public float were re-calculated at some point during the pre-effective period or at the effective date. See Section III.E.2(b) of SEC Release 33-8876.

The company may reassess its status immediately following the completion of the offering (based on the actual offering price and number of shares included in the registration statement) in order to determine the company's SRC status for purposes of filing its first periodic report. The company must reassess its SRC status as of the end of its next second fiscal quarter.

For instance, assume:

- Company X is a calendar year-end private company with more than \$100 million in revenue for the years ended December 31, 2020, 2021 and 2022.
- Company X decided to undertake an initial public offering of its common stock (to be registered on Form S-1).
- Company X had 20 million outstanding shares of common stock held by non-affiliates as of a date within 30 days of filing the initial Form S-1.
- Company X intends to sell two million shares of its common stock in connection with the S-1.
- Company X made its initial Form S-1 filing on March 17, 2023.
- Based on conversations with its underwriters, when Company X made its initial Form S-1 filing, it estimated the offering price for its shares would be \$10 per share.
- Company X's Form S-1 was declared effective on June 23, 2023.

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(Last updated June 2023)

- When Company X's Form S-1 was declared effective, the actual offering price to the public was \$12 per share.

At the time of filing the initial Form S-1, Company X would calculate its public float as follows:

Shares already outstanding	20 million
Shares to be offered	<u>2 million</u>
Total shares	22 million
Estimated offering price	x <u>\$10</u>
	<u>\$220 million</u>

Based on this calculation, Company X would be permitted to use the scaled disclosure requirements applicable to smaller reporting companies in connection with its initial Form S-1 filing, as well as all subsequent filings up to and including the final Form S-1. Even though Company X's public float increased to \$264 million when the Form S-1 was declared effective (as a result of the \$2 per share increase in the offering price), Company X is not required to reassess its status during the registration process. Company X may (but is not required to) reassess its status at the completion of its offering for purposes of determining its status for purposes of filing its 2023 periodic reports. Company X will be required to reassess its smaller reporting company status as of June 30, 2023 (the last business day of its 2023 second fiscal quarter). Assuming Company X's public float was \$250 million or more as of June 30, 2023, Company X would be required to transition to the other reporting company requirements in connection with its Form 10-Q for the quarter ended March 31, 2024.

[Editor's note: In connection with its reassessment, Company X's revenue test is based on its revenues for the year ended December 31, 2022, which was more than \$100 million.]

.9 FREQUENTLY ASKED QUESTIONS

.901 Can an SRC elect to comply with the requirements applicable to non-SRCs in some areas but not others?

Yes. SRCs may elect to comply with the SEC's disclosure requirements on an "a la carte" basis. This means SRCs may elect to comply with the disclosure requirements applicable to non-SRCs on an item-by-item basis. This is true unless the requirements applicable to SRCs are more rigorous than those for non-SRCs. In that case, the company must follow the requirements applicable to SRCs. See SEC FRM 5340.

[Editor's note: S-K 404 is currently the only disclosure item which contains expanded requirements for smaller reporting companies as compared to larger reporting companies.]

The SEC has indicated that it expects its staff will evaluate an SRC's compliance with Regulation S-K by reference to the requirements applicable to SRCs, even if the company were to voluntarily comply with the requirements applicable to non-SRCs.

.902 How should a bank or similar financial institution perform the revenue test?

The SEC staff has stated that banks and similar financial institutions must include all gross revenues from traditional banking activities. Banking activity revenues include interest on loans and investments, dividends on investments, fees from loan origination, fees from trust and investment services, commissions, brokerage fees, mortgage servicing revenues, and any other fees or income from banking or related services. See SEC FRM 5110.3c.

.903 Can an entity that is being spun-off from a non-SRC parent potentially qualify as an SRC?

Perhaps. An entity that is to be spun off from its parent coincident with or prior to its initial registration may register as an SRC if it will otherwise qualify as an SRC upon consummation of the spin-off. See SEC FRM 5110.4.

[Editor's note: The SEC staff has indicated that the guidance in FRM 5110.4 is specific to a spin-off and should not be used by analogy for transactions with different facts and circumstances. For instance, this guidance would not extend to a merger with a SPAC. See Topic III.C of the Highlights of the March 31, 2022 meeting of the CAQ SEC Regulations Committee.]

.904 Does a company with no public float automatically qualify as an SRC irrespective of its annual revenue?

No. A company that has a \$0 public float must qualify as an SRC by reference to its revenue (i.e., less than \$100 million). The SRC qualification criteria which references a public float of less than \$250 million is only available to an issuer that has a public float (i.e., not zero). See SEC FRM 5110.1 b.

.905 Is the determination of SRC status impacted by a reverse merger?

Possibly. There are a number of special considerations which apply in the case of a reverse merger. Refer to SEC 7050, SEC FRM 5230, Topic VII.F from the Highlights from the March 2011 meeting of the CAQ SEC Regulations Committee meeting, and Securities Act Forms CDI 125.11.

.906 Is an SRC required to comply with S-X 5-04 or S-X 4-08(e)?

Smaller reporting companies are not subject to S-X 5-04 or S-X 4-08(e). However, the SEC staff has indicated that when the restricted net assets of a smaller reporting company's consolidated subsidiaries are a significant proportion of consolidated net assets as of the most recently completed fiscal year-end, the amount and nature of those restrictions may be important to understanding the smaller reporting company's liquidity and its ability to pay interest and principal on debt or dividends. In these circumstances, the SEC staff has indicated that the smaller reporting company should fully discuss, in MD&A, the nature of the restrictions on its subsidiaries' net assets, the amount of those net assets, and the potential impact on the company's liquidity. Disclosures within MD&A similar to the parent company condensed financial information specified by S-X 5-04 and S-X 4-08(e) may be necessary to facilitate this discussion. See SEC FRM 5350.

.907 Are the reporting and disclosure accommodations available to an SRC the same as accommodations available to an emerging growth company (EGC)?

Not in all instances. In several instances, SRCs and EGCs are permitted to provide a similar level of disclosure. However, it is important to note that the SRC disclosure accommodations are not identical to the disclosure requirements applicable to a smaller reporting company. If the SRC is also an EGC, it may take advantage of both sets of accommodations. See SEC 2170 for further discussion of EGCs.

- .1 General
- .2 Guidance for applying the definition of an emerging growth company
- .3 Financial statements requirements
- .4 Audit requirements relating to internal control over financial reporting
- .5 Confidential submission process
- .9 Frequently asked questions

.1 GENERAL

.11 What is an emerging growth company?

The term emerging growth company (EGC) is defined in Exchange Act Rule 12b-2 and Securities Act Rule 405.

An EGC is an issuer that had total annual gross revenues of less than \$1.235 billion during its most recently completed fiscal year unless it has exited EGC status.

[Editor's note: The SEC staff has indicated that the "most recently completed fiscal year" for purposes of determining EGC status would be the most recent annual period completed, regardless of whether financial statements for the period are presented in the initial registration statement filed or submitted for the company's initial public offering of common equity securities. See JOBS Act Title I FAQ Question 51.]

[Editor's note: An issuer cannot be an EGC if it first sold common equity pursuant to an effective Securities Act registration statement on or before December 8, 2011. See JOBS Act Title I FAQ Question 2.]

.111 What causes an EGC to lose its EGC status?

An issuer that is an EGC as of the first day of its fiscal year will lose its EGC status on the earliest of:

1. the last day of the fiscal year during which it had total annual gross revenues of \$1.235 billion or more;
2. the last day of the fiscal year following the fifth anniversary of the first sale of the issuer's common equity securities in an offering registered under the Securities Act;
3. the date on which the issuer has issued more than \$1 billion in non-convertible debt securities during the previous three-year period; or
4. the date on which the issuer becomes a large accelerated filer (see Exchange Act Rule 12b-2 and SEC 3125).

If an issuer loses its EGC status after it has conducted its first sale of common equity securities pursuant to an effective registration statement as an EGC, it cannot regain EGC status. See SEC FRM 10110.7.

.12 What are some of the accommodations available to EGCs?

Title I of the Jumpstart Our Business Startups (JOBS) Act created a number of special accommodations under the US securities laws intended to make it easier for EGCs to complete an equity-IPO (Initial Public Offering) and to operate in the SEC reporting system. These special accommodations are sometimes referred to as the "IPO on-ramp" for EGCs (although they may also be available to companies that are not traditional "IPO companies," such as certain debt-only issuers). See JOBS Act Title I FAQ Question 29.

The special accommodations allow EGCs to:

- submit certain registration statements for initial SEC staff review on a confidential basis;
- prepare an equity IPO registration statement (and certain other registration statements) with only two years of audited financial statements (see SEC FRM 10220.1a);
- adopt any new or revised accounting standards using the same timeframe as private companies (if the standard applies to private companies) (see SEC FRM 10230.1);
- comply with the SEC's detailed executive compensation disclosure requirements on the same basis as a smaller reporting company (see S-K 402(l)); and
- omit financial information (including audited financial statements) if that financial information relates to periods that are not reasonably expected to be required at the time of the offering (see SEC 2170.3).

EGCs are also temporarily exempted from:

- the internal control audit requirements of Section 404(b) of the Sarbanes-Oxley Act (see SEC FRM 10240);
- any future PCAOB rules that might be adopted relating to mandatory audit firm rotation or supplemental auditor discussion and analysis reporting; and
- certain executive compensation-related disclosures (e.g., "say-on-pay," "say-on-golden parachute," "pay vs. performance," and "CEO pay ratio") (see S-K 402(t), (u), and (v)).

In addition to the special accommodations for EGCs discussed above, the JOBS Act also includes other changes to the US securities laws and regulations. The additional accommodations are not necessarily limited to EGCs. These topics are not addressed in SEC 2170.

.13 Where can I find additional information relating to the JOBS Act?

The text of the JOBS Act can be found at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr3606enr/pdf/BILLS-112hr3606enr.pdf>.

Additionally, the SEC staff has published a number of FAQs related to Title I of the JOBS Act at <http://www.sec.gov/divisions/corpfin/guidance/cfjobsactfaq-title-i-general.htm>.

The SEC staff FAQ document related to the confidential submission process for EGCs can be found on the SEC's website at <https://www.sec.gov/divisions/corpfin/guidance/cfjumpstartfaq.htm>.

.2 GUIDANCE FOR APPLYING THE DEFINITION OF AN EMERGING GROWTH COMPANY

.21 How does the revenue exit criterion work?

An EGC will lose EGC status on the last day of the fiscal year during which it had total annual gross revenues of \$1.235 billion or more. For example, a calendar year-end company whose total annual gross revenues equals or exceeds \$1.235 billion for the year ending December 31, 2023 exits EGC status on December 31, 2023 and would prepare its 2023 annual report (to be filed in 2024) as a non-EGC.

The SEC staff has indicated that the term "total annual gross revenue" should be interpreted to mean total revenue presented on the statement of comprehensive income for a company that applies US GAAP or IFRS as issued by the IASB. If a company uses home-country GAAP (other than IFRS as issued by the IASB), we understand it should use the total revenue determined under US GAAP for purposes of assessing total annual gross revenue. If a foreign private issuer presents its financial statements in a currency other

than the US dollar, it should calculate total annual gross revenue based on the US dollar exchange rate as of the last day of the most recently completed fiscal year.

See JOBS Act Title I FAQ Question 1.

See SEC 2170.901-.903.

.22 How does the fifth anniversary exit criterion work?

An EGC will lose EGC status on the last day of the fiscal year following the fifth anniversary of the first sale of the issuer's common equity securities in an offering registered under the Securities Act. The SEC staff has indicated that this criterion refers to the end of the fiscal year that includes the fifth anniversary of the first sale of the EGC's common equity securities in an offering registered under the Securities Act. See JOBS Act Title I FAQ Question 40.

For example, assume Company X, a calendar year-end EGC, first sold its common equity securities in an offering registered under the Securities Act on April 4, 2023. Company X would lose EGC status no later than December 31, 2028 (the end of the fiscal year that includes the fifth anniversary of the equity IPO date). Company X might, however, lose EGC status earlier than December 31, 2028 based on the other exit criteria.

[Editor's note: We understand that a company can qualify as an EGC even if it enters the SEC reporting system by means other than an equity IPO (e.g., a debt-only registrant). An EGC that enters the SEC reporting system in this way might never trigger the "fifth anniversary" exit criterion (if its common equity is never sold in a Securities Act offering) and, therefore, could remain an EGC indefinitely.]

[Editor's note: A company that becomes an SEC reporting company by means of a spin-off typically uses an Exchange Act registration statement rather than a Securities Act registration statement; however, that company may also offer/sell its equity securities to employees in a transaction registered under the Securities Act (typically on Form S-8). See SEC FRM 10110.3. An EGC that becomes public via only the Exchange Act, and that also files a Form S-8, should consider consulting with its legal counsel to determine whether the Form S-8 would constitute sale of the issuer's common equity securities in an offering registered under the Securities Act (thereby starting the "five-year clock"). The determination of whether a company qualifies as an EGC and the interpretation and application of many of the key principles of the JOBS Act are legal determinations. Registrants should consider consulting with their legal counsel on these matters.]

.23 How does the rolling three year debt exit criterion work?

An EGC will lose EGC status as of any date on which it has issued more than \$1 billion in non-convertible debt during the previous three years prior to that date. The SEC staff has indicated that the test should be performed on a continuous, rolling three-year basis. This means the three-year period covers any rolling three-year period. It is not limited to completed calendar or fiscal years. See JOBS Act Title I FAQ Question 17.

For example, assume a calendar year-end EGC issued \$400 million of non-convertible debt securities on May 31, 2023, which caused the amount of non-convertible debt securities issued during the immediately preceding rolling three-year period (June 1, 2020 to May 31, 2023) to exceed \$1 billion. In this fact pattern, the issuer exits EGC status on May 31, 2023.

The SEC staff has indicated that once the \$1 billion threshold has been breached, from that point on, the registrant must comply with non-EGC reporting requirements. For example, assume a registrant qualifies as an EGC as of December 31, 2022 but issues non-convertible debt in January 2023 resulting in the registrant exceeding the \$1 billion non-convertible debt issuance exit criterion. The registrant plans to file its Form 10-K for the year ended December 31, 2022 in early March 2023. In this fact pattern, the registrant

will not be an EGC for the purposes of its Form 10-K for the year ended December 31, 2022 (to be filed in March 2023). Accordingly, the registrant will not be able to take advantage of EGC accommodations in that Form 10-K (e.g., exemption relating to the auditor attestation requirements relating to internal control over financial reporting set forth in S-K 308(b) or the extended transition period exemption for new or revised accounting standards). See Topic III.C in the Highlights of the June 2021 meeting of the CAQ SEC Regulations Committee.

[Editor's note: The three-year rolling non-convertible debt computation for purposes of determining whether a company loses its EGC status is not the same as the three-year rolling non-convertible securities computation for purposes of determining whether a company is a well-known seasoned issuer (WKSI) (see Securities Act Rule 405). The two tests are trying to evaluate different characteristics. The EGC test is a means to evaluate the size of a company; the WKSI test is a means to evaluate the extent of a company's public following. For instance, the WKSI test does not include debt securities issued in the private market (even if those securities ultimately were/will be exchanged for substantially equivalent debt registered under the Securities Act).]

EGCs should consider consulting with their legal counsel when evaluating which debt issuances should be included in or excluded from the computation.

See SEC 2170.902, .904, and .905.

.24 When should EGC status be assessed in conjunction with an initial public offering?

The SEC staff has indicated that a company must qualify as an EGC at the time of initial submission to in order to be permitted to submit a confidential draft registration statement under Securities Act section 6(e). See JOBS Act Title I FAQ Question 3.

If a company ceases to qualify as an EGC after it submits a draft registration statement or publicly files a registration statement (e.g., after the initial submission date, a fiscal year has been completed with revenues over \$1.235 billion), the company will continue to be treated as an EGC for the purposes of the scaled disclosure provisions in its initial registration statement until the earlier of (i) the date on which the issuer consummates its initial public offering or (ii) the end of the one-year period beginning on the date the company ceases to qualify as an EGC. See SEC FRM 10110.5.

For example, assume a calendar year-end company submits a draft registration statement on July 14, 2023 and qualifies as an EGC at the time that the draft registration statement is **submitted for confidential review**. The company does not first publicly file its registration statement until 2024. Assume the company's revenues exceed \$1.235 billion for the calendar year ended December 31, 2023. In this fact pattern, if the company does not consummate its initial public offering by December 31, 2024, the company cannot avail itself of the EGC scaled disclosure provisions for relevant SEC filings submitted after December 31, 2024.

The immediately preceding guidance relates to an issuer that lost its EGC status before publicly filing its registration statement. Securities Act Rule 401(a) provides that the "form and content of a registration statement and prospectus shall conform to the applicable rules and forms as in effect on the initial filing date of such registration statement and prospectus." Accordingly, the ability to use the scaled disclosure provisions applicable to EGCs in a registration statement depends on whether the company qualifies as an EGC at the initial public filing date of the registration statement. If a company qualifies as an EGC on the initial date that the registration statement is **publicly filed**, the scaled disclosure provisions related to EGCs would continue to apply through effectiveness of the registration statement even if the issuer loses its EGC status during the registration process. See SEC FRM 10110.6.

[Editor's note: Under Division of Corporation Finance policy, a company that does not qualify as an EGC may be eligible to submit certain registration statements for non-public SEC staff review and for other accommodations. See SEC 2110.12.]

.3 FINANCIAL STATEMENTS REQUIREMENTS

.31 How many periods should be included in the annual financial statements included in draft and filed registration statements submitted by an EGC?

The JOBS Act amended the Securities Act to explicitly permit an EGC to provide only two years of audited issuer financial statements in connection with an equity-IPO registration statement. The SEC has codified this change in S-X 3-02.

Although the JOBS Act did not explicitly provide that same accommodation for other registration statements, the SEC staff has indicated that it will not object if, in registration statements filed after the IPO, an EGC does not present audited financial statements for any period prior to the earliest audited period presented in connection with its equity-IPO. See SEC FRM 10220.1c.

[Editor's note: We understand this interpretation applies to registration statements prepared after the equity-IPO, and not to those that come before an equity-IPO (such as a pre-equity IPO debt registration statement). See JOBS Act Title I FAQ Question 49.]

See SEC 2110.2 for a discussion of annual financial statements requirements.

.32 What are the financial statement requirements for interim periods in draft and filed registration statements submitted by an EGC?

See SEC 2110.23 for a discussion of interim financial statement requirements.

.33 Can an EGC present only two years of financial statements for a significant equity method investment even if the EGC voluntarily provides a third year of its own financial statements?

The SEC staff indicated that an EGC that voluntarily provides a third year of its own financial statements would not be required to provide three years of financial statements for an equity method investee under S-X 3-09. See SEC FRM 10220.5b.

.34 Can an EGC that is preparing a registration statement on Form S-4 or proxy statement in connection with a merger transaction present two years of annual financial statements for the target even if the requirements of the forms being filed would otherwise require three years of financial statements for the target?

Under certain circumstances, yes. See SEC FRM 10220.6 and .7 and the editor's note in SEC 7050.2. See also JOBS Act Title I FAQ Question 45.

.35 Can an EGC omit financial statements of other entities required by S-X 3-05, 3-09 and 3-14 from its draft registration statement?

An EGC may omit financial statements of an acquired or to be acquired business (e.g., S-X 3-05), an acquired or to be acquired real estate operation (e.g., S-X 3-14) or an equity method investee (e.g., S-X 3-09) from its draft registration statement if the issuer reasonably believes those financial statements will not be required at the time of the offering. See FAST Act Compliance and Disclosure Interpretations Question 2.

.36 How many years should be included in annual financial statements prepared by an EGC that is not a smaller reporting company in its annual report on Form 10-K subsequent to its IPO?

The SEC staff has indicated that an EGC that is not a smaller reporting company must provide three years of audited financial statements in its annual report on Form 10-K. See JOBS Act Title I FAQ Question 30 and SEC FRM 10220.1e.

An EGC that is a smaller reporting company may provide only two years of audited financial statements (consistent with the requirements for smaller reporting companies).

.37 Transition to new or revised accounting standards

.371 What does the phrase “new or revised financial accounting standard” mean?

The SEC staff has indicated that the phrase "new or revised financial accounting standard" is intended to mean any update to the Financial Accounting Standards Board Accounting Standards Codification (the FASB ASC) made after April 5, 2012 (see JOBS Act Title I FAQ Question 33). The transition accommodation provided to EGCs does not apply to any updates to the FASB ASC made on or before April 5, 2012. FASB ASC updates made on or before April 5, 2012 must be adopted according to the requirements for public companies.

[Editor's note: The transition provisions related to the adoption of new accounting standards can be a complex matter. See US In depth 2019-20 and SEC FRM 10230.1f.]

.372 Does the transition accommodation apply to IFRS as issued by the IASB or any home-country (i.e., non-US GAAP) accounting framework?

No. The accounting transition accommodation does not apply to any financial accounting framework other than the FASB ASC. Accordingly, an EGC may not take advantage of the transition accommodation in connection with primary financial statements prepared using an accounting framework other than the FASB ASC (e.g., the accounting transition accommodation does not apply to financial statements prepared in accordance with IFRS as issued by the IASB). A foreign private issuer that is an EGC may, however, take advantage of the accounting transition accommodation with respect to its US GAAP reconciliation (if applicable). See JOBS Act Title I FAQ Question 34.

.373 Can an EGC change its election relating to the use of the extended transition period?

The SEC staff has indicated that an EGC that initially decides take advantage of the extended transition period for complying with new or revised financial accounting standards can later elect to follow non-EGC accounting transition. However, that later election to follow non-EGC accounting transition would be irrevocable. See JOBS Act Title I FAQ Question 37.

The decision to follow non-EGC accounting transition should be indicated by checking the appropriate box on the cover page in the first periodic report or registration statement including a confidential submission following the EGC's decision.

If an EGC decides to take advantage of the extended transition period for complying with new or revised financial accounting standards, it should evaluate the disclosure requirements of SAB 74 (Topic 11-M) and should consider disclosing the effective date for non-EGCs in addition to the effective date that will apply to the EGC (assuming it remains an EGC). See JOBS Act Title I FAQ Question 14.

If an EGC decides to apply new or revised accounting standards on the same basis as a non-EGC, it must:

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- make that decision when it is first required to file a registration statement (e.g., Form S-1), periodic report (e.g., Form 10-Q), or specified other report with the SEC and check the appropriate box on the cover page;
- comply with all standards to the same extent as a non-EGC; and
- continue to comply with those standards to the same extent as a non-EGC for as long as the company remains an EGC.

See JOBS Act Title I FAQ Question 13 and SEC FRM 10230.1.

.4 AUDIT REQUIREMENTS RELATING TO INTERNAL CONTROL OVER FINANCIAL REPORTING

.41 How does the temporary EGC exemption for the audit requirements relating to internal control over financial reporting work?

SEC reporting companies are generally required to provide management's assessment of the company's internal control over financial reporting beginning with their second annual report. Non-EGCs that are accelerated filers or large accelerated filers (see Exchange Act Rule 12b-2 and SEC 3125) are also required to provide an auditor's opinion on the effectiveness of the company's internal control over financial reporting.

EGCs are exempted from the requirement to obtain an audit of internal control over financial reporting for as long as they remain an EGC. See S-K 308(b). It is important to note that this exemption only applies to the internal control audit requirements. EGCs are not exempt from the requirements to provide management's assessment of the company's internal control over financial reporting beginning with the company's second annual report.

[Editor's note: See PCAOB AS 3105.59 for auditor reporting guidance when management is required to report on the company's internal control over financial reporting but such report is not required to be audited, and the auditor has not been engaged to perform an audit of management's assessment of the effectiveness of internal control over financial reporting.]

Example

Facts: Company X, a calendar year-end EGC, first sold its common equity securities in an initial public offering registered under the Securities Act in July 2018. Company X remained an EGC at all times prior to December 31, 2023. Company X will be considered an accelerated filer as of December 31, 2023.

Analysis: December 31, 2023 is the last day of the fiscal year that includes the fifth anniversary of Company X's equity IPO. Accordingly, Company X will lose its EGC status on December 31, 2023. In addition to complying with the management assessment requirements relating to internal control over financial reporting (which were previously applicable to Company X), in its annual report on Form 10-K for the year ended December 31, 2023 Company X will also need to obtain an audit of the company's internal control over financial reporting as of December 31, 2023. Since Company X is not an EGC at December 31, 2023, the 2023 Form 10-K must be prepared without the benefit of the temporary EGC exemption from the audit requirements relating to internal control over financial reporting.

.5 CONFIDENTIAL SUBMISSION PROCESS

Under the JOBS Act, an EGC is able to submit a draft registration statement confidentially in advance of an IPO. The JOBS Act requires an EGC to file the initial confidential submission of its registration statements and all amendments with the SEC before the anticipated effective date of the registration statement or road show. See JOBS Act Title I FAQ Question 44.

SEC comment letters and issuer responses related to draft registration statements will also be made public according to the SEC staff's existing policies. See JOBS Act Title I FAQ Question 25.

An EGC should follow the SEC procedures for seeking confidential treatment if there are sections of response letters that the EGC wishes to keep confidential after the letters/responses are publicly released. See JOBS Act Title I FAQ Question 26.

See SEC 2110.12 for additional information.

See SEC 2170.907 and .908 for additional guidance.

.9 FREQUENTLY ASKED QUESTIONS

.901 How should “total annual gross revenue” be interpreted by banks and similar financial institutions when assessing EGC status?

The JOBS Act did not specifically address how the total annual gross revenue criterion should be applied by a bank or similar financial institution. The SEC staff has indicated that a bank or similar financial institution must include all gross revenues from traditional banking activities. Banking activity revenues may include interest on loans and investments, dividends on investments, fees from loan origination, fees from trust and investment services, commissions, brokerage fees, mortgage servicing revenues, and any other fees or income from banking or related services. See SEC FRM 10110.2 and SEC FRM 5110.3(c) for a smaller reporting company.

.902 How should “total annual gross revenue”, “rolling three-year basis” and “date of the first sale” be interpreted subsequent to a reverse merger when assessing EGC status?

Subsequent to a reverse merger, the SEC staff has indicated that:

- The revenue of the accounting acquirer should be used for the purposes of the annual gross revenue test. This would include the revenue of the legal acquirer from the date of the reverse merger.
- The accounting acquirer's debt issuances should be used for the purpose of the rolling three-year test. This would include the legal acquirer's debt issuances from the date of the reverse merger.
- The date of the first sale of the legal acquirer's common equity securities in an offering registered under the Securities Act should be used for purposes of the five-year anniversary test.

See JOBS Act Title I FAQ Question 47 and SEC FRM 10120.2.

.903 How should “total annual gross revenue” be interpreted when assessing EGC status if the financial statements for the most recent fiscal year are those of a predecessor of the issuer?

If the financial statements for the most recently completed fiscal year are those of the predecessor of the issuer, the predecessor's revenues should be used when determining if the issuer meets the definition of an EGC. See SEC FRM 10110.2.

.904 Are non-convertible debt securities issued in a private transaction included in the three-year rolling amount?

The SEC staff has publicly indicated that non-convertible debt securities issued in a private transaction would generally be included in the calculation. They have also indicated that, since the JOBS Act used the word "issued," only "securities" should be included in the calculation. If bank debt does not constitute a security, we understand it would not be included in the calculation. EGCs should consider consulting with

their legal counsel to evaluate which transactions should be included or excluded from the computation. See SEC FRM 10110.4 c.

.905 Would debt securities issued in a registered exchange offer typically be included in the three-year rolling amount?

Debt securities issued in a registered exchange offer would generally not be included in the assessment of the EGC rolling three-year debt exit criterion since they are identical to and replace those issued in the non-public offering. See JOBS Act Title I FAQ Question 18.

.906 Are the reporting and disclosure accommodations available to an EGC the same as scaled disclosure accommodations available to a smaller reporting company?

Not in all instances. In several instances, EGCs are permitted to provide a level of disclosure that is similar to the scaled disclosure requirements applicable to a smaller reporting company. However, it is important to note that the EGC disclosure accommodations are not identical to the scaled disclosure requirements applicable to a smaller reporting company. If the EGC is also a smaller reporting company, it may take advantage of both sets of accommodations. See SEC 2160 for further discussion of smaller reporting companies.

.907 Can an EGC use the confidential submission process to submit a draft registration statement for an exchange offer or merger?

The SEC staff has indicated that an EGC may use the confidential submission process to submit a draft registration statement for an exchange offer or merger that constitutes its initial public offering of common equity securities (JOBS Act Title I FAQ Question 43).

A Special Purpose Acquisition Company (SPAC) that plans to file a registration statement on Form S-4 within twelve months of the effective date of its initial public offering should discuss the possibility of submitting a draft registration statement on Form S-4 for non-public review with legal counsel.

.908 Does a draft registration statement need to be complete at the time it is submitted?

The JOBS Act did not specify the exact content requirements for a draft registration statement. However, the SEC staff has indicated an expectation that any draft registration statement would be substantially complete (including exhibits) at the time of initial submission. The SEC staff has indicated that it will defer review of any draft registration statement that is materially deficient. See JOBS Act Confidential Submission Process FAQ Question 7.

The SEC staff has also indicated that, since a draft registration statement is not a "filing," it does not need to be signed and does not need to include an auditor's (or other expert's) consent. However, a draft registration statement submitted by an EGC must include the signed audit report of the independent registered public accounting firm(s) covering the fiscal years presented in the registration statement.

Additionally, the SEC staff has indicated that a draft registration statement should include any other required financial statements (e.g., financial statements for a recently acquired or to-be-acquired business under S-X 3-05 or for an equity method investee under S-X 3-09). As described above, companies could omit financial information of these entities if they reasonably believe such omitted periods will not be required at the time of the offering under the circumstances described in FAST Act Compliance and Disclosure Interpretations Question 2. The initial confidential submission and all amendments must be publicly filed with the SEC no later than 15 days before the date on which the issuer conducts a road show (as defined in Securities Act Rule 433(h)(4)). Upon public filing, the previous confidential submissions are not required to be signed or to include consents. See JOBS Act Title I FAQ Question 52.

See SEC 2170.31, .33, and .34 for additional guidance.

.1 How to access Regulation C

.1 HOW TO ACCESS REGULATION C

The reprint of Regulation C is available at <http://www.ecfr.gov/current/title-17/chapter-II/part-230#230.400>.

- .1 General
- .4 Disclosure requirements
- .9 Frequently asked questions

.1 GENERAL

.11 What is Regulation D?

Regulation D establishes certain exemptions from the registration requirements of Section 5 of the Securities Act. Regulation D is set forth in Securities Act Rules 500-508 (available at <https://www.ecfr.gov/current/title-17/chapter-II/part-230/subject-group-ECFR6e651a4c86c0174>).

- Rule 504 of Regulation D provides an exemption for limited offers and sales of securities not exceeding \$10 million during a 12-month period.
- Rule 506 of Regulation D provides an exemption for limited offers and sales without regard to the dollar amount of the offering.

The availability of these exemptions is subject to a number of conditions set forth in Regulation D (e.g., Rule 502, Rule 504(b) and Rule 506(b)). Issuers should refer to Regulation D and consider consulting with their legal counsel.

.12 Are there any SEC filing requirements associated with a Regulation D Offering?

Yes. An issuer relying on an exemption under Rules 504 or 506 are required to file a Notice of Exempt Offering of Securities on Form D with the SEC no later than 15 calendar days after the first sale of securities. If the end of that period falls on a Saturday, Sunday or holiday, then the due date would be the next business day. Form D must be filed with the SEC in electronic format by means of the SEC's Electronic Data Gathering, Analysis, and Retrieval System (EDGAR) in accordance with EDGAR rules set forth in Regulation S-T. See Securities Act Rule 503.

You can find the text of Form D at <https://www.sec.gov/about/forms/formd.pdf>.

See SEC 2192.901 and SEC 2192.902 for additional guidance.

.4 DISCLOSURE REQUIREMENTS

.41 Where can I find the disclosure requirements (including financial statement requirements) applicable to a Regulation D offering?

The disclosure requirements (including the financial statement requirements) applicable to a Regulation D offering are specified in Securities Act Rule 502(b). The text of Rule 502(b) is available on Viewpoint under SEC Reporting / SEC Rules and Regulations / Selected Securities Act Rules.

The requirements vary depending upon a number of factors, including (i) the rule under which the securities are being sold, (ii) whether the securities are being sold to non-accredited investors, (iii) the amount (size) of the offering, (iv) whether the issuer is subject to the reporting requirements of Exchange Act Section 13 or 15(d) and (v) other factors described in Rule 502(b).

[Editor's note: We understand that the SEC does not require a level of financial statement disclosure any higher than US GAAP for nonpublic entities in Regulation D offerings where the issuer has concluded that such disclosures are not material to investors.]

[Editor's note: Issuers and auditors should evaluate the specific independence requirements to determine the appropriate auditor independence framework to apply (e.g., considering the amount of the offering).]

.9 FREQUENTLY ASKED QUESTIONS

.901 Is a written accountants' consent required in connection with a Regulation D offering?

No. Given that an offering under Regulation D is exempt from registration under the Securities Act and that there are no other specific requirements calling for a written consent, a Securities Act-style written consent is not required. However, the auditor may consider providing a letter similar to the letter referred to in PCAOB AI 26.17 or AU-C 945-A21. See SEC 2400.49 for additional information.

.902 Is "Experts" language required in a Regulation D offering?

No. See SEC 2300.16 for a discussion of "Experts" language in connection with a Regulation D offering statement.

- .1 General
- .2 References in “experts” disclosure to an independent registered public accounting firm or independent auditors
- .3 Reports on reviews of interim financial information included or incorporated by reference in a Securities Act registration statement
- .9 Frequently asked questions

.1 GENERAL

.11 What is “experts” disclosure?

"Experts" disclosure typically refers to disclosure in the materials relating to an underwritten offering registered under the Securities Act which indicates that the audited financial statements have been included or incorporated by reference in the registration statement and prospectus in reliance on the report of the independent registered public accounting firm, given on their authority as experts in auditing and accounting. A similar statement might also be made with respect to management's assessment of the effectiveness of internal control over financial reporting, when applicable.

.12 Why do certain parties seek to include “experts” disclosure in offering materials relating to a Securities Act registration statement?

Certain parties seek to include “experts” disclosure in offering materials relating to a Securities Act registration statement because there are provisions in the US securities laws which may provide those parties with some liability protection.

Section 11 of the Securities Act imposes liability on various parties (e.g., issuers, underwriters, accountants, certain officers and directors) for materially false or misleading statements/omissions in a registration statement. Section 11 also provides that certain parties (e.g., underwriters, officers and directors) may avoid this liability with respect to any part of the registration statement purporting to be made "upon the authority of an expert" if that party "had no reasonable ground to believe and did not believe" the "expertized" portion of the registration statement contained an untrue statement, or that there was a material omission.

Because of the protection afforded by this provision, almost all prospectuses and prospectus supplements relating to underwritten offerings registered under the Securities Act contain some form of “experts” disclosure. This is true even though the SEC's rules and regulations do not require “experts” disclosure for domestic companies.

See SEC 2300.901 and SEC 2300.902 for additional guidance.

.13 Does the SEC staff expect “experts” disclosure to refer to audit report modifications?

Generally, yes. We understand the SEC staff expects “experts” disclosure to refer to audit report modifications unless the modification relates solely to a matter of consistency in the application of accounting principles. Common examples of audit report modifications which would ordinarily be disclosed in “experts” disclosure include references relating to going concern, restatements, an adverse opinion on internal control over financial reporting and the exclusion of a recently acquired business from the scope of the audit of internal control over financial reporting. See SEC 2300.904 for additional guidance.

.14 Are there specific wording considerations related to “experts” disclosure that should be considered?

The independent accountant should exercise care when reviewing management's draft "experts" disclosure so that the language used with respect to the accountant is appropriate. We believe wording such as "the financial statements are included upon the authority of our independent registered public accounting firm

as experts" should not be used because that wording might imply that the independent accountant authorized the inclusion of the financial statements (which is the company's responsibility). In addition, we do not believe it is appropriate to use the phrase "and on the authority of the independent accountant" instead of "given on the authority of the independent account" because a similar inference might be drawn. Additionally, we believe it is important to ensure that the fields in which the independent accountant is an expert (auditing and accounting) are stated clearly.

We believe the "experts" disclosure should unambiguously convey the date of the financial statements (and, if appropriate, the date of management's assessment of the effectiveness of internal control over financial reporting) that are being included or incorporated by reference in the registration statement/prospectus in reliance on the independent accountant's report. We do not believe the "experts" disclosure should simply refer to the "latest Annual Report" or "most recent financial statements," because that type of reference could be misconstrued to "expertize" the independent accountant with respect to financial statements or assessments of internal control over financial reporting on which they have not reported and with which they might not otherwise be associated (e.g., in the case of a shelf registration statement and a change in independent accountant).

Additionally, we do not believe it is appropriate for "experts" disclosure to make reference to financial statements that are not a part of the offering materials at the time the "experts" disclosure is prepared (e.g., no "future" or "evergreen" expertization).

.15 Do registration statements on Form S-8 generally include "experts" disclosure?

No. "Experts" disclosure is generally not included in a registration statement on Form S-8 (e.g., for stock option plans) because it is generally not an underwritten offering.

.16 Do offering materials relating to transactions that are exempt from registration under the Securities Act typically include "experts" disclosure?

Generally, no. Because the concept of an "expert" has a specific meaning in the Securities Act, we believe the independent accountant generally should not agree to be named as an expert in connection with private placements, Regulation A or D offerings, or other offerings exempt from registration under the Securities Act, nor in an offering document filed with the Office of Thrift Supervision. However, we believe the independent accountant ordinarily agrees to language substantially in the form referred to in PCAOB AI 26.12-.15 and AICPA AU-C 945-A29. We believe the caption "Experts" should not be used in a non-Securities Act offering.

.17 Do registration statements on Form 10 typically include "experts" disclosure?

No. We would not expect there to be an "experts" disclosure in a registration statement on Form 10. Form 10 is a registration statement under the Exchange Act, not the Securities Act.

.2 REFERENCES IN "EXPERTS" DISCLOSURE TO AN INDEPENDENT REGISTERED PUBLIC ACCOUNTING FIRM OR INDEPENDENT AUDITORS

.21 How should the independent accountant be referred to in "experts" disclosure?

We believe the manner in which the independent accountant is referred to in the "experts" disclosure (i.e., as an independent auditor or as an independent registered public accounting firm) depends primarily on how its report is titled.

As a general matter, we believe that when the independent accountant's report relates to a registrant, it is referred to as an "independent registered public accounting firm," and when its report relates to a non-registrant (e.g., an acquired business that is not a registrant), it is referred to as "independent auditors."

.22 How should the independent accountant be referred to when multiple audit reports are included in a single Securities Act registration statement?

In instances where the independent accountant is named as an expert with respect to multiple audit reports in a single document, we believe all references to the independent accountant are ordinarily consistent. For example, where the independent accountant is the auditor of both the registrant and a non-registrant whose financial statements are also included or incorporated by reference in the registration statement, we believe the independent accountant is referred to consistently as "an independent registered public accounting firm" in the "experts" disclosure.

[Editor's note: This guidance relates to references to the independent accountant in the "experts" disclosure and does not affect the manner in which its audit report is titled.]

.3 REPORTS ON REVIEWS OF INTERIM FINANCIAL INFORMATION INCLUDED OR INCORPORATED BY REFERENCE IN A SECURITIES ACT REGISTRATION STATEMENT

.31 Should "experts" disclosure indicate that management has included its unaudited interim financial information in reliance on an independent accountant's review report on the interim financial statements if that review report is also included or incorporated by reference in the Securities Act registration statement?

No. Securities Act Rule 436(c) excludes a report on a review of unaudited interim financial information from the definition of a "report prepared by an expert," as that term is used in Sections 7 and 11 of the Securities Act. However, see SEC 2300.32 for guidance relating to disclosures registrants consider providing.

.32 What are some typical impacts on "experts" disclosure when an independent accountant's interim review report is included or incorporated by reference in a Securities Act registration statement?

In order to clearly distinguish between accountants' reports on audited and unaudited financial statements, when an interim review report is included or incorporated by reference in a Securities Act filing, the prospectus will typically indicate that an interim review report is not a report within the meaning of Sections 7 and 11 of the Securities Act and that the independent accountant's liability under Section 11 does not extend to its review report.

When an interim review report is included or incorporated by reference in a Securities Act registration statement, we believe it is preferable to use the caption "Independent Registered Public Accounting Firm" (for a registrant) or "Independent Auditors" (in the limited circumstances in which this situation could arise for a non-registrant) rather than "Experts" as the title to the "experts" disclosure because Section 11 liability does not extend to the review report. As outlined in PCAOB AS 4101.09, wording such as the following would ordinarily be appropriate when the independent accountant's interim review report is included or incorporated by reference in a Securities Act filing:

With respect to the unaudited financial information of ABC Corporation for the three-month periods ended March 31, 20X3 and 20X2, included [incorporated by reference] in this Prospectus, XYZ Auditor LLP reported that they have applied limited procedures in accordance with professional standards for a review of such information. However, their separate report dated April 28, 20X3 appearing [incorporated by reference] herein states that they did not audit and they do not express an opinion on that unaudited financial information. Accordingly, the degree of reliance on their report on such information should be restricted in light of the limited nature of the review procedures applied. XYZ Auditor LLP is not subject to the liability provisions of Section 11 of the Securities Act of 1933 for their report on the unaudited financial information because that report is not a "report" or a "part" of the registration statement prepared or certified by XYZ Auditor LLP within the meaning of Sections 7 and 11 of the Act.

[Editor's note: When an interim review report is included or incorporated by reference in a non-Securities Act offering (e.g., Rule 144A offering), we believe the above paragraph should be included in the offering materials. However, the word "Prospectus" should be replaced with a description to fit the circumstances (e.g., "offering memorandum") and the last sentence of the disclosure should be deleted because there is no Section 11 liability for any auditor report.]

In addition, we believe the accountants' consent should be modified to indicate that the independent accountant consents to the reference to it as experts under the heading "Independent Registered Public Accounting Firm" in such Registration Statement.

For those prospectuses incorporating by reference more than one Form 10-Q, the above language would be modified to refer to each of the separate review reports incorporated, as well as the respective periods covered by each report.

[Editor's note: For non-public companies, AU-C 930 requires a written review report to be issued when the independent accountant is engaged to perform an interim review (e.g., when performing an interim review for a non-public company in connection with a non-Securities Act offering such as under Rule 144A). However, there is no requirement that the review report be included or incorporated by reference in the offering document.]

.33 Should a Form 10-Q that (i) includes the review report of an independent accountant and (ii) is automatically incorporated by reference into an effective Securities Act registration include disclosure relating to the fact that the independent accountant is not an expert with respect to its interim review report?

Yes. The example in SEC 2300.32 addresses review reports on unaudited interim financial statements filed before or at the time of the filing of the Securities Act registration statement. There are additional considerations if the registration statement provides for automatic incorporation of future SEC filings.

In a "continuous" or "evergreen" offering of securities (e.g., on Form S-3), all Form 10-Qs filed during the period the securities continue to be offered are automatically incorporated by reference into the registration statement. Accordingly, we believe that each subsequent Form 10-Q which contains the independent accountant's interim review report should include a section or footnote to the financial statements explaining that the review report is not a "report" within the meaning of Sections 7 and 11 of the Securities Act, and that the independent accountant's liability under Section 11 does not extend to its interim review report. The disclosure should be similar to the example disclosure included in SEC 2300.32.

Since an interim review report is not a "report" prepared by a certified public accountant within the meaning of Sections 7 and 11 of the Securities Act, we do not believe it is necessary to modify the language in "continuous" or "evergreen" Securities Act registration statements for interim review reports included in Form 10-Qs filed after the filing of the registration statement. However, we generally would not object if management made a voluntary disclosure to update the previously filed language for this purpose. We believe the disclosure should be outside of the historical financial statements and should not be a part of the independent accountant's interim review report (since it is not a statement by the independent accountant). The following is an example of the type of modification that a company might consider including in its Form 10-Q:

"The Independent Registered Public Accounting Firm section in Form S-3, File No. 333-XXXXXX, of ABC Corporation is modified to include the following:

With respect to the unaudited financial information of ABC Corporation for the three- and six-month periods ended June 30, 20X3 and 20X2, incorporated by reference in this Prospectus, XYZ Auditor LLP reported that they have applied limited procedures in accordance with professional standards for a review of such information. However, their separate report dated August 8, 20X3 incorporated by reference herein, states that they did not audit and they do not express an opinion on that unaudited financial information. Accordingly, the degree of reliance on their report on such information should be restricted in light of the limited nature of the review procedures applied. XYZ

Auditor LLP is not subject to the liability provisions of Section 11 of the Securities Act of 1933 for their report on the unaudited financial information because that report is not a "report" or a "part" of the registration statement prepared or certified by XYZ Auditor LLP within the meaning of Sections 7 and 11 of the Act."

.9 FREQUENTLY ASKED QUESTIONS

.901 Does the SEC expect an accountants' consent provided in connection with the filing of a Securities Act registration statement to include a reference to the "experts" disclosures?

Yes. Section 7 of the Securities Act requires a written consent from "any accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him" that is named as having prepared or certified any part of the registration statement, or that is named as having prepared or certified a report for use in connection with the registration statement. Securities Act Rule 436(b) also requires a consent if the registration statement states that any information contained in the registration statement "has been reviewed or passed upon by any persons and that such information is set forth in the registration statement upon the authority of or in reliance upon such persons as experts." Accordingly, an accountants' consent included in a registration statement is expected to include a statement indicating that the independent accountant consents to the reference to their firm in the "experts" disclosure. See SEC 2400.12.

.902 Is a consent required when the "experts" disclosure is updated in a prospectus supplement to an already effective registration statement?

Some registrants elect to update the "experts" disclosure in an already effective registration statement by including revised (e.g., more current) "experts" disclosure in a later filed prospectus supplement. We do not believe an independent accountant provides a consent for updated "experts" disclosure provided in a prospectus supplement unless the filing of the prospectus supplement creates a new effective date for the independent accountant and the independent accountant is otherwise required to provide a consent. Even when the independent accountant is not providing a consent, the independent accountant reviews management's draft "experts" disclosure for appropriateness.

.903 Is it appropriate for "experts" disclosure to indicate that management's assessment of the effectiveness of internal control over financial reporting was included or incorporated by reference in a Securities Act registration statement in reliance on the independent accountant's report if the independent accountant issued a disclaimer of opinion of the effectiveness of internal control over financial reporting?

We do not believe that a disclaimer of opinion provides a sufficient basis to indicate that management's assessment has been included or incorporated by reference in reliance on the independent accountant's report.

.904 Is it appropriate for predecessor and successor auditors to consider being identified as experts when the successor auditor has audited and reported on modifications to financial statements previously audited by the predecessor auditor?

When a successor auditor has audited and reported on modifications to financial statements previously audited by a predecessor auditor, we believe the successor auditor may agree to be identified as experts with respect to the portion of the successor auditor's report that relates to the audit of the modifications when the predecessor auditor agrees to be identified (and is identified) as experts with respect to its report on the "pre-modification" financial statements. Similarly, depending on the circumstances, we believe the predecessor auditor may agree to be identified as experts with respect to its report on pre-modification financial statements when the successor auditor audits the modifications and agrees to be identified (and

is identified) as experts with respect to the portion of its report relating to the adjustments to the financial statements.

- .1 General
- .2 Form of consent
- .3 Special situations
- .4 Consents in other documents
- .5 Communication with audit committees
- .6 Public Company Accounting Oversight Board accounting support fee
- .7 Awareness letters relating to interim review reports
- .9 Frequently asked questions

.1 GENERAL

.11 What is an accountants' consent and why is it required?

An accountants' consent is a document signed by an independent accountant and provided to the issuer indicating that the independent accountant "consents" to the use of its report in a Securities Act registration statement. The SEC staff has indicated that the primary purpose of obtaining an accountants' consent is to ensure that the independent accountant is aware of the use of its report and the context in which it is used. See SEC FRM 4810.1.

The requirement for an issuer to file an accountants' consent is set forth in Section 7 of the Securities Act, which states in part:

"If any accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, is named as having prepared or certified any part of the registration statement, or is named as having prepared or certified a report or valuation for use in connection with the registration statement, the written consent of such person shall be filed with the registration statement."

The SEC implemented the Securities Act consent requirements primarily through Securities Act Rule 436 which requires an SEC registrant to file a written consent from an expert as an exhibit to a Securities Act registration statement if:

- any portion of an expert's report/opinion is quoted or summarized in the registration statement or prospectus; or
- the registration statement states that any information contained in it has been reviewed/passed upon by a person and that the information is set forth in the registration statement upon the authority of that person as an expert or in reliance on that person as an expert.

See SEC 2400.901 for additional guidance.

.12 When must the SEC's consent requirements be evaluated?

The SEC's consent requirements must be evaluated whenever an audit report is included or incorporated by reference in a Securities Act registration statement (including a post-effective amendment). Examples of Securities Act registration statements which generally trigger a requirement to evaluate the SEC's consent requirements include filings on Form S-1, F-1, S-3, F-3, S-4, F-4, S-8, and S-11. An accountants' consent is typically included as Exhibit 23 to the relevant SEC filing. See S-K 601(b)(23).

Example – Audit report is included in a Securities Act registration statement

Facts: Company A, a private company, is preparing to file a registration statement on Form S-1 for its initial public offering of common stock. The Form S-1 will include Company A's financial statements as of December 31, 2022 and 2021 and for each of the three years in the period ended December 31, 2022 together with an audit report on those financial statements.

Analysis: Company A will need to file an accountants' consent in the initially filed Form S-1.

[Editor's note: Under certain circumstances, the SEC permits companies to submit draft Securities Act registration statements for non-public review. These draft registration statements are not considered "filed" with the SEC and, therefore, do not require an accountants' consent. See JOBS Act Title I FAQ Question 52]

Example - Audit report is incorporated by reference in a new or amended Securities Act registration statement

Facts: In April 2023, Company B, an existing SEC registrant, files a new registration statement on Form S-3. The Form S-3 incorporates by reference Company B's Form 10-K for the year ended December 31, 2022. Company B's 2022 Form 10-K includes its financial statements as of December 31, 2022 and 2021 and for each of the three years in the period ended December 31, 2022 together with an audit report on those financial statements.

Analysis: Company B will need to file an accountants' consent in the initially filed Form S-3.

See SEC 2400.902 for additional guidance.

.121 When is an accountants' consent required in connection with an amendment to a Securities Act registration statement?

As noted above, the SEC's consent requirements must be considered when a registration statement is initially filed under the Securities Act. Additionally, the SEC staff has indicated that a new consent is required in connection with an amendment:

- whenever any change, other than typographical, is made to the financial statements;
- if there have been intervening events since the prior filing that are material to the company; or
- prior to the effectiveness of a registration statement if an extended period of time passes since the last filing (the SEC staff generally considers any period of time which is more than 30 days to be an "extended period of time.")

See SEC FRM 4810.3.

.13 Since the SEC's consent requirements are triggered by Securities Act registration statements, why is an accountants' consent oftentimes filed with a Form 10-K or Form 8-K?

Even though the SEC's consent requirements are generally driven by Securities Act registration statements, an accountants' consent is oftentimes filed as an exhibit to a filing made under the Exchange Act (e.g., Form 10-K or Form 8-K) when that Exchange Act filing includes an audit report and the Exchange Act report is automatically incorporated by reference into a previously filed Securities Act registration statement. The automatic incorporation of a later filed Exchange Act report into a previously filed registration statement is sometimes referred to as "forward incorporation." See Securities Act Rule 439.

For instance, Item 12(b) of Form S-3 requires registrants to incorporate by reference all Exchange Act reports (e.g., Form 10-K, Form 10-Q or Form 8-K) "subsequently filed" pursuant to Sections 13(a), 13(c), 14, or 15(d) of the Exchange Act before the termination of the offering. Accordingly, Form S-3 registration statements are considered "evergreen" in that the offering materials are updated by each subsequently filed Exchange Act report. A similar concept applies to Form S-8.

[Editor's note: See Securities Act Form CDI 123.05 for guidance on Exchange Act filings made after the date of the initial registration statement and prior to effectiveness of the registration statement.]

Any subsequently required consents may be included in the material that is subsequently filed (e.g., as an exhibit to Form 10-K) or may be filed by a post-effective amendment to the registration statement no later

than the date on which the material is filed.

Including a Form S-8 or Form S-3 consent in a Form 10-K is appropriate only in the circumstance of a continuous offering. It is not to be used when a Form S-8 or Form S-3 is not yet filed or is no longer effective.

Example – Audit report is automatically incorporated by reference in an existing Securities Act registration statement

Facts: Company C, an existing SEC registrant, has an effective registration statement on Form S-8. When Company C files its Form 10-K for the year ended December 31, 2022, it will include an audit report on Company C's financial statements as of December 31, 2022 and 2021 and for each of the three years in the period ended December 31, 2022.

Analysis: When Company C files its 2022 Form 10-K, it will be automatically incorporated by reference into the effective Form S-8. Accordingly, Company C is required to file an accountants' consent to the incorporation by reference of the audit report into Company C's Form S-8. Company C will accomplish this by including the accountant's consent as Exhibit 23 to its 2022 Form 10-K. If Company C had not previously filed a Securities Act registration statement into which its 2022 Form 10-K would be automatically incorporated when filed, then no accountants' consent would be required at the time the 2022 Form 10-K is filed.

.2 FORM OF CONSENT

.21 What are some of the factors that can have an impact on the form of an accountants' consent?

The form of an accountants' consent will depend on a number of factors, including (but not limited to):

- whether or not the entity whose financial statements are reported on is a registrant;
- the nature of the filing (e.g., an Exchange Act report that is incorporated by reference into an already effective registration statement vs. a new registration statement that includes/incorporates the audit report);
- whether the auditor has reported on the effectiveness of internal control over financial reporting;
- whether the auditor has reported on financial statement schedules (e.g., pursuant to S-X 5-04) and whether the auditor has issued a single report or two reports;
- whether the auditor is referred to as an "Expert" in a registration statement;
- whether the auditor has "dual dated" its report(s).

[Editor's note: It is not appropriate to issue a consent with respect to the inclusion/incorporation by reference of a report on a review of interim financial information in a Securities Act registration statement. However, see SEC 2400.7 regarding the issuer's need to provide an accountant's "awareness letter" in such circumstances.]

.22 Is an accountants' consent required to be addressed to either the issuer or the SEC?

No. Since a consent does not require any expression of opinion, it is not necessary to address the consent as in the case of a report on financial statements.

.23 What date is used for an accountants' consent?

An accountants' consent is usually dated as of or within a few days of filing a Securities Act registration statement.

The date of the consent should not be after the date through which subsequent events have been evaluated. Typically, the consent date would coincide with the completion of the auditor's "keeping current" procedures. The consent date might not be the same as the audit opinion date (e.g., when a newly filed Securities Act registration statement incorporates by reference an earlier filed Form 10-K).

When a consent is being provided in connection with a Form 10-K that will be automatically incorporated by reference into an already effective Securities Act registration statement, the date of the consent will generally be the same as the audit report date. One exception to this general expectation arises when the accountants' consent is being requested from a predecessor auditor. In that case, the date of the accountants' consent obtained from the predecessor auditor will be a current date while its audit report date is most likely the date of its original report.

.231 Does an accountants' consent need to refer to all dates and related explanations when an audit report is dual dated?

Yes. When the audit report is dual dated, the body of the accountants' consent refers to all dates and related explanation(s) appearing in the date block of the report exactly as they appear in the report. The actual date of the consent, however, will be the date the consent is signed.

.24 Does an accountants' consent refer to audit opinion modifications?

There is no need to refer to opinion qualifications, explanatory paragraphs or references to other auditors in the body of an accountants' consent.

.25 Does an accountants' consent need to refer to an audit report relating to the company's internal control over financial reporting if it is included or incorporated by reference in a Securities Act registration statement?

Yes. If the auditor's report on internal control over financial reporting is included or incorporated by reference in a Securities Act registration statement, the registrant is required to file a related accountants' consent.

.251 Does an accountants' consent need to refer to the reference to the auditor in management's report on internal control over financial reporting required by S-K 308(a)(4)?

No. A registrant that includes an audit report on internal control over financial reporting in its Form 10-K, is also required to state in management's report on internal control over financial reporting that the auditor audited both the internal control over financial reporting and the registrant's financial statements (see S-K 308(a)(4)). However, the registrant is not required to file an accountants' consent to that reference even if it is included or incorporated by reference in a Securities Act registration statement. This is true even though the registrant is required to file an accountants' consent to the inclusion or incorporation by reference of the audit report on the effectiveness of the registrant's internal control over financial reporting in a Securities Act registration statement (see SEC 2400.25)

.26 Does an accountants' consent need to refer to financial statement schedules when they are covered by an audit report?

Yes. The audit report on the primary financial statements will include a reference to the financial statement schedules or, in some cases, there will be a separate audit report relating to the financial

statement schedules. An accountants' consent refers to the audit report on the financial statements and financial statement schedule(s), or both audit reports on the financial statements and financial statement schedule(s), as applicable. See SEC FRM 4210.2.

[Editor's note: When an Annual Report to Shareholders is incorporated by reference in Form 10-K and the Form 10-K is, in turn, incorporated by reference in a Securities Act registration statement, the accountants' consent refers to both the incorporation by reference of the auditors' report appearing in the Annual Report to Shareholders and, if applicable, to the incorporation by reference of the auditors' report on the "Financial Statement Schedules" included in the Form 10-K, as appropriate.]

.27 Does an accountants' consent need to refer to "experts" language included in a registration statement?

Generally, yes. Many Securities Act registration statements include "experts" disclosure which typically indicates that the audited financial statements have been included or incorporated by reference in the registration statement in reliance on the related audit report, given on the auditor's authority as experts in auditing and accounting. The SEC requires the registrant to provide an accountants' consent to this reference. See SEC 2300 for a complete discussion of "experts" disclosure.

.28 Does an accountants' consent need to be modified when the introductory note to selected or summary financial data tables refers to the auditor?

If a registrant refers to an auditor in an introductory note to any selected or summary financial data tables, the SEC staff has historically required the registrant to file an accountants' consent to that use of the firm's name if the introductory note is included or incorporated by reference in a Securities Act registration statement. The SEC staff has indicated that an accountants' consent is necessary even though the audit report does not extend to the presentation of selected or summary financial data tables. The reference in an accountants' consent to the use of its name in an introductory note to any selected or summary financial data table is in addition to the reference to the use of the firm's audit report or any references to the firm in an "experts" disclosure.

[Editor's note: The SEC staff has not publicly stated any change to their historical expectation even though the SEC has rescinded S-K 301.]

.3 SPECIAL SITUATIONS

.31 What is the typical form of an accountants' consent when a "preamble" report is issued?

In limited situations, the SEC staff will permit a preliminary filing to include financial statements which reflect a future corporate event or transaction (e.g., a stock split) that will take place before the registration statement becomes effective and will require retrospective treatment in the registrant's historical financial statements. By allowing the registrant to file historical financial statements reflecting the transaction before it happens, the SEC staff can streamline its review process. When a registrant files its financial statements in this manner, the auditor issues a type of report commonly referred to as a "preamble" report. When the auditor issues a "preamble" report, the form of accountants' consent is a "preamble" consent, when a consent is required. See SEC FRM 4710 for additional information relating to "preamble" (or "to be issued") reports.

.32 Does an accountants' consent need to be modified when an auditor is engaged to report on modifications to financial statements previously audited by a predecessor auditor?

When the auditor has been engaged to report on modifications to financial statements previously audited by a predecessor auditor, the accountants' consent does not need to be modified (i.e., the statement that

the report "relates" to the financial statements is sufficient). A similar analysis would apply in situations in which the auditor is the predecessor auditor and reissues its report on pre-modification financial statements. See SEC 2400.903 for additional guidance.

.33 Will the SEC waive the consent requirements in situations involving hostile takeovers?

In rare circumstances, such as situations involving hostile takeover attempts, the SEC may waive the requirement for a registrant to provide a consent. In these cases, the registrant must apply for the waiver and provide an affidavit complying with Securities Act Rule 437. See SEC FRM 4810.5.

.34 How do the SEC's accountants' consent requirements apply when a registrant files a new Securities Act registration statement that includes or incorporates by reference both (i) the audited financial statements that have been retrospectively revised and (ii) the pre-revision audited financial statements?

There are several reasons why a registrant might revise its previously filed audited financial statements. The most common reasons for revising previously issued financial statements are to reflect a discontinued operation, change in reportable segments or change in accounting principle that requires retrospective application (see SEC 2120.23). When the revised financial statements need to be filed prior to the filing of the next Form 10-K, the revised financial statements are usually filed under Item 8.01 of Form 8-K.

If a registrant files a new or amended Securities Act registration statement that incorporates by reference (i) the audited financial statements that have been retrospectively revised (e.g., filed under Item 8.01 of Form 8-K) and (ii) the pre-revision financial statements (e.g., included in the most recent Form 10-K), then the auditor only consents to its report on the revised financial statements because the revised financial statements supersede the pre-revision financial statements. See SEC FRM 4810.6, Securities Act Rule 412(c) and footnote 25 to SEC Release 33-6383 which reads as follows:

FN 25 A number of commentators expressed concern that outdated financial statements from the latest Form 10-K would be incorporated by reference when restated financial statements are included in the prospectus or are incorporated by reference because of an accounting change or pooling subsequent to the most recent fiscal year end. Additionally, concern was expressed that the staff may require an accountant's consent for such outdated financial statements. Rule 412 of Regulation C would operate to make the restated financial statements supersede the Form 10-K financial statements and would render the superseded items not a part of the registration statement or prospectus for purposes of the Securities Act. Therefore, no consent would be required for the superseded financial statements.

Consider the following example:

Facts: Company X, a calendar year-end SEC registrant, filed its 2022 Form 10-K on February 23, 2023. Company X's 2022 Form 10-K included audited financial statements as of December 31, 2022 and 2021 and for each of the three years in the period ended December 31, 2022. In March 2023, Company X disposed of Subsidiary A. Subsidiary A was properly not reflected as a discontinued operation in Company X's 2022 Form 10-K. When Company X prepared its March 31, 2023 Form 10-Q, it reflected Subsidiary A as a discontinued operation for both 2023 and 2022.

Company X intends to file a new registration statement on Form S-3 in June 2023. Pursuant to Item 11(b) of Form S-3 (and the associated SEC staff guidance set forth in SEC FRM 13210.1), Company X has determined that it must retrospectively revise the audited financial statements originally included in its 2022 Form 10-K to reflect Subsidiary A as a discontinued operation. Company X filed the revised financial statements (and other relevant information -- such as MD&A) under Item 8.01 of Form 8-K.

Analysis: Item 12 of Form S-3 requires Company X to incorporate by reference its latest Form 10-K as well as specified subsequently filed Exchange Act reports. Accordingly, the 2020-2022 financial statements will appear to be incorporated by reference into the new Form S-3 twice -- once (in their original, unrevised form) by incorporating by reference the 2022 Form 10-K and a second time (as revised) by incorporating

by reference the Item 8.01 Form 8-K. The auditor only consents to the incorporation by reference of its audit report that is included in the Item 8.01 Form 8-K (i.e., the audit report on the revised financial statements). The auditor does not consent to the incorporation by reference of its audit report included in Company X's Form 10-K because that report and the associated financial statements were superseded by the corresponding audit report and financial statements included in the Item 8.01 Form 8-K.

.4 CONSENTS IN OTHER DOCUMENTS

.41 Is an accountants' consent required in a prospectus supplement?

Generally, no. The filing of a prospectus supplement generally does not result in a new effective date for the auditor, and therefore would not require the filing of a consent, unless the prospectus supplement includes new audited financial statements as to which the accountant is an expert (e.g., restated financial statements or financial statements required by S-X 3-05 or 3-14). In that case, a new consent would be included in a post-effective amendment to the registration statement, or by filing an Exchange Act report such as a Form 10-K or Form 8-K. See Section V.B.1.b.(iii)(B) of SEC Release 33-8591, *Securities Offering Reform*.

If a registrant requests evidence that the auditor is aware that its audit report on financial statements that are not "new audited financial statements" is included or incorporated by reference in a prospectus supplement, then the auditor can provide a transmittal letter with a manually signed copy of the audit report on the financial statements included or incorporated by reference in the prospectus supplement. That transmittal letter is not included within the prospectus supplement.

.42 Is an accountants' consent required in a free writing prospectus?

A free writing prospectus (defined in Securities Act Rule 405) generally does not require an accountants' consent because it is generally not filed as part of a registration statement.

.43 Is an accountants' consent required in a Form 11-K for employee benefit plan financial statements?

Certain employee benefit plans which register interests in the plan on Form S-8 are required to file periodic reports on Form 11-K which are incorporated by reference in Form S-8. An accountant's consent is required with respect to the auditor's report on the employee benefit plan annual financial statements which is incorporated by reference in a registration statement on Form S-8..

.44 Is an accountants' consent required in connection with a Regulation A offering statement?

Item 17(11) of Form 1-A requires an accountants' consent when an audit report is included in the offering statement. Every amendment to a Form 1-A that includes amended audited financial statements must also include the auditor's consent (see Securities Act Rule 252(f)(ii)). See SEC 2155 for additional information relating to securities offerings under Regulation A.

[Editor's note: We do not believe a Regulation A offering statement should contain an "Experts" section because the offering is exempt from Securities Act registration. Accordingly, the accountants' consent in a Regulation A offering statement does not refer to an "Experts" disclosure. See SEC 2300.16.]

.441 Is an accountants' consent required in connection with a Form 1-K of a Regulation A issuer?

The SEC staff has indicated that it would not object if an issuer with an ongoing Regulation A reporting obligation does not include an accountants' consent in a Form 1-K. See Securities Act Rules CDI 182.19.

.45 Is a franchisor required to obtain an auditor's authorization letter in connection with a franchise disclosure document?

Franchise disclosure documents ("FDDs") follow the franchise registration and disclosure guidelines established by the North American Securities Administrators Association ("NASAA") in accordance with the Federal Trade Commission's Franchise Rule. The NASAA guidelines can be found at <http://www.nasaa.org/industry-resources/corporation-finance/franchise-resources/>.

When the FDD includes audited financial statements, the franchisor is required to obtain the auditor's authorization for the inclusion of its audit report in the FDD.

The authorization letter is not a required component of the FDD to be distributed to potential franchisees. The authorization letter is to be furnished to only the franchisor unless also required by the state agency.

[Editor's note: Form F of the NASAA guidelines is an example "consent of accountant," which includes the phrase "as it may be amended" in relation to the issue date of the FDD. Consistent with AU-C 945.A23, we do not believe the phrase "as it may be amended" should be included in the auditor authorization letter.]

.46 Is an accountants' consent required in a Form 10?

A registration statement on Form 10 (e.g., filed in connection with a spin-off) is an Exchange Act registration statement, and a consent would ordinarily not be required. See SEC 2400.905 for additional guidance.

.47 Is an accountants' consent required in a Form 20-F that is used as an Exchange Act registration statement?

Yes. General Instruction 10.G of Form 20-F indicates that an accountants' consent is required in connection with a Form 20-F that is used as an Exchange Act registration statement.

.48 Is an accountants' consent required in a Form 40-F?

Yes, General Instruction D.9 to Form 40-F indicates that an accountants' consent is required in connection with a Form 40-F whether it is used as an annual report or an Exchange Act registration statement.

.49 Is an accountants' consent required in other non-Securities Act offering documents?

Although typically not required from a regulatory or legal standpoint, a consent may be requested in connection with non-Securities Act offerings such as securities offered by state governments or their municipalities (e.g., pollution control bonds), offerings in foreign jurisdictions, intrastate offerings, Regulation D offerings, or Rule 144A offerings. Use of the word consent in such situations is avoided because it may be misinterpreted to imply that the auditor is accepting liability related to the offering as if it were a registered offering under the Securities Act. If a form of consent is requested, it is drafted as a separate letter addressed only to the company. The letter is worded pursuant to PCAOB AI 26.17 or AU-C 945-A21, and, except in limited circumstances, is not included in the offering materials. See SEC 2400.23 for guidance regarding the date to use in this circumstance.

.5 COMMUNICATION WITH AUDIT COMMITTEES

See SEC 3130.6 regarding the audit committee communications specified by S-X 2-07.

.6 PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD ACCOUNTING SUPPORT FEE

The PCAOB calculates an accounting support fee that the Board bills to issuers. PCAOB Rule 7104(b)(1) provides that a registered public accounting firm generally may not sign an unqualified audit opinion with respect to an issuer's financial statements, or issue a consent to include an audit opinion issued previously, unless the registered public accounting firm has ascertained that the issuer has no outstanding past-due share of the accounting support fee. Although the PCAOB does provide for a few exceptions to this general rule, those exceptions are limited in nature. See SEC 3130.918 for further information.

.7 AWARENESS LETTERS RELATING TO INTERIM REVIEW REPORTS

In limited circumstances, a registrant may include a signed review report on unaudited interim financial statements (e.g., a PCAOB AS 4105 report) in a filing that includes those unaudited interim financial statements (e.g., in a Form 10-Q). Securities Act Rule 436 explicitly states that an interim review report is not a "report" or a "part" of the registration statement prepared or certified by the auditor within the meaning of Sections 7 and 11 of the Securities Act. Accordingly, the registrant is not required to obtain an accountants' consent relating to any review report that may be included or incorporated by reference in a Securities Act registration statement.

However, when an interim review report is included or incorporated by reference in a Securities Act registration statement, the registrant is required to file an "awareness letter" from the auditor that issued the review report. The awareness letter is addressed to the SEC and acknowledges that the auditor is aware that its report is included/incorporated by reference in the Securities Act registration statement. The awareness letter is filed as Exhibit 15 to the relevant document. See S-K 601(b)(15).

Consider the following example:

Facts: Company X, an existing calendar year-end SEC registrant, includes signed review reports on unaudited interim financial information in its Form 10-Q filings. Company X intends to file a new registration statement on Form S-3 in June 2023.

Analysis: Company X is required to incorporate by reference its March 31, 2023 Form 10-Q into the new Form S-3. Since that Form 10-Q includes a review report on unaudited interim financial information, Company X is required to include an "awareness letter" from its auditor as Exhibit 15 to the new Form S-3.

The above example relates to the inclusion of an awareness letter in a new registration statement. If the review report on interim financial information is included in a Form 10-Q that is automatically incorporated by reference into a previously filed Securities Act registration statement, then an awareness letter is filed as Exhibit 15 to the Form 10-Q.

Consider the following example:

Facts: Company Z, an existing calendar year-end SEC registrant, has an effective shelf registration statement on Form S-3. Company Z will include a signed review report on unaudited interim financial information in its March 31, 2023 Form 10-Q.

Analysis: Company Z's March 31, 2023 Form 10-Q will be automatically incorporated by reference into the effective Form S-3. Since that Form 10-Q will include a review report on unaudited interim financial information, Company Z will be required to include an "awareness letter" as Exhibit 15 to the March 31, 2023 Form 10-Q.

It is important to note that the requirements for the registrant to file an awareness letter only apply if a review report on unaudited interim financial information is included or incorporated by reference in a Securities Act registration statement. There is no requirement for a registrant to provide an awareness letter if a review report on interim financial information is not included or incorporated by reference in the registration statement (e.g., if the auditor provided a signed interim review report to the registrant but the registrant did not file the interim review report).

[Editor's note: See SEC 2300.3 for a discussion of modifications to "Experts" language and disclosures to be included in Form 10-Q relating to interim review reports that are included or incorporated by reference in Securities Act registration statements.]

.9 FREQUENTLY ASKED QUESTIONS

.901 Does an auditor ordinarily agree to enter into a contractual commitment to provide an accountants' consent for future filings?

We have seen limited instances in which a company has requested the auditor to include provisions in the engagement letter to the effect that, in the event the client-auditor relationship is terminated, the auditor agrees to consent to the continued use of its report in filings after termination. In some cases, the provision provides that the agreement is subject to the auditor completing its professional responsibilities.

Because the auditor is unable to predict the various circumstances and events that could occur in the future, in our experience, auditors do not agree to these types of commitments.

.902 Are there situations in which a consent of a third party other than an auditor is required?

Yes. Securities Act Rule 436 is not limited to auditors. Rule 436 outlines the requirements for a written consent of any third-party expert referenced in a filing included or incorporated by reference in a Securities Act registration statement. The SEC staff has provided interpretive guidance relating to certain situations in which the consent of a third party other than an auditor might be required in Securities Act Rules CDIs 233.01 through 233.08. Registrants should consider consulting with their legal counsel to determine whether a third-party consent is required.

.903 Does a predecessor auditor need to be independent at the time of signing an accountants' consent with respect to a previously issued audit report that is included or incorporated by reference in a new or amended Securities Act registration statement?

Generally, no. However, a predecessor auditor needs to consider its independence if it is required to perform new audit work (e.g., in connection with a change to the previously filed financial statements to reflect a material discontinued operation or retrospective accounting change). See SEC FRM 4830.7.

.904 Is an accountants' consent required for a pre-effective Form S-3 when a Form 10-Q is filed?

A registrant does not need to file an updated accountants' consent relating to the annual financial statements when the registrant forward incorporates a Form 10-Q into a pre-effective Form S-3. See SEC FRM 4810.4e.

.905 Is an accountants' consent required when audited financial statements filed under another Act are incorporated by reference into an Exchange Act report?

Typically, consents included in Exchange Act reports (e.g., Form 10-K) are included because the Exchange Act report is incorporated by reference into a previously filed Securities Act registration statement. However, when audited financial statements filed under an Act administered by the SEC other than the Exchange Act (e.g., the Securities Act) are incorporated by reference into an Exchange Act report, then the registrant is required to file an accountants' consent to the incorporation by reference of its report into that Exchange Act report as an exhibit to that report. See Exchange Act Rule 12b-36.

Generally, a consent is not required for reports on financial statements required to be filed under the Exchange Act that are incorporated by reference from an Exchange Act registration statement (e.g., Form 10), periodic report (e.g., Form 10-K), or proxy statement.

.906 Are there situations when a consent is not required for financial statements which are incorporated by reference into a Securities Act Registration Statement?

Securities Act Rule 439 requires, in most circumstances, the filing of a written consent to the use of an audit report which is incorporated by reference in a Securities Act registration statement (e.g., when the audit report is incorporated by reference in Forms S-1, S-3, S-4, S-8, or S-11). There are, however, certain limited circumstances in which a registrant is not required to provide an accountants' consent with respect to an audit report that is incorporated by reference into a Securities Act registration statement. These circumstances include situations in which:

- the same financial statements are presented in the registration statement and are also incorporated by reference; or
- the audited financial statements incorporated by reference in the registration statement have been superseded by revised financial statements which are also included or incorporated by reference in the registration statement (see SEC FRM 4810.6 and SEC 2400.34).

[Editor's note: We believe that this would also include situations in which a registrant files audited employee benefit plan financial statements as a part of its Form 10-K and the registration statement into which the Form 10-K is incorporated by reference does not relate to the benefit plan.]

- .1 General
- .2 Financial statements requirements
- .9 Frequently asked questions

.1 GENERAL

.11 What is Form 10 and where can I find it?

Form 10 is the basic registration form under the Exchange Act. It is to be used in all cases where no other form is prescribed. Form 10 is used to register securities under either Section 12(b) or Section 12(g) of the Exchange Act.

One common use of Form 10 is to register the shares of common stock of a subsidiary that are distributed to a parent company's shareholders on a pro-rata basis ("spin off"). Oftentimes the subsidiary's securities will be listed for trading on a national securities exchange which requires registration under Section 12(b) of the Exchange Act. See SEC Staff Legal Bulletin No. 4 for additional information.

Another common use of Form 10 is to register the securities of a company whose securities are not listed on a national securities exchange but which meets certain tests as to size and number of stockholders. Registration in this case is required by Section 12(g) of the Exchange Act.

The disclosure requirements of Form 10 are set forth under the various items within the body of the form and generally cross-reference to Regulation S-X and Regulation S-K for the specific requirements.

The text of Form 10 is available on the SEC's website (<https://www.sec.gov/files/form10.pdf>).

Other sources that issuers should consider when preparing a Form 10 include the General Instructions to Form 10 and Regulation 12B. Additionally, the SEC staff has published extensive interpretive guidance including various Compliance & Disclosure Interpretations and Industry Guides.

.12 Will the SEC staff review a Form 10 on non-public basis?

Yes, under certain circumstances. The SEC's Division of Corporation Finance will permit an issuer to submit a draft Form 10 for non-public review if the Form 10 is being prepared for the initial registration of a class of securities under Exchange Act Section 12(b). However, the non-public review process would not be available (without preclearance with the SEC staff) if the Form 10 is registering securities under Exchange Act Section 12(g).

If submission of a draft Form 10 for non-public review is permitted, the SEC staff has stated that they will not object if the Form 10 omits financial information that the issuer reasonably believes will not be required to present separately at the time the Form 10 is publicly filed.

See the guidance included in Draft Registration Statement Processing Procedures Expanded available on the SEC website (<https://www.sec.gov/corpfin/announcement/draft-registration-statement-processing-procedures-expanded>).

When permitted, the SEC staff's non-public review of a Form 10 is conditioned on the issuer providing a cover letter with the nonpublic submission indicating that the draft Form 10 (and related revisions, as applicable) will be made public within the timelines set forth by the Division of Corporation Finance. See Question 5 of the Frequently Asked Questions on Voluntary Submission of Draft Registration Statements available on the SEC website (<https://www.sec.gov/corpfin/voluntary-submission-draft-registration-statements-faqs>).

[Editor's note: The above guidance is applicable whether or not the issuer meets the definition of an emerging growth company.]

.121 Will a draft Form 10 and associated SEC staff comments and issuer responses remain non-public?

All draft Form 10s and related amendments must be made publicly available before the effective date of the Form 10. SEC comment letters and issuer responses related to a draft Form 10 will also be made public according to the SEC staff's existing policies. See Question 11 of the Frequently Asked Questions on Voluntary Submission of Draft Registration Statements available on the SEC website (<https://www.sec.gov/corpfin/voluntary-submission-draft-registration-statements-faqs>).

.122 Where can I find additional information relating to a draft Form 10 and non-public SEC staff review?

The announcement of the Division of Corporation Finance policy for non-public review can be found at <http://www.sec.gov/corpfin/announcement/draft-registration-statement-processing-procedures-expanded>.

The SEC staff has published FAQs on voluntary submission of draft registration statements available at <http://www.sec.gov/corpfin/voluntary-submission-draft-registration-statements-faqs>.

.13 When does a Form 10 become effective?

The date on which a Form 10 will become effective is prescribed directly by the Exchange Act.

- A Form 10 filed pursuant to Section 12(g) of the Exchange Act automatically becomes effective 60 days after the initial filing, or earlier if acceleration is requested and granted. See Section 12(g)(1)(B) of the Exchange Act.
- A Form 10 filed pursuant to Section 12(b) of the Exchange Act automatically becomes effective 30 days after certification by the applicable exchange or earlier if acceleration is requested and granted. See Section 12(d) of the Exchange Act.

[Editor's note: When the SEC staff grants an acceleration request relating to Form 10, the determination is typically included in the SEC's EDGAR database under the SEC STAFF ACTION document type.]

.2 FINANCIAL STATEMENTS REQUIREMENTS

.21 Where can I find the financial statement requirements applicable to Form 10?

Item 13 of Form 10 requires financial statements required by Regulation S-X as well as supplementary financial information required by S-K 302.

The periods to be covered in the issuer's financial statements and the associated age of financial statements requirements are generally driven by S-X 3-01, 3-02, 3-04 and 3-12 (S-X 8-02 and 8-08 for a smaller reporting company).

See SEC 4600 for additional information on the SEC's age of financial statement requirements.

.212 Is an issuer required to update its financial statements to comply with the SEC's age of financial statements requirements at the effective date of the Form 10 even if the effective date does not coincide with a filing?

Yes. Financial statements included in a Form 10 should comply with the relevant age of financial statements requirements at the effective date. See SEC FRM 1220.9.

The automatic effectiveness (particularly as it relates to a Form 10 filed under Section 12(g) of the Exchange Act) can raise questions about how to apply the age of financial statement requirements of Regulation S-X if the effective date does not coincide with a filing date. We understand that financial statements included in a Form 10 should comply with the relevant age of financial statements requirements in S-X 3-12 (S-X 8-08 with respect to smaller reporting companies) at the effective date even if that date does not coincide with an actual filing. Updated financial statements are typically provided by filing a pre-effective amendment to Form 10. See section VIII.B from the highlights of the June 25, 2014 meeting of the CAQ SEC Regulations Committee.

For example, assume a Form 10 pursuant to Section 12(g) of the Exchange Act is filed on September 18, 2023 and includes the issuer's annual financial statements as of December 31, 2022 and 2021 and for the years ended December 31, 2022, 2021 and 2020 and the interim financial information as of June 30, 2023 and for the six-months ended June 30, 2023 and 2022. The issuer's Form 10 must be current as of November 17, 2023 (the effective date, which is 60 days after the initial filing of the Form 10 on September 18, 2023), and as such the financial statements as of September 30, 2023 and for the nine-months ended September 30, 2023 and 2022 will need to be provided in the Form 10.

.9 FREQUENTLY ASKED QUESTIONS

.901 Is an issuer required to provide an accountants' consent in Form 10?

Generally, no. The rules of the Exchange Act do not require the filing of accountant's consents, except where reports on financial statements previously filed under other acts (e.g., the Securities Act) are incorporated by reference into an Exchange Act filing. See Exchange Act Rule 12b-36.

If an audit report on financial statements is incorporated by reference into Form 10 from a Securities Act filing (e.g., Form S-1), a consent is required. If an audit report on financial statements is included in Form 10 or incorporated by reference in Form 10 from an Exchange Act filing (e.g., Form 10-K), a consent is not required.

See General Instruction F of Form 10 with respect to incorporation by reference. See also Exchange Act Rule 12b-23.

.902 Can an issuer that meets the definition of an emerging growth company but that is not a smaller reporting company present only two years in its statements of comprehensive income in its Form 10?

No. See SEC FRM 1320.1, SEC FRM 10220.1d and S-X 3-02.

.1 General

.1 GENERAL

.11 What is Form 8-A and where can I find it?

Form 8-A is an Exchange Act registration form which can be used to register any class of securities pursuant to Section 12(b) or 12(g) of the Exchange Act of an issuer that is already required to file reports with the SEC under Section 13 or 15(d) of the Exchange Act.

Additionally, when an issuer that is not already subject to the provisions of either Section 13 or 15(d) of the Exchange Act plans to list its securities on a national securities exchange contemporaneously with the effectiveness of a Securities Act registration statement, the SEC staff will not object if that issuer uses Form 8-A in lieu of Form 10 (the basic registration form under the Exchange Act) to register the securities under the Exchange Act. By using Form 8-A instead of Form 10, the issuer can avoid the need to restate the contents of its Securities Act registration statement in its Exchange Act registration statement. See Exchange Act Forms CDI 202.05 and SEC Release 34-38850, *Phase Two Recommendations of Task Force on Disclosure Simplification*.

Form 8-A is also available to register any class of securities pursuant Section 12(b) or 12(g) of the Exchange Act of an issuer that is concurrently qualifying a Regulation A Tier 2 offering statement relating to that class of securities using the Form S-1 or Form S-11 disclosure models that includes financial statements that are audited in accordance with the standards of, and by an accounting firm that is registered with, the US Public Company Accounting Oversight Board. See section II.E.3.c, of the SEC Release No. 33-9741, *Amendments for Small and Additional Issues Exemptions under the Securities Act* and SEC 2155.

The text of Form 8-A is available on the SEC's website (<https://www.sec.gov/files/form8-a.pdf>).

.12 What information is typically included in Form 8-A?

Form 8-A calls for relatively little textual information and no financial statements. Form 8-A requires only a description of the registrant's securities pursuant to S-K 202 and the filing of certain exhibits. Information relating to the effective date of Form 8-A is described in General Instruction A(c), (d), and (e) of the form.

.13 Where can I find additional information on Form 8-A?

The Division of Corporation Finance staff has published CDIs relating to Form 8-A:

- Securities Act Rules CDIs 182.15, 182.21, 182.22, and 182.23; and
- Exchange Act Forms CDI section 102.

- .1 General
- .2 The definition of an accelerated filer
- .3 The definition of a large accelerated filer
- .4 Internal control over financial reporting transition
- .8 Frequently asked questions
- .9 Flowchart for evaluating accelerated filer status, periodic report due dates, and Sarbanes-Oxley Section 404 reporting requirements for US domestic issuers

.1 GENERAL

The SEC maintains a classification scheme under which reporting companies are designated as large accelerated filers, accelerated filers, or non-accelerated filers. This designation is commonly referred to as the company's accelerated filer status.

.11 Why does a company's accelerated filer status matter?

The SEC originally created the accelerated filer classification scheme as a way to divide the population of SEC reporting companies using domestic reporting forms between those that would be required to file Form 10-K and Form 10-Q on an accelerated basis and those that would be permitted to use later filing deadlines. Accelerated filer status has subsequently been leveraged to administer additional SEC reporting requirements. For example, the SEC uses a company's accelerated filer status in connection with:

- the transition provisions relating to Section 404 of the Sarbanes-Oxley Act (see SEC 3125.4);
- the definition of an emerging growth company (see SEC 2170);
- the requirements to disclose information relating to unresolved SEC staff comments under Item 1B of Form 10-K and Item 4A of Form 20-F.

.12 When does a company determine its accelerated filer status and when does any change in accelerated filer status take effect?

A company must determine its accelerated filer status at the end of its fiscal year. Any change in accelerated filer status is applicable beginning with the annual report for the year-end for which the status is being assessed. See SEC FRM 1340.3. See examples of transition between accelerated filer statuses at SEC 3125.24 and SEC 3125.34. See SEC 3125.803 for an exception to this general rule in the case of a change in fiscal year-end.

The flowchart at SEC 3125.9 provides a guide for evaluating accelerated filer status as of a company's year-end, as well as the periodic report due dates and Sarbanes-Oxley Section 404 reporting requirements for US domestic issuers.

.2 THE DEFINITION OF AN ACCELERATED FILER

.21 How is the term accelerated filer defined?

The definition of the term accelerated filer is set forth in Exchange Act Rule 12b-2. An issuer is an accelerated filer after it first meets all of the following conditions as of the end of its fiscal year:

- (i) The issuer had an aggregate worldwide market value of the voting and non-voting common equity held by its non-affiliates (commonly referred to as worldwide public float) of \$75 million or more, but less than \$700 million, as of the last business day of the issuer's most recently completed second fiscal quarter;

- (ii) The issuer has been subject to the requirements of Section 13(a) or 15(d) of the Exchange Act for a period of at least twelve calendar months;

[Editor's note: See Exchange Act Rules CDI 130.01 through CDI 130.03 regarding the meaning of "calendar month" and the impact of a reporting history as a "voluntary filer" when evaluating condition (ii).]

- (iii) The issuer has filed at least one annual report pursuant to Section 13(a) or 15(d) of the Exchange Act; and
- (iv) The issuer is not eligible to use the requirements for smaller reporting companies under the revenue test in paragraph (2) or (3)(iii)(B) of the "smaller reporting company" definition in Exchange Act Rule 12b-2, as applicable.

Once an issuer becomes an accelerated filer, it remains an accelerated filer unless the issuer determines as of its fiscal year-end that (i) it has become a large accelerated filer (see SEC 3125.3) or (ii) it has exited accelerated filer status (see SEC 3125.22).

.22 How does an accelerated filer exit that status?

An accelerated filer exits accelerated filer status if it determines as of its fiscal year-end that its worldwide public float was less than \$60 million as of the last business day of its most recently completed second fiscal quarter or it determines that it is eligible to use the requirements for smaller reporting companies under the revenue test in paragraph (2) or (3)(iii)(B) of the "smaller reporting company" definition in Exchange Act Rule 12b-2, as applicable.

A company that exits accelerated filer status is permitted to file as a non-accelerated filer beginning with the annual report for the year for which the status is being assessed (see SEC 3125.24). Just as with entry into accelerated filer status, a registrant only exits accelerated filer status as of year-end.

It is important to note that the threshold for entering accelerated filer status is different from the threshold for exiting accelerated filer status. Assuming the other entry conditions are satisfied (i.e., (ii), (iii) and (iv) in SEC 3125.21), a company enters accelerated filer status if its worldwide public float was at least \$75 million but less than \$700 million as of the end of its most recently completed second fiscal quarter. A company exits accelerated filer status when its worldwide public float was less than \$60 million as of the end of its most recently completed second fiscal quarter or it determines that it is eligible to use the requirements for smaller reporting companies under the revenue test in paragraph (2) or (3)(iii)(B) of the "smaller reporting company" definition in Exchange Act Rule 12b-2, as applicable. The difference between the entry and exit thresholds means that two companies that had the same worldwide public float (e.g., \$65 million) as of the end of their most recently completed second fiscal quarter could have different accelerated filer statuses at year-end.

See SEC 3125.806 for information relating to exiting accelerated filer status following an acquisition or going private transaction.

.23 What are the principal differences between filing as an accelerated filer and filing as a non-accelerated filer for a US domestic SEC registrant?

The principal differences between filing as an accelerated filer and filing as a non-accelerated filer for a US domestic SEC registrant are:

- Auditor reporting under Sarbanes-Oxley Section 404 is not required for non-accelerated filers (or for accelerated filers that meet the definition of an emerging growth company).
- Non-accelerated filers are permitted an extra 15 days to file their annual reports (due date of 90 days after year-end vs. 75 days after year-end).

- Non-accelerated filers are permitted an extra five days to file their quarterly reports (due date of 45 days after quarter-end vs. 40 days after quarter-end).
- Non-accelerated filers (that are not well-known seasoned issuers) are not required to disclose unresolved SEC staff comments under Item 1B of Form 10-K.

.24 How does transition between accelerated filer and non-accelerated filer status work?

As discussed above, accelerated filer status must be assessed each year-end, and filing deadlines, as well as Sarbanes-Oxley Section 404 reporting requirements, would follow the results of that assessment (subject to additional considerations for an emerging growth company).

For example, assume Company X is a calendar year-end US domestic SEC registrant. Company X was an accelerated filer (but not a large accelerated filer nor an emerging growth company) as of December 31, 2022. Accordingly, Company X's Form 10-K for the year ended December 31, 2022 was due on or before March 16, 2023.

Assume Company X's worldwide public float was \$40 million as of June 30, 2023 (the last business day of its 2023 second fiscal quarter). Company X's worldwide public float was \$80 million as of December 31, 2023.

Based on these facts, Company X would be considered a non-accelerated filer as of December 31, 2023 because its worldwide public float as of the last business day of its 2023 second fiscal quarter was less than \$60 million (one of the thresholds for exiting accelerated filer status). This is true even though Company X's worldwide public float had increased above \$75 million as of December 31, 2023. As noted above, even though the accelerated filer assessment is made as of the end of the year, the public float test is based on the most recently completed second fiscal quarter.

Company X's 2023 Form 10-K would be due on or before April 1, 2024 (because March 30, 2024, the 90th day after year-end, is a Saturday). Company X's 2024 Form 10-Q filings would be due within 45 days of each quarter-end because Company X would retain its status as a non-accelerated filer until the next annual assessment date.

.3 THE DEFINITION OF A LARGE ACCELERATED FILER

.31 How is the term large accelerated filer defined?

The definition of the term large accelerated filer is set forth in Exchange Act Rule 12b-2. An issuer is a large accelerated filer after it first meets all of the following conditions as of the end of its fiscal year:

- (i) The issuer had an aggregate worldwide market value of the voting and non-voting common equity held by its non-affiliates (commonly referred to as worldwide public float) of \$700 million or more, as of the last business day of the issuer's most recently completed second fiscal quarter;
- (ii) The issuer has been subject to the requirements of Section 13(a) or 15(d) of the Exchange Act for a period of at least twelve calendar months;

[Editor's note: See Exchange Act Rules CDI 130.01 through CDI 130.03 regarding the meaning of "calendar month" and the impact of reporting history as a "voluntary filer" when evaluating condition (ii).]
- (iii) The issuer has filed at least one annual report pursuant to Section 13(a) or 15(d) of the Exchange Act; and
- (iv) The issuer is not eligible to use the requirements for smaller reporting companies under the revenue

test in paragraph (2) or (3)(iii)(B) of the “smaller reporting company” definition in Exchange Act Rule 12b-2, as applicable.

The only difference between the conditions for becoming a large accelerated filer and the conditions for becoming an accelerated filer (described in SEC 3125.21) is the worldwide public float threshold in condition (i) above (\$700 million vs. \$75 million).

Once an issuer becomes a large accelerated filer, it remains a large accelerated filer unless the issuer determines as of its fiscal year-end that it has exited large accelerated filer status (see SEC 3125.32).

.32 How does a large accelerated filer exit that status?

A large accelerated filer exits large accelerated filer status if it determines as of its fiscal year-end that its worldwide public float was less than \$560 million as of the last business day of its most recently completed second fiscal quarter or it determines that it is eligible to use the requirements for smaller reporting companies under the revenue test in paragraph (2) or (3)(iii)(B) of the “smaller reporting company” definition in Exchange Act Rule 12b-2, as applicable.

A company that exits large accelerated filer status is permitted to file as an accelerated filer (unless the company has also exited accelerated filer status as described in SEC 3125.22). If the company has exited accelerated filer status, then it may file as a non-accelerated filer. As with changes in accelerated filer status, changes to large accelerated filer status are effective beginning with the annual report for the year for which the status is being assessed. See SEC 3125.34.

It is important to note that the threshold for entering large accelerated filer status is different from the threshold for exiting large accelerated filer status. Assuming that the other entry conditions are satisfied (i.e., (ii), (iii) and (iv) in SEC 3125.31), a company enters large accelerated filer status if its worldwide public float was at least \$700 million as of the end of its most recently completed second fiscal quarter. A company exits large accelerated filer status when its worldwide public float is less than \$560 million as of the end of its most recently completed second fiscal quarter or it determines that it is eligible to use the requirements for smaller reporting companies under the revenue test in paragraph (2) or (3)(iii)(B) of the “smaller reporting company” definition in Exchange Act Rule 12b-2, as applicable. The difference between the entry and exit thresholds means that two companies that had the same worldwide public float (e.g., \$600 million) as of the end of their most recently completed second fiscal quarter could have different accelerated filer statuses at year-end.

Refer to SEC 3125.806 for information relating to exiting large accelerated filer status following an acquisition or going private transaction.

.33 What are the principal differences between filing as a large accelerated filer and filing as an accelerated filer for a US domestic SEC registrant?

The principal difference between filing as a large accelerated filer and filing as an accelerated filer (that is not also an emerging growth company) for a US domestic SEC registrant is that large accelerated filers must file their Form 10-K 15 days sooner than accelerated filers (due date of 60 days after year-end for a large accelerated filer vs. 75 days after year-end for an accelerated filer). The Form 10-Q filing deadlines are the same for accelerated filers and large accelerated filers (i.e., 40 days after quarter-end). Additionally, a large accelerated filer cannot be an emerging growth company.

.34 How does transition between large accelerated filer and accelerated filer status work?

As discussed above, accelerated filer status must be assessed each year-end, and filing deadlines would follow the results of that assessment (subject to additional considerations for an emerging growth company).

For example, assume Company X is a calendar year-end US domestic SEC registrant. Company X was a large accelerated filer as of December 31, 2022. Company X's worldwide public float was \$400 million as of June 30, 2023 (the last business day of its 2023 second fiscal quarter) and it is not eligible to use the requirements for smaller reporting companies under the revenue test in paragraph (2) or (3)(iii)(B) of the "smaller reporting company" definition in Exchange Act Rule 12b-2, as applicable. Company X's worldwide public float was \$800 million as of December 31, 2023.

Based on these facts, Company X would be considered an accelerated filer (but not a large accelerated filer) as of December 31, 2023 because (i) its worldwide public float was less than \$560 million (the exit threshold for large accelerated filer status) as of the last business day of its 2023 second fiscal quarter, but was at least \$60 million (the exit threshold for accelerated filer status) as of that date and (ii) it was not eligible to use the requirements for smaller reporting companies under the revenue test in paragraph (2) or (3)(iii)(B) of the "smaller reporting company" definition in Exchange Act Rule 12b-2, as applicable. Company X is an accelerated filer as of December 31, 2023 even though its worldwide public float had increased above \$700 million by December 31, 2023. As noted above, the public float test is based on the last business day of the most recently completed second fiscal quarter. Company X's 2023 Form 10-K would be due on or before March 15, 2024 (the 75th day after year-end). Company X's 2024 Form 10-Q filings would be due within 40 days of each quarter-end (which is the same for both accelerated filers and large accelerated filers).

If Company X's worldwide public float had been \$40 million as of June 30, 2023 or if it was eligible to use the requirements for smaller reporting companies under the revenue test in paragraph (2) or (3)(iii)(B) of the "smaller reporting company" definition in Exchange Act Rule 12b-2, as applicable, it would have also exited accelerated filer status and would, therefore, be able to file its 2023 Form 10-K and 2024 Form 10-Qs as a non-accelerated filer. Refer to SEC 3125.23 for a discussion of the differences between filing as an accelerated filer and a non-accelerated filer.

.4 INTERNAL CONTROL OVER FINANCIAL REPORTING TRANSITION

.41 How does a company's accelerated filer status impact its SEC reporting requirements relating to internal control over financial reporting?

Filers other than "newly public companies" (see SEC 3125.42) are required to comply with the SEC's management reporting requirements relating to internal control over financial reporting (S-K 308(a)). Filers other than non-accelerated filers, emerging growth companies, and "newly public companies" are required to comply with the SEC's auditor reporting requirements relating to internal control over financial reporting (S-K 308(b)).

.42 What is a newly public company and how does that designation impact the transition relating to the SEC's internal control over financial reporting requirements in S-K 308(a) and (b)?

A newly public company is a company that:

- (i) was not required to file an annual report pursuant to Section 13(a) or 15(d) of the Exchange Act for the prior fiscal year; and
- (ii) did not file an annual report for the prior fiscal year

See Instruction 1 to S-K 308.

A newly public company is not required to comply with either the management (S-K 308(a)) or the auditor (S-K 308(b)) reporting requirements relating to internal control over financial reporting. A newly public company is required to include a statement in its first annual report substantially in the following form (as set forth in Instruction 1 to S-K 308):

"This annual report does not include a report of management's assessment regarding internal control over financial reporting or an attestation report of the company's registered public accounting firm due to a transition period established by rules of the Securities and Exchange Commission for newly public companies."

[Editor's note: The non-accelerated filer and emerging growth company exemptions referred to above are only applicable to the auditor reporting requirements relating to internal control over financial reporting (S-K 308(b)). Non-accelerated filers and emerging growth companies are required to comply with the management reporting requirements relating to internal control over financial reporting (S-K 308(a)) unless they are a newly public company. Refer to PCAOB AS 3105.59 for reporting guidance when management is required to report on the company's internal control over financial reporting (S-K 308(a)), but such report is not required to be audited, and the auditor has not been engaged to perform an audit of management's assessment of the effectiveness of internal control over financial reporting (S-K 308(b)).]

.43 What are the differences in internal control over financial reporting requirements for non-accelerated filers and newly public companies?

The following example highlights the differences in the internal control over financial reporting requirements for non-accelerated filers and newly public companies:

Facts: Company A and Company B each use a calendar year-end and each qualify as a non-accelerated filer as of December 31, 2023.

- Company A's SEC-registered debt securities have been outstanding since 2006. Company A's Exchange Act reporting obligations were previously suspended, but Company A has been filing Exchange Act reports (e.g., 10-Ks and 10-Qs) on a continuous basis since 2006 (due to a requirement in its debt indenture). Company A's equity securities are not registered with the SEC.
- Company B completed an initial public offering of its equity securities during June 2023. Prior to its IPO, Company B was a private company and had never filed a Form 10-K (i.e., Company B's Form 10-K for the year ended December 31, 2023 will be its first Form 10-K).

Analysis: Company A must provide management's report on internal control over financial reporting (S-K 308(a)) in its 2023 Form 10-K because all companies (other than "newly public companies") must comply with the management reporting requirements. However, since Company A is a non-accelerated filer as of December 31, 2023, it is not required to comply with the auditor reporting requirements relating to internal control over financial reporting (S-K 308(b)).

Company B is not required to comply with either the management (S-K 308(a)) or auditor (S-K 308(b)) reporting requirements relating to internal control over financial reporting in its 2023 Form 10-K because Company B is a "newly public company". Company B's 2023 Form 10-K must include the disclosure described in Instruction 1 to S-K 308 regarding the lack of management's assessment or an auditor's attestation regarding internal control over financial reporting, as discussed above.

Company B will be required to comply with the management reporting requirements relating to internal control over financial reporting (S-K 308(a)) in its Form 10-K for the year ending December 31, 2024. Company B will be required to comply with the auditor reporting requirements (S-K 308(b)) in its December 31, 2024 Form 10-K, unless Company B is a non-accelerated filer or an emerging growth company as of December 31, 2024.

.44 How are the transition provisions relating to internal control over financial reporting applied for a non-emerging growth company that was previously a voluntary filer and completes an equity IPO?

The following example illustrates the determination of Section 404 reporting requirements for a non-emerging growth company that was previously a voluntary filer and completes an equity IPO:

Facts: In 2022, Company X, a calendar year-end company, issued senior notes in a private transaction that was exempt from registration under the Securities Act. In mid-2023, Company X completed an offer to exchange the exempt notes for notes that were substantially identical to the exempt notes, except the new notes are registered under the Securities Act. The exchange offer was made pursuant to an effective registration statement on Form S-4. Company X's debt is not listed on an exchange (i.e., was not registered under Section 12 of the Exchange Act) and has at all times been held by fewer than 300 persons. All of Company X's stock has historically been held by its CEO/founder.

After filing its Form 10-K for the year ended December 31, 2023, Company X's reporting obligations were statutorily suspended under Section 15(d) of the Exchange Act because it had fewer than 300 security holders of record on January 1, 2024. However, Company X has continued to file reports (e.g., Form 10-K and Form 10-Q) with the SEC on a "voluntary" basis to satisfy a requirement in the indenture under which the senior notes were issued.

On June 3, 2024, Company X completed an IPO of its common stock. As of December 31, 2024, Company X is neither an accelerated filer nor a large accelerated filer and is not an emerging growth company.

For purposes of determining Company X's Section 404 reporting requirements for the year ending December 31, 2024, Company X would not be considered a newly public company because it filed an Annual Report on Form 10-K for the prior fiscal year (i.e., the year ended December 31, 2023).

Company X must determine its Section 404 reporting requirements based on the rules applicable to non-newly public companies. Since Company X is not a newly public company at December 31, 2024, Company X would be required to include management's report on internal control over financial reporting (S-K 308(a)) in its Form 10-K for the year ending December 31, 2024. However, the auditor's attestation report on internal control over financial reporting (S-K 308(b)) would not be required in Company X's Form 10-K for the year ending December 31, 2024 because non-accelerated filers are exempted from the internal control audit requirement (S-K 308(b)).

If, as of December 31, 2025, Company X is considered an accelerated filer or a large accelerated filer, it would be required to include both management's (S-K 308(a)) and the auditor's (S-K 308(b)) reports on internal control over financial reporting in its Form 10-K for the year ending December 31, 2025.

.8 FREQUENTLY ASKED QUESTIONS

.801 Does a company's accelerated filer status impact the due date of Form 8-K?

No. The accelerated filer rules do not affect Form 8-K filing deadlines. See SEC FRM 1340.9.

.802 Would a special financial report on Form 10-K filed pursuant to Exchange Act Rule 15d-2 or a transition report on Form 10-K be considered an annual report for the purpose of determining whether a company meets the definition of a newly public company?

Yes. Each of those reports would be considered an annual report for purposes of the definition of a newly public company. See SEC FRM 1340.10 (Note to Section).

See SEC 3185 for information relating to transition reports and SEC 3130.917 for information relating to special financial reports pursuant to Exchange Act Rule 15d-2.

.803 How is accelerated filer status determined in connection with a change in fiscal year-end?

When an SEC registrant changes its fiscal year-end, it may need to file a report with the SEC covering the transition period. The transition period is the period from the end of the most recently completed fiscal year to the beginning of the new fiscal year. The due date of a registrant's transition report is determined, in part, based on the registrant's accelerated filer status.

When a registrant changes its fiscal year-end, the registrant must assess its accelerated filer status as of the end of the transition period (i.e., its new fiscal year-end), treating the transition period as if it were a fiscal year. This is true without regard to the length of the transition period or the form used to report the transition period (e.g., Form 10-K or Form 10-Q). When assessing the accelerated filer status as of the end of a transition period, the worldwide common equity public float test (i.e., the aggregate worldwide market value of the voting and nonvoting common equity held by non-affiliates) should be based on the last business day of what would have been the registrant's most recently completed second fiscal quarter if the close of the transition period were actually the end of a full fiscal year (sometimes referred to as a "pro forma" second fiscal quarter).

For example, if a registrant changed its year end from June 30 to December 31 and is filing a transition report on Form 10-K for the six months ended December 31, 2023, the common equity public float test would be performed as of June 30, 2023 (the last business day of the "pro forma" second fiscal quarter) and the due date of the transition report would be based on this "pro forma" public float.

See SEC 3185 for a detailed discussion of the reporting requirements relating to changes in fiscal year-end (including the implications for reporting on internal control over financial reporting). See also SEC FRM 1340.8, SEC FRM 1360, and SEC FRM 1365.

.804 Are non-exchange-traded real estate investment trusts considered to have a common equity public float?

Certain REITs offer and sell shares of common stock through offerings registered under the Securities Act, but the shares are not publicly traded. We understand that the SEC staff has indicated that a REIT whose shares are not traded in a public market would not be considered to have a "common equity public float" for purposes of determining its accelerated filer status or for determining whether it is eligible to use Form S-3.

.805 How would a company's accelerated filer status determination be impacted if its public float were reduced to \$0 after the last business day of its most recently completed second fiscal quarter?

As noted above, the accelerated/large accelerated filer exit conditions are based, in part, on the company's public float at the end of the most recently completed second fiscal quarter. We understand, however, that the SEC staff will permit a company whose public float exceeded \$60 million as of the last business day of its most recently completed second fiscal quarter but was reduced to \$0 before the end of the year, to file as a non-accelerated filer beginning with the annual report covering the year in which the public float was reduced to \$0. This situation could arise if an accelerated filer or a large accelerated filer was acquired or went "private" after the end of its second fiscal quarter but continues to file reports with the SEC (e.g., because of registered debt or a bank requirement). Also, we understand the SEC staff will permit a company whose public float exceeded \$60 million both as of the last business day of its most recently completed second fiscal quarter and as of its most recent year end and was reduced to \$0 after year end but before the due date of Form 10-K, to file as a non-accelerated filer beginning with the annual report for the year preceding the year in which the public float was reduced to \$0.

For example, assume a calendar year-end accelerated filer SEC registrant whose public float exceeded

\$60 million as of June 30, 2023 (the last business day of its 2023 second fiscal quarter) was acquired on September 1, 2023. The registrant had public debt which remained outstanding and was required to continue filing reports with the SEC. In this case, even though the registrant's public float was greater than \$60 million on June 30, 2023, we understand the SEC staff would allow the registrant to file its 2023 Form 10-K as a non-accelerated filer. If the same calendar year-end SEC registrant was instead acquired on February 1, 2024, we understand the SEC staff would still allow the registrant to file its 2023 Form 10-K after February 1, 2024 as a non-accelerated filer.

Companies should consider consulting with their legal counsel and the SEC staff in this fact pattern.

.806 Is the accelerated filer status of an SEC registrant parent-company “pushed down” to its SEC registrant subsidiary?

Oftentimes, a parent company that is an accelerated filer or a large accelerated filer has one or more subsidiaries that are also SEC registrants (usually because the subsidiary issued registered debt). As a general matter, an SEC registrant parent company's accelerated filer status is not “pushed down” to its SEC registrant subsidiary. Accordingly, a parent and its subsidiary may have different Form 10-K/10-Q filing deadlines and different Sarbanes-Oxley Section 404 reporting requirements.

For example, assume Company X is an SEC registrant with common stock traded on the New York Stock Exchange. Company X is a large accelerated filer as of December 31, 2023. Company X owns 100 percent of the equity of Subsidiary Z. Both Company X and Subsidiary Z are calendar year-end companies. In 2019 Subsidiary Z issued debt that was registered under the Securities Act, and Subsidiary Z files periodic reports (i.e., Form 10-K and Form 10-Q) under Section 15(d) of the Exchange Act.

In this fact pattern, Company X and Subsidiary Z should each assess their own accelerated filer statuses based on their own facts and circumstances. Subsidiary Z would be a non-accelerated filer as of December 31, 2023, because its public float was \$0 as of the end of its most recently completed second fiscal quarter (i.e., Company X owned 100 percent of Subsidiary Z's equity). This is true even though Company X is a large accelerated filer. Based on their individual accelerated filer statuses, Company X's 2023 Form 10-K would be due on February 29, 2024 (the 60th day after year-end). Subsidiary Z's 2023 Form 10-K would be due on April 1, 2024 (because March 30, 2024, the 90th day after year-end, is a Saturday). Additionally, Company X's 2023 Form 10-K must comply with both the management reporting requirements relating to internal control over financial reporting (S-K 308(a)) and the auditor reporting requirements (S-K 308(b)). Subsidiary Z's 2023 Form 10-K only needs to include management's report on internal control over financial reporting (S-K 308(a)) and does not need to include an auditor's report on internal control over financial reporting (S-K 308(b)) because, as a non-accelerated filer, Subsidiary Z is exempt from the requirement to provide an auditor's report on internal control over financial reporting (S-K 308(b)).

See Discussion Document B from the June 2004 meeting of the CAQ SEC Regulations Committee.

An exception to the general rule that an SEC registrant parent company's accelerated filer status should not be “pushed down” to its SEC registrant subsidiary arises when a newly public company seeks to use the Exchange Act reporting history of another entity for purposes of qualifying to use Form S-3. This situation can occur, for instance, in connection with a spin-off transaction when the entity that was spun-off seeks to use its prior parent's reporting history for purposes of qualifying to use Form S-3. This situation can also occur when a newly formed holding company is formed and seeks to use the reporting history of its predecessor for purposes of qualifying to use Form S-3. See SEC Staff Legal Bulletin No. 4.

If a newly public company seeks or asserts eligibility to use Form S-3 on the basis of another entity's reporting history, it cannot also avail itself of the relief afforded a newly public company with respect to the Section 404 reporting requirements of the Sarbanes-Oxley Act of 2002 (see SEC 3125.4). In SEC Release 33-8760, *Internal Control Over Financial Reporting in Exchange Act Periodic Reports of Non-Accelerated Filers and Newly Public Companies* (December 2006) the SEC stated:

"Because of the inter-relationship between Form S-3 eligibility and accelerated filer status, we believe that, to the extent a newly formed public company seeks to use and is deemed eligible to use Form S-3 on the basis of another entity's reporting history, that company would also be an accelerated filer and therefore required to comply with Items 308(a) and 308(b) of Regulation S-K in the first annual report that it files."

.807 Which period's revenues should be considered when assessing whether a registrant is eligible to use the requirements for smaller reporting companies under the revenue test in paragraph (2) or (3)(iii)(B) of the "smaller reporting company" definition in Exchange Act Rule 12b-2, as applicable?

A registrant should use the annual revenues for the most recent fiscal year completed before the last business day of its most recently completed second fiscal quarter when assessing whether the registrant is eligible to use the requirements for smaller reporting companies under the revenue test in paragraph (2) or (3)(iii)(B) of the "smaller reporting company" definition in Exchange Act Rule 12b-2, as applicable. This is true even though a company that determines it no longer qualifies to be a smaller reporting company in connection with its annual smaller reporting company assessment (performed as of its most recently completed second fiscal quarter) may file its Form 10-K for that fiscal year using the scaled disclosure requirements applicable to a smaller reporting company. See SEC 2160.211.

For example, assume Company Q determined that it was a smaller reporting company as of its June 30, 2022 annual determination date solely because it met the revenue test under paragraph (2) of Exchange Act Rule 12b-2 (i.e., its revenue for the year ended December 31, 2021 was less than \$100 million and its public float as of June 30, 2022 was less than \$700 million). Assume Company Q's public float was equal to or greater than \$250 million but less than \$700 million as of June 30, 2023 (the date of its June 30, 2023 annual determination).

If Company Q's revenue for the year ended December 31, 2022 was \$100 million or more, then it would not qualify as a smaller reporting company under the revenue test in paragraph (2) of the "smaller reporting company" definition in Exchange Act Rule 12b-2 in connection with its annual smaller reporting company determination made on June 30, 2023. When Company Q performs its annual assessment of its accelerated filer status as of December 31, 2023, it would conclude that it is not eligible to use the requirements for smaller reporting companies under the revenue test in paragraph (2) or (3)(iii)(B) of the "smaller reporting company" definition in Exchange Act Rule 12b-2, as applicable. Therefore, assuming Company Q meets the other conditions of the definition of an accelerated filer, it would conclude that it is an accelerated filer as of December 31, 2023 and would file its Form 10-K as an accelerated filer (e.g., within 75 days and complying with applicable management and auditor reporting requirements relating to internal control over financial reporting). This is true even though Company Q can prepare its Form 10-K for the year ending December 31, 2023 using the scaled disclosure requirements applicable to a smaller reporting company.

.808 Can a foreign private issuer that files its annual report on Form 20-F qualify as a non-accelerated filer using the revenue test in paragraph (2) or (3)(iii)(B) of the "smaller reporting company" definition in Exchange Act Rule 12b-2, as applicable?

No. Only a foreign private issuer that elects to file using domestic forms (e.g., Form 10-K and Form 10-Q) and provides financial statements in accordance with US GAAP may consider the revenue test in paragraph (2) or (3)(iii)(B) of the "smaller reporting company" definition in determining its accelerated filer status. See SEC FRM 1340.6.

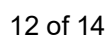
.9 FLOWCHART FOR EVALUATING ACCELERATED FILER STATUS, PERIODIC REPORT DUE DATES, AND SARBANES-OXLEY SECTION 404 REPORTING REQUIREMENTS FOR US DOMESTIC ISSUERS

Registrants should carefully analyze the SEC's rules when determining accelerated filer status, periodic report due dates, and Sarbanes-Oxley Section 404 reporting requirements. The flowchart presented in SEC

3125.9 provides a framework for evaluating these areas for US domestic issuers (i.e., companies that file on the US domestic forms). Registrants may wish to contact the SEC staff to discuss unusual situations (e.g., going private transactions, changes in ownership transactions, companies that were previously SEC registrants, changes in year-end...).

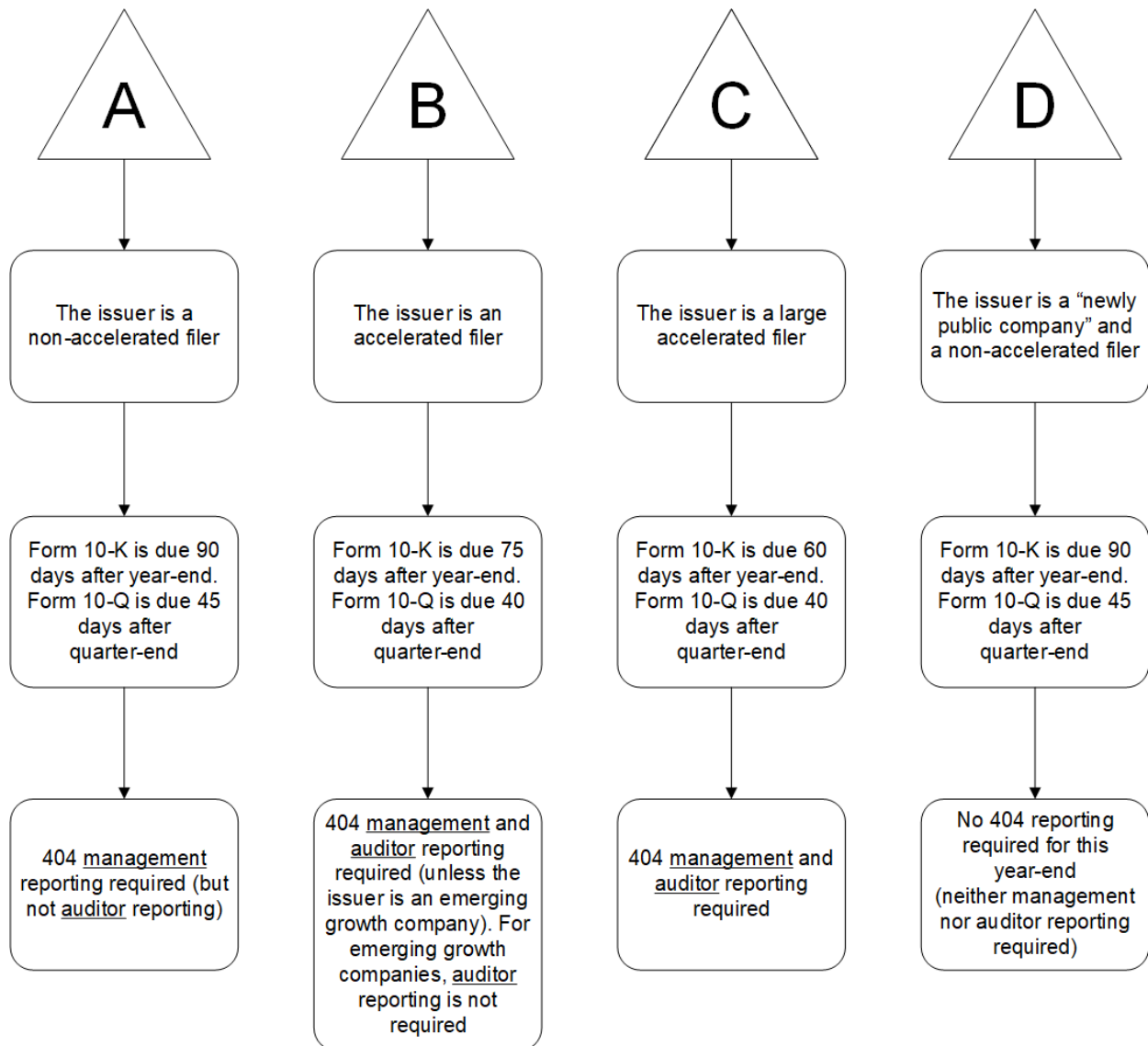
Editor's note: References to the "previous fiscal year" mean the year-end preceding the year-end for which the test is being performed. References to the "end of the most recently completed second fiscal quarter" mean the last business day of the second fiscal quarter of the year for which the test is being performed. For instance, if a calendar year-end registrant is considering its accelerated filer status as of December 31, 2023, the "previous fiscal year" is the year ended December 31, 2022 and the "end of the most recently completed second fiscal quarter" is June 30, 2023 (the last business day of the 2023 second fiscal quarter).

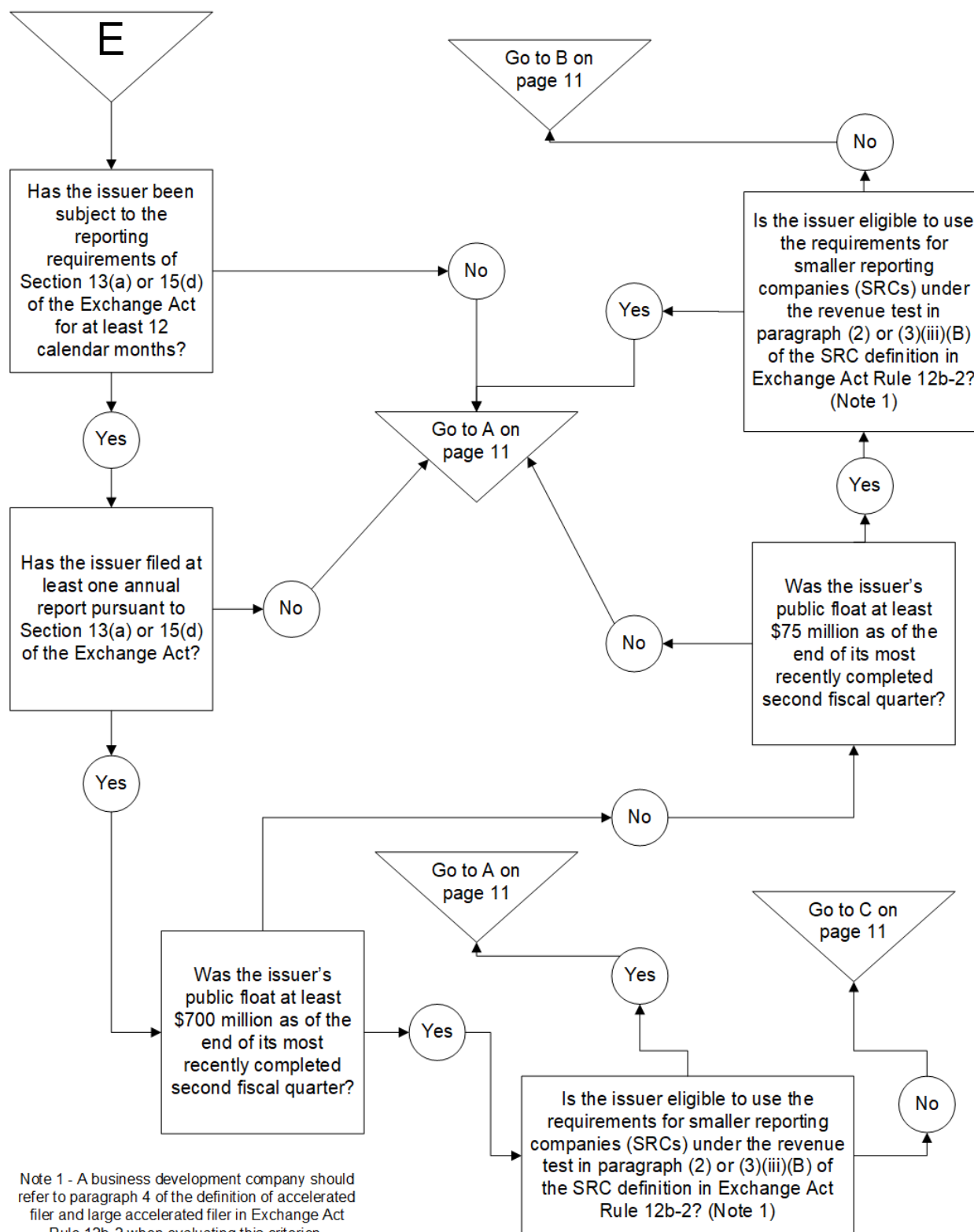
SEC 3125



THE ACCELERATED FILER SYSTEM
(Last updated June 2023)

SEC 3125





- .1 General
- .2 Section 302 certifications
- .3 Section 906 certifications
- .9 Frequently asked questions

.1 GENERAL

The Sarbanes-Oxley Act established two distinct certification requirements. These certifications are commonly referred to by the sections of the Sarbanes-Oxley Act which created them: Section 302 and Section 906.

- The SEC’s requirements applicable to Section 302 certifications are set forth in Exchange Act Rules 13a-14(a) and 15d-14(a).
- The SEC’s requirements applicable to Section 906 certifications are set forth in Exchange Act Rules 13a-14(b) and 15d-14(b).

SEC 3126 is designed to provide a brief overview of these two certifications. Issuers should consult their legal counsel for more detailed information on these certification requirements or on other certifications that may be required (e.g., certification requirements set forth in Section 303A of the New York Stock Exchange Listing Requirements).

[Editor’s note: SEC 3126 does not address the certification requirements applicable to Asset-Backed Issuers. Asset-Backed Issuers should look to the requirements of Exchange Act Rules 13a-14 and 15d-14 as they relate to Asset-Backed Issuers, S-K 601(b)(31)(ii) and associated interpretive guidance.]

.2 SECTION 302 CERTIFICATIONS

.21 Which SEC filings are required to include Section 302 certifications?

Section 302 certifications must be filed as exhibits to the following periodic reports filed under Section 13(a) or 15(d) of the Exchange Act:

- Annual Report on Form 10-K,
- Annual Report on Form 20-F,
- Annual Report on Form 40-F, and
- Quarterly Report on Form 10-Q.

The Section 302 certification requirements also apply to transition reports (see SEC 3185) filed on these forms and to amendments to previously filed reports (see Exchange Act Rule 12b-15).

See Exchange Act Rules 13a-14(a) and 15d-14(a).

.22 Who must sign the Section 302 certifications?

The Section 302 certifications must be signed by each principal executive and principal financial officer of the issuer, or persons performing similar functions, at the time of filing of the report. See Exchange Act Rules 13a-14(a) and 15d-14(a).

.23 Where can I find the text of the Section 302 certification?

The text of the Section 302 certification is set forth in S-K 601(b)(31).

S-K 601(b)(31) indicates that the certifications should be provided “exactly as set forth” in that item. The SEC staff has, however, provided the following additional guidance regarding specific paragraphs of the Section 302 certification to be filed in connection with an amendment to a prior report:

- Paragraphs 1 and 2 of the Section 302 certification must be included in all amendments to covered periodic reports.
- Paragraph 3 of the Section 302 certification may be omitted in amendments to covered periodic reports that do not contain financial statements or other financial information.
- Paragraphs 4 and 5 of the Section 302 certification may be omitted from amendments to covered periodic reports that do not contain or amend disclosure pursuant to S-K 307 or S-K 308 (or the equivalent disclosure requirement in Form 20-F or 40-F) and such disclosure is not otherwise required to be amended given the nature of the reasons for the amendment.

See Exchange Act Rules CDI 161.01.

Additionally, Exchange Act Rules 13a-14(a) and 15d-14(a) provide transition provisions with respect to the introductory language in paragraph 4 that refers to the certifying officers' responsibility for establishing and maintaining internal control over financial reporting (“*and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f))*”) as well as the full text of paragraph 4(b). These portions of the certification do not need to be provided until the first annual report required to include management's report on internal control over financial reporting. Thereafter, certifications in quarterly and annual reports are required to include these temporarily omitted elements of the Section 302 certification.

[Editor's note: The SEC staff has provided guidance for addressing certain errors relating to certifications in Regulation S-K CDIs 246.13 and 246.14.]

.3 SECTION 906 CERTIFICATIONS

.31 Which SEC filings are required to include Section 906 certifications?

Section 906 certifications must be furnished as exhibits to each periodic report (e.g., Form 10-K or 10-Q) containing financial statements filed by an issuer pursuant to Section 13(a) or 15(d) of the Exchange Act. See Exchange Act Rules 13a-14(b) and 15d-14(b), S-K 601(b)(32) and 18 U.S.C. 1350(a).

[Editor's note: S-K 601(b)(32)(ii) indicates that when furnished as Exhibit 32, the Section 906 certifications will not be deemed “filed” for purposes of Section 18 of the Exchange Act or otherwise subject to the liability of that section and will not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that the registrant specifically incorporates them by reference. Registrants should consult with their legal counsel regarding the liability issues surrounding the Section 906 certifications.]

.32 Who must sign the Section 906 certifications?

The Section 906 certifications must be signed by each principal executive officer and principal financial officer of the issuer (or equivalent thereof). See Exchange Act Rules 13a-14(b) and 15d-14(b) and 18 U.S.C. 1350(a).

.33 What are the required contents of the Section 906 certifications?

The contents of a Section 906 certification are prescribed by 18 U.S.C. 1350(b) to include certification that:

- the periodic report containing the financial statements fully complies with requirements of Section 13(a) or 15(d) of the Exchange Act and
- the information contained in the periodic report fairly presents, in all material respects, the issuer's financial condition and results of operations.

[Editor's note: Section 906 certifications are subject to the jurisdiction of the US Department of Justice.]

.9 FREQUENTLY ASKED QUESTIONS

.901 Does the Section 302 and Section 906 apply to Interactive Data Files (defined in Regulation S-T 11)?

The certification requirements of Exchange Act Rules 13a-14 and 15d-14 do not apply to Interactive Data Files (defined in S-T 11). However, disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) do apply to controls and procedures with respect to interactive data.

See Exchange Act Rules CDI 162.01.

.902 If the certifications required by Exchange Act Rules 13a-14(a) and 15d-14(a) are not included as exhibits to a Form 10-K or 10-Q, and an amendment will be filed to include the certifications as exhibits, must the entire periodic report be re-filed?

Yes. The SEC staff has indicated that if certifications are omitted from a periodic report, then the amendment filed with the certifications should include the entire report.

See Exchange Act Rules CDI 161.08.

The SEC staff has also indicated that if the amendment is not filed within the time period required for the periodic report, then the periodic report will not be considered timely filed for purposes of form eligibility.

See Exchange Act Rules CDI 161.09.

.903 Are Section 302 or 906 certifications required in a Form 8-K or Form 11-K?

Section 302 certifications are not required in Form 8-K or Form 11-K. See section II.B.2 of SEC Release 33-8124.

See Exchange Act Forms CDI 106.03 for guidance on Form 11-K.

.904 Where can I find additional SEC Staff guidance relating to the Section 302 and Section 906 certifications?

The Division of Corporation Finance staff has published CDIs relating to certifications:

- Exchange Act Rules CDIs 161.01 to 161.10, 162.01 and 181.02 and
- Regulation S-K CDIs 146.08, 215.01, 215.02, 246.13 and 246.14.

- .1 General
- .2 Financial statements requirements
- .3 Selected Form 10-K disclosure items
- .4 Annual report to shareholders
- .5 Summary annual report
- .6 Communications with audit committees
- .8 Accountants' consent
- .9 Frequently asked questions

.1 GENERAL

.11 What is Form 10-K and where can I find it?

Form 10-K is the reporting form used by most US domestic SEC registrants to comply with the SEC's annual report requirements. See Exchange Act Rules 13a-1 and 15d-1, as applicable.

The disclosure requirements of Form 10-K are set forth in the body of the form and the accompanying instructions and generally leverage Regulations S-X and S-K rather than including the detailed disclosure requirements in the form.

The text of Form 10-K is available on the SEC's website (<https://www.sec.gov/files/form10-k.pdf>).

Form 10-K can also be used as a transition report in connection with a change in fiscal year-end. See SEC 3185 and Exchange Act Rules 13a-10 and 15d-10 for more information relating to transition reports in connection with changes in fiscal year-end. Additionally, in limited circumstances, Form 10-K is used as a special financial report under Exchange Act Rule 15d-2. See SEC 3130.917.

[Editor's note: The guidance in SEC 3130 is drafted primarily from the perspective of an annual report on Form 10-K being filed by a company that is neither a smaller reporting company nor an emerging growth company (each as defined in Exchange Act Rule 12b-2). See SEC 2160 for additional information relating to smaller reporting companies and SEC 2170 for additional information relating to emerging growth companies.]

.12 What is the due date of an annual report on Form 10-K?

The due date of an annual report on Form 10-K is specified in General Instruction A(2) as follows:

- within 60 days after year-end by a registrant that meets the definition of a large accelerated filer;
- within 75 days after year-end by a registrant that meets the definition of an accelerated filer; and
- within 90 days after year-end by a registrant that meets neither the definition of an accelerated filer nor a large accelerated filer.

[Editor's note: See SEC 3125 and Exchange Act Rule 12b-2 for information relating to the SEC's definitions of the terms large accelerated filer and accelerated filer.]

See SEC 3130.912 through .914 for additional information.

.13 Is Form 12b-25 (Notification of Late Filing) available to provide a limited extension to the due date of Form 10-K in appropriate circumstances?

Yes. Form 12b-25 applies to Form 10-K. See SEC 3145.

.2 FINANCIAL STATEMENTS REQUIREMENTS

.21 Where can I find the financial statement requirements applicable to an annual report on Form 10-K?

The financial statements requirements applicable to Form 10-K are set forth under Part II-Item 8 of the form.

[Editor's note: The following discussion relates to companies that are not smaller reporting companies. Smaller reporting companies are only required to consider those sections outside of S-X Article 8 that are specifically referenced. See SEC 2160 for more information relating to smaller reporting companies.]

An annual report on Form 10-K requires financial statements meeting the requirements of Regulation S-X, except S-X 3-05, 3-14, 6-11, 8-04, 8-05, 8-06 and Article 11. In addition to consolidated financial statements of the registrant, depending upon a registrant's circumstances, condensed financial information or complete financial statements may be required for one or more of the following (although not necessarily required to be included in the registrant's financial statements):

1. The registrant (parent company only) pursuant to S-X Article 12. See SEC 4510.*
2. Unconsolidated majority-owned subsidiaries pursuant to S-X 3-09. See SEC 4520.*
3. Fifty percent or less-owned persons accounted for by the equity method pursuant to S-X 3-09. See SEC 4520.*
4. Guarantors of registered securities pursuant to S-X 3-10/13-01. See SEC 4530.
5. Affiliates whose securities collateralize an issue of registered debt pursuant to S-X 3-16/13-02. See SEC 4540.

*Not applicable to smaller reporting companies.

Registrants (other than foreign private issuers and smaller reporting companies) with securities registered pursuant to Section 12(b) (other than mutual life insurance companies) or 12(g) of the Exchange Act must provide disclosures of material quarterly retrospective changes set forth in S-K 302(a), where applicable. When required, these disclosures are usually provided in an unaudited note to the annual financial statements; however, sometimes the disclosures are provided outside the registrant's financial statements.

See SEC 3130.901 through .905 for additional information.

.3 SELECTED FORM 10-K DISCLOSURE ITEMS

.31 What are the disclosure requirements related to unresolved written SEC staff comments (Item 1B of Form 10-K)?

A registrant that is either an accelerated filer or a large accelerated filer (each as defined in Exchange Act Rule 12b-2) or a well-known seasoned issuer (as defined in Securities Act Rule 405) must disclose the substance of any unresolved written SEC staff comments relating to its periodic or current reports if (i) the comments were issued at least 180 days before the end of the fiscal year, (ii) the comments remain unresolved at the Form 10-K filing date, and (iii) the registrant believes the comments are material. For purposes of measuring the 180 days, the period begins from the date of the first comment letter that specifically raises the issue. This date may be later than the date of the initial comment letter relating to the filing.

The registrant is not required to reprint the SEC staff's comment verbatim; however, the disclosure must be sufficient to convey the substance of the comment. Additionally, the registrant's disclosure may provide other information, including the position of the registrant with respect to the comment. The disclosure requirement does not extend to comments that have been resolved, including those where the resolution includes reflecting changes in future filings.

[Editor's note: The existence of any unresolved SEC staff comments at the time of (i) filing a periodic report (even if disclosure is not required) or (ii) filing/using a registration statement is a matter that requires careful analysis to determine whether the comment needs to be resolved before moving forward with the filing/transaction.]

.32 What are the disclosure requirements related to certain tax penalties required by the American Jobs Creation Act of 2004?

The American Jobs Creation Act of 2004 (the AJCA) amended the Internal Revenue Code by adding section 6707A which, among other things, requires that a person who files an annual report on Form 10-K, pursuant to Section 13 or 15(d) of the Exchange Act (either separately or consolidated with another person), must disclose in Item 3 (Legal Proceedings) the requirement to pay certain penalties relating to certain "reportable transactions." The penalties that must be disclosed are those set forth in Section 2.05 of IRS Revenue Procedure 2005-51. Among other things, the disclosure must include the amount of the penalty, whether the penalty has been paid in full, the section and subparagraph of the Internal Revenue Code under which the penalty was determined, and a description of the penalty.

The disclosures required by the AJCA and Rev. Proc. 2005-51 are complex, and companies should consider seeking the advice of legal counsel to ensure that all required disclosures are made and that those disclosures are complete and comply with the relevant regulations. Failure to make these disclosures will be treated as a failure to disclose a listed transaction which is subject to additional penalty. Rev. Proc. 2005-51 is available on the IRS website at http://www.irs.gov/irb/2005-33_IRB/ar14.html.

[Editor's note: The IRS issued Rev. Proc. 2007-25, which clarified the applicability of the disclosure requirements to all annual reports, not just those filed on Form 10-K. Rev. Proc. 2007-25 can be found on the IRS website at http://www.irs.gov/irb/2007-12_IRB/ar15.html. During 2011, the IRS issued Treasury Decision 9550 (T.D. 9550), which provides guidance regarding the penalties applicable for failure to disclose reportable transactions in any return or statement, including any required disclosures in annual reports under the Exchange Act. T.D. 9550 can be found on the IRS website at http://www.irs.gov/irb/2011-47_IRB/ar10.html. Additional guidance was issued on March 26, 2019 under section 6707A in Treasury Decision 9853. The regulation provides additional guidance on the amount of the penalty and how to compute the amount of the penalty in different circumstances. TD 9853 is applicable to any penalties assessed after March 26, 2019 and TD 9550 applies to penalties assessed prior to that date.]

.33 What are the disclosure requirements related to sanctionable activities required by the Iran Threat Reduction and Syria Human Rights Act of 2012?

The Iran Threat Reduction and Syria Human Rights Act of 2012 amended the Exchange Act to require disclosure in annual and quarterly reports filed after February 6, 2013 if the issuer has knowingly engaged in certain activities described in the Iran Sanctions Act of 1996, the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, or certain other federal regulations covering transactions or dealings with Iran. If an issuer or an affiliate of the issuer has engaged in any such activities, the following should be disclosed:

- The nature and extent of the activity;
- The gross revenues and net profits, if any, attributable to the activity; and
- Whether the issuer or the affiliate of the issuer intends to continue the activity.

The determination of whether disclosure is required under the Iran Threat Reduction and Syria Human Rights Act is a legal determination and registrants should consider consulting with legal counsel. EDGAR was updated to introduce a new submission type, IRANNOTICE, for filers to submit notices of disclosure contained in Exchange Act quarterly and annual reports under Section 219 of the Iran Threat Reduction and Syria Human Rights Act of 2012 and Section 13(r) of the Exchange Act. See Exchange Act Sections CDI Section 147.

.34 What is typically included under Item 9B "Other Information"?

Exchange Act Rules 13a-11 and 15d-11 provide that "no failure to file a report on Form 8-K that is required solely pursuant to Item 1.01, 1.02, 2.03, 2.04, 2.05, 2.06, 4.02(a), 5.02(e), or 6.03 of Form 8-K shall be deemed to be a violation of [Section 10(b) of the Exchange Act or Exchange Rule 10b-5]." However, this limited safe harbor extends only until the due date of the registrant's periodic report covering the period in which the reportable event occurred. Accordingly, the registrant must disclose under Item 9B the information required by these items for any Form 8-K reportable event (other than Item 4.02(a), which must be reported on Form 8-K) occurring during the fourth quarter of the year covered by the Form 10-K (or for an asset-backed issuer since the last required distribution report on Form 10-D) but not previously reported on Form 8-K pursuant to the safe harbor provision. Once the information is included under Item 9B, it does not need to be repeated in a report on Form 8-K, which would otherwise have been required to be filed with respect to such information.

In addition to using Item 9B to disclose information relating to Form 8-K items covered under the limited safe harbor, the SEC staff indicated that if a Form 8-K triggering event occurs within four business days before a registrant files its Form 10-K, the registrant may use Item 9B of Form 10-K to disclose information that would otherwise be required in a Form 8-K (other than disclosures required by Items 4.01 and 4.02). All Item 4.01 and Item 4.02 events must be reported on Form 8-K. See Exchange Act Form 8-K CDI 101.01. Amendments to previously filed Form 8-Ks must be filed on Form 8-K/A. See SEC 3150.4.

.35 What are the disclosure requirements related to Item 9C "Disclosure Regarding Foreign Jurisdictions that Prevent Inspections"?

Item 9C was added to Form 10-K to implement the disclosure and submission requirements of the Holding Foreign Companies Accountable Act (HFCAA).

A registrant, identified by the SEC pursuant to section 104(i)(2)(A) of the Sarbanes-Oxley Act, as having retained, for the preparation of the audit report on its financial statements included in the Form 10-K, a registered public accounting firm that has a branch or office that is located in a foreign jurisdiction and that the Public Company Accounting Oversight Board (PCAOB) has determined it is unable to inspect or investigate completely because of a position taken by an authority in the foreign jurisdiction must electronically submit the supplemental disclosures specified by Item 9C(a) of Form 10-K to the SEC on or before the due date of the Form 10-K.

A registrant that is a foreign issuer, as defined in Exchange Act Rule 3b-4, identified by the SEC pursuant to section 104(i)(2)(A) of the Sarbanes-Oxley Act, as having retained, for the preparation of the audit report on its financial statements included in the Form 10-K, a registered public accounting firm that has a branch or office that is located in a foreign jurisdiction and that the PCAOB has determined it is unable to inspect or investigate completely because of a position taken by an authority in the foreign jurisdiction must provide the disclosures as specified by Item 9C(b) of Form 10-K.

[Editor's note: The Divisions of Corporation Finance and Trading and Markets issued a Staff Statement on the HFCAA on April 6, 2023. The statement clarifies the December 2022 amendments to the HFCAA that any foreign authority impeding PCAOB inspections can trigger the provision of the HFCAA.]

.4 ANNUAL REPORT TO SHAREHOLDERS

.41 What is an annual report to shareholders and how is it used?

Exchange Act Rule 14a-3 requires that every person solicited by management in connection with an annual meeting at which directors are to be elected shall receive an annual report, which, among other things, contains financial statements prepared in accordance with Regulation S-X (with certain limited exceptions described in Exchange Act Rule 14a-3(b)(1)). Exchange Act Rule 14a-3 specifies the information that must be included in an annual report to shareholders. The annual report to shareholders must either accompany or precede the proxy statement. Beginning in 2023, the annual report to shareholders must also be submitted electronically to the SEC via EDGAR. See SEC Release 33-11070.

[Editor's note: A company can elect to prepare a single (integrated) document which serves as both the annual report to shareholders (required by Exchange Act Rule 14a-3) and the annual report on Form 10-K. See General Instruction H of Form 10-K.]

[Editor's note: Notwithstanding the requirement to submit the annual report to the SEC via EDGAR, the information contained in the annual report to shareholders is not necessarily considered "filed" with the SEC for purposes of the liability provisions of the Exchange Act. See Exchange Act Rule 14a-3(c). See also SEC 3130.42.]

[Editor's note: The annual report to shareholders prepared to comply with Exchange Act Rule 14a-3 is different from a summary annual report which some issuers prepare and provide to their shareholders. See SEC 3130.51 for a discussion of summary annual reports.]

See SEC 3130.915 for additional information.

.42 Can financial statements and other information included in the annual report to shareholders be incorporated by reference into an issuer's Form 10-K?

Generally, yes. General Instruction G(2) to Form 10-K specifies the conditions under which information in the annual report to shareholders may be incorporated by reference in the Form 10-K. For instance, financial statements contained in the annual report to shareholders which substantially meet the financial statement requirements of Form 10-K may be incorporated by reference into the Form 10-K rather than reprinting the financial statements in the body of the Form 10-K.

Any portions of the annual report to shareholders that are incorporated by reference into the Form 10-K must be filed in electronic format as Exhibit 13 to the Form 10-K as specified by Note 2 to General Instruction G(2) and S-K 601(b)(13). Such data, to the extent incorporated by reference in a report filed under the Exchange Act, is deemed to be "filed" with the SEC. In other words, if the audited financial statements are incorporated by reference into the Form 10-K from the annual report to shareholders, those financial statements will need to be included under Exhibit 13 of the Form 10-K and they will be considered "filed" with the SEC.

It is important that the incorporation by reference language included in the Form 10-K indicate specifically what information in the annual report to shareholders is being incorporated by reference in the Form 10-K in order to avoid any possibility that other sections of the annual report, such as the Chairman's letter, etc., could be considered "filed" as part of the Form 10-K. To limit the information included in the annual report to shareholders which will be deemed to be filed, some registrants prefer to include a statement excluding all portions of the annual shareholder report which are not specifically incorporated by reference into the Form 10-K. See examples below.

Example of incorporation by reference language

Form 10-K Item 8 - Financial Statements and Supplementary Data

The financial statements, together with the report of PricewaterhouseCoopers LLP dated February 23, 2023, appearing on pages XX to YY of the XYZ Company 2022 Annual Report to Shareholders, are incorporated by reference in this Annual Report on Form 10-K.

Example of exclusion language

The financial statements, together with the report of PricewaterhouseCoopers LLP dated February 23, 2023, appearing on pages XX to YY of the XYZ Company 2022 Annual Report to Shareholders, are incorporated by reference in this Annual Report on Form 10-K. With the exception of the aforementioned information and the information incorporated in Items 5, 7, 7A, 8, and 9A, the 2022 Annual Report to Shareholders is not to be deemed filed as part of this Annual Report on Form 10-K.

.5 SUMMARY ANNUAL REPORT

.51 What is a summary annual report?

A summary annual report is a document prepared by a registrant and provided to its shareholders with certain highlights relating to the company. Summary annual reports oftentimes include financial highlights, condensed financial statements, an independent auditor's report, and a narrative discussion of the financial data. A summary annual report is different from the annual report to shareholders (see SEC 3130.41) or the Form 10-K.

There are no authoritative guidelines governing the form and content of financial information which may be included in a summary annual report. However, a better understanding of the condensed financial statements oftentimes included in a summary annual report may be promoted when they are accompanied by an appropriate level of disclosure (e.g., condensed or summary footnotes). This disclosure may also prevent the condensed financial statements from being misleading. The determination as to an appropriate level of disclosure is a matter of judgment. Items sometimes disclosed include those relating to:

- The nature of accounting changes and matters affecting comparability;
- The principal revenue recognition policies and other significant accounting policies;
- A description of significant transactions and their effect on reported results (e.g., debt extinguishments, discontinued operations, business combinations, subsequent events);
- Information relating to major contingencies or commitments;
- The terms of debt or other financing arrangements; and
- Significant related party transactions and relationships.

The SEC staff has advised registrants that the nature and amount of disclosure in a summary annual report is generally a matter for the company to determine with its legal counsel. Issuers should consult with their counsel regarding the appropriate level of disclosure to be included in a summary annual report and the applicable liability frameworks. Even though there are no specific SEC-prescribed line-item disclosure requirements, summary annual reports may be subject to various statutes/regulations (e.g., the non-GAAP financial measures rules set forth in Regulation G may be applicable (see SEC 6020)).

.6 COMMUNICATIONS WITH AUDIT COMMITTEES

.61 Are the audit committee communication requirements specified in S-X 2-07 applicable in connection with Form 10-K?

Yes. S-X 2-07 specifies that each registered public accounting firm that performs an audit required by the securities laws shall communicate the following matters to the issuer's audit committee prior to the filing of the audit report with the SEC:

- All critical accounting policies and practices to be used;
- All alternative disclosures and treatments within generally accepted accounting principles for policies and practices related to material items that have been discussed with management of the issuer or registered investment company, including:
 - (i) Ramifications of the use of such alternative disclosures and treatments; and
 - (ii) The disclosures and treatments preferred by the registered public accounting firm;
- Other material written communications between the registered public accounting firm and the management of the issuer or registered investment company, such as any management letter or schedule of unadjusted differences;
- If the audit client is an investment company, all non-audit services provided to any entity in an investment company complex, as defined in S-X 2-01(f)(14), that were not pre-approved by the registered investment company's audit committee pursuant to S-X 2-01(c)(7).

These communications are in addition to those otherwise required by generally accepted auditing standards and PCAOB rules (e.g., PCAOB AS 1301). In addition to ensuring that these communications take place prior to the time that the audit report is filed with the SEC (e.g., in the Form 10-K), they must also take place prior to the filing of a consent to the use (or incorporation by reference) of the audit report in a Securities Act registration statement (e.g., Form S-3 or Form S-8). Additionally, the communications should take place prior to the company filing the audit report in connection with an Exchange Act registration statement (e.g., Form 10) or a proxy or information statement. Accordingly, the auditor may be required to have these communications multiple times during any given year.

[Editor's note: See "Office of the Chief Accountant: Application of the Commission's Rules on Auditor Independence Frequently Asked Questions", Section L, *Audit committee communications* [2-07], Question 3 available at <https://www.sec.gov/info/accountants/ocafaqaudind080607.htm> for situations where there is a predecessor auditor.]

.8 ACCOUNTANTS' CONSENT

.81 Where can I find information relating to the SEC's requirements for accountants' consents?

See SEC 2400 for a discussion of accountants' consents.

.9 FREQUENTLY ASKED QUESTIONS

.901 Are there circumstances under which a Form 10-K will need to include audit reports from more than one auditor?

Yes. For instance, if the principal auditor makes reference to the report of another auditor in its report on the registrant's financial statement, the separate report of the other auditor must be filed in the Form 10-K in addition to the report of the principal accountant. See S-X 2-05 and SEC FRM 4140.4. Additionally, if the financial statements included or incorporated by reference in the Form 10-K for a period prior to the most recently completed fiscal year have been audited by a predecessor auditor, the separate report of the predecessor auditor must be included in the Form 10-K.

[Editor's note: The requirements applicable to Form 10-K are different from those applicable to an annual report to shareholders. See S-X 2-05 and Note 1 to paragraph (b)(1) of Exchange Act Rule 14a-3.]

.902 Where can I find information about the successor auditor "modification-only" reporting framework?

The PCAOB staff issued a series of FAQs setting forth a framework under which a successor auditor may audit and report on modifications to financial statements previously audited by another independent accountant. The FAQs also discuss a number of issues relating to the predecessor auditor when the predecessor is asked to reissue its report on "pre-modification" financial statements. The FAQs are available on the PCAOB's internet website. The PCAOB staff's questions and answers may be accessed at https://pcaobus.org/Standards/QandA/QA_Adjustments.pdf. See also SEC FRM 4830.

.903 Can a foreign private issuer voluntarily file on domestic forms (e.g., Form 10-K) using home-country GAAP or IFRS as issued by the IASB?

Yes. Foreign private issuers that voluntarily file on domestic forms may file financial statements prepared under home-country GAAP and provide a reconciliation to US GAAP under Item 18 of Form 20-F. Foreign private issuers that voluntarily file on domestic forms may file financial statements prepared under IFRS as issued by the IASB without reconciliation to US GAAP. In both cases, the filings should prominently disclose that the company meets the foreign private issuer definition but is voluntarily filing on domestic forms. See SEC FRM 6120.6.

.904 Can a registrant that is a wholly-owned subsidiary of another registrant furnish abbreviated disclosures in its Form 10-K?

Generally, yes. A registrant that is a wholly-owned subsidiary of another registrant and which, on the date of filing its Form 10-K, meets the conditions specified in General Instruction I(1) of Form 10-K, may furnish the abbreviated disclosure specified in General Instruction I(2) of Form 10-K in lieu of the information that otherwise would be required in Form 10-K.

.905 Are there circumstances in which a parent-registrant and one or more subsidiary-registrants can file a combined Form 10-K?

Yes. A parent-registrant and its subsidiary that is also a registrant are allowed to file combined periodic reports in cases where (1) the parent owns substantially all of the stock of the subsidiary, (2) there are no more than nominal differences between the financial statements of the parent and the subsidiary, and (3) the non-financial disclosures of the parent and subsidiary are substantially similar, if the combined Form 10-K includes certain other specified disclosures. These disclosures include, among other items, separate complete sets of financial statements for each entity (in this context, the requirement is intended to apply to the primary financial statements), separate financial statement notes for areas which are different

between the parent and the subsidiary (e.g., debt or capital structure), separate audit reports, separate reports on disclosure controls and procedures and internal control over financial reporting for each entity, and separate CEO/CFO Certifications for each entity. See SEC FRM 1370 for additional guidance.

[Editor's note: Similar considerations apply to filing a combined quarterly report on Form 10-Q. See SEC 3140.901]

.906 What are the requirements for "preferability letters" related to changes in accounting principles in the fourth quarter?

See SEC 3140.904. A preferability letter is expected to be filed with the Form 10-K when a material change is adopted in the fourth fiscal quarter.

Accounting changes should be evaluated to determine if they would require the inclusion of a consistency paragraph in the auditors' report in accordance with PCAOB AS 2820.

.907 Is a Selected Financial Data table required in a Form 10-K?

No. In SEC Release 33-10890, the SEC eliminated the requirement for Selected Financial Data which was previously set forth in S-K 301 (and required under Item 6 of Form 10-K). However, we understand that some registrants may elect to present similar disclosures.

.908 Are management's report on internal control over financial reporting or an auditor's attestation report required in a Form 10-K?

Perhaps. See SEC 3125.4 for guidance on the requirements to include a management's report on internal control over financial reporting or an auditor's attestation report in a Form 10K.

.909 Do the SEC's rules specify where management's report on internal control over financial reporting should be included in a Form 10-K?

No. Even though the requirement to provide management's report on internal control over financial reporting appears under Item 9A of Form 10-K, the SEC's rules do not specify where in the Form 10-K management's report should appear. In its 2003 adopting release, the SEC indicated its view that "it is important for management's report to be in close proximity to the corresponding attestation report issued by the company's registered public accounting firm..." and its expectation "that many companies will choose to place the internal control report and attestation report near the companies' MD&A disclosure or in a portion of the document immediately preceding the companies' financial statements." Companies have generally placed management's report either under Item 9A or under Item 8 (immediately preceding the registered public accounting firm's report).

.910 Is a company that is either reorganizing or liquidating under the provisions of the United States Bankruptcy Code relieved of its Exchange Act reporting obligations because it has filed for bankruptcy?

No. Companies are not relieved of their Exchange Act reporting responsibilities simply because they have filed for bankruptcy. However, in SEC Release 9660 (1972), the SEC provided guidance indicating that it would accept reports which "differ in form or content from reports required to be filed under the Exchange Act." Staff Legal Bulletin No. 2 (1997) provides the SEC staff's views on requests to modify the Exchange Act periodic reporting of issuers that are either reorganizing or liquidating under the provisions of the United States Bankruptcy Code. Staff Legal Bulletin No. 2 also sets forth the reports that are required when a registrant emerges from bankruptcy. See *PwC's Guide to Bankruptcies and liquidations*, 3.20.

.911 How can companies comply with the Form 10-K requirements to XBRL tag certain information relating to the principal auditor?

Form 10-K requires XBRL tags on the principal auditor's name, location, and PCAOB identification number. The placement of the required tags within the SEC filing is at the discretion of the registrant. Our preference is for the Firm ID to be disclosed and tagged on a page immediately preceding the audit report (e.g., in the index included in Item 8 or Item 15 of Form 10-K).

.912 When is the information required by Part III of Form 10-K due?

General Instruction G(3) to Form 10-K permits a registrant to incorporate by reference the information required by Part III of Form 10-K from the registrant's definitive proxy statement involving the election of directors if the definitive proxy statement is filed with the SEC no later than 120 days after the end of the fiscal year. If the definitive proxy statement will not be filed within the 120-day timeframe, the company must amend the Form 10-K prior to the end of the 120-day period to provide the Part III information.

[Editor's note: The filing of a preliminary proxy statement within the 120 day time period would not satisfy the requirements of General Instruction G(3). See Exchange Act Forms CDI 104.17.]

See Securities Act Forms CDI 123.01 for a discussion of circumstances under which the Part III information must be filed sooner than 120 days after year-end in order for certain registration statements to become effective.

See SEC 2120.904 for additional guidance.

.913 When are the financial statement schedules required by S-X Article 12 due?

General Instruction A(4) to Form 10-K provides that a registrant may file the financial statement schedules required by S-X Article 12 as an amendment to Form 10-K within 30 days after the original due date of the Form 10-K.

.914 When are the financial statements required by S-X 3-09 due?

See SEC 4520.24.

.915 Does the fact that Exchange Act Rule 14a-3 doesn't specifically refer to management's assessment of the effectiveness of internal control over financial reporting and any related auditor's attestation report mean that they are not required in an annual report to shareholders?

FAQ 10 to the SEC staff's frequently asked questions relating to Section 404 of the Sarbanes-Oxley Act indicates that the intent of Section 404 and the SEC's rules is that a registrant's audited financial statements with an accompanying audit report that are contained in or accompany a proxy statement or consent solicitation statement should also be accompanied by management's report on internal control over financial reporting and any associated auditor's report relating to internal control over financial reporting. The SEC staff indicated in FAQ 10 that they encourage issuers to include both management's report on internal control over financial reporting and the associated auditor's report relating to internal control over financial reporting in the annual report to shareholders when the audited financial statements are included. The SEC staff also noted that, if management states in their 404 report that internal control over financial reporting is ineffective, or if the auditor's report takes any form other than an unqualified opinion and these reports are not included in the annual report to shareholders, then the issuer would have to consider whether the annual report to shareholders contained a material omission that made the disclosures in the annual report misleading.

.916 Should a registrant file a Form 10-K/A to retrospectively revise its financial statements to reflect a subsequent change in accounting principle, discontinued operations or change in reportable segments?

Generally, no. As described in SEC 2120.23, there are a number of situations in which a registrant might need to revise the financial statements filed in its most recent Form 10-K. Changes in accounting principle, discontinued operations and changes in reportable segments are three common examples of items that might need to be retrospectively reflected.

When required, the revised financial statements are usually filed under Item 8.01 of Form 8-K. Form 10-K/A ordinarily should not be used solely to file retrospectively revised financial statements to reflect a subsequent change in accounting principle, discontinued operations or a change in reportable segments. However, the SEC staff will not object if, in a Form 10-K/A filed to correct a material error, a registrant also reflects the retrospective effects of accounting changes, discontinued operations and changes in segment presentation that have been reflected in filings with the SEC subsequent to the original Form 10-K. If the Form 10-K/A is incorporated by reference into a registration statement, then the correction of the error and the accounting change would be required to be presented in the Form 10-K/A. In these circumstances, the financial statements in the Form 10-K/A should clearly distinguish the effects of the material error from those of any subsequent accounting change. See SEC FRM 13110.6.

For example, assume Company A is a calendar year-end SEC registrant. In September 2023, Company A discovered a material error in its 2022 annual financial statements. Accordingly, Company A will be required to restate the 2022 financial statements included in its 2022 Form 10-K. The error occurred in the fourth quarter of 2022, so prior quarterly financial statements were not impacted. Company A has an effective registration statement on Form S-3.

In addition to the discovery of the error, the following events also occurred during 2023:

- In January 2023, Company A changed its internal reporting structure in an effort to integrate the operations of Acquiree Z (which was acquired during the fourth quarter of 2022). As a result, effective January 1, 2023, Company A changed its segment presentation. The revised segment structure was reflected in the 2023 interim financial statements included in Company A's 2023 Form 10-Q filings. The 2022 interim financial statements included in the 2023 Form 10-Q filings for comparative purposes were also revised to reflect the new segment structure.
- In August 2023, Company A disposed of Subsidiary X. Subsidiary X did not meet the criteria for held for sale classification as of June 30, 2023 and was properly not reported as a discontinued operation in Company A's second quarter 2023 financial statements. Subsidiary X will be reflected as a discontinued operation in Company A's 2023 financial statements to be filed in its September 30, 2023 Form 10-Q. Additionally, the 2022 interim financial statements included in the September 30, 2023 Form 10-Q will be retrospectively revised to report Subsidiary X as a discontinued operation. When the 2023 Form 10-K is filed (in 2024), the 2023, 2022 and 2021 financial statements included in the 2023 Form 10-K will reflect Subsidiary X as a discontinued operation.

Company A will file its restated 2022 annual financial statements on Form 10-K/A in October 2023 (i.e., before the September 2023 Form 10-Q is filed).

Analysis:

In addition to restating its 2022 annual financial statements to correct the material error identified during September 2023, the 2022 annual financial statements to be filed in the October 2023 Form 10-K/A will also be revised to reflect the January 2023 change in segment presentation (because the segment change has been reflected in Company A's interim financial statements for the first and second quarters of 2023 and 2022).

The amended 2022 annual financial statements to be included in the October 2023 Form 10-K/A w not be revised to reflect Subsidiary X as a discontinued operation (because at the date the Form 10-K/A is filed,

Company A has not yet filed financial statements that report Subsidiary X as a discontinued operation). Company A's disclosures should clearly identify the items that are reflected in the Form 10-K/A.

.917 What is a special financial report on Form 10-K and when can it be used?

When an initial Securities Act registration statement is declared effective in the early part of a fiscal year, it oftentimes does not include financial statements for the most recently completed fiscal year. Exchange Act Rule 15d-2 provides registrants 90 days after the effective date of the Securities Act registration statement to file a special financial report on Form 10-K. A special financial report includes audited financial statements for the most recently completed fiscal year. MD&A or other narrative disclosures are encouraged but not required. See SEC FRM 1330.5.

[Editor's note: Even if omitted from a special financial report, MD&A and other disclosures would need to be included in any subsequent registration statement or proxy statement. See SEC FRM 1330.5]

It is important to note that Exchange Act Rule 15d-2 only makes reference to a Securities Act registration statement. There is no corresponding accommodation for a registrant with securities registered under Exchange Act Section 12. Accordingly, a registrant with securities registered under Exchange Act Section 12 would not be eligible to file a special financial report under Exchange Act Rule 15d-2. See Exchange Act Rules CDI 270.01.

Normally, an initial public offering of common stock is registered under both the Securities Act (e.g., on Form S-1) and Exchange Act Section 12 (e.g., on Form 8-A); therefore, the registrant would generally not be eligible to file a special financial report under Exchange Act Rule 15d-2. Rather, the registrant should file an annual report pursuant to Exchange Act Rule 13a-1 (i.e., a complete Form 10-K following the timing guidance described in SEC 3130.12).

[Editor's note: A registrant may wish to consult with its legal counsel before concluding that it may file a special financial report on Form 10-K under Exchange Act Rule 15d-2.]

[Editor's note: A special financial report under Exchange Act Rule 15d-2 is considered an annual report for purposes of evaluating the company's status as a newly public company. See SEC 3125.802 and SEC FRM 1340.10 (NOTE to Section) for additional information.]

.918 Where can I find guidance on Public Company Accounting Overview Board accounting support fee?

Guidance on PCAOB accounting support fee can be found at:

- PCAOB Rule 7104; and
- Frequently Asked Questions: The Issuer Accounting Support Fee and the Funding Process (<https://pcaobus.org/about/accounting-support-fee/supportfeefaq>)

- .1 General
- .2 Financial statements requirements
- .9 Frequently asked questions

.1 GENERAL

.11 What is Form 10-Q and where can I find it?

Form 10-Q is the reporting form used by most US domestic SEC registrants to comply with the SEC's quarterly reporting requirements. See Exchange Act Rules 13a-13 and 15d-13.

Generally, a Form 10-Q must be filed for each of the first 3 quarters of a registrant's fiscal year. See SEC 3140.13 for information relating to the commencement of Form 10-Q filings following the effective date of a registrant's initial registration statement.

The disclosure requirements of Form 10-Q are set forth in the body of the form and the accompanying instructions and generally leverage Regulations S-X and S-K rather than including the detailed disclosure requirements in the form.

The text of Form 10-Q is available on the SEC's website (<https://www.sec.gov/files/form10-q.pdf>).

[Editor's note: Form 10-Q can also be used as a transition report in connection with a change in fiscal year-end when the transition period is less than 6 months. See SEC 3185 and Exchange Act Rules 13a-10 and 15d-10 for more information relating to transition reports in connection with changes in fiscal year-end.]

.12 What is the due date of a quarterly report on Form 10-Q?

The due date of a quarterly report on Form 10-Q is specified in General Instruction A(1) as follows:

- within 40 days after the end of each of the first three fiscal quarters by a registrant that meets the definition of a large accelerated filer or an accelerated filer;
- within 45 days after the end of each of the first three fiscal quarters by a registrant that meets neither the definition of an accelerated filer nor a large accelerated filer.

See SEC 3140.13 for information relating to the commencement of Form 10-Q reporting and the due date of a registrant's first Form 10-Q following the effective date of its initial registration statement.

See SEC 3125 and Exchange Act Rule 12b-2 for information relating to the SEC's definitions of the terms large accelerated filer and accelerated filer.

See SEC 3185 for information relating to the due date of a transition report on Form 10-Q filed in connection with a change in fiscal year-end.

.13 What is the due date of the first Form 10-Q after the effectiveness of an initial registration statement?

The requirement to file quarterly reports begins with the first fiscal quarter following the most recent fiscal year or full quarter for which financial statements were included in the initial registration statement (e.g., Form S-1) of the issuer. A first-time registrant is required to file its first Form 10-Q by the later of:

- 45 days after the effective date of the initial registration statement or

- the date on which the Form 10-Q would have otherwise been due (i.e., if the issuer had been a reporting company as of its last fiscal quarter).

See Exchange Act Rules 13a-13 and 15d-13.

For example, if a calendar-year company's initial registration statement on Form S-1 (which includes March 31, 2023 interim information) is declared effective on July 25, 2023, then its first Form 10-Q would be for the quarter ended June 30, 2023 and would be due no later than September 8, 2023 (i.e., 45 days after the effective date (July 25, 2023) since that is later than 45 days after June 30, 2023).

See SEC FRM 1330.4.

.14 Is Form 12b-25 potentially available to provide a limited extension to the due date of Form 10-Q in appropriate circumstances?

Yes. Form 12b-25 applies to Form 10-Q. See SEC 3145.

.2 FINANCIAL STATEMENTS REQUIREMENTS

.21 Where can I find the financial statement requirements applicable to Form 10-Q

The financial statement requirements applicable to Form 10-Q are set forth under Part I-Item 1 of the form. Form 10-Q requires the financial statements specified in S-X 10-01 (a smaller reporting company may look to S-X 8-03). The financial statement periods to be provided are set forth in S-X 10-01(c) (S-X 8-03, including Instruction 1, for a smaller reporting company).

[Editor's note: In addition to the balance sheets specifically required by the SEC's rules, some registrants elect to provide a balance sheet as of the end of the comparative prior year quarter as supplemental disclosure in order to provide comparative financial condition information.]

See SAB Topic 6-G.2a for additional information on certain SEC staff interpretive positions on Form 10-Q disclosures. Additionally, see Chapter 29 of the PwC Financial Statement Presentation Guide for guidance on the preparation of interim financial statements.

See SEC 3140.901, 3140.902, and 3140.903 for additional guidance.

.22 Do the interim financial statements included in a Form 10-Q need to be reviewed by an independent registered public accounting firm prior to filing?

Yes. See S-X 10-01(d) (S-X 8-03 for a smaller reporting company).

The SEC staff has stated that if management determines that it is appropriate to file a Form 10-Q before the auditor completes its review of the interim financial statements, then the Form 10-Q would be considered substantially deficient and not timely filed. The SEC staff has also stated that a Form 10-Q that is filed prior to completion of the auditor's review of the interim financial statements should disclose that the report is deficient, label the financial statement columns as "not reviewed," and describe how the registrant will remedy the deficiency. When the public accounting firm's review of the interim financial statements is subsequently completed, the registrant should disclose this fact by amending its previously filed Form 10-Q. See SEC FRM 4410.3.

[Editor's note: Any changes to the financial statements that are made in the amended filing must be evaluated to determine if they should be reported as the correction of an error.]

.221 Is the registrant required to include the review report of an independent registered public accounting firm in its Form 10-Q?

Generally, no. If the registrant states that a review was performed, a report from the independent registered public accounting firm must be filed. See SEC FRM 4410.1. However, a reference to such a review is not required, and in our experience, registrants rarely file a review report of an independent registered public accounting firm in the Form 10-Q.

[Editor's note: We do not believe the reference to the completion of the auditor's review in the circumstances described in the second paragraph of SEC 3140.22 would trigger a requirement to include a written review report.]

If a Form 10-Q that contains an interim review report is incorporated by reference in a previously filed registration statement under the Securities Act (e.g., an already effective Form S-3 or Form S-8), a public accounting firm's awareness letter should be provided as Exhibit 15 to the Form 10-Q. See S-K 601(b)(15), SEC 2400.7 and SEC FRM 4410.2.

See SEC 2300.33 regarding prospectus disclosure considerations relating to an interim review report included or incorporated in a Securities Act registration statement.

.9 FREQUENTLY ASKED QUESTIONS

.901 Are there circumstances in which a combined Form 10-Q can be filed?

A parent and its subsidiary are allowed to file combined periodic reports in cases where (1) the parent owns substantially all of the stock of the subsidiary, (2) there are no more than nominal differences between the financial statements of the parent and the subsidiary, and (3) the non-financial disclosures of the parent and subsidiary are substantially similar, if the combined Form 10-Q includes certain other specified disclosures. These disclosures include, among other items, separate reviewed financial statements for each entity (in this context, the requirement is intended to apply to the primary financial statements), separate financial statement notes for areas which are different between the parent and the subsidiary (e.g., debt or capital structure), separate reports on disclosure controls and procedures for each entity, and separate CEO/CFO Certifications for each entity.

SEC FRM 1370 for additional guidance.

[Editor's note: Similar considerations apply to filing a combined annual report on Form 10-K.]

.902 Can a foreign private issuer that voluntarily files on domestic forms file its financial statements under home-country GAAP or IFRS as issued by the IASB?

Foreign private issuers that voluntarily file on domestic forms may file financial statements prepared under International Financial Reporting Standards (IFRS) as issued by the IASB without reconciliation to US GAAP. Foreign private issuers that voluntarily file on domestic forms may file financial statements prepared under home-country GAAP and provide a reconciliation to US GAAP under Item 18 of Form 20-F. In either case, the filings should prominently disclose that the company meets the foreign private issuer definition but is voluntarily filing on domestic forms. See SEC FRM 6120.6

.903 How should a change in an accounting principle be reflected in interim financial statements included in a Form 10-Q?

Interim financial statements reflecting a change in accounting principle should be prepared in conformity with ASC 270. Upon adoption of a new accounting standard in an interim period, the SEC staff has indicated that it expects registrants to provide both the annual and interim period disclosures prescribed by the new

accounting standard, to the extent not duplicative, in each interim report filed prior to the first annual report that reflects the adoption of the standard. See SEC FRM 1500. Chapter 30.9 of the PwC Financial Statement Presentation Guide contains guidance on interim reporting consideration for changes in accounting.

[Editor's note: The registrant may also need to revise its prior audited financial statements in connection with a securities-related transaction (similar to the requirements relating to discontinued operations and changes in segment presentation). See SEC 2120.23 for situations where a new registration statement or a prospectus supplement are prepared after a new accounting pronouncement is adopted on a retrospective basis.]

See SEC 3140.904 for a discussion of the SEC's preferability letter requirements relating to changes in accounting principles.

.904 What are the requirements for "preferability letters" related to changes in accounting principles in an interim period?

Under S-X 10-01(b)(6), the first Form 10-Q filed subsequent to the date of a material accounting change is required to include a letter from the registrant's independent registered public accounting firm indicating whether or not the change is to an alternative principle that, in their judgment, is preferable under the circumstances. SAB Topic 6-G.2b includes certain SEC staff positions on accounting principle changes and the need for preferability letters. A preferability letter is not required when the change is made in response to a standard adopted by the Financial Accounting Standards Board that requires such change.

S-K 601(b)(18) requires a registrant to file a preferability letter from its independent registered public accounting firm relating to any change in accounting principles or practices, or method of applying them, that affects the financial statements in the report being filed or that is reasonably certain to affect the financial statements of future fiscal years as an exhibit. Item 601 applies to both Form 10-Q and Form 10-K. A preferability letter is expected to be filed with the Form 10-K when a material change is adopted in the fourth fiscal quarter.

Accounting changes should be evaluated to determine if they would result in a consistency paragraph in the auditors' report in accordance with PCAOB AS 2820.

A preferability letter is not required for a change in estimate affected by a change in accounting principle (see SEC FRM 4230.2.c.4). However, as with other changes in accounting principles, this type of change may only be made if it is preferable.

.905 Is a Form 10-Q required to be filed for a registrant's fourth fiscal quarter?

No. However, disclosure relating to the registrant's fourth fiscal quarter may be required in other circumstances (e.g., unusual or infrequent items, or disposal of an entity).

- .1 General
- .3 References to PwC in Form 12b-25
- .4 Other disclosure matters
- .5 Selected SEC staff compliance and disclosures interpretations
- .9 Frequently asked questions

.1 GENERAL

.11 What is Form 12b-25 and where can I find it?

Form 12b-25 is the reporting form used by registrants to notify the SEC when the registrant is unable to file specified periodic reports (see SEC 3145.12) by the original due date. The requirement to notify the SEC and to file Form 12b-25 is set forth in Exchange Act Rule 12b-25(a).

If a company timely files its Form 12b-25 and complies with the other requirements of Exchange Act Rule 12b-25(b) (including filing the related periodic report within the relevant extension period), then the SEC will consider the periodic report to have been timely filed on its original due date. One reason this is important is because companies that have not filed specified SEC reports on a timely basis during the past 12 months would not qualify for certain opportunities for additional flexibility under the SEC's rules and forms. For example, one of the eligibility requirements for filing a registration statement on Form S-3 is that the registrant has timely filed specified SEC reports for the last 12 months. See General Instruction I.A.3(b) of Form S-3. Similarly, one of the conditions to qualify as a well-known seasoned issuer is that the registrant must have timely filed specified SEC reports during the last 12 months. See Securities Act Rule 405.

The text of Form 12b-25 is available on the SEC's website (<https://www.sec.gov/files/form12b-25.pdf>).

.12 Which SEC reports are eligible for the limited extension under Exchange Act Rule 12b-25 and how long is the extension?

The reports that are eligible for the limited extension under Exchange Act Rule 12b-25(b) and the associated extension period are as follows:

	<u>Extension Period</u>
Annual reports* on Form 10-K, 11-K and 20-F	15 calendar days
Quarterly reports* on Form 10-Q	5 calendar days
Annual* and semi-annual* reports on Form N-CEN or N-CSR	15 calendar days
Distribution reports on Form 10-D	5 calendar days

*also applies to transition reports and to special financial reports
under Exchange Act Rule 15d-2 (see Exchange Act Rules CDI 135.09).

.13 What is the due date of Form 12b-25?

Form 12b-25 must be filed with the SEC no later than one business day after the original due date of the periodic report to which the notice relates. For instance, if the original due date of the related periodic report is a Friday, then the due date of the Form 12b-25 is the following Monday (assuming that neither Friday nor Monday is a holiday).

If the original due date of the related periodic report is a Saturday, Sunday or a holiday, then the Form 12b-25 would be due no later than the 2nd business day after the original due date of the related periodic report. This is because SEC rules specify that if the due date of a report (e.g., Form 10-K) is a Saturday, Sunday or a holiday, then it will be considered timely filed on the 1st business day after the Saturday/Sunday/holiday on which the report was originally due. See Exchange Act Rule 0-3 and Exchange Act Rules CDI 135.03.

For example, assume a registrant is a calendar year-end company and a non-accelerated filer. The registrant's Form 10-Q for the first quarter of 2022 is due on May 15, 2022 (the 45th day after March 31, 2022). However, since the 45th day after March 31st falls on a Sunday, Exchange Act Rule 0-3 provides that the Form 10-Q will be considered timely filed on Monday, May 16, 2022 (the next business day after May 15, 2022). If the registrant cannot file its Form 10-Q on May 16, 2022, the Form 12b-25 will be due May 17, 2022 (the next business day after the due date of the Form 10-Q).

.14 How is the extended due date determined?

If the original due date of the underlying periodic report was not a Saturday, Sunday or holiday, the extension period begins to run the day the periodic report is originally due. For example, the Rule 12b-25 extension period for a Form 10-Q due on a Friday would end the following Wednesday, the 5th calendar day after Friday (assuming neither Friday nor Wednesday is a holiday). See SEC FRM 1330.3a.

If the original due date of the periodic report is a Saturday, Sunday or holiday, then the extension period will begin to run on the next business day. This is because Exchange Act Rule 0-3 provides that a report will be considered timely filed on the first business day following the original due date when the original due date falls on a Saturday, Sunday or holiday. Similarly, if the extension period ends on a Saturday, Sunday or holiday, the filing will be considered to have been made within the extension period if it is made on the next business day. See Exchange Act Rules CDIs 135.04 and 135.05.

For example, if a Form 10-Q of a calendar year-end, non-accelerated filer is originally due Sunday, August 14, 2022 (the 45th day after June 30th), then the Form 10-Q would be considered timely filed on Monday, August 15th under Exchange Act Rule 0-3. If the registrant is unable to file the Form 10-Q by August 15th then its Form 12b-25 will be due no later than Tuesday, August 16th and the Rule 12b-25 extension period will end on Monday, August 22 (because August 20th, the 5th calendar day after August 15th, is a Saturday).

Companies should consider consulting with their legal counsel regarding the implications of not filing a periodic report by the extended due date including whether an already effective registration statement on Form S-3 might need to be amended in connection with the next Form 10-K filing (see Securities Act Rules CDI 198.02 and Exchange Act Rules CDI 135.07). The auditors would also need to consider implications on future consents that they may be asked to provide.

.3 REFERENCES TO PwC IN FORM 12B-25

Part III of Form 12b-25 must include a description "in reasonable detail" of the reason why the related periodic report could not be filed by the original due date. In our experience, disclosure under Part III ordinarily focuses on the underlying root cause of the inability to timely file. In the rare circumstance in which the reason relates to the inability of a person (other than the registrant) to provide a required opinion, report or certification, then the company must also file a letter (sometimes referred to as a "12b-25(c) letter") from that person stating the specific reasons why he/she is unable to furnish the required opinion, report or certification before the original due date.

The underlying reasons for a company's inability to timely file rarely involves PwC or the unavailability of our report, and we do not want any unwarranted implications on the public record that PwC is the reason for the delay of a required filing with the SEC.

For example, a company seeking additional financing to alleviate liquidity/going concern issues may seek to assert in its Form 12b-25 that its Form 10-K could not be filed because the audit report is not available. After further consideration, however, the issue may be that the report the auditor is prepared to provide (e.g., a report with a "going concern" paragraph) is not the report the company wants to receive or that management has not included certain disclosures in its financial statements required by applicable accounting standards (e.g., "going concern"-related disclosures discussed in FASB ASC 205-40). In that case, the company would ordinarily consult with its legal counsel before proceeding. If, after consulting with its legal counsel, the company determines it is appropriate to file the Form 12b-25, then the form would likely refer to the company's liquidity status, its plans to obtain additional financing and the consequences of not obtaining that financing (e.g., that the company might conclude and disclose that there is substantial

doubt about its ability to continue as a going concern and that the audit report would include a similar disclosure). The Form 12b-25 likely would not indicate that the reason for the company's inability to file on a timely basis is the unavailability of the audit report.

We have also seen situations in which the unavailability of the audit report is a direct result of the unavailability of data from third parties, confirmations, legal opinions, etc., any of which may be required in order for the auditor to be able to complete its procedures. While it may be true that at the due date of the company's filing the audit is not yet complete, the Form 12b-25 should address the root cause of the delay (e.g., delays in the company's closing process or the unavailability of information from third parties).

If the registrant plans to attribute its inability to timely file its report to PwC, we should work with the registrant to ensure that the disclosures in the Form 12b-25 are accurate, complete and balanced so that our letter to be included in the Form 12b-25 can express agreement. Otherwise, we will need to include clarifying detail of the reasons surrounding the registrant's inability to timely file its report in our letter. We modify our letter as needed so that the record is clear.

.31 Would an independent auditor's inability to complete an interim review constitute the "inability of a person, other than the registrant, to furnish any required opinion, report or certification" for purposes of Rule 12b-25(c)?

No. The SEC staff has informally indicated that the phrase "opinion, report or certification" does not include a completed interim review, whether or not a written review report is issued. A letter from the auditor is required only if the auditor's inability to provide a required opinion, report or certification is the reason for the filing delay.

.4 OTHER DISCLOSURE MATTERS

Filings made under the Exchange Act (including Form 12b-25) need to include whatever additional material information is necessary to keep the required disclosures from being misleading (see Exchange Act Rule 12b-20). Companies should ensure they are providing sufficient context in their Form 12b-25 disclosures and should consider consulting with their legal counsel concerning the adequacy of disclosure about the underlying reasons as to why they cannot file on a timely basis as well as other matters.

Although it is not possible to list all circumstances which should be considered, companies oftentimes consider disclosure of matters relating to:

- the company's historical accounting/financial reporting which are currently under discussion (e.g., a misstatement in previously issued financial statements),
- internal control-related matters (e.g., a material weakness has been identified but not yet disclosed),
- potential changes in business/organization (e.g., potential bankruptcy),
- internal or external investigations (e.g., as a result of matters reported through a whistleblower hotline),
- consequences of the inability to timely file their periodic report (e.g., debt covenant violations, termination of contracts or failure to meet stock exchange listing requirements).

.5 SELECTED SEC STAFF COMPLIANCE AND DISCLOSURE INTERPRETATIONS

The Division of Corporation Finance staff has published CDIs relating Form 12b-25 and Exchange Act Rule 12b-25:

- Exchange Act Forms CDI Section 107 and Exchange Act Rules CDI Section 135 and

- Exchange Act Rules CDIs 144.03 and 151.01.

.9 FREQUENTLY ASKED QUESTIONS

.901 Should an issuer file a Form 12b-25 even if it does not expect to file the related periodic report within the specified extension period?

Yes. Form 12b-25 should be filed even if the company does not expect to file the related periodic report within the specified extension period (although the company should not check the box in Part II.) See Exchange Act Rules CDI 135.02 and Exchange Act Forms CDI 107.01.

One of the conditions to the relief set forth in Exchange Act Rule 12b-25(b) is that the company represents in its Form 12b-25 that the periodic report that is the subject of the Form 12b-25 will be filed before the end of the applicable Exchange Act Rule 12b-25(b) extension period. That representation is typically made by marking the check box in Part II of Form 12b-25. If a company did not mark that check box because it did not believe it would file the periodic report within the Exchange Act Rule 12b-25(b) extension period but is able to file the periodic report containing all required disclosures within the applicable Exchange Act Rule 12b-25(b) extension period, then the company may be still be able to avail itself of the Exchange Act Rule 12b-25(b) relief. See Exchange Act Forms CDI 107.02. Companies may wish to discuss this situation with their legal counsel.

.902 May an issuer file Form 12b-25 before the due date?

Yes. Even though Form 12b-25 is not due until the business day after the due date of the related periodic report, companies may voluntarily file the Form 12b-25 earlier.

.903 Are there any extensions available beyond the initial 5-day/15-day extension?

No. The extension provided by Form 12b-25 only applies to the original due date of the report. There are no additional extensions available. See SEC FRM 1330.3.

.904 Does a Form 12b-25 need to be filed if the registrant will file the related periodic report before the deadline for filing the Form 12b-25?

We understand that a Form 12b-25 should be filed with the SEC even if the related periodic report will be filed prior to the deadline for filing the Form 12b-25. This situation may arise, for example, when a periodic report is filed shortly after 5:30 pm Eastern Time on the original due date and will be considered filed the next business day (i.e., the day after the original due date).

.905 Can a company file a new registration statement on Form S-3 during the 5-day/15-day extension period but prior to filing the periodic report that is subject to the extension?

No. Exchange Act Rule 12b-25(d) indicates that a registrant will not be eligible to “use” any Securities Act registration statement form during the extension period and prior to filing the periodic report if the use of that registration statement form is predicated on timely filed reports. The SEC staff has indicated that it interprets the term “use” contained in the rule to mean that a company would not be eligible to file a new registration statement on Form S-3 until the subject report is filed within the extension period.

.906 Can a company continue to use an already effective registration statement on Form S-3 during the 5-day/15-day extension period?

The SEC staff has provided interpretive guidance on this question in Exchange Act Rules CDI 135.06. Companies should consider consulting with their legal counsel regarding the ability to use an already effective registration statement during the extension period.

.907 What are some common examples of reports/filings that are not eligible for the Rule 12b-25 extension?

Only the periodic reports identified in Exchange Act Rule 12b-25(a) are eligible for the extension. Examples of reporting requirements for which Exchange Act Rule 12b-25 is not available to separately extend the filing deadline beyond the dates that are specified by the underlying reporting form include:

- Form 8-K (see SEC FRM 1330.3d);
- Form 20-F filed to report the loss of shell company status (see General Instruction A(d) of Form 20-F);
- Financial statements of an equity method investee (unless the investee itself is an SEC registrant and is eligible to use Exchange Act Rule 12b-25 for an extension) (see Exchange Act Rule 12b-25(f) and Exchange Act Rules CDI 135.01);

[Editor's note: Exchange Act Rules CDI 135.01 refers to investees that are less than 50% owned. However, we understand the SEC staff applies the same guidance to a 50% owned equity method investee.]

- Financial statement schedules (see Exchange Act Rule 12b-25(f));
- Information required by Part III of Form 10-K (e.g., executive compensation disclosures (see SEC 3130.912)) (see Exchange Act Rules CDI 135.10); and
- Interactive data file (i.e., XBRL) (see Exchange Act Rules CDI 135.11).

- .1 General
- .2 Completion of acquisition or disposition of assets (Item 2.01)
- .3 Changes in registrant's certifying accountant (Item 4.01)
- .4 Non-reliance on previously issued financial statements or a related audit report of completed interim review (Item 4.02)
- .9 Frequently asked questions

.1 GENERAL

.11 What is Form 8-K and where can I find it?

Form 8-K is a reporting form used by SEC registrants to disclose the types of events that the SEC has determined to be "unquestionably or presumptively material." Form 8-K is sometimes referred to as a "current report" to distinguish it from annual and quarterly reports, which are commonly referred to as "periodic reports."

The following chart shows the specific Form 8-K disclosure items and cross references to (i) the location of the related disclosure requirements within Form 8-K, (ii) the relevant section(s) of the Division of Corporation Finance Form 8-K Compliance and Disclosure Interpretations, and (iii) additional guidance provided in the SEC Volume:

Form 8-K Item #	Description	Form 8-K CDI Refs ⁽¹⁾	Additional SEC Vol. Guidance
1.01	Entry into a Material Definitive Agreement	102 202	
1.02	Termination of a Material Definitive Agreement	103	
1.03	Bankruptcy or Receivership		
1.04	Mine Safety - Reporting of Shutdowns and Patterns of Violations		
1.05	Cybersecurity Incidents		
2.01	Completion of Acquisition or Disposition of Assets	205	3150.2
2.02	Results of Operations and Financial Condition	106 206	
2.03	Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of a Registrant	107	
2.04	Triggering Events that Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement	108 208	
2.05	Costs Associated with Exit or Disposal Activities	109 209	
2.06	Material Impairments	110	

FORM 8-K (CURRENT REPORT)
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Form 8-K Item #	Description	Form 8-K CDI Refs ⁽¹⁾	Additional SEC Vol. Guidance
3.01	Notice of Delisting or Failure to Satisfy a Continued Listing Rule or Standard; Transfer of Listing	211	
3.02	Unregistered Sales of Equity Securities	112 212	
3.03	Material Modification to Rights of Security Holders	213	
4.01	Changes in Registrant's Certifying Accountant	114 214	6150
4.02	Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review	115 215	3150.4
5.01	Changes in Control of Registrant		
5.02	Departure of Directors or Certain Officers; Election of Directors; Appointment of Certain Officers; Compensatory Arrangements of Certain Officers	117 217	
5.03	Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year	118 218	3185
5.04	Temporary Suspension of Trading under Registrant's Employee Benefit Plans	119	
5.05	Amendments to the Registrant's Code of Ethics, or Waiver of a Provision of the Code of Ethics		
5.06	Change in Shell Company Status		
5.07	Submission of Matters to a Vote of Security Holders	121A	
5.08	Shareholder Director Nominations		
6.01	ABS Informational and Computational Material ⁽²⁾		
6.02	Change of Servicer or Trustee ⁽²⁾		
6.03	Change in Credit Enhancement or Other External Support ⁽²⁾		
6.04	Failure to Make a Required Distribution ⁽²⁾		
6.05	Securities Act Updating Disclosure ⁽²⁾		
6.06	Static Pool ⁽²⁾		

Form 8-K Item #	Description	Form 8-K CDI Refs ⁽¹⁾	Additional SEC Vol. Guidance
7.01	Regulation FD Disclosure		
8.01	Other Events		
9.01	Financial Statements and Exhibits	129 229	3150.2

(1) In addition to the Form 8-K Compliance & Disclosure Interpretations relating to the individual Form 8-K items, section 101 of that document contains general guidance.

(2) These items apply only to asset-backed securities. See General Instruction G of Form 8-K for additional information relating to asset-backed issuers.

The text of Form 8-K is available on the SEC's website (<https://www.sec.gov/files/form8-k.pdf>).

.111 Which SEC registrants are required to disclose information on Form 8-K?

Most US domestic SEC registrants are required to disclose information on Form 8-K. See Exchange Act Rules 13a-11 and 15d-11 for the detailed requirements.

.12 What is the due date for Form 8-K?

A Form 8-K is generally due within four business days after the occurrence of the event which triggered the disclosure requirement. There are, however, some exceptions to this general principle:

- a Form 8-K furnished under Item 7.01 (or filed under Item 8.01 solely to satisfy reporting obligations under Regulation FD) is due in accordance with the requirements of Rule 100(a) of Regulation FD;
- a Form 8-K filed under Item 8.01 (other than one discussed in the preceding bullet point) has no mandatory filing deadline; however, prompt filing is encouraged; and
- a Form 8-K filed under Item 5.08 is due within four business days after the registrant determines the anticipated meeting date.

See General Instruction B.1 of Form 8-K for information on timing.

Additionally, under certain circumstances, the financial statements and associated pro forma financial information which are required by Item 9.01 of Form 8-K may be filed not later than 71 calendar days after the date the initial Item 2.01 Form 8-K reporting the completion of the acquisition was required to be filed. See Item 9.01 of Form 8-K. See also SEC 3150.25 for additional information regarding the due date of the financial statements and associated pro forma financial information required by Item 9.01 of Form 8-K.

[Editor's note: Exchange Act Rules 13a-11(c) and 15d-11(c) provide a limited safe harbor with respect to failure to file a Form 8-K that is required solely pursuant to Item 1.01, 1.02, 2.03, 2.04, 2.05, 2.06, 4.02(a), 5.02(e) or 6.03. The limited safe harbor extends only until the due date of the registrant's periodic report (e.g., Form 10-K or Form 10-Q) covering the period in which the reportable event occurred. The availability, implications and duration of the limited safe harbor are legal matters that a company should consider discussing with its legal counsel.]

.121 How is the Form 8-K due date determined?

The date on which the triggering event occurred is considered Day 0 when determining the Form 8-K due date. In other words, Day 1 of the four-business day period is the first business day after the date on which the triggering event occurred. For example, if an Item 1.03 triggering event occurred on Friday, May 26, 2023, then the due date for the related Form 8-K is June 2, 2023. In this case, the first business day following the occurrence of the triggering event (i.e., Day 1 of the four-business day period) is Tuesday, May 30, 2023 since Monday, May 29, 2023 was a federal holiday.

.13 What is the difference between “furnishing” and “filing” information in the context of Form 8-K?

Some information disclosed in a Form 8-K is considered furnished to the SEC rather than filed. The difference between these two concepts is a legal matter that registrants should consider discussing with their legal counsel.

As a general matter, we understand that material that is furnished and not deemed filed is not subject to a right of action under Section 18 of the Exchange Act and is not automatically incorporated by reference into a registration statement. Additionally, information that is furnished to the SEC in a Form 8-K is not subject to some of the elements of S-K 10 (e.g., relating to non-GAAP measures), while filed information would generally be subject to those requirements.

Information disclosed under Item 2.02 or 7.01 of Form 8-K is considered to have been furnished and not deemed filed unless the registrant specifically states that the information is intended to be filed under the Exchange Act or incorporates it by reference into a filing under the Securities Act or the Exchange Act. If disclosure is made under Item 2.02 or 7.01 of Form 8-K, all exhibits to the report relating to Item 2.02 or 7.01 are also deemed furnished, and not filed, unless the registrant indicates otherwise. See General Instruction B.2 of Form 8-K for further information.

Information disclosed under Item 8.01 of Form 8-K is considered filed.

.2 COMPLETION OF ACQUISITION OR DISPOSITION OF ASSETS (ITEM 2.01)

.21 What events trigger a requirement to file an Item 2.01 Form 8-K?

Disclosure is required under Item 2.01 if the registrant or any of its consolidated subsidiaries has completed the acquisition or disposition of:

- a significant amount of assets, other than in the ordinary course of business, or
- a significant amount of assets that constitute a real estate operation (as defined in S-X 3-14(a)(2)).

[Editor's note: Instruction 1 to Item 2.01 specifies three situations in which disclosure under Item 2.01 is not required. The SEC staff has indicated that when considering those situations, the reference to “any person” means the company that has the obligation to file the Form 8-K. Accordingly, in situations where a wholly-owned subsidiary acquired a significant amount of assets from its parent, and both the subsidiary and the parent are reporting companies, Instruction 1 to Item 2.01 would generally exempt the parent from the requirement to file an Item 2.01 Form 8-K, but the subsidiary would not be exempted. Additionally, the SEC staff has indicated that this instruction does not apply to the sale of a subsidiary's equity, because the subsidiary would not be wholly-owned after the transaction is completed. See Exchange Act Form 8-K CDIs 205.03 and .05.]

.211 How are the terms acquisition and disposition defined?

The terms acquisition and disposition in the context of Item 2.01 of Form 8-K are defined in Instruction 2 to Item 2.01.

.212 How is the phrase “significant amount of assets” defined?

The phrase “significant amount of assets” as it is used in the context of Item 2.01 of Form 8-K is defined in Instruction 4 to Item 2.01. There are three definitions to be considered depending on the registrant’s facts and circumstances. It is important to note that the three definitions use different thresholds or calculation methodologies.

- Instruction 4(i) compares the proportion of the equity in the net book value of the assets or the amount paid or received for the assets to the registrant’s consolidated total assets using a 10% threshold;
- Instruction 4(ii) considers whether a business (as defined in S-X 11-01(d)) that is significant (as defined in S-X 11-01(b)) has been acquired or disposed using a 20% threshold; and

[Editor’s note: Instruction 4(ii) indicates that the acquisition of a business encompasses the acquisition of an interest in a business accounted for by the registrant under the equity method or, in lieu of the equity method, the fair value option. See SEC 4550.211 for a discussion of the term “business” under S-X 11-01(d).]

- Instruction 4(iii), which applies only to business development companies (as defined in Section 2(a)(48) of the Investment Company Act), compares the amount paid for the assets to the value of the registrant’s total consolidated investments using a 10% threshold.

[Editor’s note: We understand that business development companies only need to consider Instruction 4(iii) when assessing significance.]

.22 What is the due date of an Item 2.01 Form 8-K?

As discussed in SEC 3150.12, a Form 8-K is generally due within four business days after the occurrence of the event which triggered the disclosure requirement. Under certain circumstances as described below, a 71-calendar day extension (referred to as the Item 9.01 grace period) is available with respect to the requirement to file financial statements of an acquired business (including an acquired real estate operation) or acquired fund and any pro forma financial information (associated with that acquired business or fund) under Item 9.01. See SEC 3150.25 for further information relating to the Item 9.01 grace period.

See Item 9.01(a)(3) and (b)(2) of Form 8-K.

The potential availability of the Item 9.01 grace period does not change the due date of the Item 2.01 Form 8-K.

.23 What disclosures are required by Item 2.01 of Form 8-K?

The disclosures that are required by Item 2.01 are set forth in Item 2.01(a)-(f). The required disclosures will depend on the specific facts and circumstances as follows:

- dispositions require the disclosures specified in Item 2.01(a)-(d).
- acquisitions require the disclosures specified in Item 2.01(a)-(e).

- acquisitions by a registrant that was a shell company other than a business combination related shell company (each as defined in Exchange Act Rule 12b-2) immediately before the transaction require the disclosures specified in Item 2.01(a)-(f).

In addition to the disclosures required by Item 2.01, disclosure may also be required under other items of Form 8-K. For example, disclosures may be required under Item 9.01 of Form 8-K.

.24 What disclosures are required by Item 9.01 of Form 8-K relating to a business acquisition or disposition?

Business acquisitions required to be disclosed under Item 2.01 of Form 8-K:

- financial statements and any applicable supplemental information of the business acquired as specified in S-X 3-05 or 3-14 (S-X 8-04 or 8-06 for smaller reporting companies), and
- any pro forma financial information specified by S-X Article 11 (S-X 8-05 for smaller reporting companies).

Business dispositions required to be disclosed under Item 2.01 of Form 8-K:

- any pro forma financial information specified by S-X Article 11 (S-X 8-05 for smaller reporting companies).

[Editor's note: Business development companies and funds should consider the relevant form requirements and all the facts and circumstances when assessing whether a Form 8-K is required to be filed and consult with legal counsel.]

.241 How should the financial statements relating to an acquired business/real estate operation/fund be prepared for purposes of Item 9.01 of Form 8-K?

For a business/real estate operation acquisition or fund acquisition required to be disclosed by Item 2.01 of Form 8-K, Item 9.01(a) of Form 8-K indicates that the registrant should file the financial statements (and any applicable supplemental information) specified in S-X 3-05 or 3-14 (or S-X 8-04 or 8-06 for smaller reporting companies) of the business/real estate operation acquired, or specified in S-X 6-11 of the fund acquired. The financial statements must be prepared pursuant to Regulation S-X except that financial statement schedules (S-X Article 12) do not need to be filed unless they are required by S-X 6-11.

See SEC 4550.3 regarding financial statements of an acquired business (other than an acquired real estate operation). See SEC 4555.24-.26 regarding financial statements of an acquired real estate operation. See S-X 6-11 for information relating to an acquired fund. See S-X 3-05(a)(1) and S-X 3-14(a)(1) regarding the omission of financial statements schedules.

.25 How does the 71-calendar day grace period provided in Item 9.01(a)(3) work?

Item 9.01(a)(3) of Form 8-K provides that, except as described below, the historical financial statements of an acquired business (including an acquired real estate operation) or acquired fund required by Item 9.01(a) of Form 8-K may be filed as an amendment to the Form 8-K in which the completion of the transaction was reported. The amendment must be filed no later than 71 calendar days after the original Form 8-K was required to be filed. Item 9.01(b)(2) of Form 8-K applies the 71-calendar day extension to any pro forma financial information required in connection with a business acquisition. This 71-calendar day extension is commonly referred to as the Item 9.01 grace period.

The Item 9.01 grace period is not available in connection with a transaction by a registrant that was a shell company other than a business combination related shell company (each as defined in Exchange Act Rule 12b-2) immediately before the transaction (see Item 9.01(c) of Form 8-K). Accordingly, the financial statements and pro forma financial information in connection with the type of transaction described in the

preceding sentence are due no later than 4 business days after completion of the transaction. See Item 9.01(c) of Form 8-K.

Additionally, the Item 9.01 grace period is not available in connection with disposition transactions. Accordingly, the due date of the pro forma financial information relating to a business disposition required by Item 9.01(b) of Form 8-K is 4 business days after the completion of the disposition. See Exchange Act Form 8-K CDI 129.01.

.251 Is the Item 9.01 grace period the same as the grace periods provided in S-X 3-05 and S-X 3-14?

The Item 9.01 grace period is different from the grace periods described in S-X 3-05(b)(4)(i) and S-X 3-14(b)(3)(i). The Item 9.01 grace period only applies to the requirements of Form 8-K.

During the Item 9.01 grace period, a registrant is deemed to be current for purposes of its Exchange Act reporting obligations. However, registration statements under the Securities Act (e.g., Form S-3) will not be declared effective and post-effective amendments to registration statements will not be declared effective unless financial statements meeting the requirements of S-X 3-05, 3-14, 8-04 and 8-06 or S-X 6-11 (as applicable) are provided.

For example, the Item 9.01 grace period would provide 71 additional calendar days to file a Form 8-K with the financial statements and pro forma financial information relating to an acquired business that is greater than 50% significant, but the grace period provided by S-X 3-05(b)(4)(i) would not extend to the financial statements of a greater than 50% significant acquired business. Accordingly, even though the registrant in this example would be considered current for purposes of its Exchange Act reporting obligations, a new or amended registration statement on Form S-3 could not be declared effective without the financial statements and associated pro forma financial information of the recently acquired business that is greater than 50% significant. See SEC FRM 2050.4 and 2050.5.

See the Instruction to Item 9.01 of Form 8-K and SEC 4550.2221 for additional information (including information relating to the interaction between the Item 9.01 extension and the requirements associated with offerings made pursuant to effective registration statements or pursuant to Rule 506 of Regulation D).

The Item 9.01 grace period and the grace periods provided in S-X 3-05 and 3-14 also differ with respect to the periods of time that are specified. The period of time referred to in the Item 9.01 grace period is 71 calendar days following the 4th business day after the completion of the acquisition. The period of time referred to in the S-X 3-05 and 3-14 grace periods is no more than 74 calendar days after the acquisition was consummated. The SEC staff has recognized this distinction and has indicated that they will consider the Item 9.01 grace period to be substantially the same as the S-X 3-05 and 3-14 grace periods. See Note to SEC FRM 2050.1.

.26 How are the age of financial statements requirements relating to an acquired business or a real estate operation determined under Item 9.01 of Form 8-K?

For purposes of complying with Item 9.01 of Form 8-K, the required age of an acquired business's/real estate operation's financial statements is generally determined by reference to the filing date of the Form 8-K initially reporting the acquisition (see an exception to this general approach below). This date is referred to as the Item 9.01 reference date. If the acquirer did not file a Form 8-K within the four-business day deadline, the fourth business day after the acquisition is the Item 9.01 reference date. In connection with an acquired business/real estate operation that is not a foreign business (as defined in S-X 1-02(I)):

- If the Item 9.01 reference date for determining the age of financial statements in the Form 8-K for an acquired business/real estate operation that is a non-accelerated filer is 90 days or more after the acquired business's/real estate operation's year-end (60 days or more for a large accelerated filer and 75 days or more for an accelerated filer), the audited historical financial statements for its most recently completed fiscal year would be required.

- If the Item 9.01 reference date for determining the age of financial statements in the Form 8-K for an acquired business/real estate operation that is a non-accelerated filer is 135 days or more after the date of the most recent audited balance sheet included in the Form 8-K (130 days or more for a large accelerated filer or an accelerated filer), unaudited financial statements must be included as of a date within 135 days (130 days for a large accelerated filer or an accelerated filer) of the reference date (although the financial statements would not have to be updated beyond the quarter-end immediately preceding the acquisition).

In connection with an acquired business/real estate operation that is a foreign business (as defined in S-X 1-02(I)) or a foreign private issuer (as defined in Exchange Act Rule 3b-4), annual audited financial statements will be required for the acquired foreign business's most recently completed year if the Item 9.01 reference date is more than three months after the acquired foreign business's fiscal year-end. Unaudited interim financial statements are required if the Item 9.01 reference date is more than nine months after the end of the acquired foreign business's most recently completed fiscal year. The interim financial statements must cover at least the first six months of the year.

See SEC FRM 2045.14-.15.

SEC FRM 2045.17 describes an exception to the general approach described above relating to a situation in which (i) the effective date of a registration statement occurs after filing the initial Form 8-K reporting the acquisition, but during the Item 9.01 grace period, and (ii) the acquired business is significant. In that case, the SEC staff has indicated that the age of the acquired business's financial statements presented in the Form 8-K should be based on the effective date of the registration statement. This may result in the registrant providing more recent financial statements for the acquired business, but the due date of the Item 9.01 Form 8-K does not change. See SEC FRM 2045.17.

[Editor's note: If a registration statement becomes effective after the acquired business's/real estate operation's financial statements are filed under Item 9.01 of Form 8-K, the acquired company's financial statements may need to be updated beyond the date of the financial statements that were included in the amended Form 8-K. This is because the effective date of the registration statement creates a new reference date for purposes of evaluating the age of financial statements requirements. See SEC 4550.4.]

.261 Are financial statements required under Item 9.01 if they have been previously filed?

General Instruction B.3 of Form 8-K generally provides that a registrant is not required to file an additional Form 8-K if it has previously reported substantially the same information as required by Form 8-K. In this context, the term "previously reported" is defined in Exchange Act Rule 12b-2.

The SEC staff has provided three examples of situations in which previously filed financial statements of an acquired business will not be deemed "substantially the same" pursuant to General Instruction B.3 to Form 8-K. See SEC FRM 2045.16.

.262 Will the SEC staff consider waiving the financial statement requirements in Item 9.01 of Form 8-K?

The SEC staff will consider a waiver request relating to the financial statement requirements under Item 9.01 of Form 8-K when the registrant believes that strict application of the form requirements produces anomalous results. In determining whether to grant a waiver, the SEC staff will consider the company's specific facts and circumstances.

[Editor's note: When a waiver will be requested, it is prudent that the buyer and the seller and their respective professional advisors have an understanding of the content of the waiver request. In some circumstances, it may be prudent to have this understanding be a part of the merger or acquisition agreement.]

FRR 18 discusses SEC staff administrative procedures in circumstances when no waiver is granted, and the required financial statements are not supplied in the time prescribed.

Where a waiver is not granted and the required financial statements are not supplied in the time prescribed, the deficiency will affect the registrant for both Exchange Act and Securities Act purposes. The registrant would not be considered timely or current in its Exchange Act reporting obligations and, where appropriate, enforcement action would be taken. Because of the Exchange Act deficiency, resales in reliance on Rule 144 by either affiliates or non-affiliates would not be possible. In addition, no registration statements would be declared effective and sales pursuant to effective registration statements should not be made in the absence of adequate information about material acquisitions. Once registrants have furnished certified financial statements of the new combined entity for an appropriate period, they could, in some cases, be considered current for Exchange Act purposes and could register securities under the Securities Act.

See SAB Topic 1-K for the SEC staff's views regarding the application of S-X 3-05 and S-X 11-01 and the availability of waivers of certain financial statement requirements with respect to troubled financial institutions acquired or to be acquired.

.263 Should a company file an Item 2.01 Form 8-K even when the SEC staff has granted a waiver to omit the financial statements of a significant acquired business that are otherwise required under Item 9.01 of Form 8-K?

The SEC staff has indicated that companies generally should file an Item 2.01 Form 8-K even when the SEC staff has granted a waiver of the requirement to file the financial statements of the acquired business otherwise required by Item 9.01 of Form 8-K. The Item 2.01 Form 8-K would indicate that the financial statement requirements were waived. See Topic H from the March 2019 CAQ SEC Regulations Committee Meeting Highlights.

.3 CHANGES IN REGISTRANT'S CERTIFYING ACCOUNTANT (ITEM 4.01)

The disclosure requirements of Item 4.01 of Form 8-K are discussed in SEC 6150.

.4 NON-RELIANCE ON PREVIOUSLY ISSUED FINANCIAL STATEMENTS OR A RELATED AUDIT REPORT OR COMPLETED INTERIM REVIEW REPORT (ITEM 4.02)

.41 What events trigger a requirement to file an Item 4.02 Form 8-K and what are the associated disclosure requirements?

Disclosure is required under Item 4.02 if either of the following triggering events has occurred:

- (a) the registrant's board of directors, a committee of the board of directors, or the officer or officers of the registrant authorized to take such action (if board action is not required) concludes that any previously issued financial statements covering one or more years or interim periods for which the registrant is required to provide financial statements under Regulation S-X should no longer be relied upon because of an error in such financial statements; or
- (b) the registrant is advised by (or receives notice from) its independent accountant that disclosure should be made or action should be taken to prevent future reliance on a previously issued audit report or completed interim review (even if a review report was not issued) related to previously issued financial statements.

See Item 4.02 of Form 8-K for the specific disclosure requirements.

[Editor's note: As noted below, reporting under Item 4.02(b) is rare. However, if reporting under Item 4.02(b) is required, then the registrant is required to request the independent accountant to provide the registrant with a letter addressed to the SEC stating whether the

independent accountant agrees with the statements made by the registrant in response to Item 4.02 and, if not, stating the respects in which it does not agree. The registrant would file this letter as Exhibit 7 to the Item 4.02 Form 8-K. See Item 4.02(c) of Form 8-K and S-K 601(b)(7).]

[Editor's note: A PCAOB registered firm is required to notify the PCAOB when it has withdrawn an audit report on an issuer's financial statements, or withdrawn its consent to the use of its name in a report, document, or written communication containing an issuer's financial statements, and the issuer has failed to comply with an SEC requirement to make a report concerning the matter pursuant to Item 4.02 of Form 8-K. The notification is made by submitting a Special Report on Form 3 to the PCAOB. The disclosure on Form 3 will be publicly available on the PCAOB website. General Instruction 3 to Form 3 generally requires disclosure within 30 days after the occurrence of the event being reported. The note to Item 3.1 of Form 3 states that "[t]he 30-day period in which the Firm must report the event does not begin to run unless and until the issuer fails to report on Form 8-K within the time required by the Commission's rules. The Form 3 must be submitted to the PCAOB within 30 days of the expiration of the required Form 8-K filing deadline, unless, within that 30-day period, the issuer reports on a late-filed Form 8-K." (italics omitted) See Special Report on Form 3 (Items 2.1 and 3.1).]

.411 Do all revisions to previously issued financial statements trigger a requirement to file an Item 4.02 Form 8-K?

We do not believe all revisions to previously issued financial statements trigger a reporting requirement under Item 4.02. There are many reasons why a registrant may conclude that its previously issued financial statements need to be revised that do not trigger a requirement to file an Item 4.02 Form 8-K. For instance, a registrant may conclude that it needs to revise previously issued financial statements as a result of a specific event or circumstance which requires retrospective adjustment (e.g., discontinued operations, reorganization of entities under common control, changes in reportable segments and retrospective changes in accounting principles). The circumstances surrounding these types of revisions to previously issued financial statements generally do not trigger an Item 4.02 reporting requirement.

Additionally, we do not believe that a revision to previously issued financial statements to correct immaterial misstatements, either individually or in the aggregate, would generally trigger a reporting requirement under Item 4.02. For example, consider a situation in which a misstatement was discovered in 2023, but that misstatement had accumulated over several years. Assume that the misstatement was determined to be immaterial to each prior period, but that the cumulative amount of the misstatement would be material to the full 2023 fiscal year estimated net income if it were recorded in 2023. In this fact pattern, the correction of the cumulative misstatement cannot be recorded in 2023 as an "out-of-period" adjustment; rather, the previously issued financial statements will need to be revised. The requirements of SAB 108 (SAB Topic 1-N) related to the assessment of materiality should be considered in this case.

In this scenario, we do not believe that the correction of the previously issued financial statements would automatically result in the conclusion that those financial statements or the associated audit reports or completed interim reviews should not be relied on (even if the revised financial statements reflect the disclosures specified for correction of a misstatement by SEC rules and financial accounting guidance). In this example, the revision of the prior periods' financial statements was not the result of a conclusion that those previously issued financial statements were materially misstated. Instead, those previously issued financial statements were revised because the correction of the cumulative misstatement as an "out-of-period" adjustment in 2023 would have caused the 2023 financial statements to be materially misstated.

[Editor's note: Registrants should also consider the implications of any applicable compensation clawback requirements (e.g., policies adopted in connection with any exchange listing requirements adopted in response to Exchange Act Rule 10D-1). There may be situations in which an error correction would not require the filing of an Item 4.02 Form 8-K, yet an incentive compensation clawback analysis would be triggered.]

.42 Is reporting under Item 4.02(b) of Form 8-K required each time a registrant reports under Item 4.02(a)?

We do not believe reporting under Item 4.02(b) is required each time a registrant reports under Item 4.02(a). Exchange Act Form 8-K CDI 115.01 indicates that if a registrant has taken appropriate action to prevent reliance on the financial statements and filed an Item 4.02(a) Form 8-K, then the registrant does not need to file a second Form 8-K under Item 4.02(b) to indicate that the auditor has also concluded that future reliance should not be placed on its report, unless the auditor's conclusion relates to an error or matter different from the original filing under Item 4.02(a) of Form 8-K.

As a general matter, we believe that the independent accountant does not conclude that financial statements require restatement before the registrant has had the opportunity to complete its analysis of the facts, circumstances, relevant accounting literature, and materiality. However, if the independent accountant's communication to the registrant expresses a conclusion that the previously issued financial statements require restatement to correct a material misstatement, or that disclosure should be made or action should be taken to prevent future reliance on a previously issued audit report or completed interim review (relating to previously issued financial statements), reporting under Item 4.02(b) of Form 8-K would generally be required.

We believe an Item 4.02(b) Form 8-K reporting obligation would not be triggered if the independent accountant communicates to the registrant that an area of concern with respect to previously issued financial statements has been identified and that the registrant needs to investigate or reconsider its accounting or financial reporting.

Additionally, we believe that notification under PCAOB AS 2905 is not necessarily required when the registrant has already concluded that the financial statements should not be relied on, has made public disclosures to prevent future reliance on the financial statements in question, and has reported under Item 4.02(a) of Form 8-K.

We expect that reporting under Item 4.02(b) of Form 8-K will be rare. We believe filings under Item 4.02(b) of Form 8-K should generally be reserved for the limited circumstances when the independent accountant has concluded that its audit report or completed interim review should no longer be relied on, but the registrant has either reached a different conclusion regarding the underlying financial statements or has not taken the appropriate action.

We have discussed these matters with staff members of the SEC's Division of Corporation Finance. In determining whether a filing is required under Item 4.02(b) of Form 8-K, they acknowledged that an independent accountant advising a registrant to consider whether matters coming to the independent accountant's attention require revision to previously issued financial statements is different from notifying the registrant that the auditor has concluded that steps should be taken to prevent future reliance on the auditor's report (or completed interim review). The SEC staff indicated that it does not believe that an Item 4.02(b) Form 8-K is triggered by the former. However, they emphasized that filing under Item 4.02(a) of Form 8-K without also filing under Item 4.02(b) of Form 8-K would be acceptable only if the registrant made the requisite disclosures required by PCAOB AS 2905 without the independent accountant first concluding and notifying/advising the registrant that its previously issued audit report (or completed interim review) should no longer be relied upon.

.43 Does a conclusion that a previously issued assessment/report relating to the effectiveness of internal control over financial reporting should no longer be relied upon trigger a requirement to file an Item 4.02 Form 8-K when there has been no conclusion that previously issued financial statements should no longer be relied upon?

Generally, no. We understand that disclosure under Item 4.02 of Form 8-K relates solely to conclusions regarding non-reliance on previously issued financial statements due to a material misstatement. However, public reporting of the situation may, nonetheless, be required (e.g., to notify people relying on the disclosures). We believe registrants should discuss these situations with legal counsel and consider if investors should be informed that the previously issued management's assessment/report relating to the

effectiveness of internal control over financial reporting should no longer be relied upon. Auditors also consider their responsibilities under the relevant professional literature.

.9 FREQUENTLY ASKED QUESTIONS

.901 May a registrant file a Form 12b-25 (Notification of Late Filing) to extend the due date of Form 8-K?

No. Form 12b-25 does not apply to Form 8-K. See SEC FRM 1330.3 d.

.902 Could filing a Form 8-K after the due date impact a registrant's eligibility to file a new Form S-3?

Perhaps. One of the eligibility criteria for filing a Form S-3 is that during the 12 months prior to filing the Form S-3, the registrant must have timely filed all reports required to be filed under Exchange Act Section 13(a) or 15(d) other than a report that is required solely pursuant to Item 1.01, 1.02, 1.04, 2.03, 2.04, 2.05, 2.06, 4.02(a) or 5.02(e) of Form 8-K. See General Instruction I.A.3(b) of Form S-3.

[Editor's note: The above discussion is solely focused on the timely filing aspect of the Form S-3 eligibility requirements. The registrant must have filed all required disclosures on or before the date it files the Form S-3 to satisfy the eligibility requirements of General Instruction I.A.3(b) of Form S-3.]

.903 If a Form 8-K triggering event occurs within four business days before a registrant files a Form 10-K or Form 10-Q, may the registrant report the event in that Form 10-K or Form 10-Q rather than Form 8-K?

In many cases, yes. However, the SEC staff has indicated that this would not be acceptable in the case of a disclosure required under Items 4.01 or 4.02 of Form 8-K. All Item 4.01 and Item 4.02 events must be reported on Form 8-K. See Exchange Act Form 8-K CDI 101.01.

For example, if an Item 1.02 Form 8-K triggering event occurred on March 8, 2023 and the registrant planned to file its Form 10-K for the year ended December 31, 2022 on March 13, 2023, the registrant could disclose the event under Item 9B of that Form 10-K rather than filing a separate Form 8-K. However, if the triggering event were an event requiring disclosure under either Item 4.01 or Item 4.02 of Form 8-K, the disclosure would need to be provided in a Form 8-K. Disclosure in a Form 10-K to be filed by March 13, 2023 relating to an Item 4.01 or 4.02 triggering event would not suffice.

- .1 General
- .2 Financial statements requirements
- .9 Frequently Asked Questions

.1 GENERAL

.11 What is Form 11-K and where can I find it?

Form 11-K is the annual report form used by employee stock purchase, savings and similar plans, which have interests constituting securities registered under the Securities Act and are required to file reports under Section 15(d) of the Exchange Act. See SEC 2125.901 for a discussion of factors to consider in determining whether "interests" constitute securities.

The contents of Form 11-K consist of a cover page, the plan's annual financial statements, and the signature page. The text of Form 11-K is available on the SEC's website (<https://www.sec.gov/files/form11-k.pdf>).

.12 What is the due date of a Form 11-K?

A Form 11-K relating to a plan that is subject to the Employee Retirement Income Security Act of 1974 (ERISA) is due within 180 days after the plan's fiscal year-end. See General Instruction A to Form 11-K, Exchange Act Forms CDI 106.01, Exchange Act Rule 15d-21, and SEC FRM 15220.

A Form 11-K relating to a non-ERISA plan (or any plan electing not to utilize ERISA financial reporting requirements for Form 11-K purposes) is due within 90 days after the plan's fiscal year-end. See General Instruction A to Form 11-K and SEC FRM 15210.

[Editor's note: Form 11-K can also be used as a transition report in the event of a change in a plan's fiscal year-end. See SEC 3185 for additional information relating to changes in fiscal year-end. See also Exchange Act Forms CDI 206.02 and Exchange Act Rules CDI 280.02 regarding timing.]

.13 Can a plan's financial statements be included in its sponsor's annual report on Form 10-K instead of filing a Form 11-K?

Yes. Exchange Act Rule 15d-21 provides that a separate Form 11-K does not need to be filed by a plan if (i) the issuer of the stock or other securities offered to employees through their participation in the plan files annual reports on Form 10-K and (ii) the issuer furnishes the financial statements required by Form 11-K with respect to the plan as a part of the issuer's annual report on Form 10-K or as an amendment thereto.

If the above filing procedure is followed, the financial statements required by Form 11-K with respect to the plan are required to be filed within 120 days after the end of the fiscal year of the plan. However, if the fiscal year of the plan ends within 62 days prior to the end of the fiscal year of the issuer, the information, financial statements and exhibits may be furnished as part of the issuer's next annual report. If a plan subject to ERISA uses the procedure permitted by Exchange Act Rule 15d-21, the financial statements required by Form 11-K shall be filed within 180 days after the plan's fiscal year end. See SEC FRM 15210 and 15220.

.14 Is Form 12b-25 (Notification of Late Filing) potentially available to provide a limited extension to the due date of Form 11-K in appropriate circumstances?

Yes. Form 12b-25 applies to Form 11-K. See SEC 3145.

.2 FINANCIAL STATEMENTS REQUIREMENTS

Form 11-K requires financial statements relating to the plan (not the plan sponsor). The form and content requirements relating to plan financial statements are set forth in S-X Article 6A.

The financial statement requirements of Form 11-K vary depending on the plan's ERISA-status.

.21 What are the Form 11-K financial statements and related audit requirements for an ERISA plan?

A benefit plan required to file Form 11-K that is subject to ERISA may file financial statements and schedules that conform to ERISA's financial reporting requirements rather than S-X Article 6A.

A Form 11-K filed for an ERISA plan generally includes a statement of changes in net assets available for plan benefits only for the plan's latest fiscal year and a statement of net assets available for plan benefits presented in comparative form for the beginning and end of the plan year, the relevant notes and ERISA-required supplemental schedules, if applicable. See SEC FRM 15120.1-2.

To the extent required by ERISA, the plan financial statements are required to be audited by an independent accountant, except that the "limited scope exemption" contained in Section 103(a)(3)(C) of ERISA is not available. The auditor must be registered with the PCAOB, and the audit must be performed in accordance with PCAOB standards. See SEC FRM 4110.5 #9.

.22 What are the Form 11-K financial statements and related audit requirements for a non-ERISA plan?

The plan financial statements should be prepared in accordance with the applicable provisions of Regulation S-X. S-X Article 6A prescribes the form and content of financial statements to be filed for employee stock purchase, savings and similar plans. S-X Article 6A states that, in addition to the special requirements set forth therein, such financial statements must be prepared in accordance with the requirements of the general rules in S-X Articles 1, 2, 3, 3A and 4. In the event of any conflict between the general rules and the special rules of S-X Article 6A, the requirements of the special rule will prevail.

The following plan financial statements should be filed:

1. An audited statement of financial condition as of the end of the plan's latest two fiscal years.
2. An audited statement of comprehensive income (either in a single continuous financial statement or in two separate but consecutive financial statements; or a statement of net income if there was no other comprehensive income) and changes in plan equity for each of the plan's latest three fiscal years.

S-X 6A-05 also specifies certain schedules which must be filed in support of the plan's basic financial statements (see SEC FRM 15120.2). The schedules must be audited if the related plan financial statements are audited.

The auditor must be registered with the PCAOB, and the audit must be performed in accordance with PCAOB standards. See SEC FRM 4110.5 #9.

.9 FREQUENTLY ASKED QUESTIONS

.901 Is a Form 11-K required to include Sarbanes-Oxley Act section 302 or 906 certifications?

No. See Exchange Act Forms CDI 106.03 and SEC 3126.

.902 Are the disclosures of certain tax penalties required by American Jobs Creation Act of 2004 applicable to a Form 11-K?

Yes. See SEC 3130.32 for disclosure requirements of certain tax penalties required by the American Jobs Creation Act of 2004 applicable to Form 11-K.

.903 Is an accountant's consent required to be filed as an exhibit to a Form 11-K?

Under most circumstances, the Form 11-K will be automatically incorporated by reference into an already effective registration statement on Form S-8 (see SEC 2125). In this instance the plan would need to file an accountant's consent as an exhibit to the Form 11-K. See the note to Required Information of Form 11-K. See also SEC 2400 for a discussion of accountants' consents.

.904 Are the communication requirements of S-X 2-07 applicable to a Form 11-K?

Yes. S-X 2-07 does not explicitly state to whom the auditor should address the required communications with respect to Form 11-K filings. Unless there is an existing designated committee of the plan sponsor's board of directors that is responsible for oversight of the plan, the required communications should be made to the plan administrator, chairperson of the employee benefit plan committee, or other party responsible for oversight of the plan. If the changes in critical accounting policies and practices or the alternative accounting treatments relate to material or highly judgmental matters, the auditor should also consider discussing these matters directly with the plan sponsor's audit committee. On an ongoing basis, auditors should agree with the plan sponsor's audit committee and the client who should receive required communications related to the plan.

.905 Is management's report on internal control over financial reporting and the related auditor attestation report required in a Form 11-K?

No. The disclosures required by S-K 308 are not required by Form 11-K. See Exchange Act Forms CDI 106.02 and Note to SEC FRM 4310.1.

.906 Would a late Form 11-K filing by an employee benefit plan impact the sponsor's eligibility to use Form S-3?

Generally, no. An employee benefit plan is considered to be a separate issuer for purposes of the Securities Act and filings under the Exchange Act. Late or incomplete filings on Form 11-K by the employee benefit plan do not adversely affect the plan sponsor's ability to use Form S-3 (or to rely on Securities Act Rule 144) because the employee benefit plan is a separate issuer. See SEC FRM 15110.

.907 Are employee benefit plans with a reporting obligation under Exchange Act Section 15(d) and that file their annual report on Form 11-K required to file other current or periodic reports under the Exchange Act (e.g., Form 8-K or Form 10-Q)?

Generally, no. See Exchange Act Rules CDI 183.01.

.908 Do the financial statements and schedules included in Form 11-K need to be presented using Inline XBRL?

Yes, after July 11, 2025. In SEC Release No. 33-11070, *Updating EDGAR Filing Requirements and Form 144 Filings* (SEC Release 33-11070), the Commission adopted a requirement that the financial statements and schedules included in Form 11-K be presented using Inline XBRL, subject to a three-year transition period. See General Instruction F of Form 11-K and Section II.F of Release 33-11070.

- .1 General
- .2 Disclosure requirements for municipal issuers
- .3 References to the auditor
- .4 Where to find relevant guidance for municipal bond issuers

.1 GENERAL

Many state and local governments finance their capital needs through the issuance of long-term debt, primarily tax-exempt municipal bonds. In addition, government entities sometimes issue conduit debt securities, the proceeds of which are used by third parties. See the FASB definition of the term "conduit debt securities" in the Master Glossary of the FASB Accounting Standards Codification.

[Editor's note: Although the third party in a conduit financing is a "borrower" and not an "issuer," the term "issuer" is used throughout this section for ease of reference.]

.2 DISCLOSURE REQUIREMENTS FOR MUNICIPAL ISSUERS

.21 What is Exchange Act Rule 15c2-12 and where can I find it?

Exchange Act Rule 15c2-12 sets forth requirements relating to municipal securities that are within the scope of that rule. The text of Exchange Act Rule 15c2-12 is available on Viewpoint under SEC Reporting / SEC Rules and Regulations / Selected Exchange Act Rules.

The SEC published its views with respect to the disclosure obligations of participants in the municipal securities markets in an Interpretive SEC Release, *Statement of the Commission Regarding Disclosure Obligations of Municipal Securities Issuers and Others* (SEC Release 34-33741) in March 1994. The Interpretive Release complements Exchange Act Rule 15c2-12 by providing the SEC's views pertaining to disclosure, both at the time of the initial offering and on an ongoing basis.

.22 What is an official statement prepared for municipal securities offerings and where can I find them?

An official statement is a document prepared in connection with a new issue of municipal securities which describes important terms of the bonds. Exchange Act Rule 15c2-12(f)(3) sets forth the information to be included in a final official statement.

For municipal securities offerings within the scope of Exchange Act Rule 15c2-12, that rule requires brokers, dealers or municipal securities dealers acting as an underwriter to receive and review an official statement that meets the requirements of Exchange Act Rule 15c2-12(b)(1).

Copies of official statements for most bond offerings since 1990 are available on the Electronic Municipal Market Access ("EMMA") system. See SEC 3180.25.

.23 What are the disclosure requirements subsequent to the initial issuance of municipal securities?

Exchange Act Rule 15c2-12 imposes certain requirements on brokers, dealers or municipal securities dealers acting as an underwriter in a primary offering of municipal securities that come within the scope of the rule to ensure that the issuer has entered into an agreement whereby it will implement a system of continuing disclosure that remains in effect as long as the bonds are outstanding.

See Exchange Act Rule 15c2-12(b)(5) for details surrounding the continuing disclosure.

.24 What are the annual financial and operating information reporting requirements?

The items to be included in the annual financial information as well as the associated due date will be agreed upon by the parties to the financing transaction and enumerated in the continuing disclosure agreement. There is no prescribed reporting format for submission of the annual financial and operating information, and there is no statutory due date (although the SEC recommends that the information be made available within six months after the close of the issuer's fiscal year).

[Editor's note: If an issuer fails to file information by the agreed-upon deadline and subsequently issues an official statement for new bonds within the next 5 years, it must disclose its failure to file in the new bond official statement. See Exchange Act Rule 15c2-12(f)(3).]

.25 What is the Electronic Municipal Market Access System (EMMA)?

The Municipal Securities Rulemaking Board (MSRB) operates a website known as EMMA (www.emma.msrb.org) that provides free public access to disclosure and transaction information about municipal bond issues. Users are able to access an original offering document, continuing disclosure information, advance refunding documents, real-time trade and historical trade information, daily market information, and other educational materials about municipal bonds. Essentially, EMMA makes municipal disclosure information available to the market in a manner similar to the SEC's EDGAR system for corporate disclosures.

The registration and continuing disclosure submission process is described in the *EMMA Dataport Manual for Continuing Disclosure Submissions* which is available at <https://www.msrb.org/Market-Transparency/Manuals.aspx>.

Copies of official statements for most bond offerings since 1990 are available on the EMMA system.

.3 REFERENCES TO THE AUDITOR

Municipal securities offerings are not considered to be Securities Act offerings. Therefore, the "Experts" caption or "experts" language are not used to refer to the auditor in connection with a municipal bond offering (see AICPA AU-C 925.A14, par. 16). An example of an alternative form of disclosure that may be used in a municipal bond offering to describe the auditor's role can be found in AICPA AU-C 945.A29. SEC 2300 contains additional guidance on "experts" language.

As discussed in AICPA AU-C 945.A18, although the auditor is generally not required to provide the client with a letter indicating the auditor's agreement to the inclusion of its audit report in the official statement, the auditor may be requested to do so. In a municipal securities offering, this type of letter is typically referred to as an "inclusion letter." As discussed in SEC 2400.49, if an inclusion letter is provided by the auditor, it is generally in the form of a separate letter, addressed only to the auditor's client. A copy of the inclusion letter is not included in the offering document. See AICPA AU-C 945.A21. The inclusion letter is typically dated as of or within a few days prior to issuance of the securities offering document. The date of the inclusion letter usually coincides with the completion of an auditor's "keeping current" procedures and is not dated earlier than the date through which subsequent events have been evaluated.

.4 WHERE TO FIND RELEVANT GUIDANCE FOR MUNICIPAL BOND ISSUERS

- SEC's Municipal Securities Disclosure webpage at <https://www.sec.gov/municipal/municipal-securities-disclosure>.
- "Municipal Bonds—An Overview" at <https://www.investor.gov/additional-resources/news-alerts/alerts-bulletins/investor-bulletin-municipal-bonds-overview>

- “Investor Bulletin: The Municipal Securities Market” at https://www.sec.gov/oiea/investor-alerts-and-bulletins/ib_munibondsmarket

- .1 General
- .2 Transition periods of six months or more
- .3 Transition periods of less than six months but more than one month
- .4 Transition periods of one month or less
- .5 Comparative period information
- .6 Quarterly reporting subsequent to a change in fiscal year-end
- .7 Reports following a change in fiscal year
- .8 Foreign private issuers
- .9 Frequently asked questions

[Editor's note: SEC 3185 is principally focused on Exchange Act reporting guidance for a US domestic SEC registrant that changes its fiscal year-end. The guidance in this section does not address Securities Act filings. Those documents may need more current audited financial statements to comply with the relevant form's instructions and age of financial statement requirements (e.g., S-X 3-12). See SEC 4600.4 and SEC FRM 1365.4. See SEC 3185.8 for information relating to foreign private issuers.]

.1 GENERAL

.11 What are the Exchange Act reporting requirements associated with an SEC registrant's change in fiscal year-end?

The Exchange Act reporting requirements associated with an SEC registrant's change in its fiscal year-end are principally focused on two areas:

- (i) Form 8-K reporting of a registrant's decision to change its fiscal year-end (see SEC 3185.12) and
- (ii) Form 10-K/10-Q reporting for the transition period (see SEC 3185.13).

[Editor's note: The principal rules governing changes in fiscal year-end are set forth in Exchange Act Rules 13a-10 and 15d-10. These rules are substantially the same. Throughout SEC 3185 we reference Rule 13a-10. Registrants subject to Rule 15d-10 should refer to that rule for the corresponding guidance.]

.111 What do the terms "transition period" and "transition report" mean?

The "transition period" is the period of time between the last day of the most recent fiscal year and the first day of the new fiscal year. For example, if an SEC registrant with a March 31 fiscal year-end decides on June 30, 2023 to change its fiscal year-end to December 31, 2023, the transition period is the nine-month period from April 1, 2023 through December 31, 2023 (i.e., the period of time between the last day of the most recent fiscal year (March 31, 2023) and the first day of the new fiscal year (January 1, 2024)). As described more fully below, a US domestic SEC registrant generally reports the transition period on a Form 10-K or Form 10-Q. A Form 10-K or Form 10-Q used to report a transition period is commonly referred to as a "transition report."

.12 What are the Form 8-K reporting requirements associated with an SEC registrant's decision to change its fiscal year-end?

Note 1 to Exchange Act Rule 13a-10 requires specified issuers to file a Form 8-K to report a decision to change their fiscal year-end. Item 5.03(b) of Form 8-K sets forth the associated disclosure requirements. An Item 5.03(b) Form 8-K must be filed within four business days after the registrant determines to change its fiscal year-end. See also SEC 3185.901.

[Editor's note: Item 5.03(b) of Form 8-K also sets forth limited circumstances under which a Form 8-K would not need to be filed.]

.13 How does an SEC registrant report the transition period under the Exchange Act?

Separate and apart from the Form 8-K disclosure of the registrant's decision to change its fiscal year-end, Exchange Act Rule 13a-10 sets forth the SEC's transition period reporting requirements. As more fully discussed below, the transition period reporting requirements are largely driven by the length of the transition period:

- (i) six months or more (see SEC 3185.2);
- (ii) less than six months but more than one month (see SEC 3185.3); or
- (iii) one month or less (see SEC 3185.4)

See SEC FRM 1360.2.

.2 TRANSITION PERIODS OF SIX MONTHS OR MORE

.21 How does an SEC registrant report a transition period of six months or more

A transition period of six months or more must be reported on Form 10-K, including all textual disclosures (e.g., management's discussion and analysis pursuant to S-K 303) and audited transition period financial statements. See Exchange Act Rule 13a-10(b) and SEC FRM 1365.1.

[Editor's note: In no event may a transition report for a US domestic registrant cover 12 or more months. See SEC FRM 1365.3.]

.22 What is the due date of a transition report on Form 10-K?

The due date of a transition report on Form 10-K is set forth in Exchange Act Rule 13a-10(b) and depends on the registrant's accelerated filer status:

- Large accelerated filers: the transition report must be filed within 60 days after the later of (i) the election to change the fiscal year or (ii) the close of the transition period.
- Accelerated filers: the transition report must be filed within 75 days after the later of (i) the election to change the fiscal year or (ii) the close of the transition period.
- Non-accelerated filers: the transition report must be filed within 90 days after the later of (i) the election to change the fiscal year or (ii) the close of the transition period.

[Editor's note: See SEC 3125.803 and SEC FRM 1340.8 for guidance on the impact of a change in fiscal year-end on a registrant's accelerated filer status.]

Consider the following example:

Facts: Company X is a large accelerated filer with a June 30 fiscal year-end. On July 28, 2023, Company X determined to change its fiscal year-end from June 30 to December 31.

Analysis: Company X will file an Item 5.03(b) Form 8-K reporting its decision to change its fiscal year-end no later than August 3, 2023 (i.e., the fourth business day after the decision to change). The transition period for Company X is six months (July 1, 2023 through December 31, 2023). Accordingly, Company X is required to report its transition period on Form 10-K, including all textual

disclosures and audited transition period financial statements. Since Company X is a large accelerated filer, its transition report on Form 10-K is due February 29, 2024 (60 days after the later of (i) the election to change the fiscal year (July 28, 2023) or (ii) the close of the transition period (December 31, 2023)).

[Editor's note: A registrant must file its annual report for any fiscal year that ended before the date it elected to change its fiscal year-end. Accordingly, in the above example, Company X would be required to file its Form 10-K for the year ended June 30, 2023 no later than August 29, 2023.]

.23 What financial statements are required in a transition report on Form 10-K?

Similar to a Form 10-K used as an annual report, a transition report on Form 10-K is required to contain the financial statements required by Regulation S-X as specified by Item 8 of Form 10-K. In addition, a transition report on Form 10-K is required to include audited financial statements for the transition period. A transition report on Form 10-K is also required to include financial statements (or summarized footnote disclosure) for the comparative transition period. The comparative transition period financial statements/note disclosures may be unaudited. See Exchange Act Rule 13a-10(b).

Given the fact pattern shown in the example in SEC 3185.22, Company X would provide the following audited financial statements in its December 31, 2023 transition report on Form 10-K (in accordance with S-X 3-01, S-X 3-02, and S-X 3-04):

<u>Balance Sheets</u>	<u>Statements of Comprehensive Income, Cash Flows, and Equity(a)</u>	<u>Financial Statement Schedules</u>
As of 12/31/23 and the end of each of the two latest fiscal years (fiscal years ended 06/30/23 and 06/30/22).	For the six-month transition period ended 12/31/23 and for each of the three latest fiscal years (fiscal years ended 06/30/23, 06/30/22 and 06/30/21).	Required as applicable in support of and for the same periods required for the primary financial statements.

(a) See SEC 3185.5 regarding requirements for providing unaudited transition period comparative information (i.e., for the six months ended December 31, 2022 in the above example).

Company X must also include management's report on internal control over financial reporting (and the associated auditor attestation report) as of December 31, 2023. This is true even though the transition period does not constitute a fiscal year. See SEC 3185.24.

[Editor's note: Except with respect to registered investment companies, the SEC will accept the filing of audited financial statements covering a period of nine to twelve months as satisfying a requirement for filing financial statements for a period of one year where the registrant has changed its fiscal year. See S-X 3-06(a)(1). Accordingly, in the above example, if Company X had changed its fiscal year-end to March 31 (rather than December 31), then the transition period would have been nine months and the transition report would not have needed to include the June 30, 2022 audited balance sheet nor the audited statements of comprehensive income, cash flows and equity for the year ended June 30, 2021. This is because the transition period financial statements as of and for the nine-month period ended March 31, 2024 would satisfy a requirement for filing audited financial statements for a fiscal year.]

.24 How are the SEC's reporting requirements relating to internal control over financial reporting impacted by a change in fiscal year-end?

If a registrant prepares its transition report on Form 10-K (whether voluntarily or by rule), it must also comply with the applicable SEC reporting requirements relating to internal control over financial reporting,

including any applicable auditor attestation requirements, as of the end of the transition period. See Question 6 of *Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports--Frequently Asked Questions* (revised September 24, 2007).

For example, if a US domestic registrant changed its year-end from June 30 to December 31, then the transition report (i.e., on Form 10-K) would be required to include management's report on internal control over financial reporting as of December 31 and the associated auditor attestation (in each case, subject to the SEC's transition provisions relating to newly public companies and the auditor attestation exemption provided to non-accelerated filers and emerging growth companies, each as described in SEC 3125.11).

However, if the registrant is eligible to and does report the transition period on Form 10-Q, then the registrant would not be required to provide a management report on internal control over financial reporting or any related auditor attestation report as of the close of the transition period (either in the transition report or in the Form 10-K that includes the audited transition period financial statements). Consider the following example:

Facts: On March 25, 2023, Company Z, a calendar year-end accelerated filer, decided to change its fiscal year from December 31 to March 31. Company Z elected to file its transition report on Form 10-Q covering the transition period from January 1, 2023 to March 31, 2023.

Analysis: Company Z would be required to include audited financial statements for the transition period in its Form 10-K for the year ending March 31, 2024. Company Z would only be required to include a management report on internal control over financial reporting and related auditor attestation report as of March 31, 2024 in its Form 10-K for the year ending March 31, 2024. This is true even though Company Z never provided a management report on internal control over financial reporting (or associated auditor attestation) as of March 31, 2023.

.3 TRANSITION PERIODS OF LESS THAN SIX MONTHS BUT MORE THAN ONE MONTH

.31 How does an SEC registrant report a transition period of less than six months but more than one month?

A transition period of less than six months but more than one month may be reported either on Form 10-Q (with unaudited transition period financial statements) or on Form 10-K (with audited transition period financial statements). If the transition report is filed on Form 10-Q (with unaudited financial statements), then separate audited statements of comprehensive income, cash flows and equity for the transition period must be included in the annual report which covers the first 12 months of the new fiscal year. A separate audited balance sheet as of the end of the transition period would need to be filed in the annual report only if the audited balance sheet as of the end of the fiscal year prior to the transition period is not filed. The notes to the financial statements for the transition period may be integrated with the notes for the full fiscal period(s). See Exchange Act Rule 13a-10(c).

.32 What is the due date of a transition report on Form 10-Q?

The due date for a transition report on Form 10-Q is set forth in Exchange Act Rule 13a-10(c) and depends on the registrant's accelerated filer status:

- Large accelerated filers and accelerated filers: the transition report must be filed within 40 days after the later of (i) the election to change the fiscal year or (ii) the close of the transition period.
- Non-accelerated filers: the transition report must be filed within 45 days after the later of (i) the election to change the fiscal year or (ii) the close of the transition period.

[Editor's note: See SEC 3125.803 and SEC FRM 1340.8 for guidance on the impact of a change in year-end on the registrant's accelerated filer status.]

[Editor's note: If the registrant elects to report a transition period of less than six months on Form 10-K, the filing timetable described in SEC 3185.22 would apply.]

Consider the following example:

Facts: Company Y is a large accelerated filer with a fiscal year-end of August 31. On January 3, 2023, Company Y decided to change its fiscal year end to December 31 (beginning with December 31, 2022).

Analysis: Company Y will file an Item 5.03(b) Form 8-K reporting its decision to change its fiscal year-end no later than January 9, 2023 (i.e., the fourth business day after the decision to change). The transition period for Company X is four months (September 1, 2022 through December 31, 2022). Accordingly, Company Y has the option to file its transition report either on Form 10-K (with audited transition period financial statements and management's assessment of internal control over financial reporting and the associated auditor attestation) or on Form 10-Q (with unaudited transition period financial statements).

If Company Y elects to report its transition period on Form 10-Q, then the transition report would be due February 13, 2023 (i.e., because the 40th day after the later of (i) the election to change the fiscal year-end (January 3, 2023) or (ii) the close of the transition period (December 31, 2022) is February 12, 2023, which is a Sunday).

[Editor's note: Company Y would be required to file its Form 10-Q for the old fiscal year quarter ended November 30, 2022 in the normal course (i.e., by January 9, 2023). See Exchange Act Rule 13a-10(e)(1).]

.33 What financial statements are required in a transition report on Form 10-Q?

Exchange Act Rule 13a-10(c) specifies that the financial statements included in a transition report on Form 10-Q are required to cover the transition period. Additionally, in SEC Release 33-6823, *Amendments to Reporting Requirements for Issuer's Change of Fiscal Year; Financial Reporting Changes; Period to be Covered by First Quarterly Report After Effective Date of Initial Registration Statement* (SEC Release 33-6823), the Commission stated that "[c]onsistent with existing requirements for Form 10-Q, a transition report on Form 10-Q also is required to include financial information about the comparable period of the prior year." (footnote omitted). Financial statement schedules are not required to be included in a transition report on Form 10-Q. See Exchange Act Rule 13a-10(c).

Using the fact pattern described in SEC 3185.32, Company Y's transition report on Form 10-Q would include a balance sheet as of December 31, 2022 and statements of comprehensive income, cash flows and equity for the period from September 1, 2022 through December 31, 2022 as well as for the period from September 1, 2021 through December 31, 2021. Company Y would also present a balance sheet as of August 31, 2022.

.34 If a registrant reports its transition period on Form 10-Q (with unaudited transition period financial statements), will the transition period financial statements ever need to be audited?

Yes. Exchange Act Rule 13a-10(c) specifies that if the financial statements included in a transition report on Form 10-Q were unaudited, then the company must file separate audited transition period statements of income and cash flows with the first annual report for the newly adopted fiscal year. However, a separate audited balance sheet as of the end of the transition period is only required if the audited balance sheet as of the end of the fiscal year prior to the transition period is not filed. See SEC 3185.24 regarding internal control over financial reporting requirements.

Given the fact pattern described in SEC 3185.32 and .33, Company Y would be required to include audited statements of comprehensive income, cash flows and equity for the transition period (i.e., September 1, 2022 through December 31, 2022) in its Form 10-K for the year ended December 31, 2023. Company Y has the option of providing its audited balance sheet as of December 31, 2022 or August 31, 2022 in that Form 10-K. However, in most cases the transition period balance sheet will be audited (due to the requirement to provide audited statements of comprehensive income, cash flows and equity) and thus could be provided. See the Editor's note at the beginning of SEC 3185 regarding the possibility that a registrant would have to provide audited transition period financial statements in connection with a Securities Act registration statement earlier than the due date of the next Form 10-K.

See SEC 3185.5 regarding requirements for disclosures relating to the comparative transition period of the prior year.

[Editor's note: If Company Y had elected to file its transition report on Form 10-K, the guidance in SEC 3185.2 should be considered.]

.4 TRANSITION PERIODS OF ONE MONTH OR LESS

.41 How does an SEC registrant report a transition period of one month or less?

Information for a transition period of one month or less does not need to be filed in a separate transition report if either:

- The issuer's first periodic report required for the newly adopted fiscal year is an annual report and separate audited financial statements for the transition period are presented; or

The issuer files with the first annual report required for the newly adopted fiscal year separate audited statements of comprehensive income and cash flows covering the transition period; and the first periodic report required to be filed for the newly adopted fiscal year is a Form 10-Q and the information for the transition period is included in such quarterly report (i.e., the financial statements for the transition period are separately presented in the first Form 10-Q). The information covering the transition period required by Form 10-Q, Part II and Form 10-Q, Part I, Item 2, "Management's Discussion and Analysis of Financial Condition and Results of Operations," may be combined with the information regarding the quarter. However, the financial statements required by Form 10-Q, Part I, which may be unaudited, must be separately presented. See Exchange Act Rule 13a-10(d).

[Editor's note: The financial statements covering the transition period should consider the requirements of S-X 3-04 and include a statement of changes in stockholder's equity covering the transition period.]

A change from a fiscal year ending as of the last day of the month to a 52-53 week fiscal year commencing within seven days of the month-end (or vice-versa) is not deemed a change in fiscal year-end for purposes of reporting subject to Exchange Act Rule 13a-10 if the new fiscal year commences with the end of the old fiscal year. See SEC FRM 1365.7. See SEC 3185.901, regarding the requirement to report a decision to change fiscal year-end under Item 5.03(b) of Form 8-K.

See SEC 3185.5 regarding requirements for disclosures relating to the comparative transition period of the prior year.

.5 COMPARATIVE PERIOD INFORMATION

.51 How is the comparative transition period financial information presented in a transition report on Form 10-K?

Exchange Act Rule 13a-10(b) requires that the report covering the transition period include statements of comprehensive income, cash flows, and equity, which may be unaudited, for the comparative transition period of the prior year. In lieu of presenting full comparative transition period financial statements, the registrant has the option of presenting specified line items from the statement of comprehensive income in a footnote, which may be unaudited. The following is an example footnote described by Exchange Act Rule 13a-10(b) in the case of a 6-month transition period:

Note 18. Transition Period Comparative Data:

The following table presents certain financial information for the six months ended December 31, 2023 and 2022 respectively (amounts in thousands, except per share amounts):

	Six Months Ended December 31,	
	<u>2023</u>	<u>2022</u> (unaudited)
Revenues	\$XXX	\$XXX
Gross profits	XXX	XXX
Income taxes	XXX	XXX
Income from continuing operations	XXX	XXX
Net income	\$XXX	\$XXX
Earnings per common share (basic and diluted)	\$XXX	\$XXX
Weighted average common shares outstanding (basic and diluted)	XXX	XXX

If applicable, the effects of discontinued operations are also required to be disclosed.

.6 QUARTERLY REPORTING SUBSEQUENT TO A CHANGE IN FISCAL YEAR

.61 What are the quarterly reporting requirements subsequent to a change in fiscal year?

The requirement to file quarterly reports on the basis of the new fiscal year begins with the first quarter in the new fiscal year (not the transition period) that ends after the issuer determined to change its fiscal year-end. See Exchange Act Rule 13a-10(e)(3).

Issuers have the option of filing Form 10-Qs for quarters that end in the transition period on the basis of either the old or new fiscal year. See Exchange Act Rule 13a-10(e)(2).

Issuers are required to file a quarterly report for any quarter of the old fiscal year that ended before the date of the issuer's determination to change its year-end on the basis of the old fiscal year, except where the last day of the quarter also is the last day of the transition period. See Exchange Act Rule 13a-10(e)(1).

The change in quarterly reporting from the old to the new fiscal year may result in a period of less than three months that is not covered by a separate report on Form 10-Q. Exchange Act Rule 13a-10(e)(4) specifies that unless such a period of less than three months is or will be covered in the issuer's transition report or in the first annual report for the newly adopted fiscal year, separate financial statements covering such period need to be included in the issuer's initial report on Form 10-Q for the newly adopted fiscal year. Consider the following example:

Facts: Company A is an accelerated filer with a fiscal year-end of December 31. On June 1, 2023, Company A decided to change its fiscal year end to October 31. Accordingly, the transition period will be from January 1, 2023 through October 31, 2023. Company A has the option of filing its Form 10-Qs during the remainder of the transition period based on either (i) the quarters of its old fiscal year (i.e., quarters ended June 30, 2023 and September 30, 2023) or (ii) the quarters of its new fiscal year (i.e., quarter ended July 31, 2023). Assume Company A decided to file during the remainder of the transition period based on the quarters of its new fiscal year. Accordingly, Company A will file its next Form 10-Q for the quarter ended July 31, 2023.

Analysis: As a result of Company A's decision to use the quarters of its new fiscal year during the remainder of the transition period, the period from April 1, 2023 through April 30, 2023 would not be covered by a separate report on Form 10-Q. The statement of comprehensive income for the one-month period ended April 30, 2023 would be required to be included in Company A's Form 10-Q for the quarter ended July 31, 2023 in addition to the statements of comprehensive income for the three and the seven-month periods ended July 31, 2023 and 2022, the statement of cash flows for the seven-month periods ended July 31, 2023 and 2022 and the balance sheets as of July 31, 2023 and December 31, 2022. See footnote 53 of SEC Release No. 33-6823.

[Editor's note: The SEC's guidance is not clear as to whether a statement of cash flows for the one-month period ended April 30, 2023 or comparative financial statements for the one-month period ended April 30, 2022 would be required.]

The note to paragraphs (c) and (e) of Exchange Act Rule 13a-10 indicates that when it is not practicable or cost-justifiable to include financial statements for comparative periods of the prior year in a transition report on Form 10-Q or in a quarterly report for the new fiscal year, financial statements may be included for the most nearly comparative quarters of the earlier year. In such cases the issuer is required to disclose:

- A discussion of seasonal and other factors that could affect the comparability of information or trends reflected.
- An assessment of the comparability of the data.
- A representation as to the reason recasting has not been undertaken.

.7 REPORTS FOLLOWING A CHANGE IN FISCAL YEAR-END

.71 Has the SEC provided any examples of how periodic reporting works following a change in fiscal year-end?

Yes. Questions frequently arise about the appropriate manner of reporting following a change in fiscal year-end. Many of these include questions relating to reporting alternatives based on the date management determined it would make a change in year-end, or on the quarterly Form 10-Q reporting obligations and alternatives resulting from a change.

SEC FRP 102.05 includes several examples of typical reporting situations for an issuer that changes its fiscal year end. In all of these examples, it is assumed that the registrant is a domestic issuer and non-accelerated filer with a December 31 year-end date that files periodic reports pursuant to Section 13(a) or 15(d) of the Exchange Act.

[Editor's note: For accelerated or large accelerated filers, the due dates would be adjusted to those applicable to their filing status. See SEC 3125. The due dates would also be adjusted for foreign private issuers.]

Although not addressed in these examples, the requirements regarding unaudited comparative financial information also need to be considered in each of the respective filings (i.e., unaudited statements of comprehensive income, cash flows, and equity for the comparative transition period of the prior year, or

presentation of the specified statement of comprehensive income line items in an unaudited footnote). See SEC 3185.5.

.8 FOREIGN PRIVATE ISSUERS

.81 How does a foreign private issuer report a transition period under the Exchange Act?

The Exchange Act reporting requirements relating to a foreign private issuer's change in fiscal year-end are discussed in Exchange Act Rule 13a-10(g). A foreign private issuer (see SEC FRM 6250) that elects to change its fiscal year-end date would fulfill its Exchange Act transition reporting requirements through filings on Form 20-F.

For transition periods exceeding six months, foreign private issuers are required to file a complete Form 20-F and include therein audited financial statements covering the transition period. This Form 20-F is due within four months after the later of (i) the close of the transition period or (ii) the date the determination to change the fiscal year is made. See Exchange Act Rule 13a-10(g)(3). The SEC staff will consider requests for a transition period of more than twelve months if a longer period is acceptable in the issuer's home country. Issuers which receive this accommodation are required to provide complete unaudited financial statements with all of the applicable disclosures for both the twelve-month period and the remaining portion of the transition period. Further, it will be necessary to provide audited financial statements for the entire period of more than twelve months. See SEC FRM 6250.2.

For transition periods of six months or less, but more than one month, the financial statements included in transition reports on Form 20-F need not be audited, and much of the textual information required by Form 20-F can be omitted. The transition report is due within three months after the later of (i) end of the transition period or (ii) the date on which the election to change the fiscal year is made. In these situations, the statements of comprehensive income and cash flows covering the transition period would need to be included on an audited basis in the first Form 20-F for the newly adopted fiscal year. See Exchange Act Rule 13a-10(g)(4).

When the transition period is one month or less, a separate transition report is not required if the first Form 20-F for the newly adopted fiscal year covers the transition period as well as the new fiscal year. The one-month transition period must be audited. See Exchange Act Rule 13a-10(g)(5).

See also SEC FRM 6250.1.

Foreign private issuers filing a registration statement after electing to change their fiscal year may need to provide more current audited financial statements than are required under the Exchange Act transition reporting rules. A foreign private issuer's most recent audited financial statements cannot exceed the age specified by Item 8 of Form 20-F (generally 15 months) at the registration statement's effective date. See SEC FRM 6250.3.

.9 FREQUENTLY ASKED QUESTIONS

.901 Does an SEC registrant's decision to change its fiscal year end from the last day of the month to a 52-53 week fiscal year (or visa versa) trigger an Item 5.03(b) Form 8-K reporting requirement?

Yes. An Item 5.03(b) Form 8-K is required to be filed in connection with a change from a fiscal year ending as of the last day of the month to a 52-53 week fiscal year or vice versa. This is true even though separate transition period reporting may not be required pursuant to Exchange Act Rule 13a-10. See Form 8-K CDI 218.01 and SEC 3185.4.

.902 How are pro forma financial statements prepared after a change in fiscal year-end?

See SEC 4560.909 for guidance relating to the preparation of pro forma financial statements following a change in fiscal year-end.

.903 How is significance (e.g., of an acquired business) evaluated after a change in fiscal year-end?

See SEC FRM 2025.6 for interpretive guidance relating to significance evaluations following a change in fiscal year-end.

.904 How do the change in fiscal year-end reporting requirements apply to a successor issuer?

A successor issuer that has a different fiscal year-end from that of its predecessor is required to file a transition report covering the predecessor for any transition period between the close of the fiscal year covered by its last annual report and the date of succession. The reporting requirements are the same as those for changes in fiscal year-end of registrants, except that the due dates of the required reports are determined based on the date of succession. See Exchange Act Rule 13a-10(f).

.905 Has the SEC staff provided any guidance for presenting executive compensation disclosure following a change in fiscal year-end?

Yes. See Regulation S-K CDIs 217.05 (relating to the summary compensation table) and 228D.01 (relating to pay vs. performance disclosure).

.1 How to access Selected Exchange Act Rules

.1 HOW TO ACCESS SELECTED EXCHANGE ACT RULES

The reprint of Selected Exchange Act rules is available on Viewpoint under SEC Reporting / SEC Rules and Regulations / Selected Exchange Act Rules.

- .1 General
- .2 Investment test
- .3 Asset test
- .4 Income test
- .5 Aggregate significance tests
- .6 Financial information used to determine significance
- .9 Frequently asked questions

[Editor's note: In May 2020, the SEC adopted amendments to the significant subsidiary tests in S-X 1-02(w). See SEC Release No. 33-10786, *Amendments to Financial Disclosures about Acquired and Disposed Businesses* (SEC Release 33-10786). The amendments became effective January 1, 2021 subject to the transition provisions (including voluntary early compliance) described in Section II. F. of SEC Release 33-10786.

SEC 4400 contains guidance regarding the application of the significance tests contained in amended S-X 1-02(w)(1) by companies other than business development companies and registered investment companies. Business development companies and registered investment companies should refer to S-X 1-02(w)(2), S-X 6-11 and section II.E of SEC Release 33-10786.

The SEC staff has published extensive interpretive guidance relating to the significance tests and related matters (e.g., in various sections of the SEC Staff's Financial Reporting Manual). Much of the guidance was issued prior to the adoption of SEC Release 33-10786. Care should be exercised when considering guidance that was issued prior to the adoption of SEC Release 33-10786.]

.1 GENERAL

Many SEC reporting requirements are based, at least in part, on the determination of whether a tested entity (e.g., an acquired business) meets the SEC's definition of a significant subsidiary as applied in the context of the specific rule or form requirement that is calling for the assessment (e.g., S-X 3-05). If the tested entity is considered a significant subsidiary in the context under which the test is being performed, the registrant may be required to provide financial and nonfinancial disclosures, such as summarized financial information, audited and unaudited historical financial statements and/or pro forma financial information. The acquisition of a business (e.g., S-X 3-05) and the acquisition of a real estate operation (e.g., S-X 3-14) are two commonly encountered situations in which the definition of a significant subsidiary is used. Other examples can be found in footnote 23 to SEC Release 33-10786.

[Editor's note: References in SEC 4400 to "tested subsidiary" should also be read as "tested business" or "tested entity" where appropriate.]

.11 What is the significance threshold used when performing a significant subsidiary test?

The significance threshold specified in S-X 1-02(w)(1) is 10%. However, it is important to note that the various SEC rules and form requirements that make use of the significant subsidiary tests oftentimes specify different thresholds, calculation methods or limitations. Accordingly, the significance assessment should be made in the context of the specific disclosure requirement being assessed. For example, Instruction 4(ii) to Item 2.01 of Form 8-K indicates that the significance assessment relating to the acquisition or disposition of a business should be based on S-X 11-01(b). S-X 11-01(b) specifies a threshold of 20% and also provides additional requirements to be used for performing the significance assessment.

.12 Basis of accounting used to perform significance tests

.121 What basis of accounting should be used to perform significance tests?

A registrant that files its financial statements in accordance with or provides a reconciliation to US GAAP must determine significance using amounts determined under US GAAP (i.e., both the numerator and the denominator of the significance tests will be calculated under US GAAP). This is true even if the financial statements of the tested entity may be presented in accordance with International Financial Reporting Standards as issued by the International Accounting Standards Board (IFRS-IASB) without reconciliation to US GAAP.

A foreign private issuer that files its financial statements in accordance with IFRS-IASB must determine significance using amounts determined under IFRS-IASB (i.e., both the numerator and the denominator of the significance tests will be calculated under IFRS-IASB).

See S-X 1-02(w)(1) and SEC FRM 2015.3.

[Editor's note: We understand the SEC staff will permit registrants to assess significance for an acquired business based on financial statements of the acquired business that applied the non-public business entity (PBE) guidance in ASC 842-20-30-3 relating to the use of the risk-free discount rate to account for leases if that is the only non-PBE accounting method used in the financial statements. However, if the acquired business is significant, we understand the financial statements presented should follow the requirements applicable to PBEs, as appropriate. See Topic III.E in the highlights of the October 2020 meeting of the CAQ SEC Regulations Committee.]

.122 Can financial statements prepared using Private Company Council alternatives be used for performing significance tests?

Certain private companies may elect to prepare financial statements using US GAAP alternatives as developed by the Private Company Council ("PCC") and endorsed by the FASB. The SEC staff has indicated that if registrants are required to perform significance tests using US GAAP information, then the tests generally may not be performed using information that applies the accounting alternatives developed by the PCC. Therefore, to comply with requirements of S-X 1-02(w), these financial statements must be adjusted to US GAAP without applying PCC alternatives in order to perform the significance tests. See Topic III.B in the highlights of the March 2014 meeting of the CAQ SEC Regulations Committee.

.2 INVESTMENT TEST

The investment test is set forth in S-X 1-02(w)(1)(i). The investment test is applied differently depending on the purpose for which the test is being performed.

.21 How is the investment test performed for acquisitions (other than a combination of entities or businesses under common control) and dispositions?

For acquisitions (other than a combination of entities or businesses under common control) and dispositions, the investment test is performed by comparing the registrant's and its subsidiaries' investments in and advances to the tested subsidiary to the aggregate worldwide market value of the registrant's voting and non-voting common equity (the aggregate worldwide market value).

If the registrant has no aggregate worldwide market value (e.g., in connection with an initial public offering), then the comparison is made to the total assets of the registrant as of the end of the most recently completed fiscal year.

See S-X 1-02(w)(1)(i)(A).

[Editor's note: The above guidance is based solely on the application of S-X 1-02(w)(1)(i)(A). As noted in SEC 4400.11, it is important to perform the significance assessment in light of the specific provisions of the rule being evaluated. For example, S-X 11-01(b)(4) specifies circumstances under which a registrant, including a real estate investment trust, which conducts a continuous offering over an extended period of time and applies the Item 20.D. Undertakings of Industry Guide 5, would perform the investment test and the asset test (if applicable), using the registrant's total assets as of the date of acquisition or disposition (except that for acquisitions, total assets would exclude the acquired business) plus the proceeds (net of commissions) in good faith expected to be raised in the registered offering over the next 12 months.]

[Editor's note: The investment test uses the phrase "investments in and advances to" the tested subsidiary. This means that the numerator of the investment test includes two parts: "investments in" the tested subsidiary and "advances to" the tested subsidiary. The discussion regarding the determination of "investments in" the tested subsidiary is not intended to suggest that the numerator of the investment test excludes "advances to" the tested subsidiary. See footnote 53 to SEC Release 33-10786.]

.211 How is "investments in" the tested subsidiary determined for acquisitions?

For acquisitions, the "investments in" the tested subsidiary is the consideration transferred, adjusted to exclude the registrant's and its other subsidiaries' proportionate interest in the carrying value of assets transferred by the registrant and its subsidiaries consolidated to the tested subsidiary that will remain with the combined entity after the acquisition. It must include the fair value of contingent consideration that is required to be recognized at fair value on the acquisition date by US GAAP or IFRS-IASB, as applicable. If recognition of contingent consideration at fair value is not required, such as in an acquisition of an equity-method investment under ASC 323, then the "investments in" the tested subsidiary should include all contingent consideration except that for which the likelihood of payment is remote. See S-X 1-02(w)(1)(i)(A)(1).

[Editor's note: The above guidance is based solely on the application of S-X 1-02(w)(1)(i)(A)(1). As noted in SEC 4400.11, it is important to perform the significance assessment in light of the specific provisions of the rule being evaluated. For instance, S-X 3-14(b)(2)(ii) requires the "investments in" the tested real estate operation to include any assumed debt secured by the real properties when the investment test is based on the total assets of the registrant and its subsidiaries consolidated.]

[Editor's note: It is not clear whether the SEC staff's pre-existing guidance in the Note to SEC FRM 2015.5 (with respect to the investment test calculation in connection with the acquisition of an equity method investment) is still applicable.]

.212 How is "investments in" the tested subsidiary determined for dispositions?

For dispositions, the "investments in" the tested subsidiary is calculated differently depending on whether the comparison is being made to aggregate worldwide market value or total assets when the registrant has no such aggregate worldwide market value.

- If the comparison is being made to aggregate worldwide market value, then the "investments in" the tested subsidiary is the fair value of the consideration received, including contingent consideration, for the disposed subsidiary.
- If the comparison is being made to total assets, then the "investments in" the tested subsidiary is the carrying value of the disposed subsidiary.

See S-X 1-02(w)(1)(i)(A)(2).

.213 How is the aggregate worldwide market value determined for purposes of the investment test?

When determining the aggregate worldwide market value for purposes of the investment test, the registrant should use the average aggregate worldwide market value calculated daily for the last five trading days of the registrant's most recently completed month ending prior to the earlier of the registrant's announcement date or agreement date of the acquisition or disposition. See S-X 1-02(w)(1)(i)(A)(3).

The SEC staff indicated that the aggregate worldwide market value is determined using the market value from a public market, including a foreign market when the company's common stock is only listed for trading on a non-US exchange. See Topic III.C from the highlights of the June 2023 CAQ SEC Regulations Committee.

[Editor's note: Aggregate worldwide market value differs from the common equity public float amount used by registrants to determine accelerated filer status. For example, common equity public float excludes common equity held by affiliates.]

.22 How is the investment test performed for combinations between entities or businesses under common control?

For a combination between entities or businesses under common control, the investment test is performed by comparing:

- (i) the net book value of the tested subsidiary to the registrant's consolidated total assets, and
- (ii) if applicable, the number of common shares exchanged or to be exchanged to the registrant's total common shares outstanding at the date the exchange is initiated.

If either comparison meets the relevant threshold, then the tested entity is considered significant under the investment test. See S-X 1-02(w)(1)(i)(B).

.23 How is the investment test performed in cases other than those discussed in SEC 4400.21 and .22?

When performing the investment test in cases other than an acquisition or disposition (e.g., when assessing significance in connection with S-X 3-09 or S-X 4-08(g)), the investment test is performed by comparing the registrant's and its other subsidiaries' investments in and advances to the tested subsidiary to the total assets of the registrant and its subsidiaries consolidated as of the end of the most recently completed fiscal year. See S-X 1-02(w)(1)(i)(C).

.3 ASSET TEST

.31 How is the asset test performed?

The asset test is set forth in S-X 1-02(w)(1)(ii). The asset test is performed by comparing the registrant's and its other subsidiaries' proportionate share of the tested subsidiary's consolidated total assets (after intercompany eliminations) to the registrant's total consolidated assets as of the end of the most recently completed fiscal year.

[Editor's note: It is not clear whether the SEC staff's pre-existing guidance in SEC FRM 2015.4 (regarding treatment of ordinary receivables, inventory, and other working capital amounts not acquired) is still applicable.]

.4 INCOME TEST

.41 How is the income test performed?

The income test is set forth in S-X 1-02(w)(1)(iii). The income test has two components: the income component and the revenue component.

- The income component of the income test compares the absolute value of the registrant's and its other subsidiaries' equity in the tested subsidiary's consolidated income or loss from continuing operations before income taxes (after intercompany eliminations) attributable to the controlling interests to the absolute value of such consolidated income or loss of the registrant for the most recently completed fiscal year (see S-X 1-02(w)(1)(iii)(A)(1)). See SEC 4400.42 and .43 for additional computation guidance.
- The revenue component of the income test compares the registrant's and its other subsidiaries' proportionate share of the tested subsidiary's consolidated total revenue from continuing operations (after intercompany eliminations) to such consolidated total revenue of the registrant for the most recently completed fiscal year (see S-X 1-02(w)(1)(iii)(A)(2)).

The revenue component of the income test does not apply if either the registrant and its subsidiaries consolidated or the tested subsidiary did not have material revenue in each of the two most recently completed fiscal years.

- If the revenue component is not applicable, then the income test is evaluated solely based on the results of the income component (although the averaging method described below would be applicable).
- If both components are applicable, **both** components must exceed the relevant significance threshold to conclude that the tested subsidiary is significant based on the income test. For example, assume Company X acquires Business A, and the income component yields a result of 45% while the revenue component yields a result of 15%. In this scenario, because the revenue component is less than the 20% threshold established in S-X 3-05(b)(2)(i), Business A is not considered significant due to the income test.

If the revenue component of the income test is not applicable (i.e., if either the registrant and its subsidiaries consolidated or the tested subsidiary did not have material revenue in each of the two most recently completed fiscal years) then the calculation of the income component of the income test may need to be performed using an averaging method as described in S-X 1-02(w)(1)(iii)(B)(2).

[Editor's note: The use of averaging is only applicable for purposes of determining the denominator of the income component of the income test. It is not applicable to the numerator (i.e., the tested subsidiary's income).]

[Editor's note: It is not clear whether the SEC staff's historical guidance relating to averaging as described in SEC FRM 2410.5 is still applicable.]

.42 Does the denominator of the income test include a disposed entity that is included as a component of discontinued operations?

The definitions outlined in S-X 1-02(w)(1)(iii) specify that the numerator and denominator in both the income and revenue components are determined using results from continuing operations. Therefore, the denominators in the income test will not include the income/loss or revenue of a disposed business that has been previously reported as a discontinued operation in the historical financial statements. See SEC FRM 2130.3.

.43 How is the denominator of the income component of the income test calculated when the registrant has an equity method investee and non-controlling interests?

The calculation of the denominator of the income component of the income test should begin with the registrant's consolidated income or loss from continuing operations before income taxes and other items, (e.g., the line item referred to in S-X 5-03(b)(10)), adjusted to:

- a) include the registrant's equity in the income or loss from continuing operations before income taxes attributable to controlling interests of the equity method investee, and
- b) exclude the portion of the registrant's income or loss from continuing operations before income taxes and other items, attributable to any non-controlling interests in the registrant's consolidated subsidiaries.

As an example, consider the following assumptions for the registrant:

Income before taxes and other items (S-X 5-03(b)(10))	\$ 1,000
Income taxes	(400)
Equity in earnings of investees	<u>300</u>
Net income (amounts applicable to controlling and non-controlling interests)	900
Net income applicable to non-controlling interest	<u>(100)</u>
Net income applicable to controlling interest	<u>\$800</u>

The registrant has two equity-method investees in which it owns 50 percent interests. Investee A has income from continuing operations before income taxes of \$800 and net income of \$500, and Investee B has income from continuing operations before income taxes of \$290 and net income of \$100. Investees A and B own 100 percent of each of their subsidiaries (i.e., there are no noncontrolling interests at the investee level). The registrant has two 80 percent owned consolidated subsidiaries. Subsidiary X has income from continuing operations before income taxes of \$300 and net income of \$200. Subsidiary Y has income from continuing operations before income taxes of \$700 and net income of \$300.

The registrant would calculate the denominator for the income component of the income test as follows:

Income from continuing operations before income taxes and other items (S-X 5-03(b)(10))	\$ 1,000
<u>Plus - registrant's share (50%) of:</u>	
Investee A's income from continuing operations before income taxes	400
Investee B's income from continuing operations before income taxes	145
<u>Less - portion of income before taxes and other items applicable to noncontrolling interest (20%) in registrant's consolidated subsidiaries of:</u>	
Subsidiary X's income from continuing operations before income taxes	(60)
Subsidiary Y's income from continuing operations before income taxes	<u>(140)</u>
	<u>\$ 1,345</u>

See SEC FRM 2410.4.

.44 Income component of the income test for equity method investees

.441 How is the numerator of the income component of the income test determined when testing an equity method investee for significance under S-X 3-09 and S-X 4-08(g)?

The numerator of the income component of the income test is determined from the separate financial statements of the investee determined on a US GAAP basis for a registrant using US GAAP. The starting point is pre-tax income (loss) from continuing operations attributable to controlling interests. The registrant determines its proportionate interest in this pre-tax income from continuing operations and adjusts for basis differences that are considered in preparing the consolidated financial statements. Consideration should

be given to ASC 323-10-35-34 and ASC 323-10-35-32A when evaluating the basis differences. See SEC FRM 2410.3.

The numerator is determined based on the period in which the registrant accounted for the entity under the equity method of accounting taking into consideration differences in fiscal year and recording on a lag period as applicable. See SEC 4400.445.

A registrant that prepares its financial statements using IFRS-IASB would follow a conceptually similar methodology.

The numerator of the income component of the income test for an equity-method investee will usually be different from the amount the registrant reflects in its financial statements which is frequently after income taxes. Additionally, other items relating to the investee that would not be reflected in the investee's financial statements such as impairment charges recorded at the investor level, gains or losses from stock sales by the registrant, dilution gains/losses from stock sales by the investee and preferred dividends paid by the investee are generally not considered in determining the numerator but would remain in the denominator.

Intercompany transactions should not be eliminated when measuring significance of an equity method investee under S-X 3-09 and S-X 4-08(g). See SEC FRM 2410.6.

.442 How are losses that are reported by the registrant or the tested subsidiary considered in the denominator of the income component of the income test under S-X 3-09 or S-X 4-08(g) for an existing equity-method investment?

If a net loss from continuing operations before income taxes (after intercompany eliminations) attributable to the controlling interest has been incurred by either the registrant and its subsidiaries consolidated or the tested subsidiary, but not both, the equity in the income or loss from continuing operations before income taxes (after intercompany eliminations) attributable to controlling interests of the tested subsidiary should be excluded from such income or loss of the registrant and its subsidiaries consolidated for purposes of the computation. The income or loss of the tested subsidiary may only be excluded when measuring significance if the income or loss of the tested subsidiary is included in the registrant's consolidated income or loss from continuing operations before income taxes. See S-X 1-02(w)(1)(iii)(B)(1).

Example computation of the income component assuming the registrant's net income includes its equity in the tested subsidiary's net loss (assume amounts presented represent income and loss attributable to controlling interest):

Registrant's equity in tested subsidiary's pre-tax loss from continuing operations	\$(1,000)
Registrant's consolidated pre-tax income from continuing operations	<u>4,500</u>
Registrant's consolidated pre-tax income from continuing operations excluding equity in loss of tested subsidiary	<u>\$ 5,500</u>
Significance of tested subsidiary [(\$1,000) <u>divided by</u> \$5,500]	18.2%

When the registrant's pre-tax income or loss from continuing operations includes the pre-tax income or loss from continuing operations of multiple subsidiaries which must be tested for significance (e.g., in connection with multiple equity-method investees tested under S-X 3-09), there may be different denominators for purposes of each assessment. For instance, consider an example in which the registrant has pre-tax income from continuing operations, two of the tested subsidiaries have pre-tax losses from continuing operations, and two of the tested subsidiaries have pre-tax income from continuing operations. In this example, there will be three different denominators for the income component of the income test. The denominator for each tested subsidiary with a pre-tax loss from continuing operations will be different and the denominator for the tested subsidiaries with pre-tax income from continuing operations will be the same.

Example calculation of the income component:

Registrant's consolidated pre-tax income from continuing operations	\$ 5,000
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THE SIGNIFICANT SUBSIDIARY TESTS
(Last updated September 2023)

SEC 4400

Registrant's equity in pre-tax loss from continuing operations of Subsidiary A	(\$ 1,000)
Registrant's equity in pre-tax loss from continuing operations of Subsidiary B	(\$ 1,200)
Registrant's equity in pre-tax income from continuing operations of Subsidiary C	\$ 1,200
Registrant's equity in pre-tax income from continuing operations of Subsidiary D	\$ 100

Registrant's equity in pre-tax loss from continuing operations of Subsidiary A	(\$1,000)
Registrant's consolidated pre-tax income from continuing operations	<u>5,000</u>
Registrant's consolidated income from continuing operations before income taxes excluding equity in loss of Subsidiary A	<u>\$6,000</u>

Significance of Subsidiary A $[(\$1,000) \div \$6,000]$ 16.7%

Registrant's equity in pre-tax loss from continuing operations of Subsidiary B	(\$1,200)
Registrant's consolidated pre-tax income from continuing operations	<u>5,000</u>

Registrant's consolidated income from continuing operations before income taxes excluding equity in loss of Subsidiary B	<u>\$6,200</u>
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Significance of Subsidiary B $[(\$1,200) \div \$6,200]$ 19.4%

Registrant's equity in pre-tax income from continuing operations of Subsidiary C	\$1,200
Registrant's consolidated pre-tax income from continuing operations	\$5,000

Significance of Subsidiary C $[\$1,200 \div \$5,000]$ 24.0%

Registrant's equity in pre-tax income from continuing operations of Subsidiary D	\$ 100
Registrant's consolidated pre-tax income from continuing operations	\$5,000

Significance of Subsidiary D $[\$100 \div \$5,000]$ 2.0%

This example assumes that the averaging concept discussed in SEC 4400.41 is not applicable.

.443 How is the income test for an equity method investee under S-X 3-09 and S-X 4-08(g) calculated when there are changes in ownership during the period (including disposition of the entire investment)?

A change in ownership of an investee may result in the following:

- A decrease in ownership which results in a formerly consolidated subsidiary becoming an equity-method investee;
- A decrease in ownership which results in an investment previously accounted for under the equity method no longer being accounted for under that method;
- An increase in ownership which results in an investment previously accounted for under a method other than the equity method becoming an investment accounted for under the equity method; or
- An increase in ownership which results in an investment previously accounted for under the equity method becoming a consolidated subsidiary.

During years in which such changes occur, the registrant should calculate the income and revenue components of the income test based on the registrant's proportionate share for the period of the fiscal year in which the investee was accounted for by the equity method. As noted in SEC 4400.441, significance is determined based on the separate company financial statements of the equity-method investee. Therefore, any gain or loss arising from the transaction that caused the former subsidiary to become an equity-method investee should be excluded from the numerator of the income component of the income test. See SEC FRM 2410.3.

Any "holding gain or loss" resulting from the remeasurement of a registrant's previously held equity interest in an investee that is recognized in earnings when the registrant obtains control of an investee in which it held an equity interest immediately before the acquisition date, should be excluded from the numerator of the income component of the income test. See Discussion Document A-3 from the highlights of the April 2008 meeting of the CAQ SEC Regulations Committee.

For example, assume Company X, a calendar year-end SEC registrant, purchased 35 percent of the common stock of Investee A in 2017. Company X accounted for its investment in Investee A using the equity method of accounting. On November 1, 2023, Company X acquired the remaining 65 percent of Investee A's common stock. In connection with the acquisition of the remaining 65 percent of Investee A's common stock, Company X obtained control over Investee A. Accordingly, under ASC 805-10-25-9 through 25-10, Company X remeasured its prior 35 percent equity interest at the acquisition-date fair value and recorded a \$10 million holding gain in its statement of comprehensive income for the year ended December 31, 2023.

Company X should exclude the \$10 million holding gain from the numerator of the income test for purposes of evaluating whether Investee A was significant under S-X 3-09 and S-X 4-08(g) during the period in which it was accounted for under the equity method (January 1, 2023 through October 31, 2023). However, the holding gain would be included in the denominator of that significance calculation.

[Editor's note: See SEC FRM 2020.3-.4 for guidance relating to determining significance in connection with "step acquisitions."]

.444 How is the income component of the income test under S-X 3-09 and S-X 4-08(g) calculated for an investment that is being accounted for using the fair value option in lieu of the equity method?

ASC 825-10 permits a company to account for financial assets, including investments that would otherwise be required to be accounted for under the equity method, at fair value. This is commonly referred to as the fair value option. Under the fair value option, the investment is reflected on the balance sheet at fair value, with changes in fair value between reporting periods reflected in the statement of comprehensive income. The investor would not record its share of investee income or loss in the statement of comprehensive income.

In these circumstances, the numerator for the income component of the income test should be determined as the change in fair value of the relevant instrument(s) during the relevant period as recorded by the registrant in its statement of comprehensive income (see SEC FRM 2435.2). The fair value option (ASC 825-10) must be applied to all of the investor's financial interests in the entity which could include such items as equity, debt, or guarantees. If this method of assessing significance results in an anomalous answer, registrants should contact the SEC staff.

[Editor's note: At the 2021 AICPA & CIMA Conference on Current SEC and PCAOB Developments, the SEC staff indicated that the revenue component of the income test should be considered when performing the income test under S-X 3-05 (in connection with the acquisition of an investment) and S-X 3-09 and S-X 4-08(g) (for the relevant period that a registrant holds an equity investment that is being accounted for using the fair value option in lieu of the equity method).]

.445 How is the income component of the income test under S-X 3-09 and S-X 4-08(g) calculated for an equity method investee whose results are recorded on a "lag" basis?

The registrant should use the investee's financial results used by the registrant to calculate the registrant's equity in the income or loss of the investee in performing the income component of the income test. See SEC FRM 2410.7.

If a calendar year-end registrant records its equity in the earnings of an equity method investee with a September 30, 2023 year-end on a three-month lag, the numerator of the income component of the income test for the registrant's year ended December 31, 2023 would be based on the registrant's share of the investee's income for the 12 month period ended September 30, 2023 (i.e., the amount recorded in the registrant's financial statements for the year ended December 31, 2023).

.5 AGGREGATE SIGNIFICANCE TESTS

.51 How are the components of the income test determined when calculating the significance tests for acquisitions of related businesses and related real estate operations?

SEC 4550.213 and SEC 4555.223 discuss the SEC's requirements relating to the acquisition of related businesses (S-X 3-05(a)(3)) and related real estate operations (S-X 3-14(a)(3)).

The income component of the income test and the revenue component of the income test should each be calculated on a combined basis, as applicable.

See S-X 11-01(b)(3)(ii) for information regarding the financial statements to use for determining significance in connection with the acquisition of related businesses or related real estate operations.

.52 Evaluating aggregate significance of acquired and to be acquired businesses for which financial statements are not (or not yet) required

See SEC 4550.23 (businesses other than real estate operations) and SEC 4555.232 (real estate operations).

.6 FINANCIAL INFORMATION USED TO DETERMINE SIGNIFICANCE

S-X 1-02(w)(1) sets forth general requirements as to which financial information should be used to perform the various tests of significance. However, as highlighted above, significance tests should be performed in the context of the specific rule that is calling for the assessment.

For instance, S-X 3-05(b)(3) indicates that the significance assessment must be performed in accordance with the requirements of S-X 11-01(b)(3) and (4). S-X 11-01(b)(3) and (4) set forth detailed guidance as to which financial statements should be used to perform the assessments.

See SEC 4550.902 for guidance on which financial statements a registrant should use to evaluate significance for transactions that closed early in its fiscal year.

.9 FREQUENTLY ASKED QUESTIONS

.901 When determining whether an acquisition or disposition of a business is significant, should a registrant round the results of the significance tests?

The results of the significance tests should not be rounded. For example, assume a registrant acquired a business and is performing a significance test under S-X 3-05. The highest of the three significance tests yielded a result of 20.1%. In this example, the acquired business would be considered significant under S-X 3-05. The results of the test should not be rounded down to 20% to conclude that the acquired business is not significant. See SEC FRM 2015.13.

.902 How is the phrase “after intercompany eliminations” interpreted as it relates to the significance tests?

The SEC staff has indicated that intercompany transactions between the registrant and tested subsidiary should be eliminated in the same way as if the tested subsidiary was consolidated. See SEC FRM 2015.11.

Because an equity method investment is not consolidated, intercompany transactions should not be eliminated when measuring significance of an equity method investee. See SEC FRM 2410.6.

The intercompany elimination procedure may result in asymmetrical adjustments, meaning the elimination adjustments could impact the numerator of the significance calculation, the denominator of the calculation, or both the numerator and the denominator. For example, if an acquirer's total assets include a receivable from the tested subsidiary, then, for purposes of testing significance under S-X 3-05, the acquirer's total assets would be reduced by the receivable, but no adjustment would be made to the tested subsidiary's total assets (for that item) because the amount is a liability in the financial statements of the tested subsidiary (i.e., not a part of the tested subsidiary's total assets).

.903 How is the term “material revenue” interpreted when evaluating whether the revenue component of the income test is applicable?

S-X 1-02(w)(1)(iii)(A)(2) provides that the revenue component of the income test does not apply if the registrant or the tested subsidiary did not have material revenue in each of the two most recently completed fiscal years. The SEC did not define the term “material revenue” nor did it provide any interpretive guidance on how to determine if either the registrant or the tested subsidiary had material revenue during the last two years. A registrant should use judgment when considering whether the revenue component of the income test is applicable.

.904 How should the five-year averaging mechanism described in S-X 1-02(w)(1)(iii)(B)(2) be performed for the income component of the income test when the registrant presents successor and predecessor periods?

This is a complex area with little authoritative interpretive guidance. The SEC staff has indicated that registrants that wish to consider averaging when the five-year period includes both successor and predecessor periods should contact the SEC staff for additional guidance.

.905 Should a registrant adjust the denominator of the income component of the income test when the tested subsidiary qualifies to provide abbreviated financial statements described in S-X 3-05(e)?

No. Although certain costs may be excluded from the tested subsidiary's abbreviated financial statements, the registrant should not adjust the denominator of the test to exclude costs not directly related to revenue producing activities, such as corporate overhead, interest and taxes. See SEC FRM 2065.9.

.906 How should the significance tests be performed when annual financial statements are retrospectively revised?

A registrant may be required to revise its audited annual financial statements, for example, to reflect a discontinued operation or a retrospective change in accounting principle that was appropriately not reflected in the audited financial statements for the most recently completed fiscal year included in its Form 10-K. The SEC staff's pre-existing guidance with respect to significance calculations in connection with a new or amended registration statement or proxy statement is set forth in SEC FRM 2025.1 (with respect to acquired businesses) and SEC FRM 2410.8 (with respect to equity method investees). The SEC staff's pre-existing guidance with respect to significance calculations in connection with a subsequent Form 10-K is set forth in SEC FRM 2410.8.

We believe these same principles should be applied when analyzing the requirements of S-X 10-01(b)(1).

[Editor's note: As a result of applying the guidance in SEC FRM 2410.8 in connection with a subsequent Form 10-K, a previously insignificant investee may become significant as a result of a discontinued operation. Registrants are encouraged to contact the SEC staff with specific facts and circumstances if application of existing rules yields an impractical answer. See Topic III.B from the highlights of the June 2015 meeting of the CAQ SEC Regulations Committee.]

.907 May a registrant consider public offering proceeds received after the most recent pre-acquisition balance sheet date when performing significant tests?

As indicated in SEC FRM 2020.6, the registrant's assets generally may not be increased by the pro forma effect of anticipated public offering proceeds for purposes of significance tests.

[Editor's note: This differs in connection with a blind pool offering subject to the Item 20.D Undertakings of Industry Guide 5. See S-X 11-01(b)(4) and SEC 4555.6.]

.908 How should the significance tests be performed for business acquisitions or dispositions which take place after the completion of a reverse merger but before the Form 10-K reflecting the transaction is filed?

The SEC staff's pre-existing guidance is contained in SEC FRM 2025.7 (with respect to a reverse acquisition) and SEC FRM 2025.8 (with respect to a reverse recapitalization of a legal target).

.909 How should significance be calculated when a registrant contributes a business to a joint venture in exchange for an equity interest in the joint venture?

The SEC staff's pre-existing guidance is contained in SEC FRM 2025.4.

.910 How should the significance tests under S-X 3-05 be performed when a registrant increases its investment in an entity already consolidated?

When a registrant increases its investment in a company that is already reflected as a consolidated subsidiary in the audited financial statements of the registrant for a complete fiscal year, financial statements of the acquired investment are ordinarily not required. However, pro forma financial statements may be required pursuant to S-X 11-01(a)(8) which refers to other transactions for which disclosure of pro forma financial information would be material to investors. See SEC FRM 2020.5.

[Editor's note: The guidance above is focused on S-X 3-05. Financial statements of the acquired entity may be required in connection with a proxy statement or Form S-4 prepared in connection with a business combination. Refer to SEC 2121 for information regarding Form S-4 requirements.]

.911 How should the significance tests be performed when an equity-method investee is consolidated through events other than transactions?

A registrant may obtain control of an entity through events other than transactions, such as the lapse of contractual rights. This is a complex area with little authoritative interpretive guidance. Accordingly, the application of the SEC's reporting requirements on how to perform the relevant significance tests to this type of fact pattern may need to be discussed in advance with the SEC staff. See Topic 5 of Discussion Document A from the highlights of the April 2008 meeting of the CAQ SEC Regulations Committee.

.912 Can pro forma financial information be used to evaluate significance?

In some cases, yes. See S-X 11-01(b)(3).

.913 How should a registrant determine the numerators in the significance test calculations when 100% of a business is acquired by a registrant's non-wholly-owned consolidated subsidiary?

The tests used to determine significance should be performed as follows:

- The numerator used for the asset test, the investment test, and the revenue component of the income test should not consider the registrant's ownership percentage in the non-wholly-owned subsidiary.
- The numerator used for the income component of the income test should consider the registrant's ownership percentage in the non-wholly-owned subsidiary.

For example, assume a registrant has a 60%-owned consolidated subsidiary, which acquires 100% of a business.

- When performing the asset test, 100% of the acquired business's assets should generally be included in the numerator (i.e., the 60% ownership of the consolidated subsidiary does not impact the calculation).
- When performing the investment test, 100% of the registrant's and its other subsidiaries' investments in the target should generally be included in the numerator (i.e., the 60% ownership of the consolidated subsidiary does not impact the calculation).
- When performing the revenue component of the income test, 100% of the acquired business's revenue should generally be included in the numerator (i.e., the 60% ownership of the consolidated subsidiary does not impact the calculation).
- When performing the income component of the income test, the registrant's proportionate interest (i.e., 60%) of the absolute value of the acquired business's consolidated pre-tax income (loss) from continuing operations attributable to controlling interests should generally be included in the numerator. See SEC 4400.4 for guidance on the use of the absolute value.

See Topic III.D. from the March 2022 CAQ SEC Regulations Committee Meeting Highlights.

- .1 General
- .2 Disclosures required by S-X 4-08(e)
- .3 Condensed parent company financial information
- .4 Restricted net assets
- .9 Frequently asked questions

.1 GENERAL

SEC rules require certain disclosures when a registrant is restricted in its ability to transfer or dividend assets (cash or other assets) from one or more subsidiaries. The nature of the disclosures depends on the magnitude of the restriction/limitation in relation to the registrant's consolidated net assets.

- S-X 4-08(e) requires financial statement note disclosure of restrictions which limit the payment of dividends by the registrant. The financial statement note disclosure requirements set forth in S-X 4-08(e) apply to both annual shareholder reports and certain SEC filings (e.g., Form 10-K). See SEC 4510.2.
- S-X 5-04 (for Commercial and Industrial Companies) and S-X 7-05 (for Insurance Companies) require a financial statement schedule (Schedule I or II, respectively) containing condensed parent company financial data if the restricted net assets of consolidated subsidiaries (as defined in S-X 1-02(dd)) exceeds 25% of consolidated net assets as of the end of the most recent fiscal year. The condensed parent company financial information may be presented either in an audited financial statement schedule (Schedule I or II, as applicable) or in the notes to the audited financial statements. See SEC 4510.3.
- S-X 9-06 provides a similar disclosure requirement applicable to bank holding companies.
- S-X 12-04 provides guidance regarding the preparation of Schedule I/II. See SEC 4510.3 and SEC FRM 2810.

[Editor's note: ASR 302 (FRP 213) and SAB Topic 6-K.2 also discuss parent company financial information disclosure requirements. That guidance has not been updated to reflect the changes adopted by the SEC in Release 33-10532, *Disclosure Update and Simplification*. Accordingly, care should be exercised when considering those sources of guidance.]

.2 DISCLOSURES REQUIRED BY S-X 4-08(e)

The SEC has indicated that one of the major sources of restrictions limiting the payment of dividends by the registrant arises from material restrictions on a parent's ability to control its subsidiaries and investees' transfer of funds to the parent company. S-X 4-08(e) seeks certain funds-flow oriented disclosures, which the SEC has indicated may be predictive of impending cash flow problems.

The SEC's views are predicated on the assumption that a parent company must have a continual infusion of cash from its operating entities. A parent company which is a holding company oftentimes must rely on cash from its operating units to service its indebtedness or continue its cash dividend policy. Conversely, a registrant which is principally an operating company may generate adequate cash for such purposes from its own operations.

- S-X 4-08(e)(1) requires disclosure of the most significant restrictions on the registrant's ability to pay dividends and the amount of retained earnings or net income restricted or free of restrictions;
- S-X 4-08(e)(2) requires disclosure of the amount of consolidated retained earnings which represents undistributed earnings of 50% or less-owned persons accounted for by the equity method; and

- S-X 4-08(e)(3) requires disclosure (when material) of (i) the nature of any restrictions on the ability of consolidated and unconsolidated subsidiaries to transfer funds to the parent in the form of cash dividends, loans or advances and (ii) the separate amounts of restricted net assets of consolidated and unconsolidated subsidiaries.

.3 CONDENSED PARENT COMPANY FINANCIAL INFORMATION

S-X 5-04 and S-X 7-05 require a financial statement schedule (Schedule I/II) containing condensed parent company financial data if the restricted net assets of consolidated subsidiaries (as defined in S-X 1-02(dd)) exceeds 25% of consolidated net assets as of the end of the most recent fiscal year. In this context, "consolidated net assets" is considered by the SEC staff to be the registrant shareholders' equity (i.e., not total equity). See Discussion Document A of the July 2008 meeting of the CAQ SEC Regulations Committee.

S-X 12-04 and SEC FRM 2810.1 provide guidance regarding the preparation of Schedule I/II.

S-X 9-06 provides specific rules related to the preparation of the parent company financial information by bank holding companies. This information must be included in the notes to the registrant's financial statements.

[Editor's note: Bank holding companies do not have the additional 30 days provided by General Instruction A(4) of Form 10-K to file this information because a bank holding company must include the parent company financial information in the notes to the audited financial statements. See S-X 9-06.]

.4 RESTRICTED NET ASSETS

The term "restricted net assets" is defined in S-X 1-02(dd). These tests are performed as of the end of the most recent fiscal year.

[Editor's note: The computation of restricted net assets requires the creation of US GAAP balance sheet information for each subsidiary or investee.]

.9 FREQUENTLY ASKED QUESTIONS

.901 Are disclosures relating to restricted net assets required as a part of Management's Discussion and Analysis?

The instructions to S-K 303 provide that where financial statement note disclosure of restrictions on the ability of subsidiaries to transfer funds to the parent in the form of cash dividends, loans, or advances is required by S-X 4-08(e)(3), management's discussion of liquidity should include the nature and extent of the restrictions and the impact they have had, or are reasonably likely to have, on the ability of the parent company to meet its cash obligations. See Instruction 5 to S-K 303(b).

.902 What is the basis used for a subsidiary's net assets when calculating restricted net assets?

SAB Topic 6-K states that the determination of each subsidiary's net assets included in consolidated net assets is made by allocating (pushing down) to each subsidiary any related consolidation adjustments such as intercompany balances, intercompany profits, and differences between fair value and historical cost arising from a business combination accounted for as a purchase. SAB Topic 6-K was published prior to the issuance of ASU 2014-17, *Business Combinations (Topic 805) Pushdown Accounting*. The SEC staff has not formally indicated whether registrants may apply the principles of ASU 2014-17 in computing restricted assets (i.e., whether fair values arising from a business combination must be pushed down to

subsidiary financial statements). See Topic III.C in the Highlights of the October 2015 meeting of the CAQ SEC Regulations Committee.

.903 When a registrant has a consolidated shareholders' deficit, what is the net asset base used for the computation of restricted net assets?

The SEC staff has advised that when a registrant has a consolidated shareholders' deficit, its net asset base for purposes of calculating the proportionate share of restricted net assets of consolidated subsidiaries should be zero. Therefore, any restrictions placed on the net assets of subsidiaries with positive equity would result in the 25% threshold being exceeded and a corresponding requirement to provide parent company financial information. A registrant should consult with the SEC staff if it has a specific fact pattern that may support an alternative approach that would provide a more meaningful disclosure to investors. See SEC FRM 2810.4 and Topic VI.E in the Highlights of the March 2014 meeting of the CAQ SEC Regulations Committee.

.904 How does a subsidiary with a shareholder deficit impact the restricted net asset computation?

Subsidiaries with a shareholder deficit have no restricted net assets for purposes of the test. If each subsidiary where a restriction exists has a shareholder deficit, Schedule I/II, as applicable, is not required. The numerator of the restricted net assets test should not be decreased for negative net asset positions. See SEC FRM 2810.4.

.905 How do classes of outstanding stock classified outside of permanent equity impact the restricted net assets computation?

In making these tests, registrants may use amounts applicable to all classes of outstanding capital stock that are reported as equity (either temporary/mezzanine equity or permanent equity). See FRP 211.06.

.906 Are Schedules I/II prepared using the guidance in S-X 12-04 required to be covered by the report of the registrant's independent registered public accounting firm?

Yes. The schedules specified by S-X 12-04 are required to be audited. See S-X 5-04(c) and S-X 7-05(c).

.907 Where can I find examples of the types of restrictions referred to in S-X 5-04 and S-X 7-05?

S-X 1-02(dd) contains guidance on restrictions.

.908 Do the requirements of S-X 5-04, 7-05, and 9-06 apply to interim financial statements?

Generally no. See S-X 5-04(a), S-X 7-05(a), and S-X 9-06.

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- .1 General
- .2 S-X 3-09 requirements
- .3 S-X 4-08(g) requirements
- .4 S-X 10-01(b)(1) requirements
- .5 S-X 8-03(b)(3) requirements
- .6 SEC staff interpretations of significant subsidiary tests
- .9 Frequently asked questions

[Editor's note: SEC 4520 addresses disclosure requirements relating to equity-method investments and investments accounted for using the fair value option which would have otherwise been accounted for using the equity method. See SEC 4520.902 regarding unconsolidated majority-owned subsidiaries.]

.1 GENERAL

The SEC maintains disclosure requirements relating to 50% or less-owned persons accounted for by the equity method. The level of disclosure required is based on whether the disclosures are associated with an annual or interim period and the registrant's smaller reporting company status.

[Editor's note: The SEC staff interprets the phrase "50% or less-owned person accounted for by the equity method" to include any investment accounted for by the equity method even if voting ownership exceeds 50%. See SEC FRM 2405.3. Additionally, the SEC staff has interpreted the related disclosure requirements to apply to any investment accounted for by the fair value option when the investment would have otherwise been accounted for by the equity method. See SEC FRM 2435. References throughout SEC 4520 to "equity-method investees" include all investees accounted for by the equity method or the fair value option when the investment would otherwise have been accounted for by the equity method. Similarly, references to applying the "equity method" encompass the use of the fair value option when the equity method would have otherwise been required.]

.11 What are the SEC's disclosure requirements relating to equity-method investees of a registrant that is not a smaller reporting company?

The SEC's disclosure requirements relating to equity-method investees of a registrant that is not a smaller reporting company are set forth in S-X 3-09 and S-X 4-08(g) for annual periods and S-X 10-01(b)(1) for interim periods. These requirements are summarized as follows:

- S-X 3-09 requires financial statements for each equity-method investee which individually meets either the first or third test of significance (i.e., the investment test or the income test) in S-X 1-02(w)(1) using a 20% threshold. See SEC 4520.2.
- S-X 4-08(g) requires summarized financial information in the notes to the registrant's audited annual financial statements covering all equity-method investees if any one of the three significant subsidiary tests outlined in S-X 1-02(w) is met when equity-method investees are considered individually or on an aggregate basis by any combination of equity-method investees using a 10% threshold. See SEC 4520.3.
- S-X 10-01(b)(1) requires summarized statement of comprehensive income information in the notes to interim financial statements for each equity-method investee if (i) separate financial statements would otherwise be required for annual periods using a 20% threshold and (ii) the investee would be required to file Form 10-Q if the investee were a registrant. See SEC 4520.4.

.12 What are the SEC's disclosure requirements relating to equity-method investees of a registrant that is a smaller reporting company?

The SEC's disclosure requirements relating to equity-method investees of a registrant that is a smaller reporting company are set forth S-X 8-03(b)(3), which requires specified summarized financial information in the notes to the registrant's financial statements based on specified tests of significance using a 20% threshold. See SEC 4520.5.

.13 Are S-X 3-09, S-X 4-08(g), S-X 10-01(b)(1) and S-X 8-03(b)(3) applicable to investments that are accounted for using the fair value option if the investment would have otherwise been accounted for using the equity method?

Yes. The SEC staff has stated that the disclosure requirements of S-X 3-09 and S-X 4-08(g) also apply to investments accounted for using the fair value option if the investment would otherwise have been accounted for using the equity method. See SEC FRM 2435. We understand that the SEC staff similarly applies the requirements of S-X 10-01(b)(1) and S-X 8-03(b)(3) to investments accounted for using the fair value option if the investment would otherwise have been accounted for using the equity method.

.2 S-X 3-09 REQUIREMENTS

.21 When are financial statements of an equity-method investee required under S-X 3-09?

S-X 3-09 requires financial statements for each equity-method investee which individually meets either the investment test or income test of significance under S-X 1-02(w)(1) using a 20% threshold. If the threshold for either significance test is exceeded for any year for which financial statements of the registrant are presented, then S-X 3-09 financial statements are required for all years. See SEC 4520.25 regarding the associated audit requirements.

[Editor's note: The S-X 3-09 significance tests are generally performed for each year that is presented in the registrant's financial statements. S-X 3-09 financial statements, which previously were not required, could subsequently be required in a future filing as a result of retrospective revisions to the registrant's financial statements (e.g., for discontinued operations). The SEC staff has provided guidance relating to situations involving the impact of changes in accounting principle that are retroactively applied and discontinued operations at SEC FRM 2410.8.]

[Editor's note: Significance may need to be assessed even if the carrying value of the investment is zero (or is a negative amount). For instance, if a registrant's recorded equity in the investee's losses exceed its investment, or if the investment is written down by the registrant to zero, the income test may still be applicable (e.g., the impact on the registrant's income in the current year may be significant under the income test).]

See SEC 4520.908.

.22 How should financial statements required under S-X 3-09 be prepared?

Financial statements prepared pursuant to S-X 3-09 are generally the same as if the equity-method investee were a registrant. There are, however, exceptions to this general principle. For example:

- the periods to be presented are based on the audited financial statement requirements of S-X 3-01 and S-X 3-02 for a registrant (see SEC 4520.23);

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- the S-X 3-09 financial statements should only depict the portion of a fiscal year for which the investee was accounted for by the registrant using the equity method (see SEC FRM 2405.4 and SEC 4520.23); and
- S-X 3-09 financial statements are generally not required to comply with GAAP disclosures specified for a public company, for example, in the areas of segments and earnings per share, unless the entity meets the definition of a public entity set forth in the applicable accounting literature (see SEC FRM 2400.5).

See SAB Topic 6-K.4.a. for the requirement to provide separate financial statements for lower tier investees (e.g., investees accounted for by the equity method by an equity-method investee of the registrant). The SAB Topic notes that financial statements of lower tier companies may have to be furnished if they are significant in relation to the registrant. See also SEC FRM 2405.6.

S-X 3-09 financial statements (including non-issuer financial statements) filed with the SEC should generally comply with all relevant Staff Accounting Bulletins. Financial statement schedules specified by S-X Article 12 are considered part of the financial statements and registrants are required to include such schedules, as applicable, with the financial statements of significant equity-method investees under S-X 3-09. See Topic G from the highlights of the March 2019 meeting of the CAQ SEC Regulations Committee.

See SEC 4520.901, .903, and .904.

.23 For what periods should S-X 3-09 financial statements be presented?

General principle

S-X 3-09(b) provides that the investee's separate financial statements should be as of the same dates and for the same periods as the registrant's annual audited financial statements under S-X 3-01 and S-X 3-02 (if practicable). Therefore, balance sheets should generally be as of the end of the two latest fiscal years, and other statements should cover the three latest fiscal years. If the equity-method investee has a different fiscal year-end from the registrant, the financial statements of the equity-method investee may be based on the investee's fiscal year, rather than that of the registrant.

[Editor's note: Special accommodations for emerging growth companies (EGCs), which allow a registrant that is an EGC to provide only two years of financial statements for investees accounted for by the equity method, may apply. See SEC FRM 10220.5.]

See SEC 4520.903 and .911.

Year of acquisition

When providing S-X 3-09 financial statements relating to the year in which a registrant acquired an equity-method investee, those financial statements should begin with the date of acquisition and conclude with the end of the fiscal year. In the alternative, the registrant may contact the SEC staff to obtain permission to provide financial statements for a different period (e.g., for the full fiscal year of acquisition). See SEC FRM 2405.4 and SEC 4520.27.

[Editor's note: Separate equity-method investee financial statements are not required under S-X 3-09 for periods prior to the registrant's ownership of the investment. However, pre-acquisition financial statements may be required for other purposes (e.g., under Item 2.01 of Form 8-K as a significant acquired business -- see the Note to SEC FRM 2405.4).]

Consider the following example:

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Facts: Company Y is a calendar year-end, non-smaller reporting company, US domestic SEC registrant. On April 4, 2023, Company Y acquired a 25% interest in the common stock of Investee D (a calendar year-end private company). Company Y accounts for Investee D using the equity method. At the time of making its investment in Investee D, Company Y determined that Investee D was significant at the 45% level (i.e., under Items 2.01 and 9.01 of Form 8-K). In connection with the preparation of Company Y's 2023 Form 10-K, Company Y determined that Investee D was significant above the 20% level.

Analysis: In connection the acquisition of its 25% interest in Investee D, Company Y was required to file audited financial statements of Investee D as of December 31, 2022 and 2021 and for the years then ended, in order to comply with the requirements of Items 2.01 and 9.01 of Form 8-K. The period covered by the audited financial statements of Investee D that are required in Company Y's 2023 Form 10-K pursuant to S-X 3-09 should be from the date of acquisition (April 4, 2023) through the end of the fiscal year (December 31, 2023). Alternatively, Company Y may contact the SEC staff to obtain relief under S-X 3-13 to provide financial statements for a different period (e.g., calendar year 2023) in connection with the 2023 Form 10-K. See SEC 4520.27.

Year of disposition

When providing S-X 3-09 financial statements relating to the year in which a registrant disposes of an equity-method investee, the investee's statement of comprehensive income and statement of cash flows should generally be presented through the date of disposal. See SEC FRM 2405.4. The SEC staff will consider a request for relief under S-X 3-13 to accept an investee's financial statements for the entire year if obtaining the partial-year financial statements would result in undue hardship. See SEC 4520.27.

[Editor's note: If the investee is sold near the end of the registrant's most recent year, or after the registrant's year-end, it is unlikely that the SEC staff will waive the requirement to provide the financial statements if the significance test is met for the year of disposal.]

.24 When are S-X 3-09 financial statements due in connection with Form 10-K?

[Editor's note: The timing guidance discussed in SEC 4520.24 relates only to Form 10-K. See SEC 4520.905 for information relating to registration statements and proxy statements.]

S-X 3-09 provides a limited grace period for filing the separate financial statements of an equity-method investee in connection with the investor's Form 10-K. The registrant may initially file its Form 10-K without the investee's separate financial statements and then file the investee's separate financial statements by an amendment to the Form 10-K before the end of the grace period described below.

Under the S-X 3-09 grace period, the registrant is required to file the investee's separate financial statements within the following number of days after the investee's year end:

- 60 days if the investee is a large accelerated filer, except investees that are foreign businesses
- 75 days if the investee is an accelerated filer, except investees that are foreign businesses
- 90 days for all other investees, except investees that are foreign businesses
- six months for investees that are foreign businesses.

For example, assume a calendar year-end registrant, an accelerated filer, has two equity-method investees that are not foreign businesses, not large accelerated filers, and not accelerated filers. Investee A has a January 31 fiscal year-end and Investee B has an April 30 fiscal year-end.

In this fact pattern, the pertinent filing dates are as follows:

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- The registrant's December 31, 2022 Form 10-K would be due by March 16, 2023 (the 75th day after December 31, 2022).
- The registrant would file Investee A's financial statements no later than May 1, 2023 (the 90th day after January 31, 2023).
- The registrant would file Investee B's financial statements no later than July 31, 2023 (because the 90th day after April 30, 2023, July 29, 2023, is a Saturday).

Regardless of the registrant's accelerated filer status, the financial statements of both equity-method investees may be filed by an amendment to the Form 10-K within the due dates based on the investees' filer status, as noted above.

[Editor's note: S-X 3-09(b)(1) provides an accommodation for filing the financial statements of the investee where the registrant is an accelerated filer and the equity-method investee is not an accelerated filer. The SEC staff has indicated that it will provide an accommodation in all situations where the registrant is subject to shorter deadlines than the other entity. Therefore, under S-X 3-09(b)(1), the reference to the registrant as an "accelerated filer" should be interpreted to include both accelerated filers and large accelerated filers, and the reference to the other entity as "not an accelerated filer" should be interpreted to include investees that are accelerated filers when the registrant is a large accelerated filer. See S-X 3-09(b) and SEC FRM 2405.8.]

See SEC 4520.910.

.241 Is Rule 12b-25 available to extend the due date of S-X 3-09 financial statements?

Generally, no. Rule 12b-25 is not available to extend the due date of S-X 3-09 financial statements unless the investee itself is an SEC registrant and is eligible to use Exchange Act Rule 12b-25. See Exchange Act Rule 12b-25(f) and Exchange Act Rules CDI 135.01.

[Editor's note: Exchange Act Rules CDI 135.01 refers to investees that are less than 50% owned. However, we understand the SEC staff applies the same guidance to a 50% owned equity-method investee.]

.25 Are S-X 3-09 financial statements required to be audited?

Yes, but only for years in which the appropriate 20% significant subsidiary threshold was exceeded. Financial statements that are required for any year in which an equity-method investee was not significant may be presented on an unaudited basis. For example, assume Company X performed its S-X 3-09 significance assessment in connection with its Form 10-K for the year ending December 31, 2023 and determined that its equity method investee, Investee A, exceeded the significance threshold in 2023, but not in 2022 or 2021. In this case, financial statements of Investee A would be filed for 2021, 2022, and 2023, however, only the financial statements for 2023 would be required to be audited.

Audits of financial statements required by S-X 3-09 must be performed in accordance with (i) PCAOB standards, (ii) AICPA standards, or (iii) both PCAOB standards and AICPA standards, as appropriate. Local, non-US GAAS (including International Standards on Auditing) is not acceptable to the SEC. Auditors of financial statements presented to comply with S-X 3-09 must comply with the SEC independence rules even if the audit of such financial statements is performed in accordance with standards other than PCAOB standards. See Question 3 of section O, *Other Independence*, in the SEC FAQs "Office of the Chief Accountant: Application of the Commission's Rules on Auditor Independence" available at <https://www.sec.gov/info/accountants/ocafaqaudind080607.htm>. See also SEC FRM 4110.5 #7.

.26 Are there any accommodations applicable to S-X 3-09 financial statements of a foreign equity-method investee?

Yes. In SEC Financial Reporting Release No. 44 (FRR 44), the SEC provided accommodations to domestic issuers that are required to provide S-X 3-09 financial statements of foreign equity-method investees in their filings if the investee meets the definition of a foreign business (defined in S-X 1-02(l)).

The accommodations set forth in FRR 44 are summarized below.

1. Financial statements of foreign equity-method investees that meet the definition of a foreign business only need to comply with Item 17 of Form 20-F, and they are subject to the updating requirements specified in Item 8.A of Form 20-F.

Pursuant to Item 17 of Form 20-F, the financial statements may be prepared on a comprehensive basis of accounting other than US GAAP. Quantitative reconciliation of net income and material balance sheet items may be required, but the additional information specified by US GAAP for disclosure in notes to financial statements is not necessary. No reconciliation is required if the foreign business prepares its financial statements in accordance with IFRS as issued by the IASB or does not exceed the 30% level under the tests of significance which call for the inclusion of its financial statements. Even if a quantified reconciliation is not required, a discussion of the differences between local and US GAAP should be presented unless the financial statements are prepared in accordance with IFRS as issued by the IASB.

[Editor's note: Refer to SEC FRM 6410.6 for information regarding the periods that must be covered by the US GAAP reconciliation when not all years being tested exceed the 30% significance level.]

[Editor's note: The accommodation not to reconcile separate financial statements of 30% or less significant foreign business equity-method investees does not affect a domestic registrant's measurement of earnings under US GAAP or disclosures under Regulation S-X. Accordingly, equity earnings in the registrant's financial statements should be accounted for under US GAAP and any applicable S-X 4-08(g) disclosures (see SEC 4520.3) should be provided.]

If the foreign equity-method investee does not meet the definition of a foreign business, the registrant can file financial statements prepared in accordance with a comprehensive basis of accounting other than US GAAP, provided that a reconciliation to US GAAP under Item 18 of Form 20-F is provided. The reconciliation must be provided regardless of the level of significance (i.e., even if the significance level is 30% or less). Reconciliation to US GAAP would be required even if the financial statements were prepared under IFRS as issued by the IASB because the accommodation only applies to investees that meet the S-X 1-02(l) definition of a foreign business.

[Editor's note: Registrants may wish to contact the staff in the SEC's Division of Corporation Finance in this situation since this could impose a reporting requirement on the investee that exceeds the reporting requirement that would be applicable to the entity if it were a registrant.]

2. For the purposes of filing a Form 10-K, S-X 3-09(b) permits a registrant to include the audited financial statements of a significant foreign equity-method investee that meets the definition of a foreign business (as defined in S-X 1-02(l)) as an amendment to the previously filed Form 10-K within six months after the end of the investee's fiscal year. However, the six-month deadline described in S-X 3-09(b) only relates to the filing of a Form 10-K. If a registrant files a new or amended registration statement or proxy statement prior to the six-month deadline, S-X 3-12(f) indicates that the last year of audited financial statements of the significant foreign business equity method investee may be no older than 15 months at the time of filing. See also SEC 4520.905.

As noted above, S-X 3-09 requires that financial statements provided for significant equity-method investees be as of the same dates and for the same periods as the audited consolidated financial

statements of the registrant (as practicable). When the financial statements are provided for a foreign business as defined by S-X 1-02(l), and the equity-method investee is a first-time adopter of IFRS as issued by the IASB, the requirements of S-X 3-09 would be satisfied by having financial statements for the latest two years if the date of transition to IFRS-IASB was at the beginning of the earliest year provided, regardless if the financial statements of the foreign business were previously provided (e.g., the foreign business financial statements have previously been provided on a US GAAP basis). However, when the financial statements of the foreign business have previously been provided and prepared in accordance with IFRS as issued by the IASB, and the foreign business decides to change to US GAAP, the SEC staff has indicated that three years of financial statements would be required under this fact pattern. See Topic D from the highlights of the November 2016 meeting of the CAQ International Practices Task Force.

.27 Will the SEC staff consider requests for relief from providing the financial statements required by S-X 3-09?

Yes. The SEC staff will consider a registrant's request for relief under S-X 3-13 from providing the financial statements required by S-X 3-09. If the SEC staff grants a request for relief from providing financial statements required by S-X 3-09, the SEC staff may still require the presentation of summarized information in accordance with S-X 4-08(g). The SEC staff sometimes requires more detailed disclosure (e.g., investee cash flow statement information and information relating to the investee's significant accounting policies) when accepting financial statement note disclosure in satisfaction of the requirements of S-X 3-09.

.3 S-X 4-08(g) REQUIREMENTS

.31 When is disclosure required under S-X 4-08(g)?

S-X 4-08(g) requires summarized financial information in the notes to the registrant's annual audited financial statements if any one of the three significant subsidiary tests outlined in S-X 1-02(w) is met when equity-method investees are considered individually or on an aggregate basis by any combination of equity method investees. The threshold for evaluation under S-X 4-08(g) is 10% (not 20%, as in the case of S-X 3-09).

S-X 4-08(g) requires summarized financial information regardless of whether the significance test is met by an individual investee or from a combination of investees. For purposes of computing the income significance test under S-X 4-08(g), entities reporting losses should not be aggregated with entities reporting income. See S-X 1-02(w)(1)(iii)(B)(3).

[Editor's note: The SEC excludes the asset test from the determination of whether complete financial statements are needed for an equity-method investee under S-X 3-09. However, the asset test is required for equity-method investees when assessing whether summarized financial information must be included in the footnotes to the registrant's financial statements under S-X 4-08(g).]

See SEC 4520.907.

.32 What disclosures are required under S-X 4-08(g)?

If any one of the three significance tests is met, then summarized financial information must be presented for all equity-method investees (not just any that are individually significant). The summarized financial information required by S-X 4-08(g) is set forth in S-X 1-02(bb).

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[Editor's note: S-X 1-02(bb) permits some flexibility for specialized industries for which other information may be more meaningful. For example, a bank might present total interest income, total interest expense, provision for loan losses, and security gains and losses in lieu of sales and related costs and expenses.]

The SEC believes the summarized information should cover all entities. However, the exclusion of such data may be appropriate for certain entities where it is impractical to gather the information and such information is de minimis. See Note 1 to SEC FRM 2420.3 and Topic VI.E from the highlights of the March 2014 meeting of the CAQ SEC Regulations Committee.

Summarized financial information should be presented in accordance with US GAAP and in US dollars.

See SEC 4520.901 and .912.

.33 For what periods should S-X 4-08(g) disclosures be provided?

The summarized financial information should be presented insofar as is practicable as of the same dates and for the same periods as presented by the registrant in its audited consolidated financial statements (e.g., two years for balance sheet information and three years for statement of comprehensive income information).

[Editor's note: A registrant is required to present summarized financial data under S-X 4-08(g) for all years for which financial statements are presented if the significance threshold is met for any of the years for which financial statements are presented (and assuming that the registrant owned the investment(s) for all those years). For example, a registrant would be required to present the summarized financial data for all of its equity-method investments for 2023, 2022 and 2021 in the financial statements included in its 2023 Form 10-K, even if the significance test was only met in 2022.]

.34 Can the disclosures required by S-X 4-08(g) be labeled as "unaudited?"

No. The summarized financial data required by S-X 4-08(g) may not be labeled "unaudited." See SEC FRM 2420.4.

.35 Does the S-X 3-09 timing guidance (and grace period) discussed in SEC 4520.23 apply to disclosures required in Form 10-K by S-X 4-08(g)?

No. There is no grace period with respect to the disclosures required by S-X 4-08(g). The disclosures required by S-X 4-08(g) must be included in a registrant's financial statements when the Form 10-K is initially filed. See SEC 4520.905.

.4 S-X 10-01(b)(1) REQUIREMENTS

.41 When is disclosure required under S-X 10-01(b)(1)?

S-X 10-01(b)(1) requires the disclosure of summarized statement of comprehensive income information in interim financial statements for each equity-method investee, if (i) separate financial statements would otherwise be required for annual periods and (ii) the investee would be required to file Form 10-Q if the investee were a registrant.

[Editor's note: Foreign private issuers are not required to file Form 10-Q, so the requirement of S-X 10-01(b)(1) to provide summarized financial information would not

apply to an investee that would be a foreign private issuer if it were a registrant. See SEC FRM 2420.6.]

.42 How is significance assessed under S-X 10-01(b)(1) for purposes of determining whether “separate financial statements would otherwise be required for annual periods”?

Registrants should use the first and third significance tests specified by S-X 1-02(w) (i.e., the investment test and the income test), substituting 20% for 10% to determine whether “separate financial statements would otherwise be required for annual periods” (i.e., the analysis that would be required by S-X 3-09). The significance tests are performed for each individual investee and not on an aggregate basis. However, unlike the calculation of significance in annual periods, the SEC staff does not permit the use of any type of income averaging techniques in interim periods. See SEC FRM 2420.7b.

The significance calculations should be based on the balance sheets and the year-to-date statements of comprehensive income included in the interim financial statements. See SEC FRM 2420.7. Consider the following example:

Facts: Company X is a US domestic calendar year-end registrant. Company X is preparing its Form 10-Q for the quarter ended June 30, 2023. In accordance with S-X 10-01(c), Company X's Form 10-Q will include balance sheets as of June 30, 2023 and December 31, 2022 and statements of comprehensive income for the three- and six-month periods ended June 30, 2023 and 2022.

Analysis: Company X should perform four significance tests for each equity-method investee. The two investment tests of significance should be based on the balance sheets as of June 30, 2023 and December 31, 2022. The two income tests of significance should be based on the statements of comprehensive income for the six-month periods ended June 30, 2023 and 2022. If any of the four calculations exceeds 20%, then the summarized statement of comprehensive income information for that investee must be presented for both year-to-date periods. Company X does not need to perform the income test on the statements of comprehensive income for the three-month periods ended June 30, 2023 and 2022 and would not be required to provide summarized statement of comprehensive income information for the three-month periods even if it is required to provide that information for the year-to-date periods.

[Editor's note: If Company X were making this assessment in connection with its Form 10-Q for the quarter ended March 31, 2023, then the significance tests would be based on the balance sheets as of March 31, 2023 and December 31, 2022, as well as the statements of comprehensive income for the three-month periods ended March 31, 2023 and 2022.]

.43 What disclosures are required under S-X 10-01(b)(1)?

For investees that are significant (see SEC 4520.42), the following statement of comprehensive income information is required to be disclosed (although disclosure for each significant investee may be aggregated):

- net sales or gross revenues,
- gross profit (or, alternatively, costs and expenses applicable to net sales or gross revenues),
- income or loss from continuing operations,
- net income or loss, and

The registrant should present the minimum disclosures listed above for both the current and prior year comparative year-to-date periods included in that quarterly report.

See SEC FRM 2420.8.

[Editor's note: Disclosures for insignificant investees may be provided on a voluntary basis; however, if those disclosures are aggregated with disclosures for significant investees, disclosures related only to significant investees is still required.]

See SEC 4520.901.

.5 S-X 8-03(b)(3) REQUIREMENTS

.51 How are the requirements of S-X 8-03(b)(3) applied?

S-X 8-03(b)(3) requires summarized financial statement note disclosure of sales, gross profit, net income (loss) from continuing operations, net income (loss), and net income (loss) attributable to the investee(s) based on specified tests of significance using a 20% threshold.

[Editor's note: As written, S-X 8-03 applies only to interim financial statements. However, the SEC staff applies S-X 8-03(b)(3) to both interim and annual financial statements. See Note 1 to SEC FRM 2420.9.]

[Editor's note: The annual and interim disclosure requirements applicable to a smaller reporting company are analogous to the requirements of S-X 4-08(g) and S-X 10-01(b)(1). There is no analog to S-X 3-09 that is applicable to a smaller reporting company.]

See SEC 4520.901.

S-X 8-03(b)(3) indicates that significance should be assessed based on the registrant's consolidated assets, equity, or income from continuing operations attributable to the registrant. However, since comparing a registrant's investment to its equity could require more disclosure for smaller reporting companies than other registrants, the SEC staff interprets significance for purposes of S-X 8-03(b)(3) in a manner consistent with S-X 1-02(w) substituting 20% for 10% and using all three tests of significance. See Note 2 to SEC FRM 2420.9.

When assessing significance in connection with an annual period, if significance of any individual investee or any combination of investees exceeds 20%, the registrant should provide the summarized note disclosure in the registrant's financial statements for all investees for each period presented.

[Editor's note: Similar to S-X 4-08(g), the SEC believes the summarized information should cover all entities. However, the exclusion of such data may be appropriate for certain entities where it is impractical to gather the information and such information is de minimis. See Note 3 to SEC FRM 2420.9 and Topic VI.E from the highlights of the March 2014 meeting of the CAQ SEC Regulations Committee.]

When assessing significance in connection with interim periods, summarized note disclosure is only required for each investee that is significant (i.e., using a threshold of 20%) and the equity-method investee would be required to file quarterly financial information with the SEC pursuant to Exchange Act Rules 13a-13 or 15d-13 if it were a registrant. See SEC FRM 2420.6.

.52 Can the annual financial statement disclosures required by S-X 8-03(b)(3) be labeled as "unaudited?"

No. The summarized financial data required to be included in the registrant's annual financial statements by S-X 8-03(b)(3) may not be labeled "unaudited." See SEC FRM 2420.9.

.6 SEC STAFF INTERPRETATIONS OF SIGNIFICANT SUBSIDIARY TESTS

Information relating to SEC staff interpretations of the significant subsidiary test is set forth in SEC 4400.

.9 FREQUENTLY ASKED QUESTIONS

.901 Does the FASB's definition of a public business entity encompass an entity whose financial statements or financial information are required by S-X 3-09, S-X 4-08(g), S-X 10-01(b)(1) or S-X 8-03(b)(3)?

Generally, yes. The FASB's definition of a public business entity (PBE) set forth in ASU 2013-12: *Definition of a Public Business Entity* includes business entities whose financial statements or financial information are required to be or are included in an SEC filing. Accordingly, financial statements required by S-X 3-09 and financial information required by S-X 4-08(g), S-X 10-01(b)(1) or S-X 8-03(b)(3) should generally be prepared on the basis that the entity is considered a PBE, absent other guidance.

.902 Do S-X 3-09 and S-X 4-08(g) apply to unconsolidated majority-owned subsidiaries in addition to equity investees?

Yes. S-X 3-09 and S-X 4-08(g) apply to both unconsolidated majority-owned subsidiaries and equity-method investees. The US Generally Accepted Accounting Principles (US GAAP) accounting model relating to consolidations has changed substantially since the time S-X 3-09 and S-X 4-08(g) were first issued. As a result of these changes, instances in which a majority-owned subsidiary is not consolidated occur less frequently than they did previously. Accordingly, SEC 4520 is focused on investments accounted for by the equity method and does not separately discuss unconsolidated subsidiaries.

.903 May financial statements of an equity-method investee that are provided under S-X 3-09 be prepared in accordance with the requirements applicable to a smaller reporting company if the investee meets the definition of a smaller reporting company?

No. A registrant required to provide separate financial statements of an equity-method investee under S-X 3-09 may not rely on accommodations for smaller reporting companies with respect to the investee, even if that investee would meet the definition of a smaller reporting company if it were a registrant. See SEC FRM 5210.1.

.904 Can combined financial statements be presented for two or more significant equity-method investees for which financial statements are required by S-X 3-09?

If S-X 3-09 requires financial statements for two or more investees, those financial statements may be combined or consolidated if the financial position, results of operations, and cash flows will be clearly exhibited, and such combination is allowed by GAAP. Judgment needs to be exercised in determining whether a particular grouping of companies results in a reasonable presentation. In addition, the SEC staff has indicated that the presentation of combined financial statements is generally only appropriate for entities under common control or management, and then only for periods of common control or management. See SEC FRM 2415.

.905 How does the S-X 3-09 grace period with respect to Form 10-K discussed in SEC 4520.24 apply to a registration statement being prepared after the registrant's Form 10-K is filed but before the Form 10-K is amended to include the S-X 3-09 financial statements of a significant equity-method investee?

If a registrant is preparing a registration statement or transactional proxy statement after filing its Form 10-K, the S-X 3-09 requirement to file the equity-method investee's separate financial statements, updated to include its most recently completed fiscal year, follows the due dates noted in SEC 4520.24. In other words, the registrant's filing of a registration statement or transactional proxy statement does not (by itself) accelerate the requirement to update the equity-method investee's financial statements to include its most recently completed fiscal year.

However, the grace period provided by S-X 3-09(b)(1) was not intended to permit a registrant to file a registration statement or transactional proxy statement without any financial statements for a significant equity-method investee. Consider the following example:

Facts: Company Z is a calendar year-end accelerated filer. Company Z owns 40% of the common stock of Investee Q, a calendar year-end US private company. Company Z accounts for its investment in Investee Q using the equity method of accounting. Investee Q has been significant to Company Z above 20% at all times since the date Company Z first acquired its investment (five years ago). Company Z intends to file its 2023 Form 10-K on March 15, 2024 (the 75th day after December 31, 2023). Company Z intends to file Investee Q's financial statements as of December 31, 2023 and 2022 and for each of the three years in the period ended December 31, 2023 by an amendment to its (Company Z's) 2023 Form 10-K by April 1, 2024 (because the 90th day after December 31, 2023, March 30, 2024, is a Saturday).

Analysis: The grace period provided by S-X 3-09(b)(1) only applies to Form 10-K. Accordingly, if Company Z wants to file a new or amended registration statement or transactional proxy statement after it files its 2023 Form 10-K, but before it amends its Form 10-K to include the Investee Q financial statements referred to above, then Company Z would need to apply the S-X 3-12 age of financial statement requirements based on whether the registrant (Company Z) satisfies the conditions of S-X 3-01(c) to determine whether Investee Q's financial statements for its most recently completed year-end are required to be included or incorporated by reference in the registration statement. If Company Z does not meet the conditions of S-X 3-01(c), for example, because it incurred a loss in its most recent fiscal year (i.e., 2023) or because it reported losses in the two fiscal years immediately preceding the most recent fiscal year (i.e., 2022 and 2021), then Company Z would be required to include or incorporate by reference the audited financial statements of Investee Q for the year ended December 31, 2023 (together with financial statements for the other relevant prior years) within the registration statement. If Company Z meets the conditions of S-X 3-01(c), then the registration statement is not required to include or incorporate by reference Investee Q's audited financial statements for the most recent fiscal year (i.e., 2023). However, if the registration statement includes or incorporates by reference Company Z's most recent fiscal year-end audited financial statements (i.e., 2023), then audited 2022 financial statements for Investee Q (together with financial statements for the other relevant prior years) would also need to be included or incorporated by reference within the registration statement. See Topic VI.B. from the highlights of the March 2013 meeting of the CAQ SEC Regulations Committee.

[Editor's note: If Investee Q were a foreign business, the age of financial statement requirements would allow Company Z to file a registration statement during the grace period without including Investee Q's audited financial statements for the most recent fiscal year (i.e., 2023) even if Company Z did not meet the conditions of S-X 3-01(c), because S-X 3-01(h), S-X 3-02(d), and S-X 3-12(f) refer to the updating requirements of Item 8.A of Form 20-F, which indicates that the most recent annual financial statements of a foreign business can be as old as 15 months at the time the registration statement is filed. In this case, Company Z would include or incorporate by reference Investee Q's audited financial statements for 2022 (together with financial statements for the other relevant prior years) without regard to Company Z's eligibility under S-X 3-01(c).]

**UNCONSOLIDATED MAJORITY-OWNED SUBSIDIARIES
AND 50 PERCENT OR LESS-OWNED PERSONS
(Last updated June 2023)**

SEC 4520

.906 Can a registrant omit information required by S-X 4-08(g) for an equity-method investee that is significant under S-X 3-09?

Perhaps. SAB Topic 6-K.4.b. notes that if separate financial statements of significant investees are included in an annual report to shareholders, the summarized data required by S-X 4-08(g) is not required for those entities. The SEC staff also extends this relief to filings on Form 10-K. However, if the investee's financial statements are not filed at the same time as the registrant's annual report/Form 10-K, the registrant must include summarized financial information for those entities required by S-X 4-08(g) in the financial statements when they are filed. See SEC FRM 2420.5.

[Editor's note: This discussion also applies to registrants that prepare an Annual Report to Shareholders. If the Annual Report does not include the separate financial statements (that were originally included with the Form 10-K), then summarized financial information should be included in the notes to the financial statements.]

[Editor's note: The guidance in SAB Topic 6-K.4.b. is intended to provide relief from disclosure requirements which would otherwise be duplicative. SAB Topic 6-K.4.b. does not relieve a registrant of the requirement to provide summarized financial statement disclosure for an investee unless the separate financial statements of that investee are included in the annual report/Form 10-K at the time it is initially filed. Consider the following example:

Facts: Company Z is a calendar year-end US domestic SEC registrant. Company Z has three equity-method investees with the following significance levels:

Investee A	25% significant
Investee B	12% significant
Investee C	5% significant

Analysis: Company Z is required to provide summarized financial information for all three investees pursuant to S-X 4-08(g). Company Z is also required to file separate financial statements of Investee A pursuant to S-X 3-09. SAB Topic 6-K.4.b. indicates that Company Z may exclude the summarized information relating to Investee A from Company Z's disclosures under S-X 4-08(g) if Investee A's separate financial statements are included in Company Z's annual report/Form 10-K when it is initially filed. SAB Topic 6-K.4.b. does not relieve Company Z of the requirement to provide summarized financial statement information relating to Investees B and C in the notes to Company Z's financial statements. The relief also would not apply to the summarized financial information of Investee A if Investee A's separate financial statements were to be filed by an amendment to Company Z's Form 10-K as permitted by S-X 3-09.]

If one or more investees are excluded from S-X 4-08(g) disclosures due to the filing of investee financial statements pursuant to SAB Topic 6-K.4.b., the SEC staff will not object to the omission of all S-X 4-08(g) disclosures if the registrant believes that such disclosure is not material and the significance of the remaining investees does not exceed 10 percent (in the aggregate). See Topic VI.E. in the highlights of the March 2014 meeting of the CAQ SEC Regulations Committee.

Notwithstanding the guidance in SAB Topic 6-K.4.b., if a domestic registrant furnishes separate financial statements of a foreign equity-method investee that are not reconciled to US GAAP (see SEC 4520.26), the domestic registrant should furnish summarized financial data of the foreign equity-method investee pursuant to S-X 4-08(g) in accordance with US GAAP in its primary financial statements. The summarized financial data must also be presented in US dollars. See footnote 40 to Securities Act Release 33-7053 (April 1994) and footnote 30 to Financial Reporting Release No. 44 (FRR 44) (December 1994).

.907 How are S-X 3-09 and S-X 4-08(g) applied by multiple series registrants?

A statutory trust (or limited partnership) that registers the offer and sale of beneficial interests (or limited partnership interests) in multiple series is commonly referred to as a multiple series registrant. In a typical multiple series scenario, the trust or partnership (rather than each individual series) is the registrant. However, each series is considered a security. Typically, investors invest in one or more individual series being offered by a registrant, and the capital raised by a particular series is invested separately from the capital of any other series of the registrant. See SEC FRM 2410.9.

Disclosure relating to these types of registrants is presented on a series basis. Accordingly, significance for purposes of applying S-X 3-09 and S-X 4-08(g) must be assessed at the individual series level to determine if separate financial statements or summarized financial data of any investments made by an individual series must be provided. See Securities Act Sections CDI 104.01.

The fact that the trust or limited partnership (rather than the individual series) is the issuer does not negate the requirement for series-level disclosure under S-X 3-09 and S-X 4-08(g). Consider the following example:

Facts: Series A is one of five series within a registrant and the registrant's Form 10-K includes the financial statements of each of the five series. Series A has an equity method investment which has a greater than 20% significance level to Series A (but represents only 5 percent significance to the registrant overall).

Analysis: Based on the significance of the equity method investment to Series A, separate financial statements for the investee must be provided in the registrant's Form 10-K under the provisions of S-X 3-09.

.908 Does S-X 3-09 apply to the financial statements of an acquired or to be acquired business?

A registrant may need to file financial statements of a recently acquired or to be acquired business under S-X 3-05. The SEC staff has indicated that financial statements of an equity method investee of the acquired/to be acquired business in this situation are not required to be filed unless the omission of the investee's financial statements would render the financial statements of the acquired/to be acquired business misleading or substantially incomplete. Following the acquisition, the significance of the equity-method investee would be evaluated in the context of the acquirer/registrant. See SEC FRM 2005.5.

.909 If an equity-method investee is a registrant, may it delay filing its own Form 10-K as a result of the S-X 3-09 grace period available to the investor?

No. If the investee is an SEC registrant, it must file its own annual report (e.g., Form 10-K) within the timeframe prescribed by that form (i.e., without regard to the S-X 3-09 grace period which may be available to the investor in connection with the investor's Form 10-K).

.910 If the S-X 3-09 grace period ends before the due date of the investor's Form 10-K, would the investor be required to file the investee's S-X 3-09 financial statements before filing the investor's Form 10-K?

No. If the investee's annual financial statements would be due before the due date of the registrant's Form 10-K (e.g., the domestic investee's year-end is October 31 and the registrant's year-end is December 31), then the registrant may file the investee's separate S-X 3-09 financial statements no later than the time the registrant files its Form 10-K. The registrant is not required to file the separate financial statements of the investee earlier than the due date of the registrant's Form 10-K.

.911 Which financial statements should a registrant provide under S-X 3-09 when the registrant's and the investee's fiscal years differ by 6 months?

Registrants generally file financial statements for the equity-method investee's fiscal year-end that is closest to the registrant's fiscal year-end regardless of whether such equity-method investee's fiscal year-end is before or after the registrant's fiscal year-end. If the equity-method investee's fiscal year differs from the registrant by six months (e.g., registrant has a December 31 year-end and equity-method investee has a June 30 year-end), the registrant may choose to file the equity-method investee's financial statements for the fiscal year ending prior to the registrant's December 31 year-end (i.e., June 30, 2023 for a registrant with a December 31, 2023 year-end) or after the registrant's December 31 year-end (i.e., June 30, 2024 for a registrant with a December 31, 2023 year-end), provided that the selected approach is applied consistently on an equity-method investee by equity-method investee basis. Registrants should consider their specific facts and circumstances and the informational needs of users of their financial statements when deciding which approach to apply. The acceptability of the two approaches would not be dependent on whether the registrant recorded its equity in the equity-method investee's earnings on a lag basis. See Topic VI.A. from the highlights of the March 2013 meeting of the CAQ SEC Regulations Committee.

.912 Does S-X 4-08(g) require the presentation of individually significant investees separate and apart from insignificant investees?

Generally no. The SEC staff has indicated that, in general, S-X 4-08(g) permits the aggregation of all investees, whether individually significant or not. However, the SEC staff has, in certain circumstances, issued comments that it believes aggregation is misleading or suppresses important information. In those cases, the SEC staff has requested that certain investees be presented separately. Separate information also may be requested for individual investees that are very significant quantitatively or qualitatively. The decision to disclose separate summarized information for an individual investee will depend on the particular facts and circumstances.

**DISCLOSURES RELATING TO GUARANTORS AND ISSUERS OF
GUARANTEED SECURITIES REGISTERED OR BEING REGISTERED**
(Last updated February 2023)

SEC 4530

- .1 General
- .2 Availability of the reporting and disclosure framework under S-X 3-10 and Exchange Act Rule 12h-5
- .3 Disclosures required by S-X 13-01
- .9 Frequently asked questions

[Editor's note: In March 2020 the SEC adopted significant changes to its disclosure requirements relating to guarantors and issuers of guaranteed securities that are registered or being registered. See SEC Release No. 33-10762, *Financial Disclosures about Guarantors and Issuers of Guaranteed Securities and Affiliates Whose Securities Collateralize a Registrant's Securities* (SEC Release 33-10762). The new and amended rules became effective January 4, 2021, subject to voluntary early compliance and the transition provisions described in Section VI of SEC Release 33-10762. **The guidance in SEC 4530 only relates to the new and amended rules (e.g., amended S-X 3-10 and new S-X 13-01).** Reference should be made to the relevant pre-January 4, 2021 rules for disclosures made under those prior rules.]

[Editor's note: The SEC staff has published interpretive guidance pertaining to the SEC's disclosure requirements relating to guaranteed securities in SEC FRM 2500.]

.1 GENERAL

A guarantee is a common type of credit enhancement that issuers use to reduce the cost of capital. By providing guarantees, the issuer may be able to sell its securities at a lower effective yield (as compared to unguaranteed securities) or the issuer may be able to avoid the need to provide collateral to the investor.

Under U.S. securities laws, a guarantee of a debt security is a separate security, and the offer and sale of the guarantee generally must be registered under the Securities Act unless exempt from registration. If the offer and sale are registered, each issuer and each guarantor must generally file the financial statements required of a registrant in accordance with Regulation S-X. Additionally, absent an exemption, the offer and sale of the securities under the Securities Act cause each issuer and guarantor to become subject to the reporting requirements of Section 15(d) of the Exchange Act, which, among other things, would require each issuer and guarantor to file reports (e.g., Forms 10-K and 10-Q) with the SEC (for at least the fiscal year in which the Securities Act registration statement became effective).

The SEC has historically recognized that full Securities Act and Exchange Act disclosure by every subsidiary issuer and guarantor may not be necessary because in many cases an investor's evaluation of the debt and guarantee together focuses on the consolidated financial statements of the parent company. The SEC has indicated that "this principle is grounded in the idea that the investment is in the consolidated enterprise when (1) the parent company is fully obligated as either issuer or full and unconditional guarantor of the security; (2) the parent company controls each subsidiary issuer and guarantor, including having the ability to direct all debt-paying activities; and (3) the financial information of each subsidiary issuer and guarantor is included as part of the consolidated financial statements of the parent" (footnotes omitted). Accordingly, the SEC provides an alternative disclosure framework and permits subsidiary issuers and guarantors to omit full financial statements when specified conditions are satisfied. The eligibility requirements for omitting the financial statements are set forth in S-X 3-10. The SEC also exempts subsidiary issuers and guarantors from requirements to file separate reports under the Exchange Act (e.g., Forms 10-K and 10-Q) if they are permitted to omit financial statements. See Exchange Act Rule 12h-5.

Registrants may wish to consult with their legal counsel regarding their registration and reporting obligations under U.S. securities laws.

[Editor's note: It is important to recognize the distinction between a guarantee and a collateral pledge when evaluating the applicable disclosure requirements. These two common types of credit enhancements are treated differently under the U.S. securities laws, and the SEC's disclosure requirements relating to guarantees are distinct from its disclosure requirements relating to collateral pledges. See SEC 4540 for a discussion of the disclosure requirements relating to affiliates whose securities collateralize securities

that are registered or being registered. Depending on the circumstances, a particular subsidiary may be subject to the disclosure requirements applicable to collateralized securities and those applicable to guaranteed securities. For instance, if a consolidated subsidiary is a guarantor of its parent's registered debt and the parent has also pledged the subsidiary's common stock as collateral for that registered debt, then the parent should consider both sets of requirements.]

.11 Common transaction structures to which S-X 3-10 might apply

There are a number of transaction structures to which S-X 3-10 might apply. Two commonly encountered transaction structures are as follows:

Transaction Structure 1:

Facts: In September 2023, Company X, an SEC registrant with common stock listed for trading on a national securities exchange, issued debt securities in a private placement that was exempt from registration pursuant to Securities Act Rule 144A. The debt is a direct obligation of Company X and repayment of the debt is guaranteed by each of Company X's 10 U.S. consolidated subsidiaries. As a part of the private placement, Company X and the 10 subsidiary-guarantors entered into a registration rights agreement with the initial purchasers. Under the registration rights agreement, Company X and the 10 subsidiary-guarantors agreed to exchange the debt and guarantees that were issued in the private placement with substantially equivalent debt and guarantees that are registered under the Securities Act. The exchange offer will be registered on Form S-4 in November 2023.

Analysis: When Company X and the 10 subsidiary-guarantors conduct the registered exchange offer, they will be offering a total of 11 different securities: the Company X debt is one security and each of the 10 guarantees is a separate security. Absent relief, the Form S-4 used to register the exchange offer would need to include relevant disclosure (including separate financial statements) for Company X and for each of the 10 subsidiary-guarantors. Additionally, absent relief, each of the 10 subsidiary-guarantors would (for some period of time) have an obligation to file reports with the SEC (e.g., Forms 10-K, 10-Q, and 8-K). S-X 3-10 might permit omission of the historical financial statements of the subsidiary-guarantors from the registration statement filed in connection with the exchange offer, and if omission is permitted, Exchange Act Rule 12h-5 provides relief to the subsidiary-guarantors from the requirement to file Exchange Act reports with the SEC. An element of complying with S-X 3-10 includes providing the financial and nonfinancial disclosures specified by S-X 13-01 to the extent material.

[Editor's note: The provisions of S-X 3-10 and S-X 13-01 do not directly apply to the materials that are prepared in connection with the private placement (i.e., the securities and the guarantees issued in the private placement were exempt from registration). However, Company X may wish to consult with its legal counsel regarding any significant differences between the private offering materials and the requirements of a Securities Act registration statement. Many companies prepare the offering materials used in connection with a private placement in a manner that does not differ significantly from the disclosures that will be provided in connection with the subsequent registration statement. When there are significant differences, those differences are oftentimes highlighted in the private offering materials. Additionally, there may be covenants that require inclusion in the private offering materials of all financial information as if the securities were issued in a transaction that is registered with the SEC.]

Transaction Structure 2:

Facts: Company Y is an existing SEC registrant with securities listed for trading on a national securities exchange. In October 2023, Subsidiary Z (Company Y's consolidated subsidiary) intends to issue debt securities in a public offering. Company Y will guarantee the repayment of Subsidiary Z's debt. The offering of the debt and the guarantee will be registered on Form S-3. Prior to the intended offering, Subsidiary Z was not an SEC registrant.

Analysis: When Company Y and Subsidiary Z conduct the public offering, they will be offering two separate securities: the Subsidiary Z debt is one security and the Company Y guarantee is a separate security. Absent relief, the Form S-3 used to register the offering would need to include relevant disclosure (including separate financial statements) for Company Y and Subsidiary Z. Additionally, absent relief, Subsidiary Z will have an obligation to file reports with the SEC (e.g., Forms 10-K, 10-Q, and 8-K). S-X 3-10 might permit omission of the historical financial statements of Subsidiary Z from the Form S-3 filed in connection with the offer and sale of the securities, and if omission is permitted, Exchange Act Rule 12h-5 provides relief to Subsidiary Z from the requirement to file Exchange Act reports with the SEC. An element of complying with S-X 3-10 includes providing the financial and nonfinancial disclosures specified by S-X 13-01 to the extent material.

.2 AVAILABILITY OF THE REPORTING AND DISCLOSURE FRAMEWORK UNDER S-X 3-10 AND EXCHANGE ACT RULE 12h-5

As noted above, the SEC has historically recognized that full Securities Act and Exchange Act disclosure by every subsidiary issuer and guarantor may not be necessary. Accordingly, the SEC provides an alternative disclosure framework and permits subsidiary issuers and guarantors to omit full financial statements when specified conditions are satisfied. The SEC also exempts subsidiary issuers and guarantors from requirements to file separate reports under the Exchange Act (e.g., Forms 10-K and 10-Q) if they are permitted to omit financial statements.

.21 Conditions which must be met in order to omit financial statements under S-X 3-10

S-X 3-10 provides that a subsidiary issuer or guarantor of a guaranteed security that is registered or being registered may omit the financial statements required by Regulation S-X if all the conditions outlined in (i) through (v) are present:

- (i) the issuer or guarantor is a consolidated subsidiary of the parent company;
- (ii) the parent company's consolidated financial statements have been filed;
- (iii) the guaranteed security is debt or debt-like;
- (iv) one of the following eligible issuer and guarantor structures is applicable:
 - (A) the parent company issues the security or co-issues the security, jointly and severally, with one or more of its consolidated subsidiaries; or
 - (B) a consolidated subsidiary issues the security or co-issues the security with one or more other consolidated subsidiaries of the parent company, and the security is guaranteed fully and unconditionally by the parent company; and
- (v) the parent company provides the disclosures specified in S-X 13-01.

For purposes of evaluating the availability of S-X 3-10, the terms *parent company*, *debt or debt-like*, and *full and unconditional* are defined in S-X 3-10(b)(1), (2), and (3), respectively. The term *subsidiary* is defined in S-X 1-02(x).

If the conditions listed above are met, then the parent company's financial statements together with the financial and nonfinancial disclosures specified by S-X 13-01 may be presented in the registration statement and in the parent's future Exchange Act periodic reports and the subsidiary issuer's/guarantor's separate financial statements may be omitted. Additionally, the subsidiary issuer/guarantor is relieved of its separate Exchange Act reporting obligations by Exchange Act Rule 12h-5. See SEC 4530.22.

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If these conditions are not met, then the subsidiary issuer's/guarantor's financial statements are required to be included in the registration statement and the subsidiary issuer/guarantor is not relieved of its separate Exchange Act reporting obligation.

[Editor's note: See SEC 4530.909 regarding certain trust preferred securities.]

.22 Exemption from requirement to file separate Exchange Act reports with the SEC

Exchange Act Rule 12h-5 exempts any issuer of a guaranteed security or guarantor of a security that is permitted to omit financial statements by S-X 3-10 from the requirements to file separate reports with the SEC under Section 13(a) or Section 15(d) of the Exchange Act (e.g., Forms 10-K and 10-Q).

The conditions in S-X 3-10(a) must be met at the end of each annual and quarterly period for use of the Exchange Act 12h-5 exemption. See SEC FRM 2540.1. If a subsidiary issuer/guarantor with an Exchange Act reporting obligation for the guaranteed securities was initially eligible to omit its financial statements because it met the requirements of S-X 3-10 and could rely on Exchange Act Rule 12h-5, but later ceased to satisfy those requirements (e.g., the subsidiary is no longer consolidated by the parent company), that subsidiary will be required to begin filing Exchange Act reports for the period during which it ceased to satisfy the requirements of S-X 3-10. The subsidiary is required to present the financial statements that are required by Regulation S-X at the time a report is due and is not able to present the disclosures specified by S-X 13-01 for historical periods.

[Editor's note: If an issuer or guarantor of a guaranteed security has a different class of securities registered under Exchange Act Section 12, then it would not be able to rely on the relief provision in Exchange Act Rule 12h-5 until it deregisters the other class of securities. See SEC FRM 2540.1 and Exchange Act Rules CDI 254.01.]

.23 A parent company's ability to cease providing disclosures specified by S-X 13-01

A parent company may be able to cease providing the disclosures specified by S-X 13-01 if the corresponding subsidiary issuer's/guarantor's Section 15(d) reporting obligation is suspended automatically by operation of Section 15(d)(1) of the Exchange Act or through compliance with applicable rules (e.g., Exchange Act Rule 12h-3). See SEC FRM 2540.2.

Section 15(d)(1) of the Exchange Act generally provides for an automatic suspension of Exchange Act reporting obligations as to any fiscal year (other than the fiscal year in which the registration statement became effective) if the securities of each class (other than any class of asset-backed securities) to which the registration statement relates are held of record by fewer than 300 persons at the beginning of the fiscal year (or held of record by fewer than 1,200 persons at the beginning of the fiscal year in the case of a bank, a savings and loan holding company or a bank holding company, as those terms are defined). Companies may wish to consult with their legal counsel regarding the application of Section 15(d)(1) of the Exchange Act or other guidance applicable to the suspension of Exchange Act reporting requirements.

If a particular subsidiary issuer/guarantor is not permitted to omit its financial statements in reliance on S-X 3-10 and, therefore, is not exempt from Exchange Act reporting under Exchange Act Rule 12h-5, it may qualify for a suspension of its reporting obligations after filing its first Form 10-K, if the relevant requirements (e.g., Section 15(d)(1) of the Exchange Act or Exchange Act Rule 12h-3) are met.

The parent company would not be permitted to cease providing the disclosures specified by S-X 13-01 as long as the subsidiary issuer or guarantor has a reporting obligation with respect to the guarantee or guaranteed security under Exchange Act Section 12(b) (e.g., if the security is listed for trading on a national securities exchange).

[Editor's note: When evaluating whether it would be appropriate to stop providing the disclosures required by S-X 13-01, companies should consider reviewing the indenture relating to the securities to identify any provisions which may require continued reporting.]

.3 DISCLOSURES REQUIRED BY S-X 13-01

S-X 13-01 requires a registrant to make specified disclosures (to the extent material) for each guaranteed security that is (i) subject to Section 13(a) or 15(d) of the Exchange Act or (ii) being registered under the Securities Act, for which the registrant is the parent company (as defined in S-X 3-10(b)(1)) of one or more subsidiaries that issue or guarantee the guaranteed security.

The disclosure requirements of S-X 13-01 are set forth in S-X 13-01(a) and include both non-financial disclosures (S-X 13-01(a)(1)-(3)) and financial disclosures (S-X 13-01(a)(4) and (5)).

.31 Non-financial disclosures required by S-X 13-01(a)(1)-(3)

Non-financial disclosures include a description of:

- the issuers and guarantors;
- the terms and conditions of the guarantees; and
- how the structure of the guarantees and other factors may affect payment.

Additionally, each subsidiary issuer/guarantor is required to be identified in an exhibit to the applicable filing. See, for example, S-K 601(b)(22).

See SEC FRM 2515.3.

.32 Financial disclosures required by S-X 13-01(a)(4) and (5)

Financial disclosures include the summarized financial information described in S-X 1-02(bb)(1) of each issuer and guarantor of the guaranteed security with an accompanying note that briefly describes the basis of presentation. The summarized financial information required by S-X 13-01(a)(4) must **exclude** subsidiaries that are not issuers or guarantors, even if an issuer or guarantor would otherwise consolidate such non-issuer/non-guarantor subsidiaries. An issuer's or guarantor's investment in a subsidiary that is not an issuer or guarantor shall not be presented (with this treatment likely discussed in the basis of presentation note). See SEC FRM 2520.1.

[Editor's note: The treatment of non-issuer/non-guarantor subsidiaries of issuers and guarantors in the summarized financial information required by S-X 13-01(a)(4) is different from the treatment of subsidiaries that would be consolidated by an affiliate whose securities have been pledged as collateral under S-X 13-02(a)(4). See SEC 4540.22 for information relating to S-X 13-02(a)(4), if applicable.]

In addition to the line items specified by S-X 1-02(bb)(1), S-X 13-01(a)(4)(iii) requires separate line items for an issuer's or guarantor's amounts due from, amounts due to, and transactions with (i) subsidiaries that are not issuers or guarantors and (ii) related parties. Additional line items could also be necessary to comply with S-X 13-01(a)(6).

[Editor's note: In SEC Release 33-10762, the SEC provided an example in which additional line items might be required. According to the SEC's example, "if substantially all of the obligated entities' non-current assets consisted of goodwill, separate presentation of goodwill from non-current assets would be required if the parent company concludes such disclosure would be material for investors to evaluate the sufficiency of the guarantee."]

The summarized financial information of each issuer and guarantor that is consolidated in the parent company's financial statements may generally be presented on a combined basis with the summarized financial information of the parent company with appropriate eliminations. See S-X 13-01(a)(4)(iv) for

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additional guidance, including guidance regarding the potential need to provide disaggregated summarized financial information. See also SEC FRM 2520.2 for additional implementation guidance.

[Editor's note: In SEC Release 33-10762, the SEC stated that "a parent company should consider materiality and exercise judgement in determining the appropriate level of aggregation of issuers and guarantors based on the nature of the disclosure. In this regard, it may be useful to consider quantitative factors, such as the financial significance of the affected issuers and guarantors, and qualitative factors, such as the nature of the facts and circumstances applicable to the issuers and guarantors. For example, if the same contractual or statutory restrictions affect some but not all subsidiary guarantors, and such subsidiary guarantors represent a substantial portion of the Obligor Group, aggregation of the Summarized Financial Information of such subsidiary guarantors may be appropriate. Conversely, it may not be appropriate to aggregate the Summarized Financial Information of such subsidiary guarantors where the contractual or statutory restrictions are different." (footnote omitted).]

S-X 13-01(a)(4) provides additional detail and instructions for the preparation of the summarized financial information.

See SEC FRM 2515.3.

.321 Disclosure of pre-acquisition summarized financial information in connection with a Securities Act registration statement (S-X 13-01(a)(5))

Disclosure of pre-acquisition summarized financial information is required in a Securities Act registration statement filed in connection with the offer and sale of a guaranteed security if:

- (i) the parent company acquired a significant business after the date of the parent company's most recent balance sheet included in its consolidated financial statements and
- (ii) the acquired business, one or more of the acquired business's subsidiaries, or the acquired business and one or more of its subsidiaries are issuers or guarantors of the guaranteed securities.

If pre-acquisition summarized financial information is required under S-X 13-01(a)(5), it would follow the form, content and periods specified in S-X 13-01(a)(4) for each recently acquired issuer or guarantor referred to in S-X 13-01(a)(5). See S-X 13-01(a)(5) for additional information, including additional guidance relating to whether a significant business has been acquired and the treatment of acquisitions of a group of related businesses.

[Editor's note: The disclosure specified by S-X 13-01(a)(5) is only required in a Securities Act registration statement. It is not required to be included in periodic reports under the Exchange Act (e.g., Form 10-K or Form 10-Q).]

See SEC FRM 2530.

.33 Periods for which summarized financial information is required

Summarized financial information is required as of and for the most recently ended fiscal year and year-to-date interim period included in the parent company's consolidated financial statements. For instance, a U.S. calendar year-end SEC registrant parent company that provides the S-X 13-01 disclosures in its filings would provide the following information in the indicated filing:

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Filing	Required summarized financial information
Form 10-K for the year ended December 31, 2023	As of and for the year ended December 31, 2023.
Form 10-Q for the nine-month period ended September 30, 2024	As of December 31, 2023 and as of and for the nine-month period ended September 30, 2024.
Form S-3 filed to register the offer and sale of securities subject to S-X 13-01 by a calendar year-end parent company on September 15, 2024	As of and for the year ended December 31, 2023 and as of and for the six-month period ended June 30, 2024.

.34 Additional disclosure required by S-X 13-01(a)(6) and (7)

In addition to the specific disclosures referred to in S-X 13-01(a)(1)-(5), S-X 13-01(a)(6) and (7) require disclosure of:

- any financial and narrative information about each guarantor if the information would be material for investors to evaluate the sufficiency of the guarantee; and
- sufficient information to make the financial and non-financial information presented not misleading.

.35 Location of the S-X 13-01 disclosures

The parent company may elect to provide the disclosures required by S-X 13-01 in a footnote to its consolidated financial statements, or in management's discussion and analysis of financial condition and results of operations (MD&A).

If the disclosures are not included in the consolidated financial statements or in MD&A, the parent company must include the disclosures in its prospectus immediately following "Risk Factors," if any, or immediately following the pricing information described in S-K 105. See S-X 13-01(b). See SEC FRM 2515.3.

[Editor's note: We expect most companies will provide the disclosures required by S-X 13-01 in MD&A or another location outside of the financial statements. Irrespective of the location, we expect companies will be considering the controls around the disclosures.]

.36 Audit requirements relating to the S-X 13-01 disclosures

If the parent company elects to provide the S-X 13-01 disclosures in a footnote to its audited consolidated financial statements, the disclosures must be audited (including consideration of related internal control over financial reporting, as applicable). If the parent company provides the S-X 13-01 disclosures outside the audited consolidated financial statements, then the disclosures do not need to be audited. See SEC FRM 2515.3.

.9 FREQUENTLY ASKED QUESTIONS

.901 Are there any bright-line, quantitative thresholds which govern the requirements to provide disclosure under S-X 13-01?

As noted above, the disclosures specified in S-X 13-01 are required to the extent material. S-X 13-01 generally does not specify bright-line quantitative thresholds for the inclusion of disclosures.

Additionally, S-X 13-01(a)(4)(vi)(A) through (D) describe four non-exclusive circumstances in which the summarized financial disclosures may be omitted. Disclosure is a condition to omission. See SEC FRM 2520.3.

If a parent company determines that not all of the required financial information is material, the information that is not material may be omitted without additional disclosure or explanation.

[Editor's note: In SEC Release 33-10762, the SEC stated "[a] parent company's responsibility to determine whether the disclosures specified in Rule 13-01 are material is not different from how it assesses materiality in connection with other information it files with the Commission."]

.902 Can a variable interest entity consolidated by the parent company under the applicable accounting framework qualify for the reporting model under S-X 3-10?

A variable interest entity that meets the definition of a subsidiary and is consolidated by a parent company under the applicable accounting framework (e.g., Accounting Standards Codification 810, *Consolidation*, by a parent company that applies U.S. generally accepted accounting principles) could qualify to use the reporting model under S-X 3-10.

.903 Has the SEC provided any examples of situations in which separate disclosure of summarized information under S-X 13-01(a)(4)(iv) might be required?

In SEC Release 33-10762, the SEC indicated that if a non-controlling interest holder, through its ability to exercise significant influence over a subsidiary guarantor, could materially affect payments to holders of the guaranteed debt, the parent company would be required to disclose those factors and separately disclose the summarized financial information attributable to that subsidiary guarantor.

Additionally, the appendix accompanying SEC Release 33-10762 states that "[i]f a subsidiary guarantee is not full and unconditional, or where there are multiple guarantees, not joint and several, disclosure of such terms and conditions will be required by Rule 13-01(a)(2). Separate disclosure of the summarized financial information for subsidiary guarantor(s) to which such terms and conditions apply is required (Rule 13-01(a)(4)(iv))."

.904 Do subsidiary guarantee release provisions prevent a subsidiary guarantor from omitting its financial statements under S-X 3-10?

S-X 3-10 does not require a subsidiary's guarantee to be full and unconditional. Therefore, the existence of subsidiary guarantee release provisions would not prevent that subsidiary guarantor from omitting its financial statements under S-X 3-10. However, SEC Release 33-10762 indicates that to the extent material, such release provisions would be required to be disclosed pursuant to S-X 13-01(a)(2) and separate disclosure of summarized financial information applicable to that subsidiary guarantor would be required by S-X 13-01(a)(4). See SEC FRM 2515.5.

[Editor's note: SEC Release 33-10762 also indicates that any limitations and conditions of a subsidiary's guarantee and whether the guarantee is joint and several with other

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guarantees may require disclosure and may also trigger the need for separate summarized financial information under S-X 13-01(a)(4)(vi).]

.905 Are the disclosures required by S-X 13-01 applicable to Form 10-Q?

Yes. See S-X 10-01(b)(9). As noted in SEC 4530.321, however, the disclosure of pre-acquisition summarized financial information pursuant to S-X 13-01(a)(5) is only required in connection with a Securities Act registration statement filed in connection with the offer and sale of a guaranteed security.

.906 Does the 74-day grace period provided in S-X 3-05(b)(4)(i)(B) which may be available in connection with financial statements of a recently acquired business also apply to the pre-acquisition summarized financial information of a recently acquired guarantor or issuer specified by S-X 13-01(a)(5)?

No. In SEC Release 33-10762, the SEC acknowledged that pre-acquisition summarized financial information may be required before the pre-acquisition financial statements are required by S-X 3-05. The SEC indicated that they “believe investors in a registered debt offering should be provided with information about issuers and guarantors in advance of an investment decision.” They also noted that the level of detail required by S-X 13-01(a)(5) is significantly less disclosure than the full pre-acquisition financial statements required by S-X 3-05. See SEC FRM 2530.4.

.907 Does the reporting model described in S-X 3-10 apply to smaller reporting companies, foreign private issuers and Regulation A issuers?

Yes, with some modifications as indicated in the relevant rules and form requirements. See, for example:

- S-X 8-01(c) and S-X 8-03(b)(6) with respect to smaller reporting companies;
- Instruction 1 to Item 8 of Form 20-F with respect to foreign private issuers; and
- Part F/S(b)(7)(i) of Form 1-A, Item 7(g)(1) of Form 1-K, Item 3(e)(1) of Form 1-SA and Securities Act Rule 257(b)(7) with respect to Regulation A issuers.

[Editor’s note: Smaller reporting companies, foreign private issuers and Regulation A issuers should look to the requirements of the specific form they are using or rule(s) they are subject to. See SEC FRM Note to Section 2510.2.]

.908 Did the SEC address how S-X 3-10 and S-X 13-01 should be applied in connection with a new shelf registration statement relating to guaranteed securities when there are no current plans to sell any guaranteed securities?

In SEC Release 33-10762 (see Section 3.C.2.c.iii), the SEC acknowledged this question stating “[i]ssuers meeting the definition of Well-Known Seasoned Issuer (“WKSI”) are currently afforded significant flexibility under [Securities Act] Rule 430B(a), which would include the flexibility to omit the information specified in Proposed Rule 13-01 at effectiveness so long as the information is added when the shelf registration statement is amended to identify subsidiary issuers and guarantors. We acknowledge that non-WKSI issuers are not similarly able to omit this information but note that WKSI are afforded substantially greater latitude in registering and marketing securities.” (footnotes omitted). Companies with this fact pattern should consider consulting with their legal counsel.

.909 Can an issuer of trust preferred securities continue to omit its financial statements under S-X 3-10 following the adoption of the amendments in SEC Release 33-10762 ?

Trust preferred securities are generally issued by a special purpose entity created by a parent-company guarantor, which is also an SEC registrant. In these cases, the sole purpose of the special purpose entity is generally to hold securities issued by the parent company, such as junior subordinated debt or preferred stock, and to issue the trust preferred securities that have payment terms that mirror the terms of the securities it holds. An issuer of trust preferred securities is usually **not consolidated** by the parent-company guarantor under U.S. GAAP.

In November 2020, the SEC's Division of Corporation Finance staff issued a no-action letter (<https://www.sec.gov/corpfin/certain-trust-preferred-securities-111020>) relating to S-X 3-10 and certain trust preferred securities. The no-action letter states:

“Based on the facts presented, the Division will not recommend enforcement action to the Commission if issuers of the Trust Preferred Securities described in your [incoming] letter continue to omit their separate financial statements following the effectiveness of the Commission's recent amendments to Regulation S-X Rule 3-10 on January 4, 2021, as long as all the conditions set forth in your [incoming] letter are satisfied.”

It is important to note that one of the conditions outlined in the incoming letter referred to above is that the trust preferred securities were initially issued prior to March 2, 2020. Companies may wish to consult with their legal counsel to determine whether the guidance provided in the no-action letter is applicable to their specific facts and circumstances.

See SEC FRM 2520.4.

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- .1 General
- .2 Disclosures required by S-X 13-02
- .3 Frequently asked questions relating to S-X 13-02
- .4 S-X 3-16

[Editor's note: In March 2020 the SEC adopted significant changes to its disclosure requirements relating to affiliates whose securities collateralize securities that are registered or being registered. See SEC Release No. 33-10762, *Financial Disclosures about Guarantors and Issuers of Guaranteed Securities and Affiliates Whose Securities Collateralize a Registrant's Securities* (SEC Release 33-10762). The new and amended rules became effective January 4, 2021, subject to voluntary early compliance and the transition provisions described below and in Section VI of SEC Release 33-10762.]

[Editor's note: The SEC staff has published interpretive guidance pertaining to the SEC's disclosure requirements relating to collateralized securities in SEC FRM 2600.]

.1 GENERAL

A collateral pledge is a common type of credit enhancement that issuers use to reduce their cost of capital. A pledge is a residual equity interest that could potentially give the secured party a direct claim to the pledged asset in the event of a default.

The SEC maintains disclosure requirements applicable to registered securities that are collateralized by the pledge of an affiliate's securities. These requirements are based on the overarching belief that investors make their investment decisions relating to these types of securities primarily based on the registrant's consolidated financial statements with supplemental details about the affiliate whose securities are pledged as collateral. The SEC's disclosure requirements applicable to these types of securities are primarily set forth in S-X 3-16 and S-X 13-02.

- S-X 3-16 contains the disclosure requirements applicable to securities issued and outstanding before January 4, 2021 if the registrant had not, prior to that date, provided financial statements under the requirements of that rule. See SEC 4540.4.

[Editor's note: The codified transaction provisions with respect to the continued applicability of S-X 3-16 don't make specific reference to the presence of collateral release provisions. However, section VI.B of SEC Release 33-10762, footnote 6 to the SEC's Small Business Compliance Guide relating to SEC Release 33-10762, and SEC FRM 2650.1 do make reference to the presence of collateral release provisions.]

- S-X 13-02 and related rules (e.g., S-X 10-01(b)(10)) contain the disclosure requirements applicable to securities issued on or after January 4, 2021 and to securities issued and outstanding before January 4, 2021 if the registrant had, prior to that date, provided financial statements under the requirements of S-X 3-16. See SEC 4540.2 and .3.

[Editor's note: It is important to recognize the distinction between a collateral pledge and a guarantee when evaluating the applicable disclosure requirements. These two common types of credit enhancements are treated differently under the U.S. securities laws, and the SEC's disclosure requirements relating to collateral pledges are distinct from its disclosure requirements relating to guarantees. See SEC 4530 for a discussion of the disclosure requirements relating to guarantors and issuers of guaranteed securities that are registered or being registered. Depending on the circumstances, a particular affiliate may be subject to the disclosure requirements applicable to collateralized securities and those applicable to guaranteed securities. For instance, if a consolidated subsidiary is a guarantor of its parent's registered debt and the parent has also pledged the subsidiary's common stock as collateral for that registered debt, then the parent should consider both sets of requirements.]

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.11 Common transaction structures and examples

Below are two commonly encountered transaction structures relating to the SEC's disclosure requirements pertaining to collateralized securities.

Transaction Structure 1:

Facts: Company X is an SEC registrant with 5 consolidated subsidiaries. In September 2023, Company X intends to file a registration statement on Form S-3 for the offer and sale of \$500 million of debt. The debt will be secured by a pledge of the common stock of each of Company X's five subsidiaries.

Analysis: Company X must provide, to the extent material, the disclosures required by S-X 13-02 in connection with its Form S-3 and periodic reports (e.g., Form 10-K and Form 10-Q) subsequent to the effective date of the Form S-3.

Transaction Structure 2:

Facts: In September 2023, Company Y, a private company, sold a new issue of notes in a transaction that was exempt from registration under Securities Act Rule 144A. The notes are collateralized by the common stock of Company Y's wholly-owned U.S. subsidiaries: Subsidiary D and Subsidiary E. In connection with the initial sale, Company Y agreed to exchange the unregistered notes for notes that are registered under the Securities Act. The exchange offer will be registered on Form S-4 in November 2023.

Analysis: In connection with the exchange offer, Company Y is registering (i.e., on Form S-4) securities (i.e., the exchange notes) that are collateralized by the securities (i.e., the common stock) of one or more affiliates (i.e., Subsidiary D and Subsidiary E). Accordingly, Company Y must provide, to the extent material, the disclosures required by S-X 13-02 in connection with its Form S-4 and periodic reports (e.g., Form 10-K and Form 10-Q) subsequent to the effective date of the Form S-4.

[Editor's note: The SEC's requirements contained in S-X 3-16 and S-X 13-02 apply even if less than 100 percent of the securities of a particular affiliate are pledged. The requirements of S-X 3-16 and S-X 13-02 do not apply to collateral arrangements for securities that are not registered or being registered (e.g., a bank revolving line of credit) or to collateral arrangements in which the collateral is not a security (e.g., a pledge of property, plant and equipment). For instance, the provisions of S-X 13-02 do not directly apply to the materials that were prepared in connection with the private placement referred to in Transaction Structure 2 (i.e., the debt issued in the private placement was not registered or being registered). However, Company Y may wish to consult with its legal counsel regarding any significant differences between the private offering materials and the requirements of a Securities Act registration statement. Many companies prepare the offering materials used in connection with a private placement in a manner that does not differ significantly from the disclosures that will be provided in connection with the subsequent exchange offer registration statement. When there are significant differences, those differences are oftentimes highlighted in the private offering materials. Additionally, there may be covenants that require inclusion in the private offering materials of all financial information as if the securities were issued in a transaction that is registered with the SEC.]

.2 DISCLOSURES REQUIRED BY S-X 13-02

S-X 13-02 requires a registrant to make specified disclosures (to the extent material) for each security that is (i) subject to Section 13(a) or 15(d) of the Securities Exchange Act or (ii) being registered under the Securities Act, that is collateralized by a security of one or more of the registrant's affiliates. The term affiliate is defined in S-X 1-02(b).

The disclosure requirements of S-X 13-02 are set forth in S-X 13-02(a) and include both non-financial disclosures (S-X 13-02(a)(1)-(3)) and financial disclosures (S-X 13-02(a)(4) and (5)).

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.21 Non-financial disclosures required by S-X 13-02(a)(1)-(3)

Non-financial disclosures include a description of:

- the securities pledged as collateral;
- the affiliates whose securities are pledged;
- the terms and conditions of the collateral arrangement; and
- whether a trading market exists for the pledged securities.

Additionally, each affiliate whose securities are pledged as collateral and the identity of the pledged security(ies) are required to be identified in an exhibit to the applicable filing. See, for example, S-K 601(b)(22).

.22 Financial disclosures required by S-X 13-02(a)(4) and (5)

Financial disclosures include the summarized financial information described in S-X 1-02(bb)(1) of each affiliate whose securities are pledged as collateral with an accompanying note that briefly describes the basis of presentation. The summarized financial information required by S-X 13-02(a)(4) includes the financial information of **all subsidiaries** that would be consolidated by an affiliate whose securities have been pledged as collateral, even if the securities of the affiliate's consolidated subsidiaries were not pledged as collateral.

[Editor's note: The treatment of subsidiaries that would be consolidated by an affiliate whose securities have been pledged as collateral under S-X 13-02(a)(4) is different from the treatment of non-issuer/non-guarantor subsidiaries of issuers and guarantors in the summarized financial information required by S-X 13-01(a)(4). See SEC FRM 2620.1 and SEC 2620.2. See also SEC 4530.32 for information relating to S-X 13-01(a)(4), if applicable.]

In addition to the line items specified by S-X 1-02(bb)(1), S-X 13-02(a)(4)(iii) requires separate line items for an affiliate's amounts due from, amounts due to, and transactions with (i) the registrant, (ii) any of the registrant's subsidiaries not included in the summarized financial information of the affiliates, and (iii) related parties.

The summarized financial information of each affiliate that is consolidated in the registrant's financial statements may generally be presented on a combined basis with appropriate eliminations. See S-X 13-02(a)(4)(iv) for additional guidance, including guidance regarding the potential need to provide disaggregated summarized financial information. See SEC FRM 2620.4 for a discussion of situations in which less than 100% of an affiliate's ownership interests are pledged as collateral.

[Editor's note: In SEC Release 33-10762, the SEC stated that "a registrant should consider materiality and exercise judgment in determining the appropriate level of aggregation of affiliates based on the nature of the disclosure. In this regard, it may be useful to consider quantitative factors, such as the financial significance of the affected affiliates, and qualitative factors, such as the nature of the facts and circumstances applicable to the affiliates. For example, if the trading market for an affiliate's security is the same as some but not all affiliates, and such similar affiliates represent a substantial portion of the summarized financial information of the combined affiliates, aggregation of the summarized financial information of such affiliates may be appropriate depending on the facts and circumstances. Conversely, it may not be appropriate to aggregate the summarized financial information of such affiliates where the trading markets for the securities are different" (footnote omitted).]

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S-X 13-02(a)(4) provides additional detail and instructions for the preparation of the summarized financial information.

.221 Disclosure of pre-acquisition summarized financial information in connection with a Securities Act registration statement (S-X 13-02(a)(5))

Disclosure of pre-acquisition summarized financial information is required in a Securities Act registration statement filed in connection with the offer and sale of a collateralized security if:

- (i) the registrant acquired a significant business after the date of the registrant's most recent balance sheet included in its consolidated financial statements; and
- (ii) the acquired business, one or more of the acquired business's subsidiaries, or the acquired business and one or more of its subsidiaries are affiliates whose securities collateralize the registrant's collateralized security.

If pre-acquisition summarized financial information is required under S-X 13-02(a)(5), it would follow the form, content and periods specified in S-X 13-02(a)(4) for each recently acquired affiliate whose securities collateralize the registrant's collateralized security referred to in S-X 13-02(a)(5). See S-X 13-02(a)(5) for additional information, including additional guidance relating to whether a significant business has been acquired and the treatment of acquisitions of a group of related businesses.

[Editor's note: The disclosure specified by S-X 13-02(a)(5) is only required in a Securities Act registration statement. It is not required to be included in Exchange Act periodic reports (e.g., Form 10-K or Form 10-Q).]

.23 Periods for which summarized financial information is required

Summarized financial information is required as of and for the most recently ended fiscal year and year-to-date interim period included in the registrant's consolidated financial statements. For instance, a U.S. calendar year-end SEC registrant that follows the disclosure requirements of S-X 13-02 would provide the following information in the indicated filing:

Filing	Required summarized financial information
Form 10-K for the year ended December 31, 2023	As of and for the year ended December 31, 2023.
Form 10-Q for the nine-month period ended September 30, 2024	As of December 31, 2023 and as of and for the nine-month period ended September 30, 2024.
Form S-3 filed to register the offer and sale of securities subject to S-X 13-02 by a calendar year-end registrant on September 15, 2024	As of and for the year ended December 31, 2023 and as of and for the six-month period ended June 30, 2024.

The S-X 13-02 disclosures are required in annual and quarterly reports as long as the registrant has a reporting obligation under Exchange Act Section 15(d) with respect to the registered collateralized securities. See SEC FRM 2640.3.

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.24 Other disclosures required by S-X 13-02(a)(6) and (7)

In addition to the specific disclosures referred to in S-X 13-02(a)(1)-(5), S-X 13-02(a)(6) and (7) require disclosure of:

- any financial and narrative information about each affiliate if the information would be material for investors to evaluate the pledge of the affiliate's securities as collateral; and
- sufficient information so as to make the financial and non-financial information presented not misleading.

.25 Location of the S-X 13-02 disclosures

The registrant may elect to provide the disclosures required by S-X 13-02 in a footnote to its consolidated financial statements, or in management's discussion and analysis of financial condition and results of operations (MD&A).

If the disclosures are not included in the consolidated financial statements or in MD&A, the registrant must include the disclosures in its prospectus immediately following "Risk Factors," if any, or immediately following the pricing information described in S-K 105. See S-X 13-02(b).

[Editor's note: We expect most companies will provide the disclosures required by S-X 13-02 in MD&A or another location outside of the financial statements. Irrespective of the location, we expect companies will be considering the controls around the disclosures.]

.26 Audit requirements relating to the S-X 13-02 disclosures

If the registrant elects to provide the S-X 13-02 disclosures in a footnote to its audited consolidated financial statements, the disclosures must be audited (including consideration of related internal control over financial reporting, as applicable). If the registrant provides the S-X 13-02 disclosures outside the audited consolidated financial statements, then the disclosures do not need to be audited. See SEC FRM 2610.2.

.3 FREQUENTLY ASKED QUESTIONS RELATING TO S-X 13-02

.301 Are there any bright-line, quantitative thresholds which govern the requirements to provide disclosure under S-X 13-02?

As noted above, the disclosures specified in S-X 13-02 are required to the extent material. S-X 13-02 generally does not specify bright-line quantitative thresholds for the inclusion of disclosures.

Additionally, S-X 13-02(a)(4)(vi)(A) and (B) describe two non-exclusive circumstances in which the summarized financial disclosures may be omitted. Disclosure is a condition to omission. See SEC FRM 2610.2.

If a registrant determines that not all of the required financial information is material, the information that is not material may be omitted without additional disclosure or explanation.

[Editor's note: In SEC Release 33-10762, the SEC stated "[a] registrant's responsibility to determine whether the disclosures specified in Rule 13-02 are material is not different from how it assesses materiality in connection with other information it files with the Commission."]

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.302 Do the disclosure requirements of S-X 13-02 apply to non-subsidiary affiliates, such as a non-subsidiary controlled affiliate or a controlling affiliate?

S-X 13-02 does not include requirements specific to non-subsidiary affiliates. In the rare circumstances where the affiliate is not a consolidated subsidiary of the registrant, S-X 13-02(a)(6) and (7) would require the registrant to provide any financial and narrative information about each such affiliate if the information would be material for investors to evaluate the pledge of the affiliate's securities as collateral and sufficient information so as to make the financial and non-financial information presented not misleading. In SEC Release 33-10762, the SEC stated that "[b]ecause the unconsolidated affiliate's financial information is not included in the registrant's consolidated financial statements, in these circumstances disclosure beyond what is specified in Rule 13-02(a)(1) through (4) may need to be provided. In this regard, separate financial statements of the unconsolidated affiliate may be necessary to satisfy the requirements of Rules 13-02(a)(6) and (7)" (footnote omitted). See SEC FRM 2620.3.

.303 Would the disclosure requirements of S-X 13-02 apply to a variable interest entity consolidated by the registrant under the applicable accounting framework?

The disclosure requirements of S-X 13-02 would apply to a variable interest entity that meets the definition of an affiliate and is consolidated by the registrant under the applicable accounting framework (e.g., Accounting Standards Codification 810, *Consolidation*, by the registrant that applies U.S. generally accepted accounting principles).

.304 Are the disclosures required by S-X 13-02 applicable to Form 10-Q?

Yes. See S-X 10-01(b)(10). As noted in SEC 4540.221, however, the disclosure of pre-acquisition summarized financial information pursuant to S-X 13-02(a)(5) is only required in connection with a Securities Act registration statement filed in connection with the offer and sale of the collateralized securities.

.305 Does the 74-day grace period provided in S-X 3-05(b)(4)(i)(B) which may be available in connection with financial statements of a recently acquired business also apply to the pre-acquisition summarized financial information of a recently acquired affiliate specified by S-X 13-02(a)(5)?

No. In SEC Release 33-10762, the SEC acknowledged that pre-acquisition summarized financial information may be required before the pre-acquisition financial statements are required by S-X 3-05. The SEC indicated that they "believe investors in a registered debt offering should be provided with information about affiliates whose securities are pledged in advance of an investment decision." They also noted that the level of detail disclosure required by S-X 13-02(a)(5) is significantly less than full financial statement requirements of S-X 3-05.

.306 Does a parent company's ability to cease providing disclosures under S-X 3-10 and S-X 13-01 relating to subsidiary issuer/guarantors as described in SEC 4530.23 also apply to the disclosures under S-X 13-02?

No. The guidance in SEC 4530.23 is specific to S-X 3-10 and S-X 13-01.

.307 Do the disclosure requirements of S-X 13-02 apply to smaller reporting companies, foreign private issuers and Regulation A issuers?

Yes, with some modifications as indicated in the relevant rules and form requirements. See, for example:

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- S-X 8-01(d) and S-X 8-03(b)(7) with respect to smaller reporting companies;
- Instruction 1 to Item 8 of Form 20-F with respect to foreign private issuers; and
- Part F/S(b)(7)(ii) of Form 1-A, Item 7(g)(2) of Form 1-K, and Item 3(e)(2) of Form 1-SA with respect to Regulation A issuers.

[Editor's note: Smaller reporting companies, foreign private issuers and Regulation A issuers should look to the requirements of the specific form they are using or rule(s) they are subject to. See SEC FRM Note to Section 2610.1.]

.308 Are S-X 13-02 disclosures required in registration statements that register the offer and sale of securities that are not collateralized by an affiliate's securities, even if the registrant has other registered collateralized securities outstanding?

No. See SEC FRM 2640.1.

.4 S-X 3-16

[Editor's note: As noted above, the requirements of S-X 3-16 continue to apply to each registered security issued and outstanding before January 4, 2021 for which the registrant had not, prior to that date, provided the financial statements required by S-X 3-16. See the introductory text to S-X 3-16, the introductory text to S-X 13-02, and section VI.B of SEC Release 33-10762. See also the first editor's note at the beginning of SEC 4540. The most likely place where the requirements of S-X 3-16 will apply is in Form 10-K. Therefore, the discussion in SEC 4540.4 is focused solely on the application of S-X 3-16 to Form 10-K. For SEC staff interpretations guidance regarding S-X 3-16, see section 2600 of the version of the Division of Corporation Finance Financial Reporting Manual updated through October 30, 2020.]

When applicable, S-X 3-16 requires a registrant's Form 10-K to include separate financial statements for each of a registrant's affiliates whose securities constitute a "substantial portion of the collateral" for any class of securities that is registered. The corresponding requirement applicable to smaller reporting companies is set forth in S-X 8-01(d).

.41 The "substantial portion of the collateral" test

An affiliate's securities are deemed to constitute a "substantial portion of the collateral" if the aggregate principal amount, par value, or book value of the affiliate's securities as carried by the registrant or the market value of the affiliate's securities (whichever is greatest) equals 20 percent or more of the principal amount of the secured class of securities.

- The term "market value" should be read as "fair value" and applies even if the affiliate's securities are not traded on an exchange or over-the-counter market.
- The denominator of the "substantial portion of the collateral" test should be based on the outstanding principal balance of the registered debt as of end of the most recent fiscal year.

[Editor's note: If the amount of securities outstanding has decreased (e.g., because some portion of the securities has been extinguished), then the denominator of the "substantial portion of the collateral" test will decrease (as compared to the denominator in the calculation when the securities were originally issued). This has the effect of increasing the likelihood that an affiliate's financial statements will constitute a substantial portion of the collateral (i.e., because the denominator has decreased).]

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- The “substantial portion of the collateral” test should be performed for each affiliate whose securities collateralize registered securities (including holding companies).
[Editor’s note: In multi-tier organizational structures, a lower tier subsidiary may trigger the requirement to provide S-X 3-16 financial statements at multiple levels within the organization. The fact that the financial statements of an operating company and its intermediate parent holding company are nearly identical may serve as a basis to seek relief from the SEC staff but generally does not serve as sufficient basis for omission in the absence of preclearance.]
- The “substantial portion of the collateral” test should be performed separately for each class of securities that have different terms even if issued under the same indenture.
- The “substantial portion of the collateral” test should be performed using information as of the end of the most recent fiscal year for which audited financial statements would be required in the filing.

.42 Financial statement requirements

The affiliate financial statements to be provided under S-X 3-16 are those that the affiliate would provide if it were a registrant and required to file financial statements. See S-X 3-16(a). We understand that the affiliate's financial statements must comply with relevant sections of Regulation S-X, Staff Accounting Bulletins, and other SEC staff interpretive guidance.

[Editor’s note: The SEC staff has indicated that affiliate’s financial statements generally do not need to include EPS or segment information (if they are not otherwise required); however, the SEC’s other financial reporting rules in Regulation S-X should be followed.]

If the affiliate's securities constitute a substantial portion of the collateral as of the end of the most recently completed fiscal year, then the affiliate's financial statements would be required for all periods (i.e., not just periods in which the affiliate's securities constitute a substantial portion of the collateral).

[Editor’s note: The “substantial portion of the collateral” test is used to determine whether a particular affiliate's financial statements are required to be provided when S-X 3-16 is applicable. The test does not determine which financial statements are required (e.g., how many periods).]

When considering S-X 3-16, the term financial statements should be interpreted broadly. S-X 3-16 is not limited to the primary financial statements of the affiliate (e.g., financial statements of an equity method investee under S-X 3-09 or financial statement schedules under S-X 5-04 may be required).

[Editor’s note: We believe any significance tests (e.g., relating to S-X 3-09) should be assessed based on the affiliate, not the registrant.]

The SEC staff has previously indicated that a registrant that properly suspends its reporting obligations with respect to registered collateralized debt under Exchange Act Section 15(d) is no longer required to file financial statements under S-X 3-16.

The SEC staff has also indicated that if the pledged securities cease to be pledged as collateral (either by operation of the underlying indenture or by consent of the debt holders) prior to the end of the most recent period for which S-X 3-16 financial statements would be required, S-X 3-16 financial statements are not required. Ordinarily, this will also be the case if pledged securities cease to be pledged as collateral after the end of the most recent reporting period, but before the corresponding annual report is due. However, there may be situations involving adverse credit events occurring after the end of the most recent period that warrant presentation of S-X 3-16 financial statements with full disclosure of the circumstances and current status of the collateral.

.43 Frequently asked questions relating to S-X 3-16

.431 Does S-X 3-16 apply to Form 10-Q

No. S-X 3-16 does not apply to Form 10-Q.

.432 When S-X 3-16 applies, for which periods are an affiliate's financial statements required to be presented in a Form 10-K?

The financial statements that are required by S-X 3-16 are those that the affiliate would provide if it were a registrant and required to file financial statements. Generally, the affiliate's financial statements included in Form 10-K will include audited balance sheets as of the end of each of the two most recently completed fiscal years and audited statements of comprehensive income, cash flows, and changes in equity for each of the three most recently completed fiscal years.

[Editor's note: The "substantial portion of the collateral" test performed as of the end of the most recently completed fiscal year is the determining factor for whether a particular affiliate's financial statements are required to be included in the Form 10-K when S-X 3-16 is applicable. If an affiliate's securities did not constitute a substantial portion of the collateral in connection with a prior year's assessment under S-X 3-16, but as of the end of the most recently completed fiscal year the affiliate's securities do constitute a substantial portion of the collateral, then the affiliate's financial statements are required for all periods.]

.433 May an affiliate's annual financial statements included in a Form 10-K under S-X 3-16 be presented on an unaudited basis for years in which the substantial portion of the collateral test does not equal or exceed 20 percent?

No. The affiliate's annual financial statements included in a Form 10-K under S-X 3-16 must be audited for all periods presented. This conclusion is consistent with the underlying principle in S-X 3-16 that the affiliate's financial statements should be the financial statements that it would file if it were a registrant and required to file financial statements. If the affiliate were a registrant and required to file financial statements in a Form 10-K, its annual financial statements would need to be audited for all periods presented.

[Editor's note: The audit requirement in S-X 3-16 operates differently as compared to the audit requirement relating to equity method investees under S-X 3-09. Under S-X 3-09, the investee's annual financial statements may be presented on an unaudited basis for annual periods in which the investee did not meet the significance threshold.]

.434 May a registrant that is required to file its Form 10-K as either an accelerated filer or a large accelerated filer file the affiliate's audited financial statements using the deadlines applicable to a non-accelerated filer?

We understand that the financial statements required by S-X 3-16 must be filed at the same time the registrant files its Form 10-K. This is true even if the subsidiary would have more time to file its own financial statements if it were a standalone registrant.

For instance, assume Company Z, a calendar year-end large accelerated filer, is required to include the financial statements of Subsidiary J (a non-accelerated filer) in its Form 10-K pursuant to S-X 3-16. Company Z must include Subsidiary J's financial statements in its Form 10-K no later than 60 days after year-end. This is true even though Subsidiary J (as a non-accelerated filer) would not have been required to file a Form 10-K until 90 days after year-end (if Subsidiary J were a standalone registrant).

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- .2 Applying S-X 3-05 in a registration statement or proxy statement
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- .4 Age of financial statements
- .5 Predecessor guidance
- .6 Waiver requests
- .7 Alternative model for complying with S-X 3-05 by certain first-time registrants (Staff Accounting Bulletin No. 80)
- .9 Frequently asked questions

[Editor's note: In May 2020, the SEC adopted amendments to its disclosure requirements relating to acquired and to be acquired businesses. See SEC Release No. 33-10786, *Amendments to Financial Disclosures about Acquired and Disposed Businesses* (SEC Release 33-10786). The amendments became effective on January 1, 2021 subject to the transition provisions (including voluntary early compliance) described in Section II. F of SEC Release 33-10786.

SEC 4550 contains guidance relating to business acquisitions under the amended rules. The SEC codified some of its interpretive views relating to the financial statements of businesses acquired or to be acquired and pro forma information in SEC Codification of Financial Reporting Policies (FRP) 506. Additionally, the SEC staff has published extensive interpretive guidance (e.g., Topics 2 and 3 of the Division of Corporation Finance Financial Reporting Manual (SEC FRM)). Much of the guidance was issued prior to the adoption of SEC Release 33-10786. Care should be exercised when considering guidance that was issued prior to the adoption of SEC Release 33-10786.]

.1 GENERAL

.11 In what circumstances does the SEC require the filing of financial statements relating to acquired or to be acquired businesses?

The SEC requires the filing of financial statements of acquired or to be acquired businesses in many situations. S-X 3-05 and S-X 8-04 (for smaller reporting companies) are the principal rules that govern these types of financial statements. However, S-X 3-05 and S-X 8-04 are not the only sources of disclosure requirements relating to acquired or to be acquired businesses. The specific instructions of the applicable registration or reporting form that is being prepared must be evaluated to determine whether financial statements or other disclosures relating to an acquired or to be acquired business are required. For instance:

- if an issuer files a registration statement under either the Securities Act or the Exchange Act, the instructions to the specific registration form being used may require the filing of financial statements relating to an acquired or to be acquired business. See, for example, Item 11(e) of Form S-1, Item 11(b) of Form S-3, and Item 13 of Form 10, each of which requires full compliance with S-X 3-05 or S-X 8-04.

[Editor's note: Some of the provisions of S-X 3-05 and S-X 8-04 may not be applicable in a situation in which an offering or sale is being made pursuant to an already effective registration statement. See SEC 4550.2221.]

- if an SEC registrant that is required to file current reports on Form 8-K acquires a significant business, Item 9.01(a) of Form 8-K specifies the financial statements that are required in the Form 8-K (e.g., Item 9.01(a)(1) references S-X 3-05 or S-X 8-04 for determining the financial statements that must be filed) and the timing.

[Editor's note: Certain aspects of S-X 3-05 are not applicable to filings made on Form 8-K. For example, the aggregate significance analysis described in Step 3 of SEC 4550.23 does not apply.]

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- SEC forms used in connection with business combination transactions (e.g., Form S-4) oftentimes require financial statements of the target business. See, for example, Items 15-17 of Form S-4 and Item 14 of Schedule 14A, each of which specifies the financial statements of the target that are required, generally without direct reliance on S-X 3-05 or S-X 8-04 with respect to the target's financial statements. See SEC 2121.904 for additional guidance on the application of the S-X 3-05 requirements in relation to a Form S-4.

[Editor's note: SEC 4550 is focused on the requirements applicable to a registrant that is neither a smaller reporting company nor a foreign private issuer. Other considerations may apply to a registrant that is a smaller reporting company or a foreign private issuer.]

S-X 3-05 generally does not apply to the acquisition of a business that is a predecessor of the registrant. The financial statements of an acquired or to be acquired business that is the predecessor to its acquirer must be provided in the filings of the acquirer pursuant to S-X 3-01 and S-X 3-02. See SEC FRM 2005.6 and SEC 4550.5.

.2 APPLYING S-X 3-05 IN A REGISTRATION STATEMENT OR PROXY STATEMENT

S-X 3-05 is generally applied in 3 distinct steps:

- Step 1: Determine whether a transaction has occurred or is probable that is within the scope of S-X 3-05. See SEC 4550.21.
- Step 2: Determine whether financial statements relating to an individual acquired or to be acquired business (including related businesses) are required. See SEC 4550.22.
- Step 3: Determine whether disclosures are required relating to aggregate significance of acquired and to be acquired businesses for which financial statements are not (or not yet) required. See SEC 4550.23.

.21 What criteria are used to determine whether a transaction has occurred or is probable that is within the scope of S-X 3-05 (Step 1)?

S-X 3-05 applies to business acquisitions that:

- occurred during the most recently completed fiscal year or subsequent interim period for which a balance sheet is required by S-X 3-01;
- occurred after the most recent balance sheet filed pursuant to S-X 3-01; or
- are probable.

See S-X 3-05(a)(1)(i)-(ii).

S-X 3-05 does not apply to:

- the acquisition of a real estate operation (as defined in S-X 3-14(a)(2)(i)) subject to S-X 3-14 (see SEC 4555 for information relating to S-X 3-14); or
- to a business which was totally held (as defined in S-X 1-02(y)) by the registrant prior to consummation of the transaction.

.211 How is the term “business” defined for purposes of S-X 3-05?

S-X 3-05 uses the definition of a business set forth in S-X 11-01(d) to evaluate whether a particular transaction is within the scope of S-X 3-05.

[Editor's note: The acquisition of a business under S-X 3-05 includes the acquisition of an interest in a business accounted for by the registrant under the equity method or, in lieu of the equity method, the fair value option. See S-X 3-05(a)(2)(ii).]

The SEC staff considers the continuity of the business operations to be a significant factor in determining whether a business has been acquired for purposes of S-X 11-01(d). The SEC staff focuses primarily on whether the nature of the revenue-producing activity will remain generally the same after the acquisition. The SEC staff also indicated that there is a presumption that an acquisition of a separate entity, subsidiary or division is considered in determining if a business has been acquired for purposes of S-X 11-01(d). See Topic III.B from the highlights of the September 2022 meeting of the CAQ SEC Regulations Committee. For example:

- the acquisition of a manufacturing plant where the acquirer elects to (1) produce a different product, (2) use a different sales and labor force, and (3) re-tool the plant, might be viewed as the acquisition of a fixed asset, since management of the acquirer does not expect to continue the previous business operation.
- the acquisition of customer lists, trademarks, tradenames, licenses, drawings, formulas, etc., relating to a product line, may be viewed as the acquisition of a business regardless of whether any tangible assets or liabilities are acquired or assumed in connection with the transaction.
- the acquisition of an idled plant may be an asset acquisition.
- the acquisition of a hotel is generally considered a business acquisition.

The facts and circumstances surrounding each acquisition must be carefully evaluated and weighed in determining whether a business was acquired.

See SEC FRM 2010.5 and 2010.6 for guidance related to bank branch acquisitions and insurance policy acquisitions, which may constitute business acquisitions for SEC reporting purposes.

[Editor's note: The FASB's definition of a business included in ASC 805, *Business Combinations*, is not the same as the definition of a business under S-X 11-01(d). Accordingly, what constitutes a business under S-X 11-01(d) may be different from what constitutes a business for accounting purposes under GAAP. See SEC FRM 2010.1 and footnote 8 to SEC Release 33-10786.]

The various attributes included in the definition of a business included in S-X 11-01(d) are not a checklist; rather, the totality of the factors need to be evaluated. In situations where there are questions regarding how to apply the factors, a company may want to discuss its analysis with the SEC staff. If the SEC staff does not agree with management's conclusion, they may, nonetheless, waive the financial statement requirements when the financial statements will not provide incremental decision useful information. See SEC 4550.6.

.212 How is the term “probable” defined for purposes of S-X 3-05?

The SEC has not provided prescriptive guidance for determining whether an acquisition is probable. Instead, FRP 506.02.c.ii states that “consummation of a transaction is considered to be probable whenever the registrants’ [sic] financial statements alone would not provide investors with adequate financial information with which to make an investment decision.” See SEC FRM 2005.4.

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Each situation must be evaluated based on the specific facts and circumstances, and companies may wish to consult with their legal counsel in making the probability determination.

.213 How are related businesses treated for purposes of applying S-X 3-05?

Acquisitions of a group of related businesses that are probable or that have occurred subsequent to the latest fiscal year-end for which audited financial statements of the registrant have been filed are treated as if they were a single business acquisition for purposes of determining significance under S-X 3-05. Businesses are deemed to be related if:

- they are under common control or management;
- the acquisition of one business is conditional on the acquisition of each other business; or
- each acquisition is conditioned on a single common event.

The required financial statements of related businesses may be presented on a combined basis for any periods they are under common control or management. See S-X 3-05(a)(3).

.22 How do you determine whether financial statements of an individual acquired or to be acquired business (including related businesses) are required (Step 2)?

The determination as to whether financial statements relating to an individual acquired or to be acquired business (including related businesses) are required generally depends on two distinct considerations: significance and timing.

[Editor's note: If the evaluation is being made in connection with registering the offering of securities to the holders of the business being acquired, then the specific requirements of the registration form being used (e.g., Form S-4 or Form F-4) should be evaluated to determine whether financial statements are required. See SEC FRM 2200. See also SEC 2121.]

.221 What are the significance thresholds for purposes of determining whether an individual acquired or to be acquired business (including related businesses) are required under S-X 3-05?

The significance evaluation under S-X 3-05 is performed using the conditions of significance specified in S-X 1-02(w) substituting a 20% threshold for the 10% threshold set forth in S-X 1-02(w).

- If none of the significance conditions exceed 20%, then financial statements of the acquired or to be acquired business are not required based on individual significance. See S-X 3-05(b)(2)(i).
- If any of the three significance conditions exceeds 20%, but none exceed 40%, then financial statements of the acquired or to be acquired business must be filed for at least the most recent fiscal year and the most recent interim period specified in S-X 3-01 and 3-02 (subject to the considerations discussed in SEC 4550.222). See S-X 3-05(b)(2)(ii).
- If any of the three significance conditions exceeds 40%, then financial statements of the acquired or to be acquired business must be filed for at least the two most recent fiscal years and any interim periods specified in S-X 3-01 and 3-02 (subject to the considerations discussed in SEC 4550.222). See S-X 3-05(b)(2)(iii).

[Editor's note: Under certain circumstances financial statements covering a period of 9 to 12 months will be deemed to satisfy a requirement for filing financial statements for a period of 1 year. See S-X 3-06.]

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The significance determination must be made using the guidance in S-X 11-01(b)(3) and (4). Additionally, when determining the periods for which financial statements are required, the income test significance condition should be evaluated using the lower of the total revenue component or income or loss from continuing operations component. See S-X 3-05(b)(2) and (3).

S-X 11-01(b)(3) specifies the financial information to be used for purposes of determining significance, including in connection with the acquisition of net assets constituting a business that qualifies for the abbreviated financial statements model set forth in S-X 3-05(e) and the acquisition of a business that generates substantially all of its revenues from oil and gas producing activities (as defined in S-X 4-10(a)(16)) and qualifies for the abbreviated financial statements model set forth in S-X 3-05(f). See SEC 4550.32.

See also SEC 4550.902 and 4550.905.

.222 Under what circumstances are financial statements of an acquired or to be acquired business that is greater than 20% significant not required in a registration statement or proxy statement?

S-X 3-05(b)(4)(i) provides that a registration statement that is not subject to Securities Act Rule 419 (regarding offerings by blank check companies) or a proxy statement is not required to include the financial statements of a greater than 20% acquired or to be acquired business based on individual significance if:

- the acquired or to be acquired business is significant at or below the 50% level; and
- one of the following conditions is met:
 - (i) the acquisition has not been consummated; or
 - (ii) the date of the final prospectus or prospectus supplement relating to an offering as filed with the SEC pursuant to Securities Act Rule 424(b), or the mailing date in the case of a proxy statement, is no more than 74 days after consummation of the business acquisition, and the financial statements have not previously been filed by the registrant.

Accordingly, the financial statements of a significant to be acquired business generally do not need to be provided in connection with a registration statement that is not subject to Securities Act Rule 419 or a proxy statement based on individual significance unless the to be acquired business is significant above the 50% level.

The financial statements of a significant acquired business do not need to be provided in connection with a registration statement that is not subject to Securities Act Rule 419 or a proxy statement based on individual significance unless:

- the acquired business is significant above the 50% level;
- the acquired business's financial statements have been previously filed by the registrant; or
- the date of the final prospectus or prospectus supplement, or the mailing date in the case of a proxy statement, is more than 74 days after the acquisition was consummated.

See also SEC 4550.903.

[Editor's note: The ability to omit the financial statements of an acquired or to be acquired business under S-X 3-05(b)(4)(i) relates only to the assessment of whether financial statements of an individual acquired or to be acquired business (including related businesses) are required under S-X 3-05. Refer to Step 3 below for consideration of aggregate significance.]

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[Editor's note: The potential to omit the financial statements of the significant acquired or to be acquired business under S-X 3-05(b)(4)(i) relates solely to registration statements and proxy statements. A registrant (other than a foreign private issuer required to file reports on Form 6-K) that uses this temporary grace period to omit financial statements of a recently consummated business acquisition from its initial registration statement must still file those financial statements (and any required pro forma information) on a Form 8-K no later than 75 days after consummation of the acquisition. See S-X 3-05(b)(4)(ii). See SEC FRM 2045.17 for an example of the SEC staff's historical application of this concept to an existing SEC registrant.]

.2221 Are there different considerations relating to an already effective registration statement?

Offerings generally should not be made pursuant to an already effective registration statement without providing the financial statements of an acquired business that is significant above the 50% level. However, the SEC permits the following offerings or sales of securities pursuant to a registration statement that is already effective to proceed during the applicable grace period without the financial statements of a greater than 50% significant acquired business:

- offerings or sales of securities upon the conversion of outstanding convertible securities, or upon the exercise of outstanding warrants or rights;
- dividend or interest reinvestment plans;
- employee benefit plans;
- transactions involving secondary offerings (secondary offerings are generally sales of securities by selling security holders and not by the issuers); or
- sales of securities pursuant to Rule 144.

See the Instruction to Item 9.01 of Form 8-K and SEC FRM 2050.3.

We understand that the 50% "bright line" threshold referred to above with respect to a completed business acquisition does not apply in the same way to a probable business acquisition. We understand that in a delayed or continuous offering pursuant to an already effective registration statement, separate financial statements of a to be acquired business that is greater than 50% significant are not always required; rather, we understand that the registrant should consider whether the probable acquisition represents a fundamental change. See SEC FRM 2045.3 for historical SEC staff guidance and Topic IV.A from the highlights of the October 2015 meeting of the CAQ SEC Regulations Committee.

[Editor's note: The term "fundamental change" is not explicitly defined. Management generally obtains the views of its legal counsel in making this assessment.]

Registrants should also consider whether individually insignificant acquisitions occurring subsequent to effectiveness, when combined with individually insignificant acquisitions that occurred after the most recent audited balance sheet in the registration statement, but prior to effectiveness, may be of such significance in the aggregate that an amendment is necessary. See SEC FRM 2045.3.

[Editor's note: The guidance in SEC 4550.2221 is applicable to offerings or sales of securities pursuant to a registration statement that is already effective. Registration statements and post-effective amendments to registration statements cannot become effective without the financial statements of a greater than 50% significant acquired or to be acquired business. This is true even if the registration statement or post-effective amendment relates solely to the types of offerings/sales listed above. See SEC FRM 2050.5.]

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.223 Can the requirement to provide pre-acquisition financial statements be satisfied based on the inclusion of post-acquisition operating results in the registrant's audited financial statements?

Separate financial statements of an acquired business may be omitted from a registration statement or proxy statement depending on (i) the significance of the acquired business and (ii) how many months of the acquired business's operating results are included in the registrant's audited financial statements as follows:

<u>Level of significance</u>	<u>Months for which operating results of the acquired business are included in the registrant's audited financial statements</u>
Greater than 20% but not greater than 40%	9 months
Greater than 40%	12 months

See S-X 3-05(b)(4)(iii).

[Editor's note: If a registrant believes other methods of using post-acquisition audit results to satisfy some or all of an acquired business's pre-acquisition financial statement requirements are appropriate, they should consider contacting the SEC staff to discuss their specific facts and circumstances.]

Consider the following example.

Company M, a calendar year-end private company, which does not qualify as an emerging growth company, publicly files a registration statement on Form S-1 for an initial public offering in February 2024. Company M acquired Business B, a calendar year-end private company on March 17, 2023. The level of significance of the acquisition was 35% (i.e., a one-year audited annual financial statement requirement). The Form S-1 includes audited financial statements of Company M as of December 31, 2023 and 2022 and for each of the three years in the period ended December 31, 2023.

In this example, because Business B was not significant above the 40% level and Business B's post-acquisition results have been included in Company M's audited financial statements for at least 9 months (i.e., the period from March 17, 2023 through December 31, 2023), separate financial statements of Business B are not required to be provided in the Form S-1 under S-X 3-05.

.23 How do you determine whether disclosures are required relating to aggregate significance of acquired and to be acquired businesses for which financial statements are not (or not yet) required (Step 3)?

In addition to considering the significance of acquired and to be acquired businesses on an individual basis, S-X 3-05(b)(2)(iv) requires consideration of the aggregate significance for businesses acquired or to be acquired since the date of the most recent audited balance sheet filed for the registrant for which financial statements are either:

(i) not required because the acquired or to be acquired business is not significant above the 20% level;
or

(ii) not yet required based on the timing guidance referred to SEC 4550.222.

Aggregate significance is generally assessed by considering the tested group of businesses together. However, when evaluating the income test condition, businesses reporting income (the income group) should be evaluated separately from businesses reporting losses (the loss group). See S-X 1-02(w)(1)(iii)(B)(3). We understand this to be true for both the revenue component (if applicable) and the income component.

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[Editor's note: We understand that related businesses (see SEC 4550.213) should be considered as a single acquisition for purposes of determining whether the group of related businesses should be evaluated in the income group or the loss group.]

[Editor's note: There are generally two components to consider when assessing whether the income test condition has been met: the revenue component and the income component. However, S-X 1-02(w)(1)(iii)(A)(2) indicates that the revenue component is not applicable "if either the registrant and its subsidiaries consolidated or the tested subsidiary did not have material revenue in each of the two most recently completed fiscal years." We understand that when considering whether the revenue component is applicable in the context of an aggregate assessment of the income test condition, the registrant should consider whether the tested group of businesses had material revenue in each of the two most recently completed fiscal years on an aggregate basis. This means the revenue component might be applicable to one group of tested businesses (e.g., the income group) and not the other (e.g., the loss group).]

[Editor's note: The significance calculations performed in connection with the aggregate significance evaluation may be different from the calculations performed at the time an acquisition was completed.]

[Editor's note: Aggregate significance under the investment test may also need to include certain acquired or to be acquired real estate operations as described in S-X 3-05(b)(2)(iv).]

If any of the three aggregate significance conditions exceeds 50%, the following disclosures are required:

- financial statements covering at least the most recent fiscal year and the most recent interim period specified in S-X 3-01 and S-X 3-02 for any acquired or to be acquired business (or real estate operation, if applicable) for which financial statements are not yet required based on the timing guidance provided in SEC 4550.222 or S-X 3-14(b)(3)(i); and
- pro forma financial information pursuant to S-X 11-01 through 11-02 that depicts the aggregate impact of the acquired or to be acquired businesses and, if applicable, real estate operations, in all material respects.

See S-X 3-05(b)(2)(iv)(A) and (B).

[Editor's note: The financial statement requirements under the aggregate significance assessment are limited to acquired or to be acquired businesses (and real estate operations, if applicable) that are **significant above 20% individually**. However, the pro forma financial information is required to depict the aggregate impact of **all** the acquired or to be acquired businesses (in all material respects) without regard to whether their historical financial statements are required to be provided.]

The example below illustrates the aggregate significance evaluation methodology described above in connection with a registration statement to be filed on December 14, 2023 by Company X, a calendar year-end SEC registrant. For purposes of this example, assume that Acquisitions 1, 2, and 3 (the Income Group) all reported income for purposes of the income component of the income test and Acquisitions 4, 5, and 6 (the Loss Group) all reported losses for purposes of the income component of the income test. Acquisition 5 in this example was completed in early December 2023 and the financial statements have not yet been filed. Acquisition 6 is probable, but not yet completed. Also assume that the revenue test has been determined to be applicable to both the Income Group and the Loss Group. None of the businesses are "related businesses" and all businesses use a calendar year-end.

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	Asset	Investment	<u>Income test</u>	
	<u>Test</u>	<u>Test</u>	<u>Revenue Component</u>	<u>Income Component</u>
Acquisition 1	5%	6%	21%	13%
Acquisition 2	6%	5%	17%	24%
Acquisition 3	5%	6%	16%	15%
Acquisition 4	5%	5%	7%	16%
Acquisition 5	21%	4%	2%	25%
Acquisition 6	7%	6%	3%	21%
Aggregate asset test	<u>49%</u>			
Aggregate investment test		<u>32%</u>		
Aggregate income test-Income Group			<u>54%</u>	<u>52%</u>
Aggregate income test-Loss Group			<u>12%</u>	<u>62%</u>

In this example, because both the aggregate revenue and aggregate income components for the Income Group (Acquisitions 1, 2, and 3) exceeded 50%, the aggregate income test condition has been met and the following disclosures required by S-X 3-05(b)(2)(iv) are required to be included or incorporated by reference in the Form S-3:

- Financial statements of Acquisition 5 as of December 31, 2022 and for the year then ended (audited) and as of September 30, 2023 and for the nine months then ended (unaudited); and
- A pro forma balance sheet of Company X as of September 30, 2023 and pro forma statements of comprehensive income of Company X for the year ended December 31, 2022 and for the nine months ended September 30, 2023 depicting the aggregate impact of Acquisitions 1-6, in all material respects.

[Editor's note: Separate financial statements for Acquisition 5 are required because Acquisition 5 was significant individually, but the financial statements were not yet required based on the timing guidance described in SEC 4550.222. None of the other acquired or to be acquired business were significant individually; accordingly historical financial statements are not required for those acquired or to be acquired businesses.]

.3 FINANCIAL INFORMATION REQUIREMENTS OF ACQUIRED OR TO BE ACQUIRED BUSINESSES

.31 Are the financial statements provided pursuant to S-X 3-05 the same as if the acquired or to be acquired business were a registrant?

SEC FRM 2005.1 states a general principle that the financial statements of an acquired or to be acquired business provided pursuant to S-X 3-05 are generally the same as if the acquired or to be acquired business were a registrant, except that the periods to be presented are determined by the level of significance.

There are, however, exceptions to this general principle. For instance, while S-X 3-05(a)(1) makes it clear that the financial statements should be prepared in accordance with Regulation S-X, it also provides that related schedules required by S-X Article 12 are not required to be filed. Also, SEC FRM 2005.5 indicates that “[f]inancial statements of recently acquired businesses of the acquiree or equity method investees of the acquiree need not be filed unless their omission would render the acquiree’s financial statements misleading or substantially incomplete.” Additionally, careful consideration should be given to the scope and/or adoption dates of individual accounting standards/requirements to determine whether they are applicable. See SEC FRM 2005.1 for examples.

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We believe the financial statements of an acquired or to be acquired business also should comply with relevant Staff Accounting Bulletins.

The audit of the financial statements of an acquired or to be acquired business provided pursuant to S-X 3-05 may be conducted in accordance with i) AICPA standards, ii) PCAOB standards, or iii) both AICPA and PCAOB standards, as appropriate. The SEC does not generally require financial statements of a non-SEC registrant prepared to comply with S-X 3-05 to be audited by a PCAOB-registered independent public accounting firm, or that the audit be performed in accordance with PCAOB standards. See SEC FRM 4110.5 for various examples of the SEC staff's requirements relating to auditing standards and auditor registration with the PCAOB.

The SEC will not accept an audit conducted solely in accordance with International Standards on Auditing or auditing standards of a foreign jurisdiction. See SEC FRM 4210.3 and section II.6.c of SEC Release 33-10786.

The financial statements of a foreign business or entity that would qualify as a foreign private issuer (FPI) if it were a registrant can be prepared either in the same currency as the issuer or in the currency normally used for the preparation of such entity's financial statements. See SEC FRM 6620.7.

[Editor's note: See SEC 4550.5 for information relating to a predecessor.]

.32 Are there circumstances under which the SEC will accept abbreviated financial statements relating to an acquired or to be acquired business in satisfaction of S-X 3-05?

Registrants frequently acquire a component of an entity that is a business as defined in S-X 11-01(d) but does not constitute a separate entity, subsidiary, or division (e.g., a product line or a line of business contained in more than one subsidiary of the selling entity). S-X 3-05(e) permits a registrant to provide abbreviated financial statements if the acquired or to be acquired business meets all the qualifying conditions set forth in S-X 3-05(e)(1). If those conditions are met, the abbreviated financial statements must be prepared in accordance with the requirements of S-X 3-05(e)(2).

Additionally, S-X 3-05(f)(2) sets forth an abbreviated financial statements reporting model for the acquisition of a business which generates substantially all of its revenues from oil- and gas-producing activities (as defined in S-X 4-10(a)(16)). Under this model, if the acquired or to be acquired business generates substantially all of its revenues from oil- and gas-producing activities and the qualifying conditions in S-X 3-05(e)(1) are met, the financial statements may consist of only statements of revenues and expenses. The statements of revenues and expenses should exclude expenses not comparable to the proposed future operations, such as depreciation, depletion and amortization, corporate overhead, income taxes and interest associated with debt that will not be assumed by the registrant. If the financial statements are limited to statements of revenues and expenses, they should include the footnote disclosures specified in S-X 3-05(e)(2)(iii).

See SEC 4550.33 regarding auditor reporting considerations relating to abbreviated financial statements.

.33 Are there any auditor reporting considerations relating to abbreviated financial statements?

Abbreviated financial statements are generally considered special purpose financial presentations (sometimes referred to as an incomplete presentation otherwise in accordance with GAAP). Auditor reporting guidance relating to special purpose financial presentations is discussed in AICPA AU-C 805, *Special Considerations – Audits of Single Financial Statements and Specific Elements, Accounts, or Items of a Financial Statement* and PCAOB AS 3305, *Special Reports*.

One of the key factors required by professional auditing literature to be present in order to permit the auditor to issue a general use report on a special purpose presentation for use in a general purpose document (which includes registration statements and many private placement offering documents) is that the presentation be prepared pursuant to an acceptable financial reporting framework suitable for general use.

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We believe the models set forth in S-X 3-05(e) and (f) represent acceptable financial reporting frameworks for the special purpose presentations discussed therein for the purposes of:

- complying with S-X 3-05 in connection with an SEC filing; or
- preparing abbreviated financial statements of an acquired or to be acquired business (that would be permitted by S-X 3-05 in connection with an SEC registered offering) for use in offering materials relating to a private placement of securities if the issuer intends to register the private placement securities with the SEC (or exchange the private placement securities for SEC-registered securities).

[Editor's note: Auditing subsequent periods or reviewing interim periods may result in different reporting conclusions. Registrants should be aware that a conclusion that may be acceptable in a SEC filing may not be acceptable in a different context.]

In the case of either a registered offering, or a private placement of securities where the securities will subsequently be registered with the SEC (or exchanged for SEC-registered securities) where the abbreviated financial statements are not prepared in accordance with S-X 3-05(e) or (f) (e.g., the qualifying conditions in S-X 3-05(e)(1) are not present), SEC staff agreement to the special purpose presentation is obtained prior to the issuance of a report.

.34 May the financial statements of an acquired or to be acquired business that meets the definition of a foreign business be prepared on a basis of accounting other the US GAAP for purposes of S-X 3-05?

[Editor's note: SEC 4550.34 is focused on the requirements applicable to a registrant that is a domestic registrant, not a foreign private issuer. Other considerations may apply to a registrant that is a foreign private issuer.]

S-X 3-05(c) allows the financial statements of an acquired or to be acquired foreign business (as defined in S-X 1-02(l)) to comply with Item 17 of Form 20-F (see SEC 8100.925). Pursuant to Item 17, the financial statements of a foreign business may be prepared under US GAAP, IFRS as issued by the IASB (IFRS-IASB) or a comprehensive basis of accounting other than US GAAP or IFRS-IASB. If the foreign business prepares its financial statements on a comprehensive basis other than US GAAP or IFRS-IASB, Item 17 requires the financial statements of the foreign business to include a reconciliation to US GAAP prepared pursuant to the guidance in Item 17(c) of Form 20-F if the acquired or to be acquired foreign business exceeds the 30% level under the tests of significance which call for the inclusion of its financial statements. See Item 17(c)(2)(v) of Form 20-F and SEC FRM 2055.1.

[Editor's note: If financial statements for an acquired or to be acquired foreign business are required in a Form S-4, and the foreign business prepares its financial statements using a comprehensive basis other than US GAAP or IFRS-IASB, a reconciliation must be provided regardless of the level of significance of the transaction. See SEC FRM 6410.6(c).]

[Editor's note: Even if a reconciliation is not required, a discussion of the differences between local GAAP and US GAAP should be presented in a note to the audited financial statements. See section IX.E. of International Reporting and Disclosure Issues in the Division of Corporation Finance. Such discussion is not required if the financial statements are presented in accordance with IFRS-IASB.]

Under S-X 3-05, the period for which audited financial statements must be presented for a significant acquired or to be acquired business varies from one to two years, depending upon its significance to the registrant. However, IFRS-IASB specifically requires prior year comparative financial statements to be presented when the most recent fiscal year is presented. In situations where only one year of financial statements is required by S-X 3-05, the SEC staff has indicated that they would not object if the audit report includes a qualification noting a departure from IFRS-IASB (or home-country GAAP, if applicable) solely for the absence of comparative prior year financial statements. See Appendix A of the May 2019 IPTF meeting highlights.

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[Editor's note: The SEC staff has indicated that they would not object if interim financial statements prepared in accordance with IFRS-IASB do not include comparative prior period statements when prepared to comply with S-X 3-05 requirements. See Topic V of the November 2020 IPTF meeting highlights.]

.35 May the financial statements of an acquired or to be acquired business that does not meet the definition of a foreign business but would qualify as a foreign private issuer if it were a registrant be prepared on a basis of accounting other than US GAAP for purposes of S-X 3-05?

[Editor's note: SEC 4550.35 is focused on the requirements applicable to a registrant that is a domestic registrant, not a foreign private issuer. Other considerations may apply to a registrant that is a foreign private issuer.]

If an acquired or to be acquired business is not a foreign business (as defined in S-X 1-02(l)) but would qualify as a foreign private issuer (as defined in Securities Act Rule 405 and Exchange Act Rule 3b-4) if it were a registrant, S-X 3-05(d) permits the acquired or to be acquired business to provide financial statements using either US GAAP or IFRS-IASB without a reconciliation to US GAAP. However, a reconciliation to US GAAP, prepared pursuant to Item 18 of Form 20-F, would be required if the financial statements of the acquired or to be acquired business were prepared using a comprehensive basis of accounting other than US GAAP or IFRS-IASB. See footnote 161 of SEC Release 33-10786. The reconciliation to US GAAP required when local GAAP is used must be provided regardless of significance.

.36 May the financial statements of an acquired or to be acquired foreign incorporated business that does not meet the definition of a foreign business and would not qualify as a foreign private issuer if it were a registrant be prepared on a basis of accounting other than US GAAP for purposes of S-X 3-05?

A foreign incorporated acquired or to be acquired business that is not a foreign business (as defined in S-X 1-02(l)) and would not qualify as a foreign private issuer (as defined in Securities Act Rule 405 and Exchange Act Rule 3b-4) if it were a registrant, must prepare its financial statements in conformity with (i) US GAAP, (ii) home-country GAAP reconciled to US GAAP in accordance with Item 18 of Form 20-F, or (iii) IFRS-IASB reconciled to US GAAP in accordance with Item 18 of Form 20-F. The reconciliation to US GAAP must be provided regardless of significance. See SEC FRM 6410.9.

.37 When should the pro forma financial information required by S-X Article 11 generally be filed?

The pro forma financial information described in S-X Article 11 generally must accompany financial statements required to be provided pursuant to S-X 3-05. If pro forma financial information is required by S-X Article 11, it should generally be filed at the same time the audited financial statements of the acquired or to be acquired business are filed. See SEC FRM 3110.4.

See SEC 4560 for a discussion of pro forma financial information under S-X Article 11.

.4 AGE OF FINANCIAL STATEMENTS

.41 What are the age of financial statement requirements related to acquired or to be acquired businesses in a registration statement or proxy statement?

[Editor's note: The discussion in SEC 4550.41 is focused on an acquired or to be acquired business that does not meet the definition of a foreign business in S-X 1-02(l). See SEC 4550.42 for information relating to an acquired or to be acquired business that meets the definition of a foreign business.)]

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Financial statements of an acquired or to be acquired business provided in a registration statement or proxy statement pursuant to S-X 3-05 should comply with the SEC's age of financial statements rules at the initial filing date, at the date of any amendment, at the time of effectiveness (with respect to a registration statement) or at the mailing date (with respect to a proxy statement).

The age of financial statements analysis is largely the same as it is with respect to SEC registrants. See SEC FRM 2045.5 for a chart depicting the age of financial statements requirements with respect to annual financial statements and SEC FRM 2045.7 for information relating to interim financial statements. See also SEC 4600.2 through .3.

[Editor's note: Financial statements of an acquired business generally do not need to be updated if the omitted period is less than a complete quarter. However, disclosure of significant events occurring during the omitted interim period may be necessary. See SEC FRM 2045.9 and SEC 4560.34.]

One exception to the general guidance relates to the need (in certain circumstances) to provide audited annual financial statements for the most recently completed fiscal year in connection with a registration statement or proxy statement more than 45 days after the acquired or to be acquired business's fiscal year-end. When assessing the 45-day updating rule in connection with an acquired or to be acquired business pursuant to S-X 3-05, the provisions of S-X 3-01(c) are assessed based on the registrant's characteristics rather than the acquired or to be acquired business's characteristics.

[Editor's note: For purposes of evaluating S-X 3-01(c), the references to the "most recent fiscal year for which audited financial statements are not yet available" should be replaced with "the most recently completed fiscal year prior to the acquisition date" even if those financial statements are available. See Note to SEC FRM 2045.5.]

[Editor's note: The SEC staff will interpret the updating requirements in connection with a proxy statement in the same manner as for Securities Act filings. See SEC FRM 2045.12.]

[Editor's note: Financial statements provided in connection with a registration statement may need to be more current than those previously filed under Item 9.01 of Form 8-K.]

See SEC 4550.904.

The following examples illustrate the age of financial statement requirements for Securities Act filings. Unless otherwise noted, the examples assume that the registrant and the acquired business are neither large accelerated filers nor accelerated filers. In all cases the acquiree is neither a foreign private issuer nor a foreign business.

[Editor's note: The below examples relate to a registration statement that is not yet effective. After effectiveness, a domestic registrant has no specific obligation to update the prospectus except as stipulated by Securities Act Section 10(a)(3) and S-K 512(a) with respect to any fundamental change. See SEC 4550.2221 for additional information.]

Example 1

Company M, a calendar year-end SEC registrant, consummated an acquisition of Business B, a calendar year-end private company, on January 3, 2023. Business B is 45% significant. Company M does not meet the conditions in S-X 3-01(c). A Form 8-K reporting the acquisition was timely filed providing audited financial statements for Business B as of December 31, 2021 and 2020 and for the years then ended and unaudited interim financial statements as of September 30, 2022 and for the nine-month periods ended September 30, 2022 and 2021.

If Company M files a registration statement on Form S-3 on March 28, 2023, Business B's financial statements would need to be updated to include audited financial statements of Business B as of and for the year ended December 31, 2022, since the acquisition occurred after December 31, 2022, the filing is

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made more than 45 days after Business B's year-end but less than 90 days, and Company M (the registrant) is not eligible for relief under S-X 3-01(c).

Example 2

Company N, a calendar year-end SEC registrant, consummated the acquisition of Business D, a private company with a November 30 year-end, on January 3, 2023. Business D is 45% significant. Company N does not meet the conditions in S-X 3-01(c).

If Company N files a registration statement on Form S-3 on March 24, 2023, the registration statement would need to include Business D's audited financial statements as of and for the years ended November 30, 2022 and 2021, since the acquisition took place after November 30, 2022, the registration statement is being filed more than 45 days after Business D's year end but less than 90 days, and Company N (the registrant) is not eligible for relief under S-X 3-01(c).

Example 3

Company R, a calendar-year end SEC registrant, consummated the acquisition of Business F, a calendar year-end private company, on October 2, 2023. Business F is 45% significant. Company R timely filed its initial Item 2.01 Form 8-K reporting the completion of the acquisition of Business F on October 6, 2023 (the 4th business day after the acquisition) and filed an amended Form 8-K on December 18, 2023 (because December 16, 2023 - the 71st calendar day after October 6, 2023 – is a Saturday) which included audited financial statements of Business F as of and for the years ended December 31, 2022 and 2021 and unaudited financial statements as of June 30, 2023 and for the six-month periods ended June 30, 2023 and 2022.

If Company R were to file a registration statement on Form S-3 on December 21, 2023, Business F's financial statements must be updated to include unaudited financial statements as of September 30, 2023 and for the nine-month periods ended September 30, 2023 and 2022 in order to meet the requirement that the financial statements be no more than 134 days old.

If Company R were to file a subsequent registration statement on Form S-3 after December 31, 2023, it would not be required to update the financial statements of Business F beyond September 30, 2023, since financial statements would only be required for the quarter preceding the acquisition date even if Company R's financial statements were required to be updated. However, updates to the pro forma financial information reflecting the acquisition of Business F may still be required. See SEC 4560.366.

Example 4

Company S, a calendar year-end SEC registrant, consummated the acquisition of Business G, a calendar year-end private company, on March 7, 2023. Business G is 45% significant. Company S timely filed its Item 2.01 Form 8-K reporting the acquisition, which included audited financial statements of Business G as of and for the years ended December 31, 2021 and 2020 and unaudited interim financial statements as of September 30, 2022 and for the nine-month periods ended September 30, 2022 and 2021.

If Company S were to file a registration statement on Form S-3 on June 14, 2023, Company S would need to update Business G's financial statements to include audited financial statements of Business G as of December 31, 2022 and for the year then ended. Since the acquisition of Business G occurred on March 7, 2023 (during the first quarter), unaudited interim financial statements will not be required for any future periods (i.e., beyond December 31, 2022) for Business G.

Example 5

Company T, a calendar year-end SEC registrant, consummated the acquisition of Business J, a private company with a March 31 year-end, on April 4, 2023. Business J is 45% significant. Further, assume that Company T does not meet the conditions in S-X 3-01(c). A Form 8-K reporting the acquisition was timely filed, providing audited financial statements for Business J as of and for the years ended March 31, 2022

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and 2021 and unaudited interim financial statements as of December 31, 2022 and for the nine-month periods ended December 31, 2022 and 2021.

If Company T were to file a Form S-3 on June 23, 2023, Business J's financial statements must be updated to include audited financial statements of Business J as of March 31, 2023 and for the year then ended, since the acquisition was completed after March 31, 2023, the filing is made more than 45 days after Business J's year-end but less than 90 days, and Company T (the registrant) is not eligible for relief under S-X 3-01(c).

Example 6

Company Y, a calendar year-end, accelerated filer SEC registrant, consummated the acquisition of Business T, also a calendar year-end, accelerated filer SEC registrant, on February 3, 2023. Business T is 55% significant. Assume that both companies meet the conditions in S-X 3-01(c) and that neither company's December 31, 2022 audited financial statements will be available until March 10, 2023.

If Company Y were to file a Form S-3 registration statement on March 8, 2023, the registration statement may include audited financial statements of Business T as of December 31, 2021 and 2020 and for the years then ended and unaudited interim financial statements as of September 30, 2022 and for the nine-month periods ended September 30, 2022 and 2021, because Company Y is eligible for relief under S-X 3-01(c) and the Form S-3 is filed is less than 75 days after Business T's year end.

.42 What are the age of financial statement requirements applicable to acquired or to be acquired foreign businesses?

Registrants should apply the guidance in Item 8.A of Form 20-F when evaluating the age of financial statements with respect to an acquired or to be acquired foreign business (as defined in S-X 1-02(l)). See S-X 3-12(f) and SEC FRM 6220.4.

Item 8.A.4 of Form 20-F generally requires the audited financial statements of the acquired or to be acquired foreign business to be no more than 15 months old at the time of the offering or listing. Additionally, Item 8.A.5 of Form 20-F requires that if the document is dated more than nine months after the end of the last audited financial year, it should contain interim financial statements, which may be unaudited, covering at least the first six months of the financial year. Unaudited interim financial statements of an acquired or to be acquired foreign business generally do not need to be provided if the omitted period is less than six months and the acquired business does not prepare quarterly financial statements under its home-country reporting requirements. See SEC FRM 6220.7.

[Editor's note: Registrants considering offerings of securities related to i) the exercise of outstanding rights granted by the issuer, ii) dividend or interest reinvestment plans, and iii) the conversion of outstanding convertible securities or exercise of outstanding transferable warrants, should consider the guidance in Instruction 2 to Item 8 of Form 20-F.]

Similar to the discussion in SEC 4550.41 with respect to an acquired non-foreign business, financial statements of an acquired foreign business provided in connection with a registration statement may need to be more current than those previously filed under Item 9.01 of Form 8-K. Additionally, a registrant may need financial information of an acquired or to be acquired foreign business that is more current than the financial statements specified by Item 8.A of Form 20-F for purposes of preparing the registrant's pro forma financial information.

[Editor's note: The age of financial statements of an acquired or to be acquired business that does not qualify as a foreign business but would be a foreign private issuer if it were a registrant must comply with the requirements for an acquired domestic business rather than the age of financial statement requirements in Item 8 of Form 20-F. See SEC Release 33-10786, footnote 161.]

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The examples below illustrate the age of financial statements requirements under various scenarios relating to an acquired foreign business. In all examples, assume that the acquired foreign business is significant at the greater than 50% level, has a calendar year-end, and does not prepare quarterly financial statements under its home-country reporting requirements.

Example 1

Assume the acquisition is consummated on June 1, 2023.

Annual financial statements - Audited financial statements as of and for the years ended December 31, 2022 and 2021 are required in any post-acquisition registration statement because the audited financial statements cannot be more than 15 months old at the effective date.

Interim financial statements - Interim financial statements would never be required in a post-acquisition registration statement regardless of when it becomes effective because the omitted period would be less than six months.

Example 2

Assume the acquisition is consummated on September 5, 2023.

Annual financial statements – Same as Example 1.

Interim financial statements:

- Registration statement is effective prior to October 1, 2023 - No interim financial statements are required because the audited financial statements are not more than nine months old at the effective date. See SEC FRM 6220.7.a.
- Registration statement is effective after September 30, 2023 - Need interim financial statements as of June 30, 2023 and for the six-month periods ended June 30, 2023 and 2022 because the December 31, 2022 audited annual financial statements would be more than nine months old at the effective date.

Example 3

Assume acquisition is consummated on January 31, 2024.

Interim/annual financial statements:

- Registration statement is effective between January 31, 2024 and March 31, 2024 – The December 31, 2023 audited financial statements are not required because the December 31, 2022 audited financial statements are not more than 15 months old at the effective date. However, the June 30, 2023 and 2022 interim financial statements would be required because the December 31, 2022 financial statements would be more than nine months old at the effective date.
- Registration statement is effective after March 31, 2024 - The December 31, 2023 audited financial statements are required because the December 31, 2022 audited financial statements would be more than 15 months old at the effective date.

.5 PREDECESSOR GUIDANCE

Securities Act Rule 405 defines a “predecessor” as:

“... a person the major portion of the business and assets of which another person acquired in a single succession, or in a series of related successions in each of which the acquiring person acquired the major portion of the business and assets of the acquired person.”

See also Exchange Act Rule 12b-2.

A registrant’s acquisition of a business determined to be the registrant’s predecessor is not evaluated for significance under S-X 3-05 or S-X 8-04. The financial statements of an acquired business that is determined to be the predecessor to its acquirer must be provided in the filings of the acquirer pursuant to S-X 3-01 and S-X 3-02 (or S-X 8-02 and S-X 8-03 for a smaller reporting company). See SEC FRM 2005.6.

S-X 3-02 addresses the financial statement requirements of the registrant and its predecessors. Accordingly, predecessor financial statements for periods preceding the date of the acquisition should be the same as those that would be required if the predecessor were the registrant.

In addition, although S-X 3-01 does not contain the term “predecessor” as in S-X 3-02, the SEC staff’s historical practice has generally been to apply the same principle as discussed above. Accordingly, one or more balance sheets of the predecessor may be required to satisfy the balance sheet requirements of S-X 3-01. The predecessor financial statements are in addition to those of the acquirer. See SEC FRM 1170.2.c.

If the registrant’s financial statements are presented as of a date that is after the date of the acquisition of its predecessor, then the predecessor’s financial statements through the date of the acquisition must also be presented. There can be no gap in coverage between the predecessor’s pre-acquisition financial statements and the acquirer’s post-acquisition results of operations, cash flows, and shareholders’ equity. If the registrant’s post-acquisition financial statements are presented on an audited basis, then the predecessor’s financial statements through the date of the acquisition must also be audited. When predecessor audited financial statements are provided for part of a fiscal year and successor audited financial statements are provided for the rest of the year, the predecessor is not required to provide comparative financial statements for the prior year partial period. See SEC FRM 1170.3.

For example, assume Company S, a calendar year-end SEC registrant operating company, acquired Company P, a calendar year-end private operating company, on September 7, 2023. Company S accounted for its acquisition of Company P as a business combination with Company S determined to be the accounting acquirer. Company P is determined to be Company S’s predecessor.

Company S’s quarterly report on Form 10-Q for the quarterly period ended September 30, 2023 should include the following financial statements:

Company S (Successor)

- Unaudited balance sheets as of September 30, 2023 (which includes Company P) and as of December 31, 2022 (which would not include Company P).
- Unaudited statements of comprehensive income and changes in stockholder’s equity for the three- and nine-month periods ended September 30, 2023 and 2022. The unaudited statements of comprehensive income and changes in stockholders’ equity for the three- and nine-month periods ended September 30, 2023 include Company P from September 7, 2023 through September 30, 2023.
- Unaudited statements of cash flows for the nine-month periods ended September 30, 2023 and 2022. The unaudited statement of cash flows for the nine-month period ended September 30, 2023 includes Company P from September 7, 2023 through September 30, 2023.

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Company P (Predecessor)

- Unaudited balance sheet as of December 31, 2022. The September 30, 2023 balance sheet of Company P on a standalone basis is not required because Company S's September 30, 2023 balance sheet includes Company P.
- Unaudited statements of comprehensive income and changes in stockholders' equity for the periods January 1, 2023 through September 6, 2023, and July 1, 2023 through September 6, 2023, and for the three- and nine-month periods ended September 30, 2022.
- Unaudited statements of cash flows for the period January 1, 2023 through September 6, 2023 and for the nine-month period ended September 30, 2022.

Company S's annual report on Form 10-K for the year ended December 31, 2023 should include the following financial statements:

Company S (Successor)

- Audited balance sheets as of December 31, 2023 (which includes Company P) and December 31, 2022 (which would not include Company P).
- Audited statements of comprehensive income, changes in stockholders' equity, and cash flows for the years ended December 31, 2023, 2022 and 2021. The statements of comprehensive income, stockholders' equity, and cash flows for the year ended December 31, 2023 include Company P from September 7, 2023 through December 31, 2023.

Company P (Predecessor)

- Audited balance sheet as of December 31, 2022.
- Audited statements of comprehensive income, changes in stockholders' equity, and cash flows for the period from January 1, 2023 through September 6, 2023 and for the years ended December 31, 2022 and 2021.

[Editor's note: See SEC FRM 2025.10-11 regarding financial statements used to measure significance in connection with certain predecessor/successor fact patterns.]

.6 WAIVER REQUESTS

Occasionally, a registrant may conclude the financial statements required by S-X 3-05 are not necessary for investor protection or it is impractical to provide the requisite audited financial statements for significant business acquisitions. In those instances, the registrant may request a waiver from the SEC staff. These requests are normally directed to the Chief Accountant of the Division of Corporation Finance, which can be accessed on the SEC's website (https://www.sec.gov/forms/corp_fin_noaction).

[Editor's note: We understand that the SEC staff expects that a registrant's waiver request includes the calculations for each of the applicable significance tests even if the outcome of one or two of the tests is lower than the threshold outlined in S-X 3-05. Additionally, we understand that the SEC staff expects that the registrant's request also includes an analysis of the information that will be omitted and its assessment of the materiality of the omitted information if the registrant's request is granted. See Topic III.B.4 from the March 2021 CAQ SEC Regulations Committee Meetings Highlights.]

.7 ALTERNATIVE MODEL FOR COMPLYING WITH S-X 3-05 BY CERTAIN FIRST-TIME REGISTRANTS (STAFF ACCOUNTING BULLETIN NO. 80)

The SEC staff recognizes that strict application of S-X 3-05 in some IPOs may result in a requirement to provide financial statements for acquired and to be acquired businesses that may not be significant as a result of the registrant's recent substantial growth in assets and earnings. In response to this possibility, the SEC staff issued Staff Accounting Bulletin No. 80 (SAB Topic 1-J) (SAB 80) to provide its views on how a first-time registrant that has been built by the aggregation of discrete businesses that remain substantially intact after the acquisition can comply with S-X 3-05 in its initial registration statement. See SEC FRM 2070 for additional information.

[Editor's note: SAB 80 has not been updated for the issuance of SEC Release 33-10786. Registrants that elect to apply SAB 80 should be mindful of consummated acquisitions and probable acquisitions that occur during the registration process because the significance calculations must be continually updated through the effective date of the registration statement, and financial statement requirements may change.]

.9 FREQUENTLY ASKED QUESTIONS

.901 Are financial statements required pursuant to S-X 3-05 when a registrant begins to consolidate an equity investee as a result of events other than transactions?

This is a complex area with little authoritative or interpretive guidance. Accordingly, the application of the SEC's reporting requirements (e.g., Item 2.01 of Form 8-K, S-X 3-05, and S-X Article 11) to this type of fact pattern may need to be discussed in advance with the SEC staff. See Topic 5 of Discussion Document A from the highlights of the April 2008 meeting of the CAQ SEC Regulations Committee.

.902 Which financial statements should a registrant use to evaluate significance for transactions that closed early in its fiscal year?

S-X 11-01(b)(3)(i) states that when determining significance, a registrant should use "the registrant's most recent annual consolidated financial statements required to be filed at or prior to the date of acquisition or disposition and the business's pre-acquisition or pre-disposition financial statements for the same fiscal year as the registrant."

For a company undertaking an IPO:

Assume that a calendar year-end company files its initial registration statement in 2023 which includes audited financial statements for the fiscal years ended December 31, 2022 and 2021 and also consummated an acquisition that is 45% significant on February 4, 2022. The SEC staff has indicated that the registrant would be required to assess significance on the basis of its December 31, 2021 financial statements. This is true even though its December 31, 2021 financial statements were not "required to be filed" at or prior to the date of the acquisition.

For an existing registrant:

Assume that a calendar year-end registrant files its annual report on Form 10-K for the fiscal year ended December 31, 2022 on January 31, 2023 and subsequently consummated an acquisition on February 3, 2023. The SEC staff has indicated that the registrant would have the option to use either its December 31, 2021 or December 31, 2022 financial statements to assess significance since the Form 10-K was filed prior to its due date and the acquisition date. See Topic III.B.3 from the March 2021 CAQ SEC Regulations Committee Meeting Highlights.

.903 Is the temporary grace period described in SEC 4550.222 (S-X 3-05(b)(4)(i)) the same as the grace period provided by Item 9.01 of Form 8-K?

The temporary grace period provided in S-X 3-05(b)(4)(i) (i.e., not more than 74 calendar days after completion of the acquisition) is similar to, but different from, the grace period provided by Item 9.01 of Form 8-K (i.e., 71 calendar days after the 4th business day following completion of the acquisition). However, the SEC staff has historically indicated that they would consider the Item 9.01 Form 8-K grace period to be substantially equivalent to the S-X 3-05(b)(4)(i) grace period for a not-yet-effective registration statement or a not-yet-effective post-effective amendment. See SEC FRM Note to Section 2050.1.

For example, assume Company Y acquired Business B (25% significant) on May 19, 2023. An Item 2.01 Form 8-K initially reporting the acquisition must be filed no later than May 25, 2023 (the 4th business day after completion of the acquisition). Based on the requirements of Item 9.01(a)(4) of Form 8-K, Company Y must file Business B's financial statements (and the associated pro forma financial information) by an amendment to the initial Form 8-K no later than August 4, 2023 (the 71st calendar day after the initial Form 8-K was required to be filed). Notwithstanding the deadline for filing Business B's financial statements (and the associated pro forma financial information) in an amended Form 8-K, under a plain reading of S-X 3-05(b)(4)(i), Company Y could not file a new registration statement on Form S-3 after August 1, 2023 (the 74th calendar day after the completion of the acquisition) without providing Business B's financial statements (and the associated pro forma financial information). However, under the guidance provided by the SEC staff in the note to SEC FRM 2050.1, Company Y could file a new Form S-3 on August 2 or 3, 2023 without providing Business B's financial statements (and the associated pro forma financial information), even though the instructions to Form S-3 require inclusion/incorporation by reference of financial statements required by S-X 3-05. See SEC FRM 2045.17 for information regarding the SEC staff's historical practice with respect to determining the age of the financial statements to be included in the subsequently filed Item 9.01 Form 8-K.

.904 Is a well-known seasoned issuer filing an automatic shelf registration statement required to comply with the SEC's age of financial statements requirements relating to acquired or to be acquired businesses?

Yes. Automatic shelf registration statements and post-effective amendments of a well-known seasoned issuer (defined in Securities Act Rule 405) become effective immediately upon filing. Immediate effectiveness does not exempt a well-known seasoned issuer from the requirement to comply with the age of financial statement requirements with respect to itself and all completed and probable acquired businesses at the time of effectiveness. See SEC FRM 2045.4.

.905 Can the registrant use alternative significance tests in unusual circumstances without SEC staff preclearance?

The SEC staff has indicated that registrants must use only those significance tests specified in the specific rules and that alternative significance tests are not appropriate (e.g., adjusting historical income amounts to exclude nonrecurring items). If the registrant believes that the prescribed significance tests yield anomalous results, the registrant should contact the SEC staff to discuss their specific facts and circumstances. See SEC FRM 2020.1. When discussing the matter with the SEC staff, registrants frequently refer to alternative significance tests to support an assertion that an acquisition is not significant to require the financial statements specified under the rules. See SEC 4550.6]

.906 Does S-X 3-05 contain any specific disclosure requirements relating to an acquired or to be acquired business that includes significant oil- and gas-producing activities?

Yes. An acquired or to be acquired business that includes significant oil- and gas-producing activities (as defined in the FASB ASC Master Glossary) must provide the disclosures in ASC 932, *Extractive Activities – Oil and Gas*, 932-235-50-3 through 50-11 and 932-235-50-29 through 50-36 for each full year of operations presented. These disclosures may be presented as unaudited supplemental information. If prior

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year reserve studies were not made, registrants may develop these disclosures computing the changes backward, based on a reserve study of the most recent year. The method of computation must be disclosed in a footnote. See S-X 3-05(f)(1).

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- .1 General
- .2 Applying S-X 3-14 in a registration statement or proxy statement
- .3 Pro forma financial information
- .4 Properties subject to triple net leases
- .5 Properties securing mortgage loans
- .6 Blind pool real estate offerings

[**Editor's note:** In May 2020, the SEC adopted amendments to its disclosure requirements relating to acquired and to be acquired real estate operations. See SEC Release No. 33-10786, *Amendments to Financial Disclosures about Acquired and Disposed Businesses* (SEC Release 33-10786). The amendments became effective on January 1, 2021, subject to voluntary early compliance and the transition provisions described in Section II. F of SEC Release 33-10786. SEC 4555 contains guidance relating to acquired and to be acquired real estate operations under the amended rules.

The SEC staff has published extensive interpretive guidance relating to the acquisition of real estate operations (e.g., SEC FRM Section 2300). Much of the guidance was issued prior to the adoption of SEC Release 33-10786. Care should be exercised when considering guidance that was issued prior to the adoption of SEC Release 33-10786.]

.1 GENERAL

.11 In what circumstances does the SEC require the filing of financial statements relating to acquired or to be acquired real estate operations?

The SEC requires the filing of financial statements of acquired or to be acquired real estate operations in many situations. S-X 3-14 and S-X 8-06 (for smaller reporting companies) are the principal rules that govern these types of financial statements. However, S-X 3-14 and S-X 8-06 are not the only sources of disclosure requirements relating to acquired or to be acquired real estate operations. The instructions of the applicable registration or reporting form that is being prepared must be evaluated to determine whether financial statements or other disclosures relating to an acquired or to be acquired real estate operation are required. For example:

- if an issuer files a registration statement under either the Securities Act or the Exchange Act, the instructions to the specific registration form being used may require the filing of financial statements relating to an acquired or to be acquired real estate operation (e.g., Item 27 of Form S-11 and Item 13 of Form 10).

[**Editor's note:** Some of the provisions of S-X 3-14 may not be applicable in a situation in which an offering or sale is being made pursuant to an already effective registration statement (i.e., the requirements may be different when applied in connection with a prospectus supplement as compared to a new or amended registration statement). See SEC 4550.2221.]

- if an SEC registrant that is required to file current reports on Form 8-K acquires a significant real estate operation, Item 9.01(a) of Form 8-K specifies the financial statements that are required in the Form 8-K and the timing (e.g., Item 9.01(a)(1) references S-X 3-14 for determining the financial statements that must be filed).

[**Editor's note:** Certain aspects of S-X 3-14 are not applicable to filings made on Form 8-K. Specifically, financial statements of probable acquisitions of real estate operations are not required and the aggregation requirements described in Step 3 of SEC 4555.2 do not apply.]

- SEC forms used in connection with business combination transactions (e.g., Form S-4) oftentimes require financial statements of the target real estate operation (see, for example, Items 15-17 of Form

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S-4 and Item 14 of Schedule 14A, each of which specifies the financial statements of the target that are required, generally without direct reliance on S-X 3-14 or S-X 8-06 with respect to the target's financial statements).

[Editor's note: SEC 4555 is focused on the requirements applicable to a registrant that is not a smaller reporting company or a foreign private issuer. Other considerations may apply if a registrant is a smaller reporting company or a foreign private issuer.]

S-X 3-14 does not apply to the acquisition of a real estate operation that is a predecessor of the registrant. The financial statements of an acquired or to be acquired real estate operation that is determined to be the predecessor to its acquirer must be provided in the filings of the acquirer pursuant to S-X 3-01 and 3-02. See SEC FRM 2005.6. Guidance related to a predecessor's reporting obligations can be found at SEC 4550.5.

.2 APPLYING S-X 3-14 IN A REGISTRATION STATEMENT OR PROXY STATEMENT

.21 How is S-X 3-14 applied in connection with a registration statement or proxy statement?

S-X 3-14 is generally applied in 3 distinct steps:

- Step 1: Determine whether a transaction has occurred or is probable that is within the scope of S-X 3-14. See SEC 4555.22
- Step 2: Determine whether financial statements relating to the acquisition of an individual real estate operation (including the acquisition of a group of related real estate operations) are required. See SEC 4555.23.
- Step 3: Determine whether disclosures are required relating to aggregate significance of acquired or to be acquired real estate operations for which financial statements are not (or not yet) required. See SEC 4555.24.

.22 What factors are used to determine whether a transaction has occurred or is probable that is within the scope of S-X 3-14? (Step 1)

S-X 3-14 applies to real estate operation acquisitions:

- that occurred during the most recent fiscal year or subsequent interim period for which a balance sheet is required by S-X 3-01;
- that occurred after the date of the most recent balance sheet filed pursuant to S-X 3-01; or
- that are probable.

See S-X 3-14(a)(1)(i)-(ii).

S-X 3-14 does not apply to a real estate operation which was totally held (as defined in S-X 1-02(y)) by the registrant prior to consummation of the transaction (S-X 3-14(a)(4)).

.221 How is the term “real estate operation” defined for purposes of applying S-X 3-14?

S-X 3-14(a)(2)(i) defines the term real estate operation as “a business (as set forth in S-X 11-01(d)) that generates substantially all of its revenues through the leasing of real property.” See SEC 4550.211 for a discussion of the definition of a business as set forth in S-X 11-01(d).

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There is no bright line percentage for determining whether substantially all revenues are generated through the leasing of real property. The registrant should consider the specific facts and circumstances when making the evaluation.

[Editor's note: Footnote 244 to SEC Release 33-10786 indicates that office, apartment, and industrial buildings, as well as shopping centers and malls, generally meet the definition of a real estate operation. Properties that generate revenues from operations other than leasing, such as nursing homes, hotels, motels, golf courses, auto dealerships, and equipment rental operations generally do not meet the definition of a real estate operation because these operations are more susceptible to variations in revenues and costs. See also Securities Act Forms CDI 113.03. The acquisition of a business that does not meet the definition of a real estate operation is evaluated under S-X 3-05. See SEC 4550.]

The definition of a real estate operation includes the acquisition of an interest in a real estate operation accounted for under the equity method or in lieu of the equity method, the fair value option. See S-X 3-14(a)(2)(ii).

.222 How is the term “probable” defined for purposes of applying S-X 3-14?

See SEC 4550.212 for a discussion of the term probable as it is used in S-X 3-14.

.223 When are real estate operations considered “related” for purposes of applying S-X 3-14?

Acquisitions of a group of related real estate operations that are probable or that have occurred subsequent to the latest fiscal year-end for which audited financial statements of the registrant have been filed are treated as if they were a single acquisition for purposes of determining significance under S-X 3-14. S-X 3-14(a)(3) states that acquisitions are related if:

- they are under common control or management;
- the acquisition of one real estate operation is conditional on the acquisition of each other real estate operation; or
- each acquisition is conditioned on a single common event (e.g. an IPO).

S-X 3-14 also states that the required financial statements of related real estate operations may be presented on a combined basis for any period that they are under common control or management. See S-X 3-14(a)(3).

.23 How do you determine whether financial statements relating to the acquisition of an individual real estate operation (including the acquisition of related real estate operations) are required? (Step 2)

Once a transaction has been determined to be within the scope of S-X 3-14 (i.e., the acquisition of a real estate operation has occurred within the relevant time period or is probable), the determination as to whether financial statements are required is generally dependent on two distinct considerations: significance and timing. (See SEC 4555.22)

[Editor's note: If the evaluation is being made in connection with registering the offering of securities to the holders of the real estate operation being acquired, then the specific requirements of the registration form being used (e.g., Form S-4) should be evaluated to determine whether financial statements are required.]

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.231 How is significance evaluated under S-X 3-14?

The significance evaluation under S-X 3-14 is performed using only the investment test in S-X 1-02(w)(1)(i) as modified by S-X 3-14(b).

If the investment test is 20% or less, then financial statements of the acquired or to be acquired real estate operation are not required based on individual significance. See S-X 3-14(b)(2)(i)(A).

If the investment test exceeds 20%, then financial statements of the acquired or to be acquired real estate operation for at least the most recent fiscal year (audited) and for the most recent interim period (unaudited) as specified in S-X 3-01 and 3-02 must be filed. See S-X 3-14(b)(2)(i)(B).

Financial statements of the real estate operation acquired or to be acquired must be filed for the periods specified above or such shorter period as the real estate operation has been in existence. See S-X 3-14(b)(2).

[Editor's note: Under certain circumstances financial statements covering a period of 9 to 12 months will be deemed to satisfy a requirement for filing financial statements for a period of 1 year. See S-X 3-06.]

When the investment test is based on the total assets of the registrant and its subsidiaries consolidated (e.g., when the registrant has no aggregate worldwide market value as described in S-X 1-02(w)(1)(i)(A)), the "investments in and advances to" the tested real estate operation (i.e., the numerator of the investment test) is modified to include any assumed debt secured by the real estate property. See S-X 3-14(b)(2)(ii).

[Editor's note: Examples of when the registrant would not have an aggregate worldwide market value include during an initial public offering or when the registrant's stock is not publicly traded.]

For example, assume that on June 2, 2023 Company Y, a calendar year-end company in the initial public offering process, acquired Property P, a calendar year-end business that meets the definition of a real estate operation. Company Y paid \$10 million to Property P's owner and assumed \$8 million of debt secured by Property P. Further assume that Company Y had total assets of \$85 million as of December 31, 2022.

Given that Company Y does not have an aggregate worldwide market value, it would be required to include any assumed debt secured by Property P in its "investments in and advances to" calculation for purposes of assessing significance under S-X 3-14(b):

Consideration transferred as described in	
S-X 1-02(w)(1)(i)(A)(1)	\$10 million
Assumed debt secured by Property P	<u>8 million</u>
Investments in and advances to Property P	
for purposes of S-X 3-14	<u>\$18 million</u>

Based on these facts, the modified investment test yields a level of significance above 20% (\$18 million / \$85 million). Accordingly, audited financial statements of Property P as of and for the year ended December 31, 2022 and unaudited interim financial statements as of and for the three-month period ended March 31, 2023 would be required in the registration statement.

The significance determination must be made using the guidance in S-X 11-01(b)(3) and (4). S-X 11-01(b)(3) specifies the financial statements to be used for purposes of determining significance in situations other than those relating to a continuous offering conducted over an extended period of time in which the registrant applies the Item 20.D Undertakings of Industry Guide 5 - *Preparation of Registration Statements Relating to Interests in Real Estate Limited Partnerships* (Industry Guide 5). S-X 11-01(b)(4) applies in connection with a continuous offering conducted over an extended period of time in which the registrant applies the Item 20.D Undertakings of Industry Guide 5. See SEC 4555.6 for more information regarding the Item 20.D Undertakings of Industry Guide 5.

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.232 Under what circumstances are financial statements of an acquired or to be acquired real estate operation that is greater than 20% significant not required in a registration statement or proxy statement?

S-X 3-14(b)(3) provides circumstances under which a registration statement that is not subject to Securities Act Rule 419 (regarding offerings by blank check companies) or a proxy statement is not required to include the financial statements of a greater than 20% significant acquired or to be acquired real estate operation based on individual significance. These circumstances are similar to those described for an acquired or to be acquired business under S-X 3-05(b)(4)(i) as discussed in SEC 4550.222.

Additionally, see SEC 4550.2221 for a discussion of financial statement requirements in an already effective registration statement.

.233 Would pre-acquisition financial statements be required once an acquired real estate operation has been included in the registrant's audited consolidated financial statements for at least nine months?

Registrants may omit separate financial statements of an acquired real estate operation from a registration statement or proxy statement once the results of operations of the acquired real estate operation have been reflected in the registrant's audited consolidated financial statements for at least nine months. See S-X 3-14(b)(3)(iii).

.24 How do you determine whether disclosures are required relating to aggregate significance of acquired and to be acquired real estate operations for which financial statements are not (or not yet) required? (Step 3)

In addition to considering the significance of acquired and to be acquired real estate operations on an individual basis, S-X 3-14(b)(2)(i)(C) requires consideration of the aggregate significance of real estate operations acquired or to be acquired since the date of the most recent audited balance sheet filed for the registrant, for which financial statements are either:

- not required because the acquired or to be acquired real estate operation is not significant above the 20% level or
- not yet required based on the timing guidance referred to in SEC 4555.222.

Aggregate significance is calculated as the sum of the investment tests for the individual acquired or to be acquired real estate operations. If the sum of the investment tests for the individual acquired or to be acquired real estate operations exceeds 50%, then the aggregate investment test has been met and the disclosures described below are required.

[Editor's note: The guidance above relates to S-X 3-14. S-X 3-05(b)(2)(iv) requires a similar evaluation with respect to the aggregate impact of businesses acquired and to be acquired. Under S-X 3-05(b)(2)(iv), the aggregate investment test also includes the results of the aggregate investment test of any acquired or to be acquired real estate operations under S-X 3-14(b)(2)(i)(C). See SEC 4550.23.]

.241 What disclosures are required relating to aggregate significance?

If the aggregate investment test condition described in S-X 3-14(b)(2)(i)(C) exceeds 50%, the following disclosures are required:

- financial statements covering at least the most recent fiscal year and the most recent interim period specified in S-X 3-01 and 3-02 that are not yet required based on the guidance referred to in SEC 4555.223; and

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- pro forma financial information pursuant to S-X 11-01 and 11-02 that depicts the aggregate impact of all acquired and to be acquired real estate operations in all material respects.

[Editor's note: The financial statement requirements under the aggregate significance assessment are limited to acquired or to be acquired real estate operations that are significant above 20% individually (acquisitions of related real estate operations would be evaluated as a single acquisition). However, the pro forma financial information is required to depict the aggregate impact of all the acquired or to be acquired real estate operations (in all material respects) without regard to whether their historical financial statements are required to be provided.]

.242 How is the age of S-X 3-14 financial statements determined?

The age of financial statement requirements under S-X 3-14 are applied the same way they are applied under S-X 3-05. See SEC 4550.4.

.25 What are the financial statement presentation requirements under S-X 3-14?

The financial statement presentation requirements applicable to acquired or to be acquired real estate operations are set forth under S-X 3-14(c). The financial statements may be only statements of revenues and expenses excluding expenses not comparable to the proposed future operations such as mortgage interest, leasehold rental, depreciation, amortization, corporate overhead and income taxes. The notes to the financial statements must include the following disclosures specified by S-X 3-14(c)(2):

- the type of omitted expenses and the reason(s) why they are excluded from the financial statements;
- a description of how the financial statements presented are not indicative of the results of operations of the acquired real estate operation going forward because of the omitted expenses; and
- information about the real estate operation's operating, investing and financing cash flows, to the extent available.

.26 What supplemental information is required by S-X 3-14?

S-X 3-14(f) requires the following supplemental information to be filed with the financial statements for each real estate operation:

- material factors considered in assessing the real estate operation, including sources of revenues (including, but not limited to, competition in the rental market, comparative rents, and occupancy rates) and expenses (including, but not limited to, utility rates, property tax rates, maintenance expenses, and capital improvements anticipated); and
- other material factors that would cause the reported financial statements not to be indicative of future results.

[Editor's note: S-X 3-14(f) indicates that the factors considered by the registrant "must be described in the filing". S-X 3-14(f) does not specifically require the inclusion of the supplemental information in the financial statements. When these financial statements are presented in Form S-11, the above discussion should supplement the "Operating Data" disclosures required by Item 15 of Form S-11.]

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.27 Can S-X 3-14 financial statements relating to foreign real estate operations be prepared using local GAAP or IFRS?

The financial statements of an acquired or to be acquired real estate operation that meets the definition of a foreign businesses (as set forth in S-X 1-02(l)) may be presented in accordance with S-X 3-14(d).

The financial statements of an acquired or to be acquired real estate operation that do not meet the definition of a foreign business but would qualify as a foreign private issuer (as defined in Securities Act Rule 405 and Exchange Act Rule 3b-4) may be presented in accordance with S-X 3-14(e).

.3 PRO FORMA FINANCIAL INFORMATION

The pro forma financial information described in S-X Article 11 generally must accompany financial statements of a significant acquired or to be acquired real estate operation. If a registrant presents the financial statements of an individually insignificant real estate operation, the SEC staff encourages the registrant to also provide S-X Article 11 pro forma financial information in the filing (see SEC FRM 3110.3). If pro forma information is required by S-X Article 11, it should generally be filed at the same time the audited financial statements of the acquired or to be acquired real estate operations are filed.

See SEC 4560 for a discussion of pro forma financial information.

.4 PROPERTIES SUBJECT TO TRIPLE NET LEASES

A triple net lease typically requires the lessee to pay costs normally associated with ownership of the property, such as property taxes, insurance, utilities, and maintenance costs. When a registrant has triple net leased one or more real estate properties to a single lessee/tenant, and such properties represent a "significant" portion of the registrant's assets, a registrant should consider the need to provide the lessee's financial statements or other financial information. An asset concentration is generally considered "significant" if it exceeds 20% of the registrant's assets as of its most recent balance sheet. See SEC FRM 2340.

[Editor's note: SEC Release 33-10786 clarifies that the requirements of S-X 3-14 also apply to triple net leases because the activity depicted in the S-X 3-14 financial statements is consistent with how the triple net lease arrangement may affect the registrant's results of operations. See footnote 219 to SEC Release 33-10786. Accordingly, financial statements of a lessee or guarantor in a triple net lease arrangement cannot be provided in lieu of any required S-X 3-14 financial statements.]

.5 PROPERTIES SECURING MORTGAGE LOANS

Included in the category of properties acquired or to be acquired under S-X 3-14 are operating properties underlying certain mortgage loans, which in economic substance represent an investment in real estate or a joint venture rather than a loan. The financial statements of properties which will secure mortgage loans made or to be made which have the characteristics of real estate investments or joint ventures may be required by S-X 3-14. SAB Topic 1-I sets forth SEC staff guidance regarding properties securing mortgage loans.

.6 BLIND POOL REAL ESTATE OFFERINGS

Certain registrants, typically non-traded real estate investment trusts, that sell securities in continuous offerings over an extended period of time follow the disclosure guidance in Industry Guide 5. Industry Guide 5 provides different Securities Act and Exchange Act reporting requirements with respect to the acquisition of real estate operations both during and after the distribution period. See SEC FRM 2325.

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(Last updated June 2023)**

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[Editor's note: The distribution period (as defined in the Note to SEC FRM 2325.1) is the period during which the registrant is conducting a continuous Securities Act registered offering through a registration statement subject to Industry Guide 5. We understand that the SEC staff does not consider a registration statement filed prior to effectiveness to be made during the "distribution period". We understand that the significance test calculations under S-X 1-02(w) should be used to calculate the significance of any properties acquired before the distribution period. See SEC 4400.]

Registrants in these types of offerings generally do not initially identify the specific assets that will be acquired with the proceeds of the offering. Rather, the offering materials generally include a description of the types and ranges of assets that will be acquired. These types of offerings are oftentimes referred to as blind pool offerings.

Registrants raising capital through blind pool real estate offerings undertake to disclose information about significant acquisitions in addition to financial statements under S-X 3-14. The undertakings include the use of sticker supplements related to certain significant real estate operations that will be acquired and post-effective amendments.

As noted above, S-X 3-14(b)(2)(iii) provides that the significance determination with respect to a real estate operation is made using S-X 11-01(b)(3) and (4). S-X 11-01(b)(4) provides guidance for performing the investment test when a registrant, including a real estate investment trust, conducts a continuous offering over an extended period of time, applies the Item 20.D. Undertakings of Industry Guide 5, and bases the investment test on the total assets of the registrant and its subsidiaries consolidated.

[Editor's note: S-X 11-01(b)(4) also applies to non-real estate business acquisitions by registrants in blind pool offerings. A registrant conducting a blind pool offering could be required to provide financial statements relating to real estate operations under S-X 3-14 and financial statements relating to businesses under S-X 3-05.]

When the S-X 3-14 investment test is performed under S-X 11-01(b)(4), the numerator of the significance test is calculated as described in S-X 3-14(b)(2)(ii). See example in SEC 4555.231.

The calculation of the denominator of the significance test will depend on whether the calculation is performed (i) during the distribution period, (ii) after the distribution period has ended but before the next Form 10-K is filed, or (iii) after the next Form 10-K is filed. See S-X 11-01(b)(4)(i)-(iii).

[Editor's note: The denominator calculated under S-X 11-01(b)(4)(i) includes, in addition to the total assets of the registrant as of the date of acquisition or disposition, the registrant's good faith estimate of offering proceeds (net of commissions) to be raised in the registered offering over the next 12 months. When estimating the offering proceeds expected to be raised in the registered offering over the next 12 months, the registrant could consider the pace of fundraising as of the measurement date, the sponsor or dealer-manager's prior public fundraising experience, and offerings by similar companies. See footnote 275 to SEC Release 33-10786.]

For further information about the disclosure requirements for undertakings see Item 20.D. of Industry Guide 5, Disclosure Guidance: Topic No. 6 – *Staff Observations Regarding Disclosures of Non-Traded Real Estate Investment Trusts* and SEC FRM 2325.2.

- .1 General
- .2 Scope of transactions for which pro forma financial information is required
- .3 Form and content of pro forma financial information
- .9 Frequently asked questions

[Editor's note: In May 2020 the SEC adopted amendments to its pro forma financial information requirements. See SEC Release No. 33-10786, *Amendments to Financial Disclosures about Acquired and Disposed Businesses* (SEC Release 33-10786). The amendments became effective January 1, 2021 subject to the transition provisions (including voluntary early compliance) described in Section II. F of SEC Release 33-10786.

The guidance in SEC 4560 is primarily drafted from the perspective of a registrant that is not a smaller reporting company following the scaled disclosure requirements of S-X Article 8. S-X 8-05 requires that the preparation, presentation, and disclosure of pro forma financial information by smaller reporting companies should comply with S-X Article 11 except the information may be presented in a more condensed format. Smaller reporting companies should look to S-X 8-05 and the specific form requirements/instructions (e.g., Item 9.01 of Form 8-K or General Instruction II.C of Form S-3) when preparing pro forma financial information.

The SEC staff has published extensive interpretive guidance relating to pro forma financial information (e.g., Topic 3 of the Division of Corporation Finance Financial Reporting Manual). Much of the guidance was issued prior to the adoption of SEC Release 33-10786. Care should be exercised when considering guidance that was issued prior to the adoption of SEC Release 33-10786.]

.1 GENERAL

.11 What is the objective of pro forma financial information, and where can I find the SEC rules that govern its preparation and presentation?

The primary objective of pro forma financial information is to show how one or more significant transactions (e.g., a business combination) might have affected historical financial statements if the transaction(s) had taken place as of an earlier date.

S-X Article 11 is the principal source of rules that govern the requirements to provide pro forma financial information and the preparation and presentation of pro forma financial information. Smaller reporting companies should look to S-X 8-05.

In addition to referring to Regulation S-X, the specific instructions of the applicable registration statement or reporting form (e.g., Form 8-K) that is being prepared should also be evaluated to determine whether pro forma financial information is required.

.2 SCOPE OF TRANSACTIONS FOR WHICH PRO FORMA FINANCIAL INFORMATION IS REQUIRED

.21 What types of transactions trigger the SEC's requirements to present S-X Article 11 pro forma financial information?

Pro forma financial information is required by S-X Article 11 if any of the six specific conditions set forth in S-X 11-01(a) are present. Two of the most frequently encountered conditions are:

- completed and probable significant business acquisitions (including the acquisition of an interest in a business accounted for by the equity method). See S-X 11-01(a)(1)-(2); and
- completed and probable dispositions of a significant portion of a business. See S-X 11-01(a)(4).

S-X 11-01(a) also sets forth a general condition which requires the presentation of pro forma financial information when consummation of other transactions has occurred or is probable for which disclosure of pro forma financial information would be material to investors. See S-X 11-01(a)(8).

[Editor's note: Assessing whether the condition set forth in S-X 11-01(a)(8) is present requires the exercise of judgement. The SEC staff has provided some examples in SEC FRM 3160.]

There may be sources of guidance requiring the presentation of pro forma financial information other than S-X Article 11. For instance, S-X 3-05(b)(2)(iv)(A) and S-X 3-14(b)(2)(i)(C)(1) require the presentation of pro forma financial information in connection with certain business and real estate operation acquisitions, respectively. There are also situations (such as distributions to promoters/owners at or prior to closing of an IPO and other changes in capitalization at or prior to closing of an IPO) that could require the presentation of pro forma financial information. See SEC FRM 3410, 3420 and 3430. That interpretive guidance differs from the requirement to provide pro forma financial information under S-X Article 11. See SEC 2110.904-.907.

.22 What are some of the key terms used in S-X Article 11?

It is important to apply the terminology used throughout S-X Article 11 in the proper context. For instance:

- S-X 11-01(d) sets forth guidance for evaluating the term “business.” The term “business” has a different meaning for purposes of S-X Article 11 than it does under US GAAP or International Financial Reporting Standards as issued by the International Accounting Standards Board (IFRS-IASB). See SEC 4550.211 and footnote 8 to SEC Release 33-10786.
- S-X 11-01(b) sets forth guidance for determining whether a business acquisition or disposition is significant. This guidance leverages the SEC’s significant subsidiary tests in S-X 1-02(w) with certain modifications. See SEC 4400. S-X 11-01(b) prescribes the information that should be used to determine significance. See S-X 11-01(b)(3)-(4).
- The word probable is discussed in SEC FRM 2005.4 and SEC 4550.212.

.3 FORM AND CONTENT OF PRO FORMA FINANCIAL INFORMATION

.31 What are the S-X Article 11 general presentation requirements for pro forma financial information?

S-X 11-02(a) sets forth the general requirements for presentation of pro forma financial information including:

- an introductory paragraph which briefly describes the information specified in S-X 11-02(a)(2);
- a pro forma condensed balance sheet;
- pro forma condensed statement(s) of comprehensive income; and
- explanatory footnotes.

Pro forma financial information provided under S-X Article 11 is not required to be audited.

Pro forma financial information is ordinarily presented in columnar format with separate columns presenting condensed historical statements, pro forma adjustments, and pro forma results. See S-X 11-02(a)(4). In certain circumstances a narrative description of the pro forma effects of a transaction may be provided in lieu of the pro forma financial statements. See S-X 11-02(a)(1) and the NOTE to SEC FRM 3110.1.

In situations where management believes the actual impact of a transaction could differ materially from the pro forma impact (e.g., if management believes the final allocation of purchase price could differ materially from the estimated allocation used for pro forma purposes), a statement to that effect should be made, along with disclosure in the pro forma financial information of the possible estimated range of impact.

The explanatory notes to the pro forma financial information are required to disclose revenues, expenses, gains and losses (and related tax effects) which will not recur in the income of the registrant beyond 12 months after the transaction as well as the additional information relating to Transaction Accounting Adjustments and Autonomous Entity Adjustments as described in S-X 11-02(a)(11).

The explanatory notes should be sufficiently detailed to enable a reader to clearly understand the assumptions and calculations involved in developing each of the pro forma adjustments.

.32 What are the pro forma condensed balance sheet requirements of S-X Article 11?

The pro forma condensed balance sheet should be presented as of the end of the most recent period for which a consolidated balance sheet of the registrant is required by S-X 3-01. The captions which must be presented in the pro forma condensed balance sheet are set forth in S-X 11-02(a)(3). A pro forma condensed balance sheet is not required if the transaction is already reflected in the registrant's most recent historical balance sheet filed. See S-X 11-02(c)(1). Consider the following example.

Company A, a calendar year-end SEC registrant, consummated the acquisition of Business B on November 30, 2023, and the acquisition is significant above 50%. Company A files a registration statement on Form S-3 on December 15, 2023. In this fact pattern, the registration statement should include/incorporate by reference a pro forma condensed balance sheet as of September 30, 2023 (i.e., the most recent period for which a consolidated condensed balance sheet of the registrant is required by S-X 3-01) and the pro forma condensed statements of comprehensive income for the year ended December 31, 2022 and the nine months ended September 30, 2023. A pro forma condensed balance sheet is not required as of December 31, 2022.

Assume similar facts described above except Company A files its Form S-3 on April 15, 2024. In this fact pattern, the most recent historical balance sheet of Company A incorporated by reference in the registration statement will be as of December 31, 2023. A pro forma condensed balance sheet as of December 31, 2023 would not need to be included/incorporated by reference because the acquisition of Business B is already reflected in Company A's historical balance sheet as of December 31, 2023. However, Company A would need to include/incorporate by reference a pro forma condensed statement of comprehensive income for the year ended December 31, 2023 in the Form S-3.

.33 What are the pro forma condensed statement of comprehensive income requirements of S-X Article 11?

Except as described below, pro forma condensed statements of comprehensive income are presented only for the most recently completed fiscal year and subsequent interim period up to the most recent interim date for which a balance sheet is required. A pro forma condensed statement of comprehensive income for the comparable interim period is optional. See S-X 11-02(c)(2)(i). Consider the following example.

Company X, a calendar year-end SEC registrant, acquired Business Y on December 15, 2023. The acquisition is significant for purposes of S-X Article 11. In September 2024, Company X files a registration statement on Form S-3. In this case, a pro forma condensed statement of comprehensive income is only required for the fiscal year ended December 31, 2023 because the acquisition of Business Y is already reflected in the 2024 interim statement of comprehensive income of Company X.

However, if Company X had acquired Business Y on January 31, 2024, a pro forma condensed statement of comprehensive income would also be required for the six months ended June 30, 2024 to include the one-month pre-acquisition period.

For transactions required to be accounted for under US GAAP or IFRS-IASB by retrospectively revising the historical statements of comprehensive income (e.g., combination of entities under common control and discontinued operations), pro forma condensed statements of comprehensive income must be filed for all periods for which historical financial statements of the registrant are required to be presented. Retrospective revisions to the registrant's historical financial statements stemming from the registrant's adoption of a new accounting principle must not be reflected in the pro forma condensed statements of comprehensive income until they are reflected in the registrant's historical financial statements. See S-X 11-02(c)(2)(ii).

[Editor's note: S-X 11-02(c)(2)(ii) states that pro forma statements of comprehensive income must be filed for all periods for which historical financial statements of the registrant are required; however, consistent with the examples in SEC FRM 3230.2, we understand the SEC staff does not require the presentation of a statement of comprehensive income for the corresponding interim period of the preceding fiscal year.]

The captions which must be presented in the pro forma condensed statements of comprehensive income are set forth in S-X 11-02(a)(3).

The statement of comprehensive income used to prepare the pro forma financial information must only be presented through income (loss) from continuing operations. See S-X 11-02(b)(1). The pro forma condensed statement of comprehensive income should disclose income (loss) from continuing operations, and income (loss) from continuing operations attributable to the controlling interests. See S-X 11-02(a)(5).

Historical and pro forma basic and diluted earnings per share are presented on the face of the pro forma condensed statement of comprehensive income as specified by S-X 11-02(a)(9). The notes to the pro forma financial information should make the computation of pro forma EPS clearly determinable.

If a registrant consummates a business acquisition using the proceeds from a common stock offering, the pro forma EPS should be based on the historical weighted average shares outstanding and only be adjusted to include the number of common shares whose proceeds were used to consummate the business acquisition. Effect should be given to shares issued or to be issued as if issuance had taken place at the beginning of the period presented.

When convertible securities will automatically convert to common stock in connection with an IPO, the number of shares used to compute pro forma EPS should include the number of common shares into which the securities will convert as if they were outstanding as of the beginning of the most recently completed fiscal year presented in the S-X Article 11 pro forma financial statements, irrespective of when the convertible securities were issued. Refer to Topic III.B.1 from the highlights of the March 2021 meeting of the CAQ SEC Regulations Committee.

Common shares whose proceeds will be used for general corporate purposes should not be included as an adjustment in computing pro forma EPS. See SEC FRM 3230.4 #6.

.34 How do you apply the requirements of S-X Article 11 when entities have different fiscal year-ends?

Pro forma condensed statements of comprehensive income generally must be presented using the registrant's fiscal year-end.

If the most recent fiscal year-end of any other entity involved with the transaction differs from the registrant's most recent fiscal year-end by one fiscal quarter or less, then the historical financial statements of each entity may be combined without any adjustments to conform the fiscal year-end of the other entity to the registrant's fiscal year-end.

If the most recent fiscal year-end of any other entity involved in the transaction differs from the registrant's most recent fiscal year-end by more than one fiscal quarter, then the other entity's statement of comprehensive income should be brought up to within one fiscal quarter of the registrant's most recent fiscal year-end, if practicable. This updating may be done by adding subsequent interim period results and deducting comparable preceding year interim period results. See examples below.

The updating procedure referred to above may result in a situation in which an interim period is excluded from or included more than once in the pro forma condensed statements of comprehensive income. Disclosure of the periods combined and the sales or revenues and income for periods that were excluded from or included more than once in the pro forma condensed statement of comprehensive income is required. See S-X 11-02(c)(3). Additionally, the SEC staff has indicated that quantitative and narrative disclosures about gross profit, selling and marketing expenses, and operating income of any period excluded from or included more than once, may be necessary to inform readers about the effects of unusual charges or adjustments in those periods. See SEC FRM 3330.2.

When pro forma financial information is prepared by combining different fiscal periods, the number of months included for the registrant and the other entity should be the same.

Combining entities with fiscal year-ends that differ by one fiscal quarter or less

Company M, a calendar year-end SEC registrant, acquired Business Q with a November 30 year-end in September 2023. Company M would be able to present pro forma financial information combining Company M's historical financial statements for the year ended December 31, 2022 with Business Q's historical financial statements for the year ended November 30, 2022. Similarly, for the presentation of the subsequent interim period, Company M may combine its financial statements for the six months ended June 30, 2023 with Business Q's financial statements for the six months ended May 31, 2023.

Company X, a calendar year-end SEC registrant, acquired Business B, a private company with a June 30 year-end, on June 15, 2023. Since Business B's year-end differs from Company X's year-end by more than one fiscal quarter, Business B's historical financial information used in the pro forma condensed statement of comprehensive income must be brought up to within one fiscal quarter of Company X's fiscal year-end. The following illustrates some examples of the options available to Company X assuming that only a Form 8-K is required to report the transaction (requirements may be different in a registration statement or proxy statement):

Combining entities with fiscal year-ends that differ by more than one fiscal quarter by including the same historical period

Option 1 – Company X could include:

- A pro forma condensed balance sheet as of March 31, 2023, which combines Company X's historical balance sheet as of March 31, 2023 with Business B's historical balance sheet as of March 31, 2023;
- A pro forma condensed statement of comprehensive income for the year ended December 31, 2022 (with Business B's results included for the 12 months ended December 31, 2022); and
- A pro forma condensed statement of comprehensive income for the three-month period ended March 31, 2023 (with Business B's results included for the three-month period ended March 31, 2023).

In this example, no historical period is included more than once or excluded from the pro forma financial information.

Combining entities with fiscal year-ends that differ by more than one fiscal quarter by including a historical period twice

Option 2 – Company X could also include:

- Same pro forma condensed balance sheet as described under Option 1 above;
- A pro forma condensed statement of comprehensive income for the year ended December 31, 2022 (with Business B's results included for the 12 months ended March 31, 2023); and
- A pro forma condensed statement of comprehensive income for the three-month period ended March 31, 2023 (with Business B's results included for the three-month period ended March 31, 2023).

Under either option, disclosure of the periods combined would be required (as described in S-X 11-02(c)(3)). Under option 2, disclosure would be required for the sales or revenues and income for any periods included more than once in the pro forma financial information (i.e., Business B's financial information for the three months ended March 31, 2023 would be included twice). Additional quantitative and narrative disclosure about gross profit, selling and marketing expenses, and operating income for the period included more than once may also be necessary. See SEC FRM 3330.2.

Combining entities with fiscal year-ends that differ by more than one fiscal quarter by excluding a historical period

Company A, an SEC-registrant with an August 31 year-end acquired Business Z, a private company with a calendar year-end, on July 21, 2023. Since Business Z's year-end differs from Company A's year-end by more than one fiscal quarter, Business Z's historical financial information used in the pro forma condensed statement of comprehensive income must be brought up to within one fiscal quarter of Company A's fiscal year-end.

The following pro forma financial information could be provided in the Form 8-K reporting the acquisition:

- A pro forma condensed balance sheet as of May 31, 2023, which combines Company A's historical balance sheet as of May 31, 2023 with Business Z's historical balance sheet as of June 30, 2023;
- A pro forma condensed statement of comprehensive income for the year ended August 31, 2022, which combines Company A's historical results for the year ended August 31, 2022 with Business Z's historical results for the twelve months ended June 30, 2022; and
- A pro forma condensed statement of comprehensive income for the nine months ended May 31, 2023, which combines Company A's results for the nine months ended May 31, 2023 with Business Z's results for the nine months ended June 30, 2023.

As a result of this presentation, neither of the pro forma condensed statements of comprehensive income include Business Z's results of operations for the period from July 1, 2022 through September 30, 2022. Disclosure of the sales or revenue and income excluded (for the period from July 1, 2022 through September 30, 2022) from the pro forma condensed statement of comprehensive income is required. Additional quantitative and narrative disclosure about gross profit, selling and marketing expenses, and operating income for the period excluded may also be necessary. See SEC FRM 3330.2.

.35 What are some common pro forma adjustments required by S-X Article 11?

The pro forma condensed balance sheet and statements of comprehensive income must include and, except as described below, be limited to the following pro forma adjustments:

- Transaction Accounting Adjustments (see S-X 11-02(a)(6)(i)) and
- Autonomous Entity Adjustments (see S-X 11-02(a)(6)(ii)).

Additionally, a registrant may, in its discretion, include Management's Adjustments in the explanatory notes to the pro forma financial information. See S-X 11-02(a)(7). Management's Adjustments may not be presented on the face of the pro forma condensed balance sheet or statements of comprehensive income.

Pro forma adjustments should be referenced to notes that clearly explain the assumptions involved. See S-X 11-02(a)(8). Transaction Accounting Adjustments and Autonomous Entity Adjustments are required to be presented in separate columns. See S-X 11-02(a)(6)(ii). Pro forma adjustments generally should not be netted unless the gross amounts can be clearly determined from the explanatory footnotes. See SEC FRM 3240.7.

[Editor's note: Although SEC Release 33-10786 indicates that pro forma financial information should be presented using the same basis of accounting as the registrant, it does not address whether pro forma adjustments may be necessary to conform the

accounting policies of the acquired or to be acquired business to those of the registrant for all pro forma periods presented and, if so, how such pro forma adjustments should be presented. We understand that the SEC staff believes pro forma adjustments should be included to conform the acquired business's accounting policies to those of the registrant for all periods presented. Such adjustments should be included as Transaction Accounting Adjustments. See SEC 4560.351.]

.351 What are Transaction Accounting Adjustments required by S-X Article 11?

As described in S-X 11-02(a)(6)(i), Transaction Accounting Adjustments in the:

- pro forma condensed balance sheet depict the accounting for the transaction required by US GAAP or IFRS-IASB, as applicable. Transaction Accounting Adjustments in the pro forma condensed balance sheet are calculated using the measurement date and method prescribed by the applicable accounting standard. For probable transactions, the measurement date is as of the most recent practicable date prior to the effective date (for registration statements), qualification date (for Regulation A offering statements) or mailing date (for proxy statements).
- pro forma condensed statements of comprehensive income depict the effect of the pro forma balance sheet adjustments assuming those adjustments were made as of the beginning of the fiscal year presented. These adjustments are necessary even if a pro forma condensed balance sheet is not required (e.g., because the transaction is already reflected in the most recent historical balance sheet). If the condition which triggered the presentation of pro forma financial information does not have a balance sheet effect, then the Transaction Accounting Adjustments should depict the accounting required by US GAAP or IFRS-IASB, as applicable.

For example, assume Company J, a calendar year-end US domestic SEC registrant, acquired Business D, a calendar year-end private company on May 18, 2023. Company J will present a pro forma condensed balance sheet as of March 31, 2023 reflecting pro forma adjustments (including the Transaction Accounting Adjustments) using the measurement date and method prescribed by US GAAP. In the pro forma condensed statements of comprehensive income for the year ended December 31, 2022 and the interim period ended March 31, 2023, adjustments should be made to depict the effects of the Transaction Accounting Adjustments that were made to the pro forma balance sheet assuming the adjustments were made as of the beginning of the fiscal year presented (January 1, 2022 in this example). See S-X 11-02(a)(6)(i)(a).

Additionally, the explanatory notes must disclose the information specified in S-X 11-02(a)(11)(ii) (e.g., a table showing the total consideration transferred or received including its components and how they were measured).

Transaction Accounting Adjustments are limited to adjustments to account for the transaction using the measurement date and method prescribed by the applicable accounting standards.

[Editor's note: Registrants frequently issue debt to finance the acquisition of a business. SEC Release 33-10786 does not directly address the presentation of the effects of additional financing necessary to complete the acquisition. S-X 11-01(a)(8) requires that a registrant give pro forma effect when consummation of other transactions that have occurred or are probable for which disclosure of pro forma financial information would be material to investors. Registrants should evaluate whether the acquisition financing should be reflected in the pro forma financial information.]

See SEC 4560.365 for a discussion of the impact of new accounting pronouncements.

.352 What are Autonomous Entity Adjustments required by S-X Article 11?

Autonomous Entity Adjustments are adjustments necessary to reflect the operations and financial position of the registrant as an autonomous entity when the registrant was previously part of another entity, such as a spin-off transaction in which the costs allocated to the entity do not reflect all of the expected costs of operating as a standalone public company.

[Editor's note: We understand that the SEC staff has expressed the view that Autonomous Entity Adjustments should be supported by a contractual arrangement (e.g., a transition services agreement or a new lease agreement). If there are adjustments not supported by a contractual arrangement, consideration should be given as to whether they may be presented as Management's Adjustments. See 4560.353 for a discussion of Management's Adjustments.]

Additionally, the explanatory notes must disclose the information specified in S-X 11-02(a)(11)(iii) (e.g., material uncertainties).

.353 What are Management's Adjustments discussed in S-X Article 11?

Management's Adjustments depict the synergies and dis-synergies of acquisitions and dispositions for which pro forma effect is being given. Management's Adjustments may (but are not required to) be presented if, in management's opinion, they would enhance an understanding of the pro forma effects of the transaction and the conditions specified in S-X 11-02(a)(7) are met.

If presented, Management's Adjustments must be disclosed in the explanatory notes to the pro forma financial information and must be presented 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 the corresponding amounts after giving effect to Management's Adjustments. See S-X 11-02(a)(7)(ii) for additional disclosure requirements.

Management's Adjustments included or incorporated by reference in a registration statement, proxy statement, offering statement or Form 8-K should be as of the most recent practicable date prior to the effective date, mail date, qualification date, or filing date as applicable, which may require that they be updated if previously provided in a Form 8-K that is appropriately incorporated by reference. See S-X 11-02(a)(7)(ii)(B).

.36 What are the pro forma disclosure requirements for an acquired or to be acquired business when the aggregate impact is above the 50% significance level?

The SEC's rules generally allow registrants to omit pro forma financial information if the financial statements of an acquired business are not required in the filing. However, pro forma financial information is still required when the aggregate impact of businesses acquired or to be acquired for which financial statements were not or are not yet required under either S-X 3-05 or S-X 3-14 is significant above the 50% level. See SEC 4550.23 and SEC 4555.24.

.361 How should pro forma financial information be presented when multiple transactions have occurred or are probable?

When consummation of more than one transaction has occurred or is probable, the pro forma financial information must present separate columns for each transaction for which pro forma presentation is required by S-X 11-01.

For example, assume Company A, an SEC registrant, consummated the acquisition of Business B during the fiscal year. The acquisition was significant at 25%. Company A files an Item 9.01 Form 8-K with the required financial statements of Business B in accordance with S-X 3-05 and pro forma financial information in accordance with S-X Article 11. Subsequently, Company A plans to file a registration statement on Form

S-3. At the time of filing the Form S-3, Company A determines that its pending acquisition of Business Z (significance is over 50%) is considered probable. In this example, the pro forma financial information in the registration statement should give effect to both the acquisition consummated during the fiscal year (Business B) and the probable acquisition (Business Z). This would be accomplished by including additional pro forma columns to reflect the probable acquisition separately.

If the pro forma financial information is presented in a proxy statement for purposes of obtaining shareholder approval of one of the transactions, the effects of that transaction must be clearly set forth. See S-X 11-02(b)(4).

.362 How should pro forma financial information be presented when multiple outcomes for some transactions are possible?

If a transaction is subject to different potential outcomes with a wide range of possible effects, multiple pro forma presentations may be needed to give effect to the range of possible results. See S-X 11-02(a)(10).

A common example is a tender offer where the seller has options to receive cash or stock. In this example, since the amounts of cash and stock to be ultimately exchanged cannot be determined until consummation of the tender offer, two pro forma presentations are usually made to depict the two ends of the spectrum of the tender offer: the effect of issuing the maximum of cash and minimum of stock, and vice versa. Occasionally, management may believe that there is a probable outcome that differs from the two presentations depicting the opposite ends of the spectrum. As a result, another pro forma presentation may be necessary to reflect the outcome considered most probable by management.

Multiple presentations may also be required where, for example, a registrant files a proxy statement requesting shareholder approval of a business acquisition and the number of shares to be issued in the transaction will be determined at closing by a formula. Since the purchase price could vary, additional presentations may be required. The registrant may present the pro forma effects using a purchase price based on the most recent trading price of the common stock. As another example, special purpose acquisition company (SPAC) shareholders generally can redeem all or a portion of their shares in conjunction with the SPAC's acquisition of an operating company. Since the amount of the redemption can vary, additional presentations may be required in the registration statement (e.g., S-4) or a proxy statement.

See SEC FRM 3240.5

.363 What are the S-X Article 11 disclosure requirements related to tax effects?

The tax effects of pro forma adjustments should normally be calculated at the statutory rate in effect during the periods for which pro forma condensed statements of comprehensive income are presented and should be reflected as a separate pro forma adjustment. See S-X 11-02(b)(5).

[Editor's note: The SEC staff has indicated that it is ordinarily not appropriate for the tax effect of pro forma adjustments to be calculated using the effective rate. If taxes are not calculated using the statutory rate, or if other aspects of tax accounting are depicted, consideration should be given to providing disclosure in the explanatory notes to the pro forma financial information. See SEC FRM 3270.]

.364 How is pro forma financial information presented when a registrant and an acquired business prepare their financial statements using different bases of accounting?

When a US domestic registrant acquires a foreign business or a business that would qualify as a foreign private issuer if it were a registrant, the acquired business's financial statements presented to comply with S-X 3-05 or S-X 3-14 may be prepared on a comprehensive basis other than US GAAP (e.g., IFRS-IASB or local GAAP). In those situations, pro forma financial information for the acquisition is required to reflect the acquired business on the same basis of accounting as that of the registrant, which for a domestic

registrant is US GAAP. Similarly, foreign private issuers would prepare their pro forma financial information on the basis of accounting in its primary financial statements (e.g., IFRS–IASB).

.365 How should pro forma financial information relating to an acquired business be presented when the registrant and the acquired company adopt new accounting standards on different dates or using different methods of adoption?

If a registrant adopts a new accounting standard as of a different date or under a different transition method than an acquired or to be acquired business, the registrant must conform the date and method of adoption of the acquired business to its own when preparing pro forma financial information required by S-X Article 11. Such adjustments should be included as Transaction Accounting Adjustments. See SEC FRM 3250.1(m).

.366 Is pro forma financial information required to be “current” in connection with a registration statement or proxy statement?

The SEC requires pro forma financial information for a significant business acquisition or disposition of a significant portion of a business to be filed in a Form 8-K. The age of the pro forma financial information to be included in the Form 8-K will generally be based on the date the Form 8-K reporting the significant acquisition or disposition is filed. If no filing is made timely (on or prior to the 4th business day following the acquisition date), the age of financial statements required to be filed is generally determined by reference to the 4th business day after the consummation of the acquisition. See SEC FRM 2045.13 and SEC 3150.2 for further discussion.

The pro forma financial information filed in a Form 8-K may be different from the pro forma financial information required in a subsequently filed registration statement (e.g., Form S-3). The pro forma financial information included or incorporated by reference in a registration statement may need to be updated to include more recent financial information.

For example, assume Company X, a calendar year-end US domestic SEC registrant, acquired Business T (a calendar year-end US private company) on September 21, 2023. The acquisition was significant at 25%. Company X reported the acquisition of Business T in an Item 2.01 Form 8-K (the initial Form 8-K) on September 27, 2023 (four business days after the date of the acquisition). Business T's financial statements and Company X's pro forma financial information must be filed by amendment to Company X's Form 8-K no later than December 7, 2023 (the 71st calendar day after the initial Form 8-K was required to be filed).

In this example, September 27, 2023 is the reference date for determining the age of financial statements, including the pro forma financial information, to be included in Company X's Item 9.01 Form 8-K. Based on the reference date of September 27, 2023, pro forma financial information as of June 30, 2023 and for the six months ended June 30, 2023 and for the year ended December 31, 2022 is required in the Form 8-K. See SEC 3150 for a discussion of the requirements of Items 2.01 and 9.01 of Form 8-K.

If Company X were to file a new registration statement on Form S-3 December 29, 2023, then that date (December 29, 2023) would be the reference date for determining the age of Company X's pro forma financial information to be included in the Form S-3. The reference date to determine the age of Company X's pro forma financial information to be included in the Form S-3 would ultimately need to be updated to the effective date of the registration statement. The requirement to provide pro forma financial information in the Form S-3 will be based on the most recent balance sheet of the registrant on file pursuant to S-X 3-01. Accordingly, Company X must provide updated pro forma financial information for the nine-month period ended September 30, 2023 and for the year ended December 31, 2022 in connection with its registration statement. No pro forma condensed balance sheet is required since the acquisition is fully reflected in Company X's historical balance sheet as of September 30, 2023.

Furthermore, if Company X were to file a new registration statement on Form S-3 on June 7, 2024, Company X must provide updated pro forma financial information for the year ended December 31, 2023. No pro forma condensed balance sheet is required since the acquisition is fully reflected in Company X's historical balance sheet as of March 31, 2024. Assuming that there were no other transactions for which

pro forma financial information would be required, updated pro forma financial information for periods ending after December 31, 2023 (e.g., three months ended March 31, 2024) would not be required because Business T would be included in the consolidated financial statements of Company X for all periods ending after that date.

[Editor's note: If Management's Adjustments are presented in the explanatory notes, they may need to be updated even if no updates are required for the periods covered by the pro forma financial information. Management's Adjustments should be as of the most recent practicable date prior to the effective date of a registration statement. See S-X 11-02(a)(7)(ii)(B).]

.367 Does S-X Article 11 permit the use of financial forecasts in lieu of pro forma financial information?

S-X 11-03 permits the use of a financial forecast in lieu of pro forma condensed statements of comprehensive income. A pro forma condensed balance sheet would be required in addition to the forecast. The financial forecast must comply with S-K 10(b) and be presented in accordance with AICPA guidelines. See S-X 11-03(b). Management must have a reasonable basis for the assumptions underlying the prospective financial information. An absence of adequate persuasive support may, however, preclude a registrant from including prospective financial information in a filing. A forecast may not be substituted for the disclosure of pro forma financial information required by US GAAP or IFRS-IASB.

See SEC FRM 3500.

[Editor's note: Very few registrants have elected to file forecasts in lieu of pro forma condensed statements of comprehensive income. SEC rules do not require a forecast to be reported upon by an independent registered public accounting firm.]

.9 FREQUENTLY ASKED QUESTIONS

.901 Is pro forma financial information required for a significant business disposition, even if the disposed business does not meet the criteria of a discontinued operation?

Yes. Pro forma financial information is required if the disposed business is significant even if the disposed business does not satisfy the criteria of a discontinued operation. See S-X 11-01(a)(4) and SEC FRM 3120.1.

.902 Should an expected disposition in connection with an acquisition be reflected in the pro forma financial information?

In a business acquisition, the registrant or the acquired or to be acquired business may expect to dispose of certain operations in order to gain the approval of one or more regulatory agencies. The pro forma financial information should reflect the impact of these disposals to the extent the specific operations to be disposed are identifiable at the time the pro forma financial information is prepared. If the operations are not identifiable with any reasonable certainty at that time, the notes to the pro forma financial information should disclose the contingency and its reasonably possible impact on the financial results. See SEC FRM 3250.1(l).

.903 Can a registrant that is required to present pro forma financial information depicting a recent acquisition of a significant business also present additional annual periods (i.e., in addition to the most recently completed fiscal year and subsequent interim period), if the pro forma financial information gives effect to a disposition that meets the criteria for discontinued operations, even if the disposition does not trigger a separate Exchange Act reporting requirement?

The SEC staff has indicated the periods for which pro forma adjustments are presented generally should be based on the transaction that is triggering the pro forma reporting requirements (e.g., the business acquisition), and therefore the pro forma adjustments to reflect the discontinued operations would be limited to only the most recent year and interim period.

Nonetheless, while the separate pro forma reporting requirement may not have been triggered for the discontinued operation, the SEC staff has indicated that, if the registrant believes it is material to investors, there may be circumstances where pro forma condensed statements of comprehensive income reflecting the discontinued operation may be necessary for the relevant periods. In such circumstances, the pro forma adjustments to reflect the business acquisition would be limited to the most recent year and interim period. See Topic IX.C in the Highlights of the March 27, 2012 CAQ SEC Regulations Committee.

.904 Can Transaction Accounting Adjustments giving effect to the disposition of a business decrease historically incurred compensation expense for employees who were not, or will not be, transferred or terminated as of the disposition date?

No. Transaction Accounting Adjustments giving effect to the disposition of a business should not decrease historically incurred compensation expense for employees who were not, or will not be, transferred or terminated as of the disposition date. See S-X 11-02(b)(3).

.905 Should unusual events that are included in the historical results for the most recent fiscal year (e.g., a goodwill impairment or a gain on the sale of a business that is not a discontinued operation) be excluded from the pro forma financial information?

Generally, no. S-X 11-02(c)(4) indicates that:

“whenever unusual events enter into the determination of the results shown for the most recently completed fiscal year, the effect of such unusual events should be disclosed and consideration should be given to presenting a pro forma condensed statement of comprehensive income for the most recent twelve-month period in addition to [the required periods], if the most recent twelve-month period is more representative of normal operations.”

The latest twelve-months pro forma presentation is in addition to (and not instead of) the required annual and interim pro forma condensed statements of comprehensive income.

.906 Does S-X Article 11 apply in connection with the acquisition of an interest in a business that will be accounted for by the registrant under the fair value option in lieu of the equity method if it is significant?

S-X 11-01(a)(1) indicates that the phrase business acquisition “encompasses the acquisition of an interest in a business accounted for by the equity method.” S-X 3-05(a)(2)(ii) and S-X 3-14(a)(2)(ii) make it clear that the phrase “business acquisition” also includes the acquisition of an interest in a business accounted for by the registrant under the fair value option in lieu of the equity method. Accordingly, the acquisition of an interest in a business that will be accounted for by the registrant under the fair value option in lieu of the equity method that is significant would require compliance with S-X Article 11. However, the SEC staff has indicated that full pro forma financial information under S-X Article 11 generally is not required when the registrant elects the fair value option for the investment (in accordance with US GAAP). In this situation, the SEC staff would expect registrants to include a narrative discussion explaining how the application of

the fair value option for its investment will impact the results of operations and balance sheet in future periods. See the Note to SEC FRM 3110.1.

.907 Is S-X Article 11 pro forma financial information required in a Form 10-K?

Generally, no. Item 8(a) of Form 10-K specifically states that compliance with S-X Article 11 is not required. However, disclosure of certain pro forma financial information relating to a business acquisition is required by US GAAP. Additionally, the SEC staff has indicated that if a registrant prepares a supplemental pro forma MD&A (e.g., a discussion in Form 10-K to give investors additional insight regarding the ongoing effects of a major acquisition), then pro forma financial information may be presented in a format consistent with S-X Article 11. Other formats, such as the footnote pro forma information specified by ASC 805, may also be appropriate depending on the particular facts and circumstances. See SEC FRM 9220.6-.9.

.908 Is it considered misleading to present the acquiree's financial statements without the accompanying pro forma financial information?

If the financial statements of an acquired business are required in the filing, the pro forma financial information required by S-X Article 11 should be filed at the same time. The SEC staff has indicated that the presentation of an acquiree's financial statements without accompanying pro forma financial information can be misleading. See SEC FRM 3110.4.

.909 What periods should be presented for pro forma financial information after a change in fiscal year-end in which the transition report has been filed on Form 10-K?

The registrant may present pro forma financial information for the transition period and the most recent fiscal year (and interim period). Alternatively, the registrant may present a pro forma statement of comprehensive income for the most recent annual period (9 to 12 months under S-X 3-06). In either case, the length of the period used for the target should be identical to the period of the registrant. See Note to SEC FRM 3230.1.

.910 What interest rate should be used to prepare pro forma financial information reflecting a debt issuance?

Generally, the interest rate should be based on either the current interest rate or the interest rate for which the registrant has a commitment. If actual interest rates in the transaction can vary from those depicted, disclosures of the effect on income of a 1/8 percent variance in interest rates should be disclosed. Although use of current or committed interest rates is appropriate in most cases, careful consideration should be given to the facts and circumstances specific to each presentation to determine whether the interest rate used is reasonable. Certain limited circumstances may warrant the use of an interest rate other than the current or committed rate. The SEC staff has indicated that in some instances the registrant should use the interest rates that were prevailing during the period covered by the pro forma financial information. When a rate other than the current or committed rate is used, prominent disclosure of the basis of presentation and the anticipated effects of the current interest rate environment should appear in the introduction to the pro forma financial statements and wherever pro forma financial information is provided. See SEC FRM 3260.

.911 What stock price should be used in determining the value of stock to be issued in connection with a probable business acquisition?

Registrants should use the most recent practicable date prior to the effective date (for registration statements), qualification date (for Regulation A offering statements) or mailing date (for proxy statements) for determining the value of stock to be issued in a transaction that has not yet been consummated. In addition, the notes to the pro forma condensed balance sheet should include a disclosure of the date at which the stock price was determined and a sensitivity analysis for the range of possible outcomes based

upon percentage increases and decreases in the recent stock price. The percentages should be reasonable in light of existing volatility in the acquirer's stock price. See Note to SEC FRM 3250.1(f).

.912 Can a registrant disclose Management's Adjustments as a range?

We understand the SEC staff would generally not object to a registrant disclosing Management's Adjustments as a range provided that the appropriate reconciliation as required by S-X 11-02(a)(7)(ii)(A) is included.

.913 How should transaction expenses associated with a business combination be reflected in the pro forma financial information?

We understand that the SEC staff has indicated that transaction expenses already incurred should not be eliminated and that the pro forma financial information should reflect an estimate for those expenses not yet incurred.

.914 On what basis of accounting should pro forma information be presented in connection with a reverse merger when the legal acquirer and the accounting acquirer use different bases of accounting to prepare their financial statements?

The SEC staff has indicated that there is no single set of considerations, and individual facts and circumstances should drive the conclusion. Companies should consider various factors such as (i) the basis of accounting to be used by the combined entity after the merger, (ii) the needs of the respective shareholder groups, and (iii) home country regulatory requirements when determining the basis of accounting used for preparing the pro forma financial information. Multiple pro forma presentations on both bases of accounting may be appropriate in certain situations. Companies should consider consulting with the SEC staff if there are complexities in evaluating the appropriate basis of accounting to use for the pro forma financial information in a reverse acquisition. See Topic C in the Highlights of the November 2015 CAQ International Practices Task Force.

.915 Could pro forma information relating to an acquired business be required to be more current than the financial statements of the acquired business?

Yes. There could be situations based on the fiscal year ends of a US domestic registrant and an acquired foreign business, where pro forma financial information could be required that would be more current than the foreign business's separate historical financial statements.

For example, assume Company Q, a calendar year-end US domestic SEC registrant acquired Business N, a calendar year-end private company that meets the definition of a foreign business, on June 15, 2023. Business N is 45% significant and does not prepare quarterly financial statements under its home-country reporting requirements.

In the Item 2.01/9.01 Form 8-K reporting the acquisition, Company Q will be required to provide historical financial statements of Business N for the years ended December 31, 2022 and 2021 but is not required to provide interim financial statements of Business N as of March 31, 2023 and for the three-month periods ended March 31, 2023 and 2022. See SEC 4550.42.

Even though Company Q is not required to provide Business N's March 31, 2023 and 2022 historical financial statements, Company Q will need to include Business N's March 31, 2023 balance sheet information in Company Q's March 31, 2023 condensed pro forma balance sheet and Business N's statement of comprehensive income information for the three months ended March 31, 2023 in Company Q's condensed pro forma statement of comprehensive income for the three-month period ended March 31, 2023.

- .1 General
- .2 Applying the SEC's age of financial statements requirements
- .3 Requirements of S-X 3-01(c) and S-X 8-08(b)
- .4 Special considerations
- .8 Frequently asked questions
- .9 Flowchart for evaluating age of financial statements requirements

.1 GENERAL

.11 What does the phrase “age of financial statements” mean?

The phrase “age of financial statements” generally refers to how old the most recent financial statements are at the filing/submission date of a registration statement or proxy statement. The age of financial statements is generally expressed as the number of days that have elapsed since the date of the most recent financial statements included or incorporated by reference in a registration statement or proxy statement up to and including the filing/submission date. The calculated age of financial statements will be compared to the SEC's age of financial statements requirements to determine whether the financial statements need to be updated to a more recent date before filing/submitting a registration statement or proxy statement.

For example, if a registration statement for a calendar year-end SEC registrant is filed/submitted on May 10, 2024, and the date of the registrant's most recent financial statements included or incorporated by reference in the registration statement is December 31, 2023, then the age of the financial statements as of the filing/submission date is 131 days, calculated as follows:

January (full month)	31 days
February (full month)	29 (in 2024)
March (full month)	31
April (full month)	30
May (May 1-10)	10
	<u>131</u> days

In other words, on the filing/submission date of the registration statement (i.e., May 10, 2024), the most recent financial statements are 131 days old. That age number will be compared to the SEC's age of financial statement requirements to determine whether the financial statements need to be updated to a more recent date before filing/submitting the registration statement.

[Editor's note: The age of financial statements analysis addresses the date of the most recent financial statements required to be included or incorporated by reference in a registration statement or proxy statement under Regulation S-X. This analysis does not address which additional financial statements (i.e., preceding the most recent financial statements) are required to be included or incorporated by reference in the registration statement or proxy statement. That is a separate analysis governed by other rules. See, for example, S-X 3-01(a), S-X 3-02(a) and S-X 3-04.]

[Editor's note: The SEC's Division of Corporation Finance has issued guidance under which certain companies may be able to omit financial statements otherwise required by Regulation S-X from certain filings/submission. See SEC 2110.22 and .23 and SEC 3110.12 for additional information. SEC 4600 addresses the SEC's age of financial statements requirements without regard to the possibility that a company may be permitted to omit certain financial statements otherwise required by Regulation S-X under the Division of Corporation Finance guidance referred to above. See SEC FRM 1210.]

.12 Where can I find the SEC's rules governing the age of financial statements requirements applicable to a US domestic SEC registrant in a registration statement or proxy statement?

S-X 3-12 is the principal rule governing the age of financial statements for a US domestic, non-smaller reporting company SEC registrant to be included in a registration statement or proxy statement. Smaller reporting company registrants may look to S-X 8-08.

[Editor's note: The guidance in SEC 4600 is focused primarily on US domestic SEC registrants that have been in existence for at least one fiscal year. Foreign private issuers should refer to S-X 3-12(f). Registered management investment companies should refer to S-X 3-12(e).]

.13 When must a US domestic SEC registrant meet the age of financial statements requirements in connection with a registration statement or proxy statement?

Registrants must generally meet the SEC's age of financial statements requirements in connection with a registration statement or proxy statement at:

1. the initial filing/submission date (see SEC FRM 1210);
2. the date of an amendment (pre-effective or post-effective) (see SEC FRM 1220.10 and .11);
3. the effective date (see SEC 4600.802) and
4. the mailing date, with respect to a proxy statement (see SEC 4600.801).

References throughout SEC 4600 to the "date a filing/submission is made" or the "filing/submission date" or similar references are intended to encompass any time a registrant is required to meet the age of financial statements requirements (including the effective date, the date of a non-public submission and the mailing date of a proxy statement).

See SEC 3110.212 for additional guidance on the age of financial statements requirements in connection with a Form 10.

[Editor's note: A foreign private issuer subject to the requirements of the undertaking in S-K 512(a)(4) should refer to SEC FRM 6230 for additional guidance.]

See SEC 4600.802 for additional guidance.

.2 APPLYING THE SEC'S AGE OF FINANCIAL STATEMENTS REQUIREMENTS

The SEC's age of financial statements requirements specify that a US domestic SEC registrant's most recent balance sheet included in a registration statement or proxy statement generally cannot be more than:

- 134 days old for a non-accelerated filer or
- 129 days old for an accelerated filer or large accelerated filer

at the filing/submission date, except that third quarter financial statements are considered current until financial statements for the most recently completed fiscal year-end are required (see SEC 4600.21).

For example, a private company with a calendar year-end that is filing/submitting a Form S-1 for its initial public offering would need to provide its March 31, 2024 unaudited interim financial statements if that Form S-1 were filed/submitted after May 13, 2024. This is because after May 13, 2024, the December 31 financial statements would be more than 134 days old, calculated as follows:

AGE OF FINANCIAL STATEMENTS REQUIREMENTS
(Last updated June 2023)

SEC 4600

January (full month)	31 days
February (full month)	29 (in 2024)
March (full month)	31
April (full month)	30
May (May 1-13)	<u>13</u>
	134 days

[Editor's note: If the applicable cutoff date (e.g., the 134th day) falls on a Saturday, Sunday, or holiday, then the filing may be made on the next business day without having to update the financial statements. See SEC FRM 1220.12.]

Refer to the second editor's note under SEC 4600.11 regarding the possible omission of financial statements otherwise required by Regulation S-X.

.21 How soon after year-end must a US domestic SEC registrant provide its audited financial statements for that recently completed fiscal year in connection with the filing/submission of a registration statement or proxy statement?

A US domestic SEC registrant is required to provide its audited financial statements for its most recently completed fiscal year in connection with a registration statement or proxy statement filed/submitted after year-end if any of the following conditions is met:

1. The audited financial statements are available (see last paragraph of SEC FRM 1220.3) or
2. The filing/submission date is more than 45 days after the end of the most recently completed fiscal year and the registrant does not meet the requirements of S-X 3-01(c) (or S-X 8-08(b) for a smaller reporting company) (see SEC 4600.3) or
3. The filing is made more than the following number of days after the year end corresponding to the registrant's accelerated filer status or smaller reporting company status, as applicable:

	<u>Cutoff date</u>
a. Large accelerated filer	59 days
b. Accelerated filer	74 days
c. Non-accelerated filer	89 days
d. Smaller reporting company that is an initial filer	90 days

Refer to the editor's note under SEC 4600.2 regarding a cutoff date which falls on a Saturday, Sunday or holiday.

As noted above, if the registrant is not required to provide audited financial statements for its most recently completed fiscal year, then the registrant is required to provide interim financial statements at least as current as the end of the third fiscal quarter of its most recently completed fiscal year. Refer to the second editor's note under SEC 4600.11 regarding the possible omission of financial statements otherwise required by Regulation S-X.

For example, an existing calendar year-end SEC registrant that is a large accelerated filer and meets the requirements of S-X 3-01(c) would not need to provide its December 31, 2022 audited financial statements (assuming they are not available) in connection with a registration statement or proxy statement filed on or before February 28, 2023 (the 59th day after December 31, 2022). However, financial statements (which may be unaudited) at least as current as September 30, 2022 would be required.

As another example, assume Company X, a private company with a calendar year-end, intends to submit an initial registration statement on Form S-1 for non-public review in February 2023. Company X is not a smaller reporting company and does not meet the conditions of S-X 3-01(c).

If Company X's December 31, 2022 audited financial statements are available, then they must be provided in the Form S-1 submission. If Company X's December 31, 2022 audited financial statements are not available, then they are not required to be provided in the submission as long as that submission is made on or before February 14, 2023 (the 45th day after December 31, 2022). If the submission is made after February 14, 2023, then it will need to include Company X's December 31, 2022 audited financial statements.

A plain reading of S-X 3-12(b) would indicate that if Company X isn't required to include its December 31, 2022 audited financial statements in the Form S-1 submission, then it would be required to include its interim financial statements (which may be unaudited) as of a date no earlier than September 30, 2022 (i.e., the end of Company X's most recently completed third fiscal quarter). However, refer to the second editor's note under SEC 4600.11 regarding the possible omission of financial statements otherwise required by Regulation S-X.

See SEC 4600.801 and .802 for additional guidance.

.3 REQUIREMENTS OF S-X 3-01(C) AND S-X 8-08(B)

.31 How does S-X 3-01(c) work?

Under certain circumstances, S-X 3-12 provides registrants with additional time before they are required to provide audited financial statements for the most recently completed fiscal year if the registrant satisfies the conditions set forth in S-X 3-01(c). See condition 2 in SEC 4600.21.

In order to qualify for this additional time, the registrant must satisfy all three of the conditions set forth in S-X 3-01(c):

1. The registrant files annual, quarterly and other reports pursuant to Section 13 or 15(d) of the Exchange Act and all reports due have been filed;

[Editor's note: The SEC staff has indicated that a reporting company that has not filed its first Exchange Act report since an initial offering has not met the above condition. See SEC FRM 1220.3.]

2. For the most recent fiscal year for which audited financial statements are not yet available, the registrant, "reasonably and in good faith," expects to report income attributable to the registrant (i.e., after adjusting for income or loss attributable to non-controlling interests), after taxes; and
3. For at least one of the two fiscal years immediately preceding the most recent fiscal year, the registrant reported income attributable to the registrant (i.e., after adjusting for income or loss attributable to non-controlling interests), after taxes.

[Editor's note: The income amount referred to in the above conditions includes income or loss related to discontinued operations. See SEC FRM 1220.3.]

For example, assume three pre-existing, calendar year-end, non-smaller reporting company SEC registrants (Companies R, S, and N) each intend to file a registration statement on Form S-3 on February 15, 2023 (i.e., more than 45 days after the most recently completed fiscal year end). Each of the companies has filed all Exchange Act reports that are due. Companies R, S and N had the following income (loss) attributable to the registrant, after taxes for the most recently completed three years:

	<u>Company R</u>	<u>Company S</u>	<u>Company N</u>
2020	\$1 million	(\$2 million)	\$1 million
2021	(\$2 million)	(\$2 million)	\$1 million
2022 (estimated)	\$1 million	\$1 million	(\$2 million)

Analysis: Under these assumptions, Company R does not need to provide its 2022 audited financial statements in the February 15, 2023 Form S-3 (assuming the audited financial statements are not otherwise available), because it had positive income attributable to Company R, after taxes during 2020, and because it expects to report positive income attributable to Company R, after taxes for 2022.

Companies S and N must provide 2022 audited financial statements in their February 15, 2023 Forms S-3. Company S must provide 2022 audited financial statements in its Form S-3 because it did not have positive income attributable to Company S, after taxes for either 2021 or 2020. Company N must provide 2022 audited financial statements in its Form S-3 because it does not expect to report positive income attributable to Company N, after taxes for 2022.

.32 Are the requirements of S-X 8-08(b) the same as the requirements of S-X 3-01(c)?

No. Although these two rules appear similar, there are important differences between S-X 8-08(b) and S-X 3-01(c).

For instance, a company must already have a reporting obligation under Section 13 or 15(d) of the Exchange Act to meet the first condition of S-X 3-01(c), whereas that condition is not applicable to S-X 8-08(b). This means that a smaller reporting company that is doing an initial public offering may be able to qualify for the reporting relief provided in S-X 8-08(b) while a non-smaller reporting company doing an initial public offering would not be able to qualify for the reporting relief under S-X 3-01(c).

Additionally, S-X 3-01(c) and S-X 8-08(b) use different income reference points for assessing eligibility. As noted in SEC 4600.31, S-X 3-01(c) uses income attributable to the registrant, after taxes. S-X 8-08(b) uses income attributable to the registrant from continuing operations, and before income taxes. See SEC FRM 1220.3.

.4 SPECIAL CONSIDERATIONS

.41 Are the age of financial statements requirements calling for the inclusion of interim financial statements always the same as the filing due dates for Form 10-Q?

No. The updating requirements calling for the inclusion of interim financial statements may differ from the due dates of Form 10-Q. Accordingly the date on which interim financial statements would need to be provided in a registration statement or proxy statement under the SEC's age of financial statements requirements may be earlier than the corresponding due date of a registrant's Form 10-Q.

The SEC staff recognizes the difference between the Form 10-Q due dates and the age of financial statements requirements, and they have a practice of providing additional flexibility for qualifying registrants. The SEC staff will generally not insist that an existing registrant update its unaudited interim financial statements before the due date of the corresponding Form 10-Q, as long as all four of the following conditions are satisfied:

- The financial statements provided in the filing are at least as current as the quarterly financial statements that are on file with the SEC;
- The registrant has filed all of its Exchange Act reports for the last 12 months in a timely fashion and has been reporting under the Exchange Act for at least 12 months (i.e., a new registrant would not meet this condition);
- The registrant confirms that the quarterly report will be timely filed; and
- There have been no material trends, events, or transactions that arose subsequent to the date of the latest balance sheet provided in the filing that would materially affect an investor's understanding of the registrant's financial condition and results of operations (a description of these types of items will not suffice to qualify for this administrative relief).

See SEC FRM 1220.5.

[Editor's note: When the filing is made between the time that an earnings release has been published and the date that the 10-Q is to be filed, capsule data (which includes at least the same level of data reported in the earnings release) for the quarter is often included or incorporated by reference in the filing/submission. Registrants should consider whether the registration statement should be updated to include the financial statements from which the earnings release information was derived.]

See SEC 4600.804 for additional guidance.

.42 Could a US domestic SEC registrant that recently changed its fiscal year-end be required to provide audited transition period financial statements in connection with a registration statement or proxy statement prior to the date those transition period financial statements would otherwise be required to be audited under the Exchange Act?

Yes, in certain circumstances.

When a US domestic SEC registrant changes its fiscal year-end, it may need to file a transition report that includes financial statements covering the transition period with the SEC. The transition period is the period from the end of the most recently completed fiscal year to the beginning of the new fiscal year. If the transition period is less than six months, the registrant has the option of reporting the transition period on Form 10-Q (with unaudited financial statements). If the registrant elects to present its transition report on Form 10-Q, then the transition period financial statements would need to be audited no later than the time the registrant files its Form 10-K for its first full fiscal year following the close of the transition period. See SEC 3185 for more information regarding changes in fiscal year-end.

According to an SEC staff interpretation, if the most recent audited financial statements provided in a Securities Act registration statement or proxy statement following a change in year-end are dated more than one year and 45 days before the date the filing is made, then the audited financial statements must be updated to include/incorporate by reference the audited transition period financial statements. Accordingly, an SEC registrant that changes its fiscal year-end may need to have the transition period financial statements audited before the due date of its first annual report of the new fiscal year. See SEC FRM 1365.4.

[Editor's note: In reaching this interpretation, we understand that the SEC staff concluded that S-X 3-01(c) is not broadly applicable in the case of a change in year-end. If a registrant believes it should not be required to provide audited transition period financial statements prior to the date that the first Form 10-K for the new fiscal year is filed, it should consider contacting the SEC staff.]

For example, assume Company A, a non-smaller reporting company SEC registrant with an October 31 fiscal year-end, determined on February 1, 2023 to change its fiscal year-end to December 31.

The transition period would be November 1, 2022 through December 31, 2022. Company A may file its transition report on Form 10-Q with unaudited financial statements for the two months ended December 31, 2022. In this case, the Form 10-K for the year ending December 31, 2023 would need to include audited financial statements for the transition period (i.e., the two months ended December 31, 2022).

Absent pre-clearance with the SEC staff, Company A would have to provide audited transition period financial statements in any registration statement or proxy statement filed after December 15, 2023 (since the most recent audited financial statements are dated more than 1 year and 45 days after October 31, 2022). Company A's accelerated filer status would not impact that conclusion.

.43 How do the age of financial statements requirements apply to a newly formed registrant which does not have predecessor operations?

A registrant that has not been in existence for a complete fiscal year must provide audited financial statements as of a date less than 135 days before the filing date of the registration statement. See, for example, S-X 3-01(a) (S-X 8-02 for a smaller reporting company). The SEC staff has indicated that the requirement to provide audited financial statements applies to the initial filing date, but that subsequent updates performed to comply with the 135-day rule may be made on an unaudited basis, except that audited financial statements are required if the effective date of the registration statement is more than 45 days after the company's fiscal year-end (a smaller reporting company may consider the age of financial statements requirements in S-X 8-08).

See SEC FRM 1220.4.

.44 How do the age of financial statements apply to a US business acquired or to be acquired?

See SEC 4550.41 regarding the age of financial statements requirements for a US business acquired or to be acquired in connection with a registration statement or proxy statement. See SEC 3150.26 with respect to the age of financial statements requirements for an acquired business in connection with an Item 9.01 Form 8-K.

[Editor's note: See SEC 4550.42 for information relating to an acquired foreign business.]

.8 FREQUENTLY ASKED QUESTIONS

.801 Does the age of financial statements need to be evaluated as of the mailing date when a combined Form S-4 registration statement/proxy statement is prepared?

In the case of a combined Form S-4 registration statement/proxy statement, the SEC staff has indicated that the age of financial statements requirements do not need to be evaluated as of the mailing date of the proxy unless the mailing is delayed beyond the time necessary to prepare the material for mailing (generally no more than a few days after the S-4 becomes effective). See SEC FRM 1220.8.

[Editor's note: The application of the 90 days guidance in S-X 8-08 is not clear as to whether a filing made on day 90 would meet the age of financial statements requirements. Registrants should consider reaching out to the SEC staff to discuss their facts when reaching a conclusion.]

.802 Can a registrant register additional securities on an effective registration statement under Securities Act Rule 462(b) when the financial statements are not within the age limitations at the filing date of the Rule 462(b) registration statement?

The SEC staff has indicated that a registrant may register additional securities on an effective registration statement under Securities Act Rule 462(b) even if the financial statements in the original effective registration statement, which were within the age limitations of S-X 3-12 as of the effective date of that registration statement, are not within the age limitations of S-X 3-12 as of the filing date of the Rule 462(b) registration statement. However, the registrant should consider whether more current financial information would be required to be disclosed to investors to make the information in the registration statement not misleading. See Securities Act Rules CDI 244.06.

.803 Can a registrant file a prospectus supplement under Securities Act Rule 424 to sell securities from an effective Form S-3, even if it does not meet the criteria of S-X 3-01(c)?

The SEC staff has indicated that S-X 3-01 does not prevent a shelf takedown and would not apply to the prospectus supplement as it is not for the purpose of updating the prospectus under Section 10(a)(3) of the Securities Act. See Securities Act Rules CDI 212.13.

.804 Do the age of financial statements requirements described in SEC 4600 apply to Form 10-K and Form 10-Q?

No. Although Item 8 of Form 10-K generally calls for financial statements of the registrant required by Regulation S-X, S-X 3-01(b) and (c), and S-X 8-08 indicate that those rules are not applicable to Form 10-K. Additionally, Item 1 of Part I of Form 10-Q refers only to S-X 10-01 (S-X 8-03 for a smaller reporting company). S-X 10-01(c) and S-X 8-03 specify the financial statements required to be included in Form 10-Q.

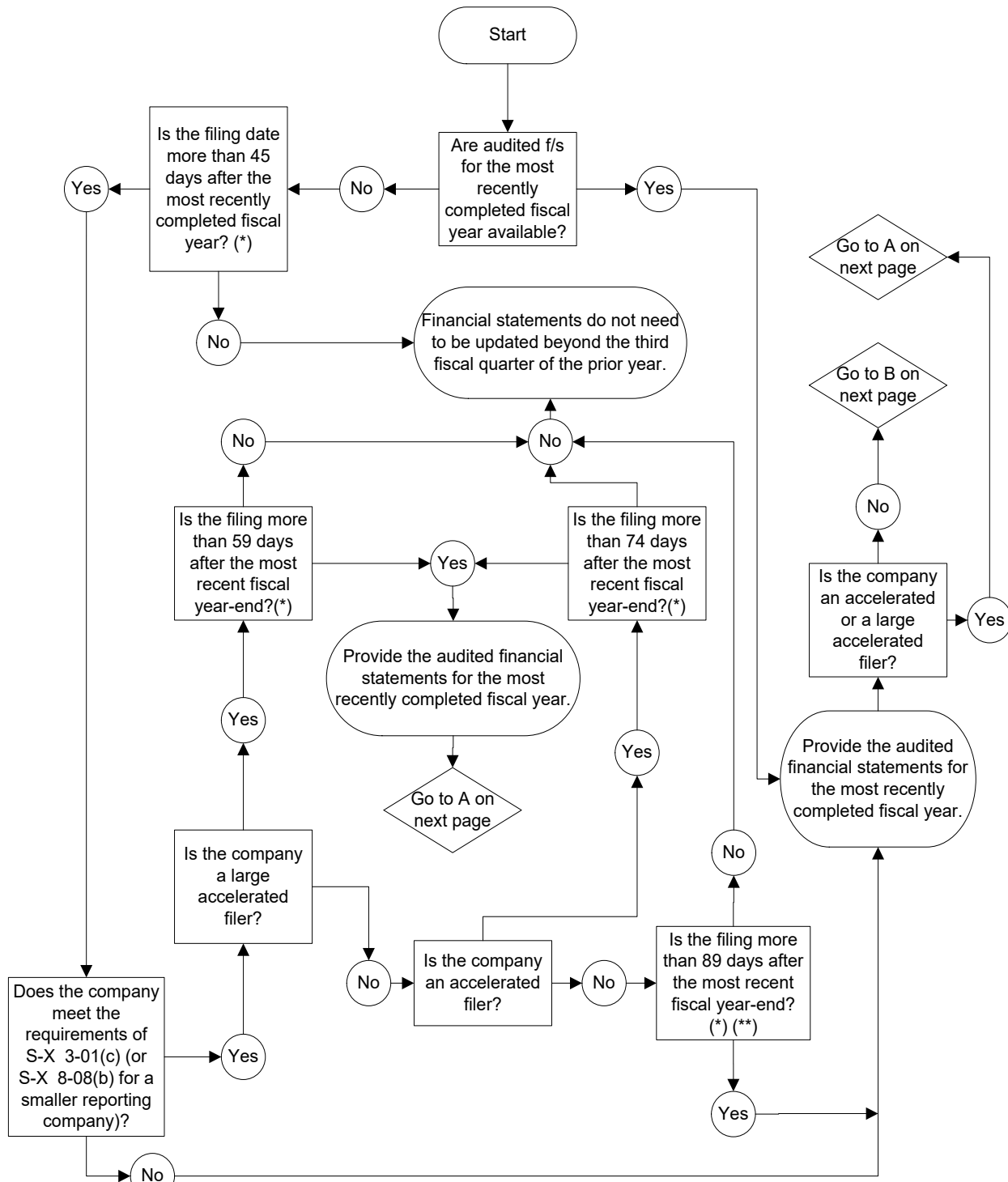
.9 FLOWCHART FOR EVALUATING AGE OF FINANCIAL STATEMENTS REQUIREMENTS

The following flowchart can be used to assess the age of financial statements requirements for an SEC registrant in connection with a new or amended registration statement or proxy statement. Special circumstances (e.g., when there has been a change in year-end or when the registrant is a smaller reporting company) may require further analysis. When a filing cut-off date (e.g., the 45th day after year-end) falls on a Saturday, Sunday, or holiday, then the filing may be made on the next business day without having to update the financial statements.

This flowchart does not take into account the potential for omitting financial statements otherwise required by Regulation S-X under Division of Corporation Finance policy described in SEC 2110.22 and .23 and SEC 3110.12.

AGE OF FINANCIAL STATEMENTS REQUIREMENTS
(Last updated June 2023)

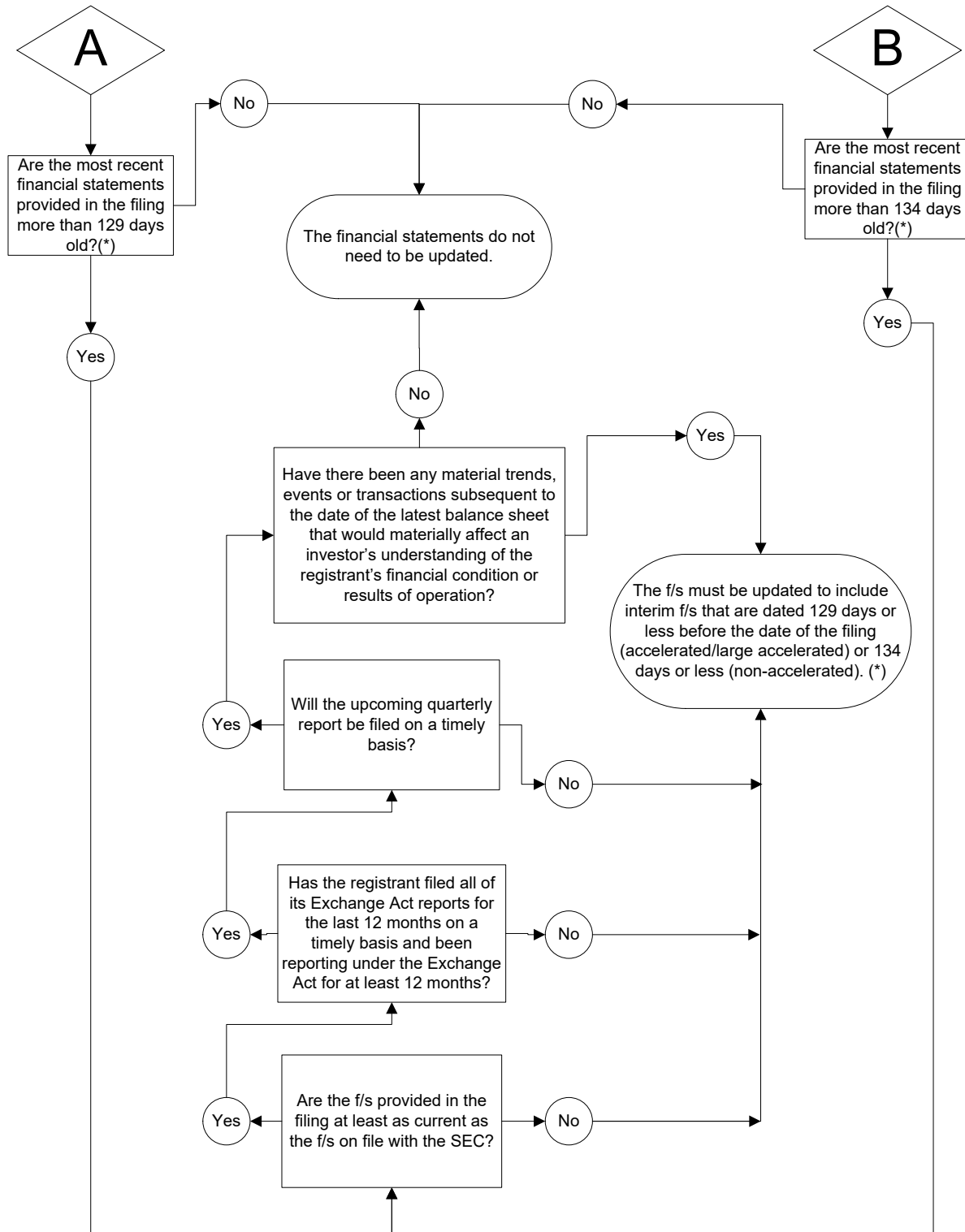
SEC 4600



(*) When a filing cut-off date (e.g., the 45th day after year-end) falls on a Saturday, Sunday or holiday, then the filing may be made on the next business day without having to update the financial statements.
 (**) 90 days for an initial filer that qualifies as a smaller reporting company.

AGE OF FINANCIAL STATEMENTS REQUIREMENTS
(Last updated June 2023)

SEC 4600



(*)When a filing cut-off date (e.g., the 129th day after year-end) falls on a Saturday, Sunday or holiday, then the filing may be made on the next business day without having to update the financial statements.

.1 How to access Regulation S-X

.1 HOW TO ACCESS REGULATION S-X

The reprint of Regulation S-X is available on Viewpoint under SEC Reporting / SEC Rules and Regulations / Regulation S-X.

- .1 General
- .2 How to access Staff Accounting Bulletins

.1 GENERAL

[Editor's note: In 2018, the SEC amended its rules and forms in order to simplify and update disclosure requirements (See SEC Release 33-10532 <https://www.sec.gov/rules/final/2018/33-10532.pdf> for more information). The SEC staff has not updated the Staff Accounting Bulletins (SABs) to conform to the amendments included in the SEC release. Accordingly care should be exercised when considering these sources of guidance.]

SABs represent interpretations and practices followed by the Division of Corporation Finance and the Office of the Chief Accountant in administering the disclosure requirements of the Federal securities laws; they are not rules or interpretations of the Commission, nor do they bear official Commission approval. The Commission's staff issues SABs as a means of informing the financial community of its views on certain matters relating to accounting and disclosure practices. In general, SABs are intended to be an effective and expeditious means of communication and contribute to consistency in the implementation of the Federal securities laws.

.2 HOW TO ACCESS STAFF ACCOUNTING BULLETINS

The reprint of the Staff Accounting Bulletins is available on Viewpoint under SEC Reporting / SEC Interpretative Guidance / Staff Accounting Bulletins (SABs).

- .1 General
- .2 Presentation and disclosure requirements
- .3 Additional SEC staff interpretive guidance
- .4 Key performance indicators and metrics in MD&A
- .5 How to access Regulation G
- .6 How to access Non-GAAP Financial Measures Compliance and Disclosure Interpretations

.1 GENERAL

[Editor's note: The guidance set forth in SEC 6020 was prepared with a view toward U.S. domestic SEC registrants. Foreign private issuers and investment companies should refer to the relevant rules, form instructions and interpretive guidance.]

.11 What is a non-GAAP financial measure?

The SEC has defined the term “non-GAAP financial measure” in S-K 10(e)(2) and Rule 101(a)(1) of Regulation G and has provided additional information about what is (or is not) a non-GAAP financial measure in S-K 10(e)(4) and (5) and Rule 101(a)(2) and (3) of Regulation G.

In general terms, a non-GAAP financial measure is a numerical measure of a registrant’s historical or future financial performance, financial position, or cash flows that:

- includes amounts that are excluded from the most directly comparable GAAP measure, or
- excludes amounts that are included in the most directly comparable GAAP measure.

Non-GAAP financial measures exclude:

- operating and other statistical measures (such as unit sales, number of employees, number of subscribers or number of advertisers);
- ratios or statistical measures calculated using exclusively one or both of:
 - financial measures calculated in accordance with GAAP; and
 - operating measures or other measures that are not non-GAAP financial measures; and
- financial measures required to be disclosed by GAAP, SEC rules, or a system of regulation of a government or governmental authority or self-regulatory organization that is applicable to the registrant.

See SEC FRM 8120.2 for common examples of measures that generally constitute non-GAAP measures and SEC FRM 8120.3 for common examples of measures that are generally not non-GAAP measures.

.2 PRESENTATION AND DISCLOSURE REQUIREMENTS

.21 Applicable requirements

There are three basic sets of presentation and disclosure requirements which should be considered when evaluating whether a particular non-GAAP financial measure and the manner of its presentation comply with the relevant SEC rules. The appropriate requirements to apply generally depend on where the non-GAAP financial measure is disclosed. Accordingly, it is important to ensure that the proper requirements are being considered. The three sets of presentation and disclosure requirements are:

- Regulation G (applicable to non-GAAP financial measures prepared by a registrant required to file reports under section 13(a) or 15(d) of the Exchange Act (other than an investment company) or a person acting on the registrant's behalf),
- Instruction 2 to Item 2.02 of Form 8-K (applicable to a non-GAAP financial measure furnished to the SEC under Item 2.02 of Form 8-K -- e.g., a quarterly or annual earnings release), and
- S-K 10(e) (applicable to information filed with the SEC -- e.g., in a Form 10-K or Form 10-Q or included/incorporated by reference in a registration statement).

[Editor's note: The requirements of Regulation G and S-K 10(e) do not apply to non-GAAP financial measures included in disclosure relating to a proposed business combination transaction, the entity resulting from the business combination transaction, or an entity that is a party to the business combination transaction if the disclosure is contained in a communication that is subject to the SEC's communications rules applicable to business combination transactions. See S-K 10(e)(6). See Non-GAAP Financial Measures CDI 101.02, CDI 101.03 and, CDI 101.04.]

If a registrant is considering disclosure of a particular non-GAAP financial measure in multiple places (e.g., in an earnings release and in a Form 10-K or Form 10-Q), the registrant should consider all relevant potential presentation and disclosure models. Certain non-GAAP financial measure disclosures may be allowable in information "furnished" to the SEC (e.g., under Item 2.02 Form 8-K), but not allowed if "filed" with the SEC (e.g., in Form 10-K or Form 10-Q). See SEC 3150.13 for a discussion of the distinction between "furnishing" and "filing" information with the SEC.

.22 The Regulation G presentation and disclosure model

The Regulation G presentation and disclosure model provides registrants with the broadest amount of flexibility as compared to the other models.

The provisions of Regulation G apply to any registrant (or person acting on the registrant's behalf), other than an investment company, that publicly discloses a non-GAAP financial measure (e.g., orally, telephonically, in a press release, by webcast, etc.). Regulation G contains a general requirement that a non-GAAP financial measure should not be made public if that measure, taken together with the information accompanying it, is misleading. Additionally, Regulation G requires that a non-GAAP financial measure be accompanied by:

- the most directly comparable financial measure calculated and presented in accordance with GAAP; and
- a reconciliation (by schedule or other clearly understandable method) between the non-GAAP financial measure disclosed or released and the most comparable financial measure or measures calculated and presented in accordance with GAAP.

The reconciliation must be quantitative for historical non-GAAP financial measures.

The reconciliation must also be quantitative for forward-looking non-GAAP financial measures to the extent available without unreasonable effort. If a quantitative reconciliation with respect to a forward-looking non-GAAP measure is not presented in reliance on the "unreasonable efforts" exception, the registrant should disclose that fact and identify the information that is unavailable and its probable significance. See Non-GAAP Financial Measures CDI 102.10(b).

.23 Presentation and disclosure of non-GAAP financial measures in information "furnished" to the SEC under Item 2.02 of Form 8-K (e.g., earnings releases)

Non-GAAP financial measures "furnished" to the SEC under Item 2.02 of Form 8-K are subject to the provisions of Regulation G (i.e., not misleading and presentation of most directly comparable GAAP measures together with a reconciliation). Additionally, Instruction 2 to Item 2.02 of Form 8-K requires:

- the registrant to disclose the most directly comparable financial measure calculated and presented in accordance with GAAP with equal or greater prominence (as compared to the non-GAAP financial measure). See Non-GAAP Financial Measures CDI 102.10;
- a statement disclosing the reasons why management believes that the non-GAAP financial measure provides useful information to investors; and
- a statement disclosing the additional purposes, if any, for which management uses the non-GAAP financial measure (to the extent material).

[Editor's note: There is no prohibition against disclosing a non-GAAP financial measure that is not used by management in managing its business. See Non-GAAP Financial Measures CDI 102.04.]

[Editor's note: S-K 10(e)(iii) provides that a filing need not include disclosure relating to (i) the reasons management believes the non-GAAP financial measure is useful for investors or (ii) management's "other uses" for the non-GAAP financial measure, if the filing is not an annual report on Form 10-K and those disclosures were included in the registrant's most recent annual report on Form 10-K (or a more recent filing). However, the required information should be updated to the extent necessary to meet the disclosure requirements at the time of the current filing.]

The SEC staff has indicated that if a registrant issues a press release with "preliminary" or "estimated" earnings and results of operations for a completed quarterly period, this preliminary earnings release must comply with all of the requirements of Item 2.02 Form 8-K. See Form 8-K CDI 106.07.

.24 Presentation and disclosure of non-GAAP financial measures in information "filed" with the SEC (e.g., Form 10-K, Form 10-Q or registration statements)

Non-GAAP financial measures included in information that is "filed" with the SEC are subject to the requirements of Regulation G and the requirements contained in Instruction 2 to Item 2.02 Form 8-K (i.e., the requirements of S-K 10(e)(1)(i)). Additionally, S-K 10(e)(1)(ii) generally prohibits the following in any documents "filed" with the SEC:

- Excluding charges or liabilities that require cash settlement from non-GAAP liquidity measures, (other than the measures of earnings before interest and taxes (EBIT) and earnings before interest, taxes, depreciation, and amortization (EBITDA)).
- Adjusting a non-GAAP performance measure to eliminate or smooth items identified as nonrecurring, infrequent or unusual, when (i) the nature of the charge or gain is such that it is reasonably likely to recur within two years or (ii) there was a similar charge or gain within the prior two years.
- Presenting non-GAAP financial measures on the face of the financial statements prepared in accordance with GAAP or in the accompanying notes.
- Presenting non-GAAP financial measures on the face of any pro forma financial information required to be disclosed by S-X Article 11; and

- Using titles or descriptions of non-GAAP financial measures that are the same, or confusingly similar to, titles or descriptions used for GAAP financial measures (e.g., referring to EBITDA as "operating earnings").

The prohibitions for non-GAAP measures in S-K 10(e)(1)(ii) are more restrictive than the general disclosure requirements of Regulation G or the instructions to Item 2.02 of Form 8-K. As a result of these prohibitions, certain non-GAAP financial measures may be acceptable if included in documents "furnished" to the SEC (e.g., under Item 2.02 of Form 8-K) but may not be appropriate if included in documents "filed" with the SEC (e.g., in Form 10-Q or Form 10-K).

.3 ADDITIONAL SEC STAFF INTERPRETIVE GUIDANCE

The following SEC staff interpretive guidance should also be considered when evaluating the provisions of S-K 10(e).

.31 General interpretive guidance

The SEC staff has stated that presenting a non-GAAP performance measure that excludes normal, recurring, cash operating expenses necessary to operate a registrant's business could be misleading. When assessing the appropriateness of a non-GAAP adjustment relating to normal, operating expense, the SEC staff has indicated that the company's operations, revenue generating activities, business strategy, industry and regulatory environment will be considered. In addition, the SEC staff has indicated that it would view an operating expense that occurs repeatedly or occasionally, including at irregular intervals, as recurring. See SEC Non-GAAP Financial Measures CDI 100.01.

The SEC's rules prohibit a company from describing a charge or gain as "non-recurring, infrequent or unusual" when there was a similar item during the prior two years or when it is reasonably likely that a similar item will arise during the next two years. However, this prohibition only applies to how the adjustment is described. The SEC staff makes clear in its interpretive guidance that the prohibition was not intended to establish a blanket prohibition on disclosing non-GAAP performance measures that exclude recurring items. Companies may make adjustments (even for recurring items) they think are appropriate and consistent with the SEC's rules. See Non-GAAP Financial Measures CDI 102.03.

The SEC staff has indicated that the prohibitions in S-K 10(e) would not preclude the presentation in MD&A of an otherwise prohibited non-GAAP financial measure if such measure is a material debt covenant and that information about the covenant is material to an investor's understanding of the company's financial condition and/or liquidity. See Non-GAAP Financial Measures CDI 102.09.

Certain financial measures (or information) prepared in accordance with guidance published by a government, governmental authority or self-regulatory organization that is applicable to the registrant are excluded from the definition of a non-GAAP financial measure if the registrant is required to disclose the measure. If not required by a system of regulation that is applicable to the registrant, then the information is considered a non-GAAP financial measure and the registrant must provide the disclosures required by Regulation G or S-K 10(e), if applicable, including the quantitative reconciliation from the non-GAAP financial measure to the most comparable measure calculated in accordance with GAAP. See Non-GAAP Financial Measures CDI 102.12.

Non-GAAP financial measures that are presented inconsistently between periods should disclose the change and the reasons for the change. In addition, depending on the significance of the change, it may be necessary to recast prior measures to conform to the current presentation and place the disclosure in the appropriate context. See Non-GAAP Financial Measures CDI 100.02.

Non-GAAP financial measures that exclude non-recurring charges should also exclude non-recurring gains. See Non-GAAP Financial Measures CDI 100.03.

Non-GAAP financial measures that use recognition and measurement principles that are inconsistent with those required by GAAP (e.g., accelerating revenue recognition, presenting a non-GAAP measure

of revenue that deducts transaction costs when gross presentation is required by GAAP or the inverse presenting a measure of revenue on a gross basis when net presentation is required by GAAP or changing the measurement of revenue or expenses in a non-GAAP performance measure from an accrual basis to a cash basis) would be considered misleading. See Non-GAAP Financial Measures CDI 100.04.

A non-GAAP financial measure could be misleading if it, and/or any adjustment made to the GAAP measure, is not appropriately labeled and clearly disclosed. Non-GAAP Financial Measures CDI 100.05 includes examples of disclosures that the SEC staff has indicated would be considered misleading.

Non-GAAP financial measures could be misleading even if they are accompanied by detailed disclosures about the nature and effect of each adjustment. See Non-GAAP Financial Measures CDI 100.06.

.32 Interpretive guidance on prominence

As noted above, S-K 10(e)(1)(i)(A) requires that when a registrant presents a non-GAAP financial measure it must present the most directly comparable GAAP measure with equal or greater prominence.

In Non-GAAP Financial Measures CDI 102.10(a) and CDI 102.10(b), the SEC staff has provided a number of disclosure examples that the SEC staff believes would cause a non-GAAP measure to be more prominent than the comparable GAAP measure. For instance, the SEC staff has identified the presentation of an income statement of non-GAAP measures or the presentation of a non-GAAP income statement when reconciling non-GAAP measures to the most directly comparable GAAP measures as situations where the disclosure of non-GAAP measures is more prominent. The SEC staff considers a non-GAAP income statement to be one that is comprised of non-GAAP measures and includes all or most of the line items and subtotals found in a GAAP income statement. See Non-GAAP Financial Measures CDI 102.10(c).

Additionally the SEC staff has indicated that when omitting the quantitative reconciliation relating to a forward looking non-GAAP financial measure in reliance on the exception provided by S-K 10(e)(1)(i)(B), the non-GAAP measure would be considered to be presented with greater prominence than the comparable GAAP measure if the registrant does not disclose its reliance upon the exception and identify the information that is unavailable and its probable significance in a location of equal or greater prominence. See Non-GAAP Financial Measures CDI 102.10(b).

.33 Interpretive guidance on EBIT / EBITDA

By its very nature, EBITDA oftentimes excludes charges/liabilities that require (or will require) cash settlement (e.g., taxes and interest). The SEC has stated that EBIT and EBITDA were exempted from the prohibition to exclude charges/liabilities that require (or will require) cash settlement (see S-K 10(e)(1)(ii)(A)) because of their wide and recognized existing use. However, registrants that present these measures in filings with the SEC must reconcile these measures to the most directly comparable GAAP financial measure. Also, in discussing why the measure is useful to investors, registrants should consider discussing why investors would find the measure valuable in the context in which it is presented. Although the SEC's non-GAAP financial measures rules do not specifically indicate that EBIT and EBITDA can only be considered non-GAAP liquidity measures, registrants intending those measures to be used as non-GAAP performance measures should consider disclosing why a measure that excludes the income statement impact of assets that are likely integral to the entity's performance (e.g., depreciation charges for fixed assets used in operations) is a reasonable measure of operating performance.

Registrants that conclude that EBIT and EBITDA are non-GAAP measures of liquidity would need to consider the most directly comparable GAAP measure (which would likely be cash flows from operating activities) and use that measure to satisfy the reconciliation requirements. This may require

registrants to provide reconciliations that are different from those that have been traditionally presented.

The SEC staff has indicated that it views the definition of earnings for purposes of calculating EBIT or EBITDA to be net income as presented in the statement of operations. See Non-GAAP Financial Measures CDI 103.01.

EBIT and EBITDA per share amounts should not be presented. See Non-GAAP Financial Measures CDI 103.02.

[Editor's note: With respect to liquidity measures, the exemption that permits the presentation of EBIT or EBITDA does not extend to the presentation of "adjusted EBIT" or "adjusted EBITDA." Registrants should evaluate any such measures in light of the requirements and prohibitions established in S-K 10(e) without regard to the exemption in the preparation of a liquidity measure for EBIT and EBITDA. See Non-GAAP Financial Measures CDI 103.01.]

Refer to the discussion in SEC 6020.31 and Non-GAAP Measures CDI 102.09 regarding presentation of a non-GAAP measure that is a material debt covenant.

.34 Interpretive guidance on segment reporting

Although measures of profit or loss and total assets for reportable segments continue to be allowed under GAAP applicable to segment reporting, registrants should consider including a robust discussion of all items materially impacting the consolidated financial statements as well as the impacted segments without regard to whether they are included in or excluded from the measure of segment profitability in accordance with GAAP applicable to segment reporting. See footnote 28 to FRP 501.06a and Non-GAAP Financial Measures CDIs 104.01 through 104.06.

The presentation of the total segment profit or loss measure in any context other than the ASC 280 required reconciliation in the footnote would generally be considered the presentation of a non-GAAP financial measure because it has no authoritative meaning outside of the ASC 280 required reconciliation in the footnotes to the company's consolidated financial statements. As such, a registrant should consider the applicable non-GAAP disclosure requirements if the total of each segment measure of profitability is presented outside the ASC 280 disclosures. See Non-GAAP Financial Measures CDI 104.04.

.35 Interpretive guidance on non-GAAP per share measures

Although there is no *per se* prohibition in S-K 10(e) on non-GAAP per share measures in documents filed with the SEC, this should not be interpreted as a repeal of the SEC's long-standing position on non-GAAP per share measures detailed in Accounting Series Release (ASR) No. 142. Certain registrants (e.g., those in the real estate industry) will not necessarily be precluded from using funds from operations per share (subject to the other presentation and disclosure requirements applicable to the particular non-GAAP financial measure). See Non-GAAP Financial Measures CDIs 102.01 and 102.02.

Per share measures that are prohibited specifically under GAAP (e.g., cash flow per share) or SEC rules (e.g., non-GAAP liquidity measure that measures cash generated) continue to be prohibited in materials filed with, or furnished to, the SEC. ASR No. 142 explains the SEC's concern that certain financial information (e.g., sales, current assets, funds flow, total assets, cash and other similar figures) presented on a per share basis cannot logically be related to the common shareholder without adjustment. Whether per share data is prohibited depends on whether the non-GAAP measure can be used as a liquidity measure, even if management characterizes it solely as a performance measure (see Non-GAAP Financial Measures CDI 102.05). The SEC staff has also indicated that EBIT or

EBITDA measures should not be presented on a per share basis. See Non-GAAP Financial Measures CDI 103.02.

.36 Interpretive guidance – income tax effects

A registrant should provide income tax effects on its non-GAAP measures, depending on the nature of the measures, and should provide transparent disclosure of the tax effects. See Non-GAAP Financial Measures CDI 102.11.

.4 KEY PERFORMANCE INDICATORS AND METRICS IN MD&A

The SEC has issued interpretive guidance on the disclosure of key performance indicators and metrics in MD&A. In the guidance, the SEC reminded companies that present key performance indicators and metrics in MD&A to consider the existing MD&A requirements including any existing regulatory frameworks such as generally accepted accounting principles or, with respect to non-GAAP measures, Regulation G or S-K 10(e). Additionally, the SEC reminded companies to consider whether they may need to include additional material information in order to keep the presentation of the key performance indicator/metric from being misleading (e.g., estimates or assumptions underlying the metric or its calculation).

The guidance also indicates that the SEC would generally expect the following disclosures (based on the relevant facts and circumstances):

- A clear definition of the metric and how it is calculated;
- A statement indicating the reasons why the metric provides useful information to investors; and
- A statement indicating how management uses the metric in managing or monitoring the performance of the business.

The SEC also provided guidance on disclosures relating to a change in the method of calculation or presentation of a metric (to the extent material).

Refer to Section 501.16 of the Codification of Financial Reporting Policies for further detail.

.5 HOW TO ACCESS REGULATION G

The text of Regulation G is available on Viewpoint under SEC Reporting / SEC Rules and Regulations.

.6 HOW TO ACCESS NON-GAAP FINANCIAL MEASURES COMPLIANCE AND DISCLOSURE INTERPRETATIONS

The text of the SEC staff's Non-GAAP Financial Measures Compliance and Disclosure Interpretations is available on Viewpoint under SEC Reporting / SEC Interpretative Guidance / Compliance and Disclosure Interpretations.

CHANGES IN REGISTRANT'S CERTIFYING ACCOUNTANT
(Last updated on June 2023)

SEC 6150

- .1 General
- .2 Disclosure requirements of S-K 304
- .3 Letter from the former auditor required by S-K 304(a)(3) to be publicly filed with the SEC by the registrant (Exhibit 16 letter)
- .4 Direct reporting to the SEC and/or the PCAOB by the former auditor
- .5 Example Item 4.01 Form 8-K disclosure
- .6 Disclosure by entities registered under the Investment Company Act, brokers and dealers, commodity pool operators and commodity pools, and investment advisers
- .9 Frequently asked questions

[Editor's note: The guidance in SEC 6150 is directed primarily toward US domestic SEC registrant public companies. Entities registered under the Investment Company Act, brokers and dealers, commodity pool operators and commodity pools, and investment advisers are discussed in SEC 6150.6. Foreign private issuers should consider the disclosure requirements of Item 16F of Form 20-F. See SEC 8100.51.]

Throughout SEC 6150 references to "former auditor" include the outgoing or predecessor auditor, and references to "new auditor" include the incoming or successor auditor.]

.1 GENERAL

.11 What triggers the SEC's auditor change disclosure requirements and where can I find those requirements?

An SEC registrant is required to make disclosure if during its two most recent fiscal years or any subsequent interim period its principal auditor resigns, declines to stand for re-election, or is dismissed. The disclosure requirements are also triggered if during the registrant's two most recent fiscal years or any subsequent interim period a new principal auditor has been engaged to audit the registrant's financial statements. These disclosure requirements apply to both existing SEC reporting companies and to companies that are in the process of completing an initial registration of securities. See additional discussion at SEC 6150.13. See also SEC 6150.904 for guidance when there is a change between member firms.

The auditor changes referred to above are the most commonly encountered triggers for disclosure. Disclosure is also required if during the two most recent fiscal years or subsequent interim period:

- an independent auditor (i) engaged to audit a significant subsidiary (as defined in S-X 1-02(w), see SEC 6150.901) of the registrant and (ii) on whom the principal auditor expressed reliance in its report, resigns, declines to stand for re-election, or is dismissed or
- a new independent auditor has been engaged to audit a significant subsidiary (as defined in S-X 1-02(w), see SEC 6150.901) of the registrant and the principal auditor is expected to express reliance on the other auditor in its report.

The SEC's auditor change disclosure requirements are set forth in S-K 304. See additional discussion at SEC 6150.2.

[Editor's note: In most cases, the disclosures relating to the new auditor and the former auditor are made at the same time. However, there are situations in which the disclosures are made at different times. See SEC 6150.910.]

For additional guidance, see SEC FRM Topic 4500, Regulation S-K CDI Sections 111 and 211, Exchange Act Form 8-K CDI Sections 114 and 214 and Section 603.02.a of the SEC Codification of Financial Reporting Policies.

.12 How does an existing SEC reporting company disclose a change in auditor?

An existing SEC reporting company is required to disclose a change in auditor by filing an Item 4.01 Form 8-K. The Item 4.01 Form 8-K would include the information specified in S-K 304(a)(1) with respect to the former auditor and S-K 304(a)(2) with respect to the new auditor, as applicable. See SEC 6150.5 for an example of an Item 4.01 Form 8-K disclosure.

Additionally, the company is required to obtain a letter from the former auditor as specified in S-K 304(a)(3) and file the letter as an exhibit to the Item 4.01 Form 8-K (see S-K 601(b)(16)). This letter is commonly referred to as an Exhibit 16 letter. Exhibit 16 letters are discussed at SEC 6150.3.

The Item 4.01 Form 8-K is due by the end of the fourth business day following the event which triggered the disclosure (e.g., the dismissal of the former auditor). See SEC 6150.903. See SEC 3150.121 for information on how to determine the due date of a Form 8-K.

[Editor's note: As noted above, the resignation, declination to stand for re-election or dismissal of the former auditor is a triggering event separate and apart from the engagement of the new auditor. Accordingly, depending on timing, two Item 4.01 Form 8-K filings may be required. See SEC 6150.910]

[Editor's note: When an issuer dismisses its existing auditor, we understand the disclosure obligation is triggered when the outgoing auditor is notified.]

.13 Are the auditor change disclosure requirements applicable to a company that is in the process of an initial registration of its securities using Form S-1 (e.g., an IPO)?

Yes. Item 11(i) of Form S-1 requires the registrant to provide the disclosure required by S-K 304 in its prospectus. Accordingly, the company would be required to provide disclosure of any auditor changes that took place during the company's two most recently completed fiscal years or subsequent interim period up to the date of the filing. The registrant would also be required to provide an Exhibit 16 letter as an exhibit to the registration statement.

.131 Are the auditor change disclosures required in a Form S-1 even if the former auditor's report doesn't appear in the prospectus (e.g., the new auditor reaudited all periods previously audited by the former auditor)?

Yes. The disclosures (and Exhibit 16 letter) are required even if the former auditor's report does not appear in the prospectus. The fact that an auditor change took place during the specified timeframe is the disclosure trigger.

.14 Are auditor change disclosures required in a registrant's annual meeting proxy statement (Schedule 14A)?

Item 9(d) of Schedule 14A requires the disclosures prescribed by S-K 304(a) in connection with a registrant's proxy statement for an annual meeting at which directors are to be elected or any solicitation with respect to the election or ratification of the auditor. Accordingly, a registrant would be required to provide the specified disclosures in connection with any auditor change which took place within the two most recently completed fiscal years or subsequent interim period up to the date of the filing.

A letter from the former auditor is not required to be filed with a proxy statement. However, under certain circumstances a registrant may be required to include a statement from the auditor in the proxy statement. See Instruction 2 to S-K 304.

[Editor's note: When applicable, auditor change disclosure under Item 9 of Schedule 14A is required even if the disclosure has been previously provided (e.g., in an Item 4.01 Form

8-K) and even if there is no change from the previously provided disclosure. See Instruction 1 to S-K 304.]

.15 How do auditor change disclosures apply in connection with a reverse acquisition?

See discussion in SEC 7050.46.

.16 Are auditor change disclosures required in documents other than the documents discussed in SEC 6150?

Yes. In addition to the disclosure requirements described throughout SEC 6150, there are a number of other situations which may call for disclosure relating to a change in auditor as well as a letter from the outgoing auditor. For example, a Regulation A issuer may be required to provide auditor change disclosure and a letter from the outgoing auditor in connection with Form 1-A or Form 1-U.

Auditor change disclosure/notification requirements should be reviewed to ensure compliance with the relevant rules which call for the disclosure/notification.

.2 DISCLOSURE REQUIREMENTS OF S-K 304

The disclosure requirements of S-K 304(a) are principally divided between disclosures relating to the former auditor and disclosures relating to the new auditor.

.21 What disclosures are required relating to the former auditor?

The disclosure requirements with respect to the former auditor are set forth in S-K 304(a)(1) and include:

- (1) State whether the former auditor resigned, declined to stand for re-election, or was dismissed and the date thereof.

[Editor's note: The SEC staff has indicated that they expect to see one (but only one) of the three terms/phrases "resigned," "declined to stand for re-election," or "dismissed" in the auditor change disclosure. See SEC FRM 4510.2. Additionally, although the SEC's disclosure requirements refer to a declination to stand for "re-election," we understand the SEC staff views that term to encompass a declination to stand for "re-appointment" as well.]

- (2) State whether the principal auditor's report on the financial statements for either of the past two fiscal years contained an adverse opinion or a disclaimer of opinion, or was qualified or modified as to uncertainty, audit scope, or accounting principle; and describe the nature of each such adverse opinion, disclaimer of opinion, modification, or qualification.

[Editor's note: A paragraph in an auditor's report describing the correction of an accounting error or a change in accounting principle is not a "modification" of an opinion that requires reporting under S-K 304. However, other modifications, such as explanatory paragraphs regarding an entity's ability to continue as a going concern or a material uncertainty (e.g., a material unresolved litigation matter) should be disclosed. See Regulation S-K CDI 111.05.]

- (3) State whether the decision to change auditors was recommended or approved by any audit or similar committee of the board of directors, if the issuer has such a committee, or the board of directors, if the issuer has no such committee.
- (4) State whether, during the registrant's two most recent fiscal years and any subsequent interim period preceding the change in auditor, there were any disagreements with the former auditor on any matter of accounting principles or practices, financial statement disclosure, or auditing scope or procedure,

which disagreements, if not resolved to the satisfaction of the former auditor, would have caused it to make reference to the subject matter of the disagreements in its report on the financial statements for such years. See SEC 6150.231 for a discussion of "disagreements" and SEC 6150.233 for a discussion of the disclosure requirements.

[Editor's note: The SEC staff has issued guidance stating that the phrase "subsequent interim period" means the period from the end of the registrant's most recent fiscal year through the date of the former auditor's resignation, declination to stand for re-election, or dismissal. The period is not limited to the end of the most recent fiscal quarterly period. Similarly, the "subsequent interim period" referred to in S-K 304(a)(2), which requires disclosure of the engagement of a new auditor, is the period from the end of the registrant's most recent fiscal year through the date on which the new auditor is engaged. See Regulation S-K CDI 111.01.]

- (5) Provide information for each reportable event that occurred within the registrant's two most recent fiscal years and any subsequent interim period preceding the change in auditor. If the event led to a disagreement or difference of opinion, then the event should be reported as a disagreement and does not need to be reported as both a disagreement and as a reportable event. See SEC 6150.232 for a discussion of reportable events and SEC 6150.233 for a discussion of the disclosure requirements.

See SEC 6150.905 if the auditor change relates to the revocation of the former auditor's PCAOB registration.

.22 What disclosures are required relating to the new auditor?

The disclosure requirements relating to the new auditor are set forth in S-K 304(a)(2) and include:

- (1) the name of the new auditor and
- (2) the date of the new auditor's engagement.

Additionally, the registrant must describe consultations with the new auditor during the registrant's two most recent fiscal years and any subsequent interim period prior to engaging the new auditor regarding:

- (1) the application of accounting principles to a specified transaction (either completed or proposed) or the type of audit opinion that might be rendered on the registrant's financial statements, if either a written report was provided to the registrant or oral advice was provided that the new auditor concluded was an important factor considered by the registrant in reaching a decision as to the accounting, auditing or financial reporting issue, or
- (2) any matter that was the subject of a disagreement or reportable event.

The disclosure requirements with respect to these matters include the following:

- (1) a statement identifying the issues that were the subjects of the consultation;
- (2) a brief description of the views of the new auditor as expressed orally or in writing to the registrant on each issue (if written views were received by the registrant, they must be filed as an exhibit); and
- (3) a statement whether the former auditor was consulted by the registrant regarding the issues, and if so, a summary of the former auditor's views.

The registrant is required to (i) request the new auditor to review the disclosure required by S-K 304(a) before the disclosure is filed and (ii) provide the new auditor the opportunity to furnish the registrant with a letter addressed to the SEC containing any new information, clarification of the registrant's expression of its views, or the respects in which the new auditor does not agree with the statements made by the registrant

in response to S-K 304(a). The registrant must file any such letter as an exhibit to the Form 8-K or registration statement, if applicable.

.23 Disagreements and reportable events

As indicated in SEC 6150.21 (items (4) and (5)), registrants must disclose any disagreements or reportable events (each as defined in S-K 304(a)(1)(iv) and S-K 304(a)(1)(v), as applicable) that occurred during the last two fiscal years and any subsequent interim period prior to the resignation, declination to stand for re-election or dismissal of the former auditor.

.231 How is the term "disagreements" interpreted for purposes of the SEC's auditor change disclosures?

The following guidance should be considered when determining whether a reportable disagreement occurred:

1. Disagreements contemplated by S-K 304 are those that occur at the decision-making level (e.g., between officers or other individuals of the registrant having overall responsibility for presentation of its financial statements and the engagement leader (and sometimes others) of the auditor). Each situation will have to be analyzed on its particular merits.
2. The term disagreements is interpreted broadly to include any difference of opinion concerning any matter of accounting principles or practices, financial statement disclosure, or auditing scope or procedure which if not resolved to the satisfaction of the former auditor would have caused it to make reference to the subject matter of the disagreement in connection with its report. It is not necessary for there to have been an argument to have had a disagreement -- merely a difference of opinion. See Instruction 4 to S-K 304.
3. Where it is clear that the registrant disagreed with the auditor's proposed accounting or audit scope but accepted the auditor's position in order to obtain an unqualified report, a reportable disagreement may still exist. The fact that the matter was subsequently addressed to the auditor's satisfaction and the subsequent rendering of an unqualified report does not, by itself, remove the necessity for reporting a disagreement.
4. Disagreements do not include initial differences of opinion based on incomplete facts or preliminary information that were later resolved to the former auditor's satisfaction, provided the registrant and the auditor do not continue to have a difference of opinion upon obtaining additional relevant facts or information. See Instruction 4 to S-K 304.
5. Depending upon the timing of the resignation, declination to stand for re-election or dismissal of the former auditor, communication of a disagreement to the Audit Committee (e.g., pursuant to PCAOB AS 1301.22) may not yet have occurred. That fact does not change the requirement to disclose disagreements under S-K 304.
6. See SEC 6150.906 with respect to disagreements relating to material weaknesses in internal control over financial reporting.

It is preferable for the registrant's description of the disagreement included in the registrant's disclosure under S-K 304 to be accurate and complete so the former auditor may limit its Exhibit 16 letter to a statement of concurrence. However, if the former auditor is not satisfied with the description, it will expand its Exhibit 16 letter as warranted in the circumstances. Exhibit 16 letters are discussed at SEC 6150.3.

.232 What is a reportable event for purposes of the SEC's auditor change disclosures?

In addition to any disagreement which might require reporting pursuant to S-K 304 (see SEC 6150.231), certain other events might also require reporting. Those events are referred to as reportable events and are described in S-K 304(a)(1)(v) as follows:

- (1) the auditor having advised the registrant that the internal controls necessary to develop reliable financial statements do not exist;

[Editor's note: All material weaknesses (as defined in S-X 1-02(a)(4) and PCAOB AS 2201), including both resolved and unresolved matters, that existed at any point during the most recent two years or subsequent interim period prior to the auditor change must be disclosed. Significant deficiencies (as defined in S-X 1-02(a)(4) and PCAOB AS 2201) should also be considered as they may suggest other reportable events (e.g., regarding the need to significantly expand audit scope). See Regulation S-K CDIs 111.03 and 111.04.]

[Editor's note: We understand that Item (1) above would apply even if management of the registrant concluded that the internal controls necessary to develop reliable financial statements do not exist.]

SEC comment letters related to Item 4.01 Form 8-Ks have requested information regarding material weaknesses to be disclosed in the Item 4.01 Form 8-K. An example of such a comment follows:

"We note the disclosure of material weaknesses related to the accounting for [situation X] and [situation Y]. In detail, please describe the nature of each material weakness and the amount involved, if any. Also, tell us in what period the reportable event occurred and whether or not you restated or intend to restate any prior period for any adjustment resulting from the material weakness; and if not, why not. Tell us in detail the steps you have taken or plan to take and the procedures you implemented or plan to implement to correct each material weakness."

- (2) the auditor having advised the registrant that it is no longer able to rely on management's representations or is unwilling to be associated with the financial statements prepared by management;
- (3) the auditor having advised the registrant:
 - (i) of the need to significantly expand the scope of its audit or
 - (ii) that information has come to the auditor's attention during the time period covered by S-K 304(a)(1)(iv) that, if further investigated, may:
 - (a) materially impact the fairness or reliability of either a previously issued audit report or the underlying financial statements, or the financial statements issued or to be issued covering the fiscal period(s) subsequent to the date of the most recent financial statements covered by an audit report, or
 - (b) cause it to be unwilling to rely on management's representations or be associated with the registrant's financial statements, and,due to the change in auditor, the former auditor did not expand the scope of its audit or conduct further investigation; or
- (4) the auditor having advised the registrant that information has come to the auditor's attention that it has concluded materially impacts the fairness or reliability of either a previously issued audit report or the underlying financial statements, or the financial statements issued or to be issued covering the fiscal period(s) subsequent to the date of the most recent financial statements covered by an audit

report, and, due to the change in auditor, the issue has not been resolved to the auditor's satisfaction prior to its resignation, dismissal, or declination to stand for re-election.

[Editor's note: The phrase "having advised the registrant" as used in (1) - (4) above contemplates both written and oral communications. See Instruction 5 to S-K 304.]

Reportable events include circumstances in which there are significant unresolved audit issues at the date of dismissal, resignation, or declination. For example, the auditor may have advised the registrant that it preliminarily believed that a going concern explanatory paragraph was required for the current year, or that it was necessary to obtain an appraisal for the fair value of option or stock awards.

.233 What disclosures are required when there is a disagreement or reportable event?

If a disagreement or reportable event existed during the relevant period, the registrant must provide the disclosures required by S-K 304(a)(1)(iv). Those disclosure requirements include the following items:

- (1) A description of each disagreement or reportable event;
- (2) A statement as to whether any audit or similar committee of the board of directors, or the board of directors, discussed the subject matter of each disagreement or reportable event with the former auditor; and
- (3) A statement whether the registrant has authorized the former auditor to respond fully to the inquiries of the successor auditor concerning the subject matter of each disagreement or reportable event, and, if not, a description of the nature of and reason for any limitation.

Additionally, registrants are required to comply with S-K 304(b) in many filings made subsequent to an auditor change. S-K 304(b) generally states that if, during the fiscal year in which the change in auditor took place or during the subsequent fiscal year, there have been transactions or events similar to those which involved a disagreement or reportable event, and those transactions or events were material and were accounted for or disclosed in a manner different from that which the former auditor would have concluded was required, the registrant shall state the existence and nature of the disagreement or reportable event, and also state the effect on the financial statements if reported in the manner required by the former auditor. Disclosure is not required, however, if the method asserted by the former auditor ceases to be generally accepted because of subsequently issued authoritative standards or interpretations.

.3 LETTER FROM THE FORMER AUDITOR REQUIRED BY S-K 304(a)(3) TO BE PUBLICLY FILED WITH THE SEC BY THE REGISTRANT (EXHIBIT 16 LETTER)

[Editor's note: The former auditor's letter discussed in SEC 6150.3 is different from a former auditor's cessation letter which is required under certain circumstances by PCAOB rules. When required, a PCAOB cessation letter is submitted directly to the SEC by the former auditor, but it is not filed with the SEC by the registrant. PCAOB cessation letters are discussed in SEC 6150.4.]

.31 Is the registrant required to obtain a letter from the former auditor in connection with an auditor change?

Yes. S-K 304(a)(3) requires the registrant to provide the former auditor with a copy of the disclosures it is making in response to S-K 304(a) that the former auditor shall receive no later than the day that the disclosures are filed with the SEC. The registrant must request the former auditor to furnish the registrant with a letter addressed to the SEC, stating whether or not the former auditor agrees with the statements

made by the registrant in response to S-K 304(a) and, if not, stating the respects in which it does not agree. This letter is commonly referred to as an Exhibit 16 letter.

The registrant is required to file the former auditor's letter as an exhibit (usually Exhibit 16) to the report or registration statement containing the auditor change disclosure. If the former auditor's letter is unavailable at the time of filing the report or registration statement, then the registrant must request the former auditor to provide the letter as promptly as possible so that the registrant can file the letter with the SEC within ten business days after the filing of the report or registration statement. Notwithstanding the ten-business-day period, the registrant must file the Exhibit 16 letter by amendment within two business days of receipt.

The former auditor may provide the registrant with an interim letter highlighting specific areas of concern and indicating that a more detailed letter will be forthcoming within the ten-business-day period noted above. If the interim Exhibit 16 letter was not filed with the report or registration statement containing the registrant's disclosure regarding the change in auditor, then the interim letter must be filed by the registrant as an amendment to the report/registration statement within two business days of receipt.

In situations where the former accountant declines to provide an Exhibit 16 letter, the registrant should indicate that fact in the Item 4.01 Form 8-K. See Form 8-K CDI 214.01.

If a registrant amends its disclosures under Item 4.01 Form 8-K disclosures, or similar disclosure included in a registration statement for any reason, it must also file an updated letter from the former auditor addressing the revised disclosures. See SEC FRM 4510.3.

[Editor's note: Even though there are provisions for a situation in which the former auditor's Exhibit 16 letter is not available at the time the registrant first files the auditor change disclosures, this a rare occurrence. In the usual situation, the registrant provides draft disclosures to the former auditor sufficiently in advance of filing such that the former auditor is able to provide an Exhibit 16 letter to the registrant prior to the registrant filing the associated disclosures.]

.4 DIRECT REPORTING TO THE SEC AND/OR THE PCAOB BY THE FORMER AUDITOR

The disclosures discussed in SEC 6150.2 and the filing of the Exhibit 16 letter referred to in SEC 6150.3 are obligations of the registrant. Under certain circumstances, the former auditor is required to communicate directly with the SEC and/or the PCAOB in connection with an auditor change.

.41 When is the former auditor required to communicate directly to the SEC regarding the cessation of the client-auditor relationship?

[Editor's note: The former auditor's letter discussed in SEC 6150.41 is different from the Exhibit 16 letter which is required by S-K 304(a)(3). Exhibit 16 letters are discussed in SEC 6150.3.]

A firm that was a member of the SEC Practice Section of the AICPA on April 16, 2003 (a former SECPS member firm) may be required to report in writing the fact that the auditor-client relationship has ceased to the former client and simultaneously to the SEC's Office of the Chief Accountant pursuant to section 1000.08(m) of the AICPA SEC Practice Section Manual (see PCAOB Rule 3400T). See SEC 6150.907. A triggering event indicating that the client-auditor relationship has ended may be either oral or written.

- A former SECPS member firm that has been the auditor for an SEC registrant that is required to file current reports on Form 8-K is required to report that the auditor-client relationship has ceased directly in writing to the former client and the SEC if the former client did not report the change in auditors in a timely filed Item 4.01 Form 8-K. For purposes of this rule, we understand the SEC staff would generally treat a voluntary filer the same as an SEC registrant that is required to file current reports on Form 8-K.

- A former SECPS member firm that has been the auditor for an SEC registrant that is not required to file current reports on Form 8-K is required to report that the auditor-client relationship has ceased directly in writing to the former client and the SEC whether or not the former client reported the change in auditors in a timely filed report. See SEC 6150.908 regarding employee benefit plans that file their annual reports on Form 11-K.

The notification referred to above is commonly referred to as a PCAOB cessation letter.

[Editor's note: The term SEC registrant is defined in section 1000.38 (Appendix D) of the AICPA SEC Practice Section Manual (see PCAOB Rule 3400T). Under certain circumstances, a PCAOB cessation letter may be required in connection with an initial registration statement. See SEC 6150.911.]

The PCAOB has stated that section 1000.08(m) of the AICPA SEC Practice Section Manual also applies to situations where a former SECPS member firm believes it no longer has a relationship with a former issuer audit client. The PCAOB stated that "In situations where a former issuer audit client has "gone dark" or declared bankruptcy, for example, and therefore the firm believes that the client-auditor relationship has ceased, SECPS § 1000.08(m) requires the firm to notify the former client and the SEC's Office of the Chief Accountant of the end of the issuer client-auditor relationship." See footnote 51 to PCAOB release 2013-010. Additionally, we believe that a PCAOB Form 3 filing may be required in these situations. See also SEC 6150.42.

.411 What is the due date of a PCAOB cessation letter?

The PCAOB cessation letter is due no later than the fifth business day following the former auditor's determination that the auditor-client relationship has ended.

The requirement to file the PCAOB cessation letter commences on the date the auditor is notified that it will be replaced (or the date the auditor resigns or declines to stand for re-election), even if additional services will be performed. For example, if the registrant notifies the auditor on February 16, 2023 that another firm has been engaged to audit the financial statements for the year ending December 31, 2023, the PCAOB cessation letter, if required, should be sent within five business days of February 16, 2023, even if the audit of the December 31, 2022 financial statements is not complete. If required, a PCAOB cessation letter needs to be sent only at the time the auditor is first informed by the registrant of the dismissal.

.412 How is a PCAOB cessation letter submitted to the SEC?

If required, the PCAOB cessation letter is sent in the form of a letter addressed to the former SEC client with a copy to the SEC's Chief Accountant by the end of the fifth business day following the former auditor's determination that the client-auditor relationship has ended.

The SEC staff has agreed to accept an email or a facsimile of the PCAOB cessation letter. The SEC staff has indicated that e-mail submission of these letters is strongly encouraged. The Office of the Chief Accountant has established a dedicated mailbox to facilitate timely and efficient submission of the required notification letter. Audit firms should email cessation letters to SECPSletters@sec.gov. The SEC staff will accept the date the email is received as the notification date. The SEC's guidance for submitting the PCAOB cessation letter is available on the SEC's website (<https://www.sec.gov/page/communicating-oca>).

To ensure compliance with the PCAOB's requirements, the exact name of the registrant and the Commission File Number should be used in the e-mail. If there are multiple SEC registrants affected (e.g., parent with SEC-registered subsidiaries, series of mutual funds, etc.), the exact name of each registrant and each Commission File Number should be set forth in the PCAOB cessation letter.

.42 When is the former auditor required to communicate directly to the PCAOB regarding the cessation of the client-auditor relationship?

PCAOB Rule 2203 requires all PCAOB registered firms (i.e., not limited to former SECPS member firms) to file a special report on Form 3 (Item 2.1-C) with the PCAOB when an SEC reporting company that is required to file a Form 8-K does not file an Item 4.01 Form 8-K regarding a change in auditor. The Form 3 is a public document and is due 30 days after the due date of the Item 4.01 Form 8-K. If the Item 4.01 Form 8-K is filed during the 30-day period, a Form 3 is not required. If required, the Form 3 would include the SEC reporting company's name and CIK number, whether the auditor resigned, declined to stand for re-election, or was dismissed, and the date thereof.

.5 EXAMPLE ITEM 4.01 FORM 8-K DISCLOSURE

The following is an example of an Item 4.01 Form 8-K disclosure in a situation in which there were no opinion modifications or qualifications, and no disagreements or reportable events.

Item 4.01. Changes in Registrant's Certifying Accountant

(a) Previous independent registered public accounting firm

- (i) On June 6, 2023, XYZ Corporation (the "Registrant") dismissed CPA LLP as its independent registered public accounting firm. The Registrant's Audit Committee [and/or Board of Directors, if applicable] participated in and approved the decision to change XYZ's independent registered public accounting firm.

or [On June 6, 2023, CPA LLP resigned as the independent registered public accounting firm for XYZ Corporation.]

or [On June 6, 2023, CPA LLP declined to stand for re-election as the independent registered public accounting firm for XYZ Corporation.]

[Editor's note: See SEC 6150.909 for a discussion relating to date of termination. That date is to be used in this paragraph. If the auditor's resignation, declination to stand for re-election, or dismissal will become effective upon completion of procedures on a Form 10-K or Form 10-Q, a second sentence is added to the disclosure above, as follows: "Such dismissal/resignation/declination to stand for re-election will become effective upon completion by CPA LLP of its [audit/review] of the financial statements of XYZ Corporation as of and for the year/quarter ended XXX and the filing of the related Form 10-K/10-Q."]

- (ii) The reports of CPA LLP on the financial statements for the fiscal years ended December 31, 2022 and 2021 contained no adverse opinion or disclaimer of opinion and were not qualified or modified as to uncertainty, audit scope or accounting principle.
- (iii) During the fiscal years ended December 31, 2022 and 2021 and the subsequent interim period through June 6, 2023, there have been no disagreements with CPA LLP on any matter of accounting principles or practices, financial statement disclosure, or auditing scope or procedure, which disagreements if not resolved to the satisfaction of CPA LLP would have caused them to make reference thereto in their reports on the financial statements for such years.

[Editor's note: If a disagreement or reportable event (see (iv) below) is required to be reported, the registrant must provide the disclosures required by S-K 304(a)(1)(iv). See SEC 6150.233 for a description of the required disclosures.]

- (iv) During the fiscal years ended December 31, 2022 and 2021 and the subsequent interim period through June 6, 2023, there have been no reportable events (as defined in S-K 304(a)(1)(v)).

[Editor's note: Although many companies make the disclosure included in (iv) above, the absence of reportable events is not a disclosure required by S-K 304(a). See Regulation S-K CDI 111.02.]

- (v) The Registrant has requested that CPA LLP furnish it with a letter addressed to the SEC stating whether or not it agrees with the above statements. A copy of such letter, dated June 12, 2023, is filed as Exhibit 16 to this Form 8-K.

(b) New independent registered public accounting firm

- (i) The Registrant engaged ABC & Co. as its new independent registered public accounting firm as of June 6, 2023. During the fiscal years ended December 31, 2022 and 2021 and the subsequent interim period through June 6, 2023, the Registrant has not consulted with ABC & Co. regarding either (i) the application of accounting principles to a specified transaction, either completed or proposed; or the type of audit opinion that might be rendered on the Registrant's financial statements, and neither a written report was provided to the Registrant nor was oral advice provided that ABC & Co. concluded was an important factor considered by the Registrant in reaching a decision as to the accounting, auditing or financial reporting issue; or (ii) any matter that was either the subject of a disagreement, as that term is defined in S-K 304(a)(1)(iv) and the related instructions to S-K 304, or a reportable event, as that term is defined in S-K 304(a)(1)(v).

[Alternatively, the second sentence above could be replaced with the following sentence: "During the fiscal years ended December 31, 2022 and 2021 and the subsequent interim period through June 6, 2023, the Registrant has not consulted with ABC & Co. regarding any of the matters described in S-K 304(a)(2)(i) or S-K 304(a)(2)(ii)."]

[Editor's note: The disclosure that there have been no consultations with the new auditor is optional. Only a description of consultations is required.]

.6 DISCLOSURE BY ENTITIES REGISTERED UNDER THE INVESTMENT COMPANY ACT, BROKERS AND DEALERS, COMMODITY POOL OPERATORS AND COMMODITY POOLS, AND INVESTMENT ADVISERS

.61 How do companies registered under the Investment Company Act report a termination of the auditor relationship?

Instead of Form 8-K, companies registered under the Investment Company Act typically report the termination of an auditor relationship in the applicable periodic report (Item 13 of Form N-CSR, which is required to be filed semiannually), and the auditor makes appropriate modifications to the terminology of the Exhibit 16 letter (SEC 6150.3) to correspond to the location in the applicable form where the auditor change disclosures are reported. However, the due date (i.e., 5th business day) and reporting guidance for the PCAOB cessation letter (SEC 6150.41) still apply when there is an auditor change with respect to a company that is registered under the Investment Company Act.

We understand that only a change in auditor that occurred during the period covered by the Form N-CSR needs to be reported. If a registrant elects to disclose a change in auditor in its Form N-CSR that occurred after the period covered by the Form N-CSR, it should note the requirement that information included in the Form N-CSR must be included in shareholder reports. For example, if a change in auditor occurred on August 15, 2023 that was reported in the Form N-CSR for the six months ended June 30, 2023, it may be difficult for the registrant to prepare a timely June 30 shareholder report that includes the Form N-CSR material. Registrants should consider consulting with legal counsel in these circumstances.

[Editor's note: The staff of the SEC's Division of Investment Management considers a change in accountants to have occurred when a fund is transferred from one legal registrant to a different legal registrant audited by another firm. Even though no affirmative resignation or dismissal occurs, the staff's view is that because the succeeding fiscal year's audit report for the same entity will be issued by a new firm and will refer to the report of

other accountants, the PCAOB cessation letter and Form N-CSR Item 13 change in accountants disclosure should be provided. See the January 10, 2006 minutes of the AICPA Investment Companies Expert Panel.]

The instruction to Item 13 of Form N-CSR are reprinted below:

- (4) Change in the registrant's independent public accountant. Provide the information called for by Item 4 of Form 8-K under the Exchange Act. Unless otherwise specified by Item 4, or related to and necessary for a complete understanding of information not previously disclosed, the information should relate to events occurring during the reporting period.

[Editor's note: Item 4 of Form 8-K was renumbered Item 4.01.]

.62 How do brokers and dealers report auditor changes?

Brokers and dealers that are public companies are subject to the same requirements applicable to other SEC registrants, including filing of an Item 4.01 Form 8-K to report a change in auditor together with an Exhibit 16 letter and, when applicable, the auditor's issuance of a PCAOB cessation letter. Brokers and dealers registered only because of Section 15(a) of the Exchange Act (i.e., they do not have a reporting obligation under Section 13(a) or Section 15(d) of the Exchange Act) are not subject to those requirements.

All brokers and dealers are required by Exchange Act Rule 17a-5(f)(3) to file a notice reporting a replacement of auditors in accordance with that rule.

.63 What are the CFTC/NFA auditor change requirements applicable to commodity pools and commodity pool operators?

Commodity pools and commodity pool operators that are public companies are subject to the same requirements applicable to other SEC registrants, including filing of an Item 4.01 Form 8-K to report a change in auditor together with an Exhibit 16 letter and, when applicable, the auditor's issuance of a PCAOB cessation letter.

Commodity Futures Trading Commission (CFTC) Rule 1.16(g)(1) and (2) require registrant reporting to the CFTC of a change in auditor of a commodity pool operator, with a copy to be provided to the appropriate self-regulatory organization (SRO), usually the National Futures Association ("NFA"), within 15 business days of the change. That requirement also applies to changes in auditors of commodity pools.

The content of the required notice by the registrant is substantially similar (both in nature and periods covered) to that required by S-K 304(a), except that:

1. there is no requirement to include reportable events as defined in S-K 304(a)(1)(v) (e.g., material weaknesses in internal controls) unless they relate to reportable disagreements and
2. reportable disagreements include matters of compliance with CFTC rules.

There is no prescribed format to the notice. Practice has typically been to prepare it in the form of a letter addressed to the appropriate regulator. CFTC Rule 1.16(g) also requires that the predecessor auditor provide a letter addressed to the CFTC stating its agreement with the statements in the registrant's notice or describing those matters with which the auditor disagrees. While the rule does not make clear how or when the letter is to be filed, the context suggests that the letter should accompany the registrant's filing of the notice. The rule is clear, however, that the registrant (and not the auditor) is responsible for filing the letter with the regulator.

There is no requirement for the auditor to provide a letter to the registrant directly reporting the cessation of the auditor-client relationship.

[Editor's note: A change in auditor by an applicant for registration is to be filed with the NFA. Thus, instances may occur where disclosures will be made even though the auditor has not audited any financial statements. This would be the case if the auditor were dismissed before completing an audit.]

CFTC Rule 1.16(g)(3) also requires, if (a) a disagreement has been reported within the 24 months prior to the date of the most recent audited balance sheet, (b) there were any transactions or events similar to those which involved a reported disagreement, and (c) the transactions or events are material and accounted for or disclosed in a manner different from that which the former auditor apparently would have concluded was required, the registrant is to file a notice with the CFTC and designated SRO describing the matter and the effect on the financial statements had the method apparently preferred by the predecessor auditor been followed. There is no requirement for the predecessor auditor to review or otherwise acknowledge this submission.

CFTC Rule 1.16(g) is reprinted below:

(g) *Replacement of accountant.* (1) In the event (i) the independent public accountant who was previously engaged as the principal accountant to audit an applicant's or registrant's financial statements resigns (or indicates he declines to stand for re-election after the completion of the current audit) or is dismissed as the applicant's or registrant's principal accountant, (ii) another independent accountant is engaged as principal accountant, or (iii) an independent accountant on whom the principal accountant expresses reliance in his report regarding a subsidiary resigns (or formally indicates he declines to stand for re-election after completion of the current audit) or is dismissed or another independent public accountant is engaged to audit that subsidiary, an applicant shall file written notice of such occurrence with the National Futures Association, and a registrant shall file written notice of such occurrence with the Commission at its principal office in Washington, DC, and with the designated self-regulatory organization, if any, not more than 15 business days after such occurrence.

(2) Such notice must state (i) the date of such resignation (or declination to stand for re-election, dismissal or engagement) and (ii) whether, in connection with the audit of the two most recent fiscal years and any subsequent interim period preceding such resignation, dismissal or engagement, there were any disagreements with the former accountant on any matter of accounting principles or practices, financial statements disclosure, auditing scope or procedures, or compliance with the applicable rules of the Commission, which, if not resolved to the satisfaction of the former accountant, would have caused him to make reference in connection with his report to the subject matter of the disagreements (if so, describe such disagreements). The disagreements required to be reported in this paragraph (g)(2) include both those resolved to the former accountant's satisfaction and those not resolved to the former accountant's satisfaction. Disagreements contemplated by this paragraph (g)(2) are those which occur at the decision-making level, i.e., between personnel of the applicant or registrant responsible for presentation of its financial statements and schedules and personnel of the accounting firm responsible for rendering its report. The notice must also state whether the accountant's report on the financial statements and schedules for any of the past two years contained an adverse opinion or a disclaimer of opinion or was qualified as to uncertainties, audit scope, or accounting principles (if so, describe the nature of each such adverse opinion, disclaimer of opinion, or qualification). An applicant must also request the former accountant to furnish the applicant with a letter addressed to the National Futures Association, and a registrant must also request the former accountant to furnish the registrant with a letter addressed to the Commission, stating whether he agrees with the statements contained in the notice of the applicant or registrant and, if not, stating the respects in which he does not agree. Each copy of the notice and accountant's letter must be manually signed by the sole proprietor or a general partner or a duly authorized corporate officer of the applicant or registrant, as appropriate, and by the accountant.

(3) If (i) within the 24 months prior to the date of the most recent audited financial statement, a notice has been filed pursuant to paragraph (g)(1) of this section reporting a change of accountants, (ii) included in such filing there is a reported disagreement on any matters of accounting principles or practices, financial statements disclosure, auditing scope, or noncompliance with the applicable rules of the Commission, (iii) during the fiscal year in which the change in accountants took place or during the subsequent fiscal year, there have been any transactions or events similar to those which involved a reported disagreement, and (iv) such transactions or events are material and were accounted for or

disclosed in a manner different from that which the former accountant apparently would have concluded was required, the existence and nature of the disagreements and also the effect on the financial statements must be stated in a written notice to the National Futures Association, in the case of an applicant, or to the Commission at its principal office in Washington, DC, and the designated self-regulatory organization, if any, in the case of a registrant, if the method which the former accountant apparently would have concluded was required had been followed. These disclosures need not be made if the method asserted by the former accountant ceases to be generally accepted because of authoritative standards or interpretations subsequently issued. The notice required by this paragraph (g)(3) must be filed by the applicant or registrant concurrently with the financial statements and schedules to which it pertains.

.64 How are changes with respect to an independent accountant engaged to perform a surprise examination of funds and securities under Advisers Act Rule 206(4)-2 reported?

Pursuant to Instruction 3 to Form ADV-E, an independent accountant engaged to perform a surprise examination of funds and securities in accordance with Advisers Act Rule 206(4)-2 must file a statement on Form ADV-E (a designated form for accountants' filings related to surprise examinations) within four business days of its resignation, dismissal, or termination from the engagement, or a decision to decline reappointment. That statement must include:

- (A) The date of such resignation, dismissal, removal, or other termination, and the name, address, and contact information of the accountant, and
- (B) An explanation of any problems relating to examination scope or procedure that contributed to such resignation, dismissal, removal, or other termination.

Change in accountant filings for investment advisers are made electronically on Form ADV-E through the Investment Adviser Registration Depository (IARD). The adviser must initiate the filing by providing the auditor an electronic link to the form. Instructions on the use of the IARD to file Form ADV-E, including accountant terminations, are available at: <http://www.iard.com/pdf/formADV-E.pdf>. For a termination, the filing is in the form of a "fill-in-the-blanks" webpage, including:

- Date of Termination
- Accounting Firm Name and contact information (address, city, state, zip code, country, telephone number and e-mail)
- Reason for the Termination (with a "drop-down" box of standard reasons)
- The Question, "Were there any problems relating to the examination scope or procedure that contributed to such resignation, dismissal, removal, or other termination?" with "Yes/No" radio buttons. If this question is answered "Yes," a statement of those problems must be uploaded in the form of a searchable-text PDF file.

Note that the IARD presently accepts only a single PDF attachment to any individual filing.

Since the entity that is subject to the surprise examination is generally not an SEC audit client, as defined, a PCAOB cessation letter is generally not required for these changes in accountants. Similarly, there is no requirement to report whether any governing body approved the change in accountants, as many advisers are privately-held entities who do not have independent governing bodies (including sole proprietorships).

The SEC Division of Investment Management staff has stated informally that a change in accountants is only deemed to have occurred upon an affirmative communication between the adviser and the accountant of a change. A failure to execute an engagement letter on a timely basis, or an adviser's extended failure to communicate with the accountant about engaging them for the current year's examination, would not be considered an implicit termination requiring issuance of the statement.

The SEC staff has also advised that, where a surprise examination was used to comply with the custody rule for a pooled investment vehicle in one year, but in the following year an annual audit of the vehicle's financial statements will be relied upon for compliance purposes instead, a Form ADV-E reporting the termination of the auditor for purposes of the surprise examination should be filed (even if the same auditor will perform the financial statement audit). The purpose of the filing is to notify the Commission that the surprise examination has been discontinued. If there is no appropriate drop-down reason for the termination, a statement should be filed noting the discontinuance of the surprise examination.

.9 FREQUENTLY ASKED QUESTIONS

.901 Does the term significant subsidiary used in S-K 304(a) include an equity method investee that is significant under S-X 3-09?

In this context, we understand the term "significant subsidiary" does not include an equity method investee even if the investee is significant under S-X 3-09, and even if the principal auditor made reference to the investee's auditor in the principal auditor's opinion on the registrant's financial statements.

.902 Do the auditor change requirements apply if the former auditor will continue to provide services (e.g., complete an in-progress audit or interim review)?

Yes. See further discussion in SEC 6150.909.

.903 Can a registrant's Item 4.01 Form 8-K reporting obligation be satisfied by providing the required disclosures in a periodic report (e.g., Form 10-K or Form 10-Q) if the periodic report is filed within the four-business day deadline?

No. The SEC staff has indicated that Item 4.01 Form 8-K disclosure requirements cannot be satisfied by filing the information in a periodic report. This is true even if the periodic report is filed within the four-business day deadline for filing the Item 4.01 Form 8-K. See Exchange Act Form 8-K CDIs 101.01 and 214.02 and SEC 3150.903.

.904 Does the SEC staff consider a change between member firms that are different legal entities of the same network to be an auditor change that triggers disclosure?

Yes. The SEC's auditor change disclosure requirements are triggered when there is a change between member firms that are different legal entities of the same network (e.g., change from Audit Network A's US member firm to Audit Network A's-Canadian member firm). See Exchange Act Form 8-K CDI 114.02.

When considering the disclosure requirements associated with the newly engaged firm, the SEC staff recognizes that the new auditor may have participated in the audit of a portion of the registrant in prior years. The SEC staff has indicated that they generally would not object to excluding disclosure of consultations with members within the same global network that are performed in the ordinary course of the audit. An entity could include disclosure that there have been no consultations other than those conducted in the ordinary course of the audit, and the SEC staff would not require that a list of those normal course consultations be disclosed. See Topic IX.D from the highlights from the March 2012 meeting of the CAQ SEC Regulations Committee.

.905 If an auditor change was a result of revocation of the auditor's PCAOB registration, should that fact be disclosed?

Yes. SEC FRM 4115.2 addresses disclosures that should be made when an auditor's registration is revoked by the PCAOB. It states that a company should indicate that the PCAOB has revoked the registration of its

prior auditor when providing the information that S-K 304 requires regarding a change in accountants. See Exchange Act Form 8-K CDI 114.01 and Regulation S-K CDI 111.07. If a company previously explained the PCAOB registration revocation in its Item 4.01 Form 8-K, it does not need to repeat this disclosure in its Form 10-K.

[Editor's note: Audit reports issued by an auditor whose registration has been revoked by the PCAOB may not be included in a registrant's filings after the revocation date. This is true even if the reports were issued prior to the revocation. A registrant in this fact pattern will likely need to engage a new auditor to perform reaudits of prior period financial statements. See SEC FRM 4115.1.]

.906 Would a disagreement regarding the assessment of a material weakness require disclosure under S-K 304(a)(iv) in connection with an auditor change?

We understand that the SEC staff has concluded that disclosure of a disagreement relating to a conclusion regarding a material weakness assessment would only be required if the disagreement is the reason for the auditor change. See, for example, Question 5 in *Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports (Frequently Asked Questions)* (revised 9/24/2007).

We understand that the disclosure requirement would also apply (assuming that the disagreement is the reason for the change) even if management ultimately adopted the auditor's point of view and concluded that a material weakness exists if they only did so not to have a report different from the auditor's report.

[Editor's note: The disclosure of other disagreements under S-K 304 is not conditioned on the reason for the change in auditor.]

.907 Is a PCAOB cessation letter required from a former auditor that was not a member of the SEC Practice Section of the AICPA on April 16, 2003?

No. A PCAOB cessation letter is not required if the former auditor was not an SECPS member firm on April 16, 2003. Within the PwC network, only the US member firm is a former SECPS member firm. None of the non-US PwC network member firms are former SECPS member firms.

.908 Is a PCAOB cessation letter required in connection with an auditor change relating to an employee benefit plan that files its annual report on Form 11-K?

SEC FRM 15230 states that the Division of Corporation Finance staff does not object when employee benefit plans filing Form 11-K do not file any other Exchange Act reports. Accordingly, the SEC staff has indicated that plans are not subject to any Form 8-K reporting requirements, including Item 4.01 regarding changes in the plan's certifying accountant. We understand the SEC staff has stated that PCAOB cessation letters are not required to be submitted for employee benefit plans.

.909 Is an existing SEC registrant required to file two Item 4.01 Form 8-Ks when an auditor change is communicated but won't become effective until a later date?

Sometimes an auditor change is communicated, but the change will not become effective until the current (i.e., outgoing) auditor completes certain services (e.g., an in-process audit or review). This approach is oftentimes used as a means to facilitate an orderly transition between the predecessor and successor auditors. The Item 4.01 Form 8-K must be filed within four business days of the initial notification of the auditor change. The SEC staff has indicated that an amendment to the initial Item 4.01 Form 8-K is not required when the termination becomes effective (e.g., upon the filing of a subsequent Form 10-K).

[Editor's note: We believe that if there were disagreements or reportable events between the filing of the initial Form 8-K communicating the auditor change and the effective date

of the termination that were not previously disclosed, the company should consider (together with its legal counsel) whether disclosure is warranted. In addition, we believe that the SEC staff could elicit disclosure of disagreements or reportable events in other ways.]

[Editor's note: The SEC staff's view referred to above does not affect the requirement to communicate disagreements to the audit committee, or the requirement to file an amended Item 4.01 Form 8-K when the new auditor is engaged (if the new auditor had not yet been engaged at the time of making the disclosures regarding the outgoing auditor).]

.910 Could an existing SEC registrant be required to make two Item 4.01 Form 8-K filings if the dismissal of the former auditor and the engagement of the new auditor are not disclosed at the same time?

Yes. As noted above, disclosure relating to the former auditor and disclosure relating to a new auditor are separate requirements. Although in most cases, the disclosures relating to the new auditor and the former auditor are made at the same time, there are situations in which the disclosures are made at different times. See Instruction to Item 4.01 Form 8-K.

The following example illustrates a situation in which two Item 4.01 Form 8-Ks would be filed.

Facts: Company Y, a calendar year-end SEC registrant, notified its auditor on January 26, 2023 that it will be dismissed upon completion of the audit of the financial statements for the year ended December 31, 2022. On February 6, 2023, Company Y engaged a new auditor to audit the financial statements for the year ending December 31, 2023. The former auditor will complete its audit of the 2022 financial statements. The new auditor will perform the review of the first quarter of 2023.

Analysis: Company Y will report the dismissal of its former auditor by filing an Item 4.01 Form 8-K no later than February 1, 2023 (the fourth business day after notification). The Form 8-K will include disclosures through the date of notification and an Exhibit 16 letter from the former auditor either (i) filed with the Form 8-K or (ii) filed by amendment to the Form 8-K within ten business days.

Company Y will file an amendment to the Item 4.01 Form 8-K to disclose the engagement of the new auditor no later than February 10, 2023 (the fourth business day after the engagement of the new auditor). We understand that the SEC staff would not require an amendment to the Item 4.01 Form 8-K in connection with the effectiveness of the termination of the former auditor upon the filing of the Company's Form 10-K for the year ended December 31, 2022. However, the Company should consider (together with its legal counsel) whether disclosure of any additional disagreements or reportable events is warranted. See SEC 6150.909.

.911 Could the PCAOB cessation letter requirements discussed in SEC 6150.41 be triggered while a company is in the process of completing an initial public offering (i.e., the company is not yet a reporting company)?

Yes. The term SEC registrant as it is used in section 1000.38(m) of the AICPA SEC Practice Section Manual includes an issuer making an initial filing, including amendments, under the Securities Act or the Exchange Act (see AICPA SEC Practice Section Manual section 1000.38 (Appendix D)). As noted in SEC 6150.41, a former SECPS member firm that has been the auditor for a company that meets the definition of an SEC registrant that is not required to file current reports on Form 8-K is required to report that the auditor-client relationship has ceased directly in writing to the former client and the SEC. Accordingly, if a former SECPS member firm resigns, declines to stand for re-election or is dismissed as the auditor of a company that meets the definition of an SEC registrant, it must follow the applicable PCAOB cessation letter requirements. There is nothing in the PCAOB cessation letter requirements that would exempt an auditor change with respect to a company that meets the definition of an SEC registrant but is not (yet) required to file Exchange Act reports with the SEC.

.912 Is an Exhibit 16 letter required for inclusion in a draft registration statement?

No. Under certain circumstances, the SEC permits companies to submit draft Securities Act registration statements for confidential/non-public review. These draft registration statements are not considered "filed" with the SEC and, therefore, do not require an Exhibit 16 letter until the first public filing of the registration statement. It is important to note that the SEC expects that the S-K 304 disclosures will be included in the draft registration statement.

1. How to access Regulation S-K

.1 HOW TO ACCESS REGULATION S-K

The reprint of Regulation S-K is available on Viewpoint under SEC Reporting / SEC Rules and Regulations / Regulation S-K.

.1 How to access Industry Guides

.1 HOW TO ACCESS INDUSTRY GUIDES

The reprint of the Industry Guides is available on Viewpoint under SEC Reporting / SEC Interpretive Guidance / Securities Act and Exchange Act Industry Guides.

- .1 General
- .2 SEC reporting requirements before a reverse merger is completed
- .3 SEC reporting requirements in connection with the completion of a reverse merger
- .4 Other post-consummation reporting requirements

[Editor's note #1: SEC 7050 focuses on the SEC reporting requirements relating to reverse acquisitions and reverse recapitalizations involving US companies. There are additional considerations if a non-US company is involved. See SEC 8100.15, 53, and 54. SEC 7050 also does not comprehensively address all issues relating to emerging growth companies (EGCs) (SEC 2170) and all of the examples contained herein assume that the entities are non-EGCs. See SEC FRM 10120.2, Example 2. Additionally, SEC 7050 does not comprehensively address issues relating to a merger structure in which a newly formed holding company acquires an operating company and a shell company, commonly referred to as a "double dummy structure."]

[Editor's note #2: Reverse acquisitions/recapitalizations may raise complex auditor independence issues (e.g., with respect to partner rotation requirements). SEC 7050 does not comprehensively address independence matters. Additionally, see PwC's accounting and financial reporting guide *Business combinations and noncontrolling interests* (BCG) for guidance on evaluating whether a transaction should be accounted for as a reverse acquisition/recapitalization. See BCG 2.3 for considerations when evaluating which combining entity is the accounting acquirer. See BCG 2.10 for guidance relating to reverse acquisitions and reverse recapitalizations.]

[Editor's note #3: The guidance in SEC 7050 principally applies to reverse mergers where the entity that issues its equity interests (i.e., the legal acquirer) is an existing SEC registrant and the legally acquired entity (i.e., the accounting acquirer) is a private company. Additional considerations may arise for reverse merger transactions where the legal acquirer is not a US SEC registrant. For example, there can be a number of unique reporting considerations involving transactions that are "tax inversions," based upon the specific facts and circumstances.]

[Editor's note #4: Reverse acquisitions/recapitalizations can raise questions on the adoption date of new accounting pronouncements.]

[Editor's note #5: See Topic III.D from the March 2021 CAQ SEC Regulations Committee Meeting Highlights for a discussion of Critical Audit Matters (CAMs) requirements applicable to the registration statements prepared by a Special Purpose Acquisition Company (SPAC).]

[Editor's note #6: On January 24, 2024, the SEC adopted amendments to its rules and forms relating to special purpose acquisition companies (SPAC), shell companies, and projections. The amendments can be found in SEC Release 33-11265, *Special Purpose Acquisition Companies, Shell Companies, and Projections* (SEC Release 33-11265). The amendments become effective July 1, 2024 (except for Regulation S-K 1610, which will become effective June 30, 2025). Any filings made on or after the effective date of SEC Release 33-11265 must comply with the final rules. The guidance on these topics within the SEC Volume is based on the pre-amendment rules and forms. Companies can refer to SEC Release 33-11265 and PwC In Brief No. US2024-01 for additional guidance.]

.1 GENERAL

In every business combination, one of the combining entities must be identified as the acquirer for accounting purposes. When a business combination is effected through the issuance of equity interests, the entity that issues its equity (i.e., the legal acquirer) is usually the acquirer for accounting purposes. Sometimes, however, the legal acquirer/issuer is not the acquirer for accounting purposes. A transaction in which the legal acquirer/issuer is not the accounting acquirer is commonly referred to as a reverse merger.

A reverse merger may be either a reverse acquisition or a reverse recapitalization:

- A reverse acquisition is a transaction in which a business issues its equity interests to effect the acquisition of an operating company but the legally acquired entity is treated as the acquirer for accounting purposes. A reverse acquisition is accounted for as a business combination as if the legally acquired business (commonly referred to as the accounting acquirer) had acquired the legal acquirer (commonly referred to as the issuer). See ASC 805-40 for guidance on the accounting for a reverse acquisition.
- A reverse recapitalization is a transaction in which a shell company (see definition in Exchange Act Rule 12b-2) issues its equity interests to effect the acquisition of an operating company. A reverse recapitalization is accounted for as a capital transaction equivalent to the operating company (i.e., the accounting acquirer) issuing its equity for the net assets of the shell company followed by a recapitalization. A reverse recapitalization is not accounted for as a business combination because the shell company is not a business. Since a reverse recapitalization is not accounted for as a business combination, there would not be any goodwill or other intangible assets recorded as a result of the transaction.

The key distinction between a reverse acquisition and a reverse recapitalization is that in a reverse acquisition the legal acquirer/issuer is a business and in a reverse recapitalization the legal acquirer/issuer is a shell company. References throughout this section to a "reverse merger" mean either a reverse acquisition or a reverse recapitalization, depending on the context.

Although the SEC's rules do not directly address reverse mergers, guidance on reverse mergers is available in SEC FRM Topic 12. For accounting purposes, the company that is legally acquired in the reverse merger (i.e., the accounting acquirer) is considered the continuing reporting entity. Reports filed for periods that end after the reverse merger is completed should treat the accounting acquirer as if it were the legal successor to the registrant's reporting obligations. For instance, all financial statements included in SEC filings for periods that end after the completion of the reverse merger will be those of the accounting acquirer (including comparative periods).

.2 SEC REPORTING REQUIREMENTS BEFORE A REVERSE MERGER IS COMPLETED

When an acquisition will be effected through the exchange of equity interests, the legal acquirer/issuer will usually register the shares of its stock to be issued in the reverse merger using Form S-4. If the transaction requires the approval of one or more groups of shareholders, then the Form S-4 will oftentimes be combined with a proxy statement prepared pursuant to Regulation 14A.

The SEC financial reporting requirements applicable to a Form S-4/proxy statement prepared in connection with a reverse merger are generally driven by the legal form of the transaction -- not the accounting form. Accordingly, the company that will be issuing its equity interests in the transaction (i.e., the legal acquirer/issuer) is generally considered the "acquiring entity" for purposes of evaluating the disclosure requirements of the Form S-4/proxy statement. The company to be legally acquired in the reverse merger is generally considered the "acquired entity" for purposes of evaluating the disclosure requirements of the Form S-4/proxy statement. This is true even though the entity to be legally acquired will be treated as the accounting acquirer following the completion of the reverse merger. See SEC FRM 1140.7, SEC FRM 2200.1, and SEC FRM 12260. See editor's notes below regarding SPACs.

Consider the following example:

Facts: Company A (an SEC registrant operating company) intends to issue shares of its common stock to acquire Company B (a private operating company) in a transaction that will be accounted for as a reverse merger with Company B treated as the accounting acquirer. Company A intends to file a registration statement on Form S-4 to register the shares of its common stock that will be issued in the transaction. The Form S-4 will also serve as a proxy statement in connection with the shareholder vote to be held with respect to the transaction.

Question: Is Company B considered the acquiring entity or the acquired entity in connection with the Form S-4/proxy statement?

Analysis: Company B will be treated as the acquired entity (i.e., the target) for purposes of preparing the Form S-4/proxy statement. This is true even though Company B will be treated as the accounting acquirer once the transaction has been completed. As the acquired entity/target, Company B may be able to take advantage of the accommodations provided to target companies in the rules and form instructions governing the preparation of a Form S-4/proxy statement.

[Editor's note: When available, these potential financial reporting accommodations are specific to a Form S-4/proxy statement. These accommodations should not be extended by analogy to other situations (e.g., the Form 8-K reporting the completion of the reverse merger or future annual and quarterly reports on Forms 10-K or Form 10-Q). This means that the post-consummation financial reporting requirements may be more restrictive than those that apply before the reverse merger is completed. Companies should ensure they consider the full extent of their financial reporting requirements throughout the lifecycle of the transaction to ensure that they will have all the required information. See SEC 7050.3 and SEC 7050.4 for a discussion of post-consummation reporting requirements.]

The accommodations may apply differently when the legal acquirer is a public shell company. For instance, in transactions where the registrant is a SPAC, the SEC staff has stated that it considers the transaction to be equivalent to an initial public offering of the target, and that they would expect the financial statements of the target included in either a proxy statement or Form S-4 to be audited in accordance with the standards of the PCAOB. See SEC FRM 1140.5 and SEC FRM 4110.5 #6 and #3a. Additionally, the SEC staff has indicated that the private operating company's financial statements should be presented in the S-4/merger proxy as if the transaction were the initial registration statement of the private operating company. See further discussion in the highlights from the September 2018 meeting of the CAQ SEC Regulations Committee.]

See SEC 2121 for additional information relating to the financial statement requirements of Form S-4. See also SEC FRM 10220.6 and 10220.7.

[Editor's note: The SEC staff has indicated that it would not object if an EGC SPAC registrant that has not filed (or been required to file) its first Form 10-K provides two years of annual financial statements (and relevant interim financial statements) of a private operating company target in the Form S-4 if the private target would qualify as an EGC. This guidance is consistent with guidance provided in SEC FRM 10220.7 with respect to a proxy statement.]

[Editor's note: There are situations where the non-reporting target in a SPAC transaction had a change in auditor during the two most recent fiscal years or any subsequent interim period. The SEC staff communicated that disclosure under S-K Item 304(a) would not be required for a non-reporting target in a proxy statement on Schedule 14A or in a combined proxy and registration statement, but the disclosure could be provided if the information was believed to be material. The disclosures set forth in S-K Item 304(b) would be required in both the proxy statement or a combined proxy and registration statement on Form S-4. See Topic III.B in the highlights of the June 2021 meeting of the CAQ SEC Regulations Committee.]

.21 Evaluating whether the accounting acquirer can use the scaled disclosure requirements applicable to a smaller reporting company in connection with a Form S-4/proxy statement

As noted above, the disclosure requirements applicable to a Form S-4/proxy statement generally follow the legal form of the transaction.

Item 17(b)(7) of Form S-4 indicates that the acquired company/target's financial statements should be those that the target would be required to include in an annual report to securities holders if it were required to

prepare an annual report. The annual report requirements are set forth in Exchange Act Rule 14a-3(b)(1) and (2).

If the entity to be legally acquired (i.e., the accounting acquirer) meets the definition of a smaller reporting company set forth in S-K 10(f), then it may use the scaled disclosure requirements applicable to a smaller reporting company in connection with the Form S-4/proxy statement. These reporting accommodations are available even if the legal acquirer/issuer is not eligible to use the smaller reporting company disclosure requirements.

If the entity to be legally acquired (i.e., the accounting acquirer) does not meet the definition of a smaller reporting company set forth in S-K 10(f), then it may not use the scaled disclosure requirements applicable to a smaller reporting company. This is true even if the legal acquirer/issuer is eligible to use the smaller reporting company disclosure requirements.

[Editor's note: Additional considerations may apply when the legal acquirer is a public shell company.]

See SEC FRM 2200.1 and .2. See also Securities Act Forms CDI 125.11.

[Editor's note: The above analysis is only applicable to a Form S-4/proxy statement. See SEC 7050.32 and SEC 7050.41 for a discussion of the accounting acquirer's ability to use scaled disclosure in connection with the Form 8-K reporting the completion of the reverse merger and the combined company's consideration of its status as a smaller reporting company after the completion of the reverse merger.]

.211 Examples

Example 1

Facts: Company A (an SEC registrant operating company) intends to issue shares of its common stock to acquire Company B (a private operating company) in a transaction that will be accounted for as a reverse merger with Company B treated as the accounting acquirer. Company A intends to file a registration statement on Form S-4 to register the shares of its common stock that will be issued in the transaction. The Form S-4 will also serve as a proxy statement in connection with the shareholder vote to be held with respect to the transaction. Company A does not meet the definition of a smaller reporting company. Company B does meet the definition of a smaller reporting company.

Question: May Company B use the scaled disclosure requirements applicable to a smaller reporting company in connection with the Form S-4/proxy statement?

Analysis: Yes. The disclosure in the Form S-4/proxy statement relating to Company B may follow the scaled disclosure requirements applicable to a smaller reporting company. This is true even though the disclosure relating to Company A may not follow the scaled disclosure requirements applicable to a smaller reporting company in connection with the Form S-4/proxy statement. It is important to note that the analysis and conclusion may be different with respect to other reporting requirements (e.g., in connection with the Form 8-K reporting the completion of the reverse merger).

Example 2

Facts: Company A (an SEC registrant operating company) intends to issue shares of its common stock to acquire Company B (a private operating company) in a transaction that will be accounted for as a reverse merger with Company B treated as the accounting acquirer. Company A intends to file a registration statement on Form S-4 to register the shares of its common stock that will be issued in the transaction. The Form S-4 will also serve as a proxy statement in connection with the shareholder vote to be held with respect to the transaction. Company A meets the definition of a smaller reporting company. Company B does not meet the definition of a smaller reporting company.

Question: May Company B use the scaled disclosure requirements applicable to a smaller reporting company in connection with the Form S-4/proxy statement?

Analysis: No. The disclosure in the Form S-4/proxy statement relating to Company B may not follow the scaled disclosure requirements applicable to a smaller reporting company. This is true even though the disclosure relating to Company A may follow the scaled disclosure requirements applicable to a smaller reporting company in the Form S-4/proxy statement. It is important to note that the analysis and conclusion may be different with respect to other reporting requirements (e.g., in connection with the Form 8-K reporting the completion of the reverse merger).

.22 Evaluating whether the financial statements of a private company accounting acquirer included in the Form S-4/proxy statement need to be audited in accordance with PCAOB standards by a firm that is registered with the PCAOB

Ordinarily, financial statements of a private company target included in a Form S-4/proxy statement may be audited in accordance with AICPA standards by a firm that is not registered with the PCAOB (see SEC FRM 4110.5 #6). This is because the private legal target is not considered an issuer in connection with the Form S-4/proxy statement. However, the SEC staff has stated that the financial statements of an operating company (predecessor) whose financial statements are filed by a SPAC must be audited by a PCAOB registered firm using PCAOB standards. See SEC FRM 4110.5 #6 and #3a. See Editor's note regarding SPACs in SEC 7050.2.

[Editor's note: This analysis is applicable only to a Form S-4/proxy statement. See SEC 7050.35 and SEC 7050.481 for a discussion of whether the accounting acquirer's financial statements need to be audited in accordance with PCAOB standards by a firm registered with the PCAOB in connection with the Form 8-K reporting the completion of the reverse merger or future reporting requirements (e.g., in a future Form 10-K).]

[Editor's note: If an operating company (predecessor), for which financial statements are filed by a SPAC, does not meet the PCAOB's definition of an issuer, then the report on the separate financial statements of the operating company (predecessor) should refer to both PCAOB and AICPA standards (dual standards). The operating company's (predecessor) financial statements must be audited by a firm that is registered with the PCAOB.]

Additionally, it is important to note that the audit may not be conducted in accordance with a local non-US GAAS (e.g., International Auditing Standards). This is true even if the target is a non-US entity. See SEC FRM 4210.3.

[Editor's note: See Topic III.D from the March 2021 CAQ SEC Regulations Committee Meeting Highlights for a discussion of Critical Audit Matters (CAMs) requirements applicable to the target company's financial statements included in a Form S-4/proxy statement prepared by a SPAC.]

.221 Example

Facts: Company A (an SEC registrant operating company) intends to issue shares of its common stock to acquire Company B (a private operating company) in a transaction that will be accounted for as a reverse merger with Company B treated as the accounting acquirer. Company A intends to file a registration statement on Form S-4 to register the shares of its common stock that will be issued in the transaction. The Form S-4 will also serve as a proxy statement in connection with the shareholder vote to be held with respect to the transaction.

Question: Do Company B's annual financial statements included in the Form S-4/proxy statement have to be audited in accordance with PCAOB standards by a firm that is registered with the PCAOB?

Analysis: No. Company B's financial statements provided in connection with the Form S-4/proxy statement may be audited in accordance with AICPA standards by a firm that is not registered with the PCAOB. It is also important to note that the audit may not be conducted in accordance with a local non-US GAAS (e.g., International Auditing Standards).

[Editor's note: The example above addresses a fact pattern in which the legal acquirer is an SEC registrant operating company. The answer would have been different if Company A were a SPAC. See SEC FRM 4110.5 #6 and #3a.]

.3 SEC REPORTING REQUIREMENTS IN CONNECTION WITH THE COMPLETION OF A REVERSE MERGER

[Editor's note: The guidance set forth in SEC 7050.3 and SEC 7050.4 is focused on the Form 8-K and periodic reporting requirements under the Exchange Act. If the combined company intends to file a new or amended registration statement or a proxy/information statement after the reverse merger is completed, the reporting requirements may be substantially different. See SEC FRM 12220.2d. It is not uncommon for a registrant to file a registration statement subsequent to a de-SPAC merger. The SEC staff indicated it would not object if a registrant omits the pre-merger historical financial statements of a SPAC from a post-merger Form S-1 if the de-SPAC transaction is reflected as a reverse recapitalization and the Form S-1 includes historical financial statements of the merged company for a post-merger period and pre-merger historical financial statements of the previously private operating company which have been retrospectively revised, as appropriate, for the effects of the share exchange. See Topic III.A in the highlights of the June 2021 meeting of the CAQ SEC Regulations Committee. Registrants that intend to file a post-consummation registration statement or proxy/information statement should consider contacting the SEC staff to discuss the relevant reporting requirements.]

An SEC registrant is required to report the completion of a significant business acquisition by filing a Form 8-K (under Item 2.01). This is true even if the transaction is a reverse merger.

In addition to reporting under Item 2.01, companies should also consider whether they have reporting obligations under other items of Form 8-K. For example, disclosure may also be required under:

- Item 1.01, Entry into a Material Definitive Agreement
- Item 3.02, Unregistered Sales of Equity Securities
- Item 4.01, Changes in Registrant's Certifying Accountant
- Item 5.01, Changes in Control of Registrant
- Item 5.02, Departure of Directors or Certain Officers; Election of Directors; Appointment of Certain Officers; Compensatory Arrangements of Certain Officers
- Item 5.03, Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year
- Item 5.06, Change in Shell Company Status
- Item 9.01, Financial Statements and Exhibits

Registrants should consider consulting with their legal counsel regarding Form 8-K reporting requirements.

[Editor's note: In September 2011, the SEC staff issued CF Disclosure Guidance: Topic No. 1 Staff Observations in the Review of Forms 8-K Filed to Report Reverse Mergers and Similar Transactions.]

.31 Disclosure requirements under Item 2.01 of Form 8-K

All Form 8-Ks reporting the completion of a significant business acquisition must include the information specified by Item 2.01(a) through 2.01(e) of Form 8-K. Item 2.01(f) of Form 8-K includes additional disclosure requirements when the legal acquirer/issuer is a shell company. See SEC 3150.2 for a discussion of the disclosure requirements of Item 2.01 of Form 8-K.

.311 Legal acquirer/issuer is a shell company

If the legal acquirer/issuer is a shell company, then, in addition to the disclosures required by Item 2.01(a) through 2.01(e) of Form 8-K, the Form 8-K reporting the completion of the reverse merger must include all information that would be required in a registration statement on Form 10 (e.g., historical financial statements of the accounting acquirer and associated pro forma financial information, MD&A, disclosure relating to the accounting acquirer's business, legal proceedings, etc.). See SEC FRM 12220.1b. See SEC 3110 for information relating to Form 10.

[Editor's note: The SEC has indicated that it requires Form 10-level information in order to deter abuse and to provide investors with timely and complete information necessary for their investment decisions. By requiring Form 10-level disclosure, investors in an operating business that merged with a shell company will receive the same level of disclosure that they would have received if the operating business had registered under the Exchange Act (rather than reaching the same result through a reverse recapitalization). See SEC Release No. 33-8587, *Use of Form S-8, Form 8-K, and Form 20-F by Shell Companies* (SEC Release 33-8587). It is important to note, however, that there are some requirements applicable to a shell company reverse merger that are more stringent than the corresponding requirements that would have applied if the operating company had filed a Form 10. See, for example, SEC 7050.361.]

.312 Legal acquirer/issuer is an operating company

If the legal acquirer/issuer is an operating company, then the Form 8-K reporting the completion of the acquisition is required to include the information called for by Item 2.01(a) through 2.01(e) of Form 8-K and the historical financial statements of the accounting acquirer and the associated pro forma financial information. See SEC FRM 12220.2b.

.313 Periods to be presented in the Form 8-K

The accounting acquirer's financial statements are generally required for all periods specified by S-X 3-01 and S-X 3-02 or S-X 8-02 and S-X 8-03 (as appropriate). The level of significance does not have any impact on the number of years for which financial statements are required in the Form 8-K reporting the completion of the reverse merger. This is because, for financial reporting purposes, the accounting acquirer is considered the successor to the registrant's reporting obligations. See SEC FRM 12210.1.

[Editor's note: The SEC staff has stated that it would not object if an EGC SPAC registrant that has not filed (or been required to file) its first Form 10-K provides two years of annual financial statements (and appropriate interim financial statements) for a private operating company in the Form 8-K reporting the completion of the acquisition if the private operating company would qualify as an EGC.]

S-X 3-06 provides that, in certain circumstances, the filing of audited financial statements for a period of nine months will satisfy the financial statement requirement for one year. S-X 3-06(a)(2) is not applicable with respect to the historical financial statements of the accounting acquirer included in the Form 8-K reporting the completion of a reverse merger. See SEC FRM 12220.2(c). S-X 3-06(a)(1) is, however, available in the case of a change in year-end.

[Editor's note: SEC FRM 12220.2(c) refers specifically to a situation in which the legal acquirer/issuer is an operating company. However, we understand that the requirements are interpreted similarly for a situation in which the legal acquirer/issuer is a shell company because the requirements of Form 10 would not permit the use of S-X 3-06(a)(2) for a company that is registering its securities on Form 10.]

.314 Examples

Example 1

Facts: Company A (a shell company, SEC registrant) acquired Company B (a private operating company) in a transaction that will be accounted for as reverse merger with Company B treated as the accounting acquirer.

Question: What disclosures about Company B will need to be included in the Item 2.01 Form 8-K reporting the completion of the reverse merger?

Analysis: The disclosures relating to Company B included in the Item 2.01 Form 8-K reporting the completion of the reverse merger must include:

- the information required by Item 2.01(a) through 2.01(e) of Form 8-K; and
- all the information that would be required if Company B were registering its securities under the Exchange Act on Form 10 (e.g., historical financial statements, pro forma financial information, MD&A, etc.).

See SEC 7050.34 regarding the due date of the Form 8-K and SEC 3110 information relating to Form 10.

Example 2

Facts: Company A (an operating company, SEC registrant) acquired Company B (a private operating company) in a transaction that will be accounted for as a reverse merger with Company B treated as the accounting acquirer.

Question: What disclosures about Company B will need to be included in the Item 2.01 Form 8-K reporting the completion of the reverse merger?

Analysis: The disclosures relating to Company B included in the Item 2.01 Form 8-K reporting the completion of the reverse merger are required to include:

- the information required by Item 2.01(a) through 2.01(e) of Form 8-K; and
- the historical financial statements of Company B and the associated pro forma financial information.

See SEC 7050.34 regarding the due date of the Form 8-K.

[Editor's note: The responses in these two examples only address the disclosures required by Item 2.01 of Form 8-K. There may be additional disclosures required under other Items (e.g., Item 4.01, Item 5.03, etc.). Company A should consider consulting with its legal counsel regarding its disclosure obligations in connection with the completion of the reverse merger.]

.32 Evaluating whether the disclosure relating to the accounting acquirer included in the Form 8-K reporting the completion of the reverse merger can follow the scaled disclosure requirements applicable to a smaller reporting company

There are a number of factors which enter into the determination as to whether the accounting acquirer may follow the scaled disclosure requirements applicable to a smaller reporting company in connection with the Form 8-K reporting the completion of the reverse merger. The principal factors driving the analysis are whether the legal acquirer/issuer is a shell company or an operating company and whether the accounting acquirer (in the case of a legal acquirer/issuer that is a shell company) or the legal acquirer/issuer (in the case of a legal acquirer/issuer that is an operating company) meets the definition of a smaller reporting company. This means that the disclosures relating to the accounting acquirer to be filed in the Form 8-K reporting the completion of the reverse merger may be different from the disclosure requirements that were applicable to the Form S-4/proxy statement. See SEC FRM 2200.2 and Securities Act Forms CDI 125.11.

.321 Legal acquirer/issuer is a shell company

If the legal acquirer/issuer is a shell company, then the disclosure relating to the accounting acquirer included in the Form 8-K reporting the completion of the reverse merger may follow the scaled disclosure requirements applicable to a smaller reporting company only if the accounting acquirer meets the definition of a smaller reporting company set forth in S-K 10(f). The legal acquirer/issuer's eligibility as a smaller reporting company is not a factor in this determination. This is because the Form 8-K is required to include all of the information that would be required in a registration statement on Form 10. A company registering its securities on Form 10 would only be able to use the scaled disclosure requirements applicable to a smaller reporting company if that company meets the definition of a smaller reporting company. See SEC FRM 5230.1.

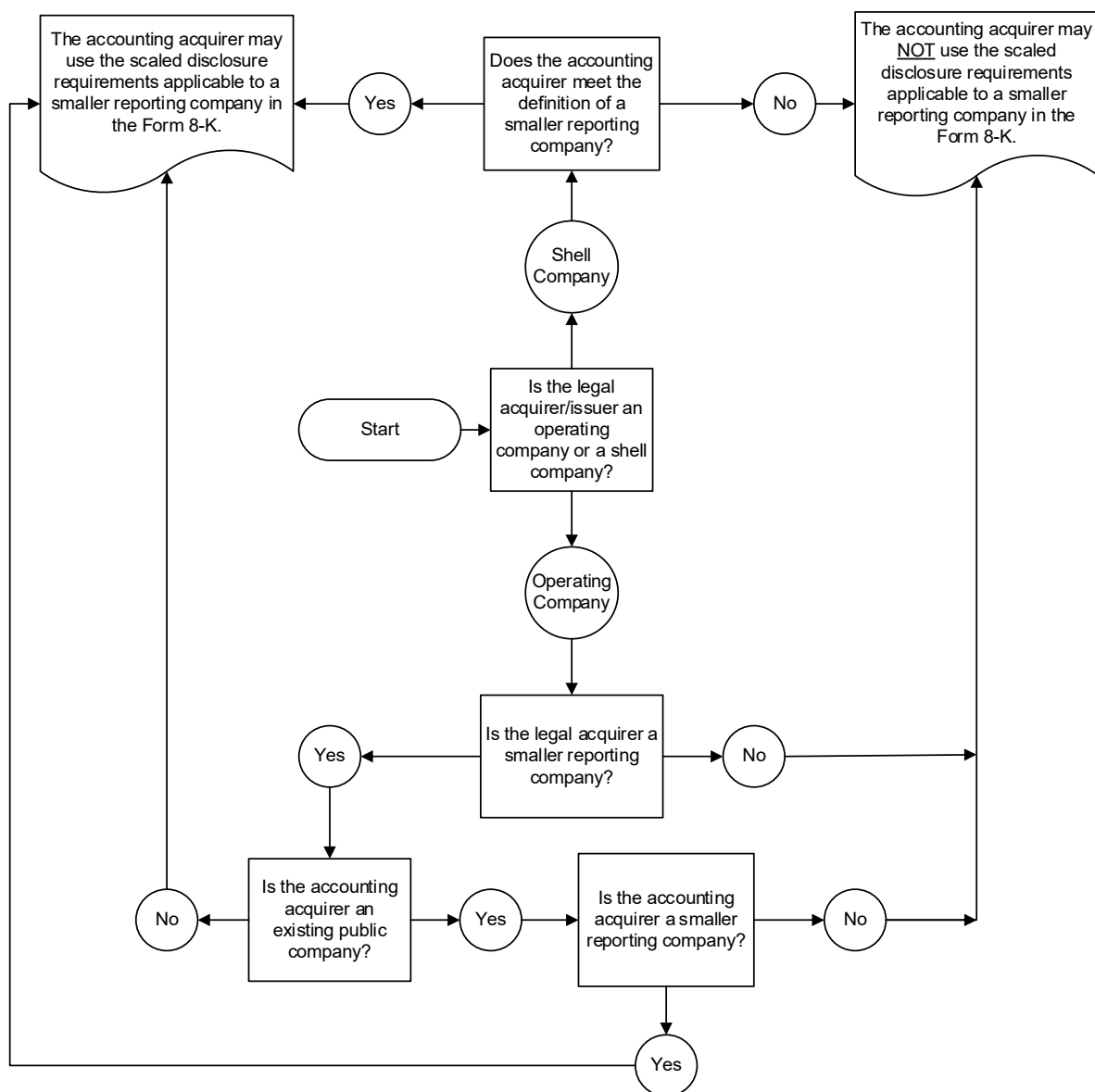
[Editor's note: The combined company may be permitted to retain its status as a smaller reporting company even if the Form 8-K disclosure relating to the accounting acquirer is not permitted to follow the scaled disclosure requirements. See SEC 7050.41 and SEC FRM 5230.3. If, however, the accounting acquirer is an existing SEC registrant that is not a smaller reporting company, then the legal acquirer/issuer will no longer be a smaller reporting company at the time the acquisition is completed. See SEC FRM 5230.4.]

.322 Legal acquirer/issuer is an operating company

If the legal acquirer/issuer is an operating company, then the disclosure relating to the accounting acquirer included in the Form 8-K reporting the completion of the reverse merger may follow the scaled disclosure requirements applicable to a smaller reporting company, if the legal acquirer/issuer meets the definition of a smaller reporting company, unless the accounting acquirer is an existing SEC registrant that is not a smaller reporting company. If the accounting acquirer is an existing SEC registrant that is not a smaller reporting company, then the legal acquirer/issuer will no longer be a smaller reporting company at the time the acquisition is completed; therefore, the disclosure included in the Form 8-K reporting the completion of the reverse merger may not follow the scaled disclosure requirements applicable to a smaller reporting company. See SEC FRM 5230.4.

.323 Flowchart for evaluating whether the accounting acquirer may use the scaled disclosure requirements applicable to a smaller reporting company in connection with the Form 8-K reporting the completion of the reverse merger

The following flowchart may be used to assess whether the disclosure relating to the accounting acquirer included in the Form 8-K reporting the completion of the reverse merger may follow the scaled disclosure requirements applicable to a smaller reporting company.



.324 Examples

Example 1

Facts: Company A (a shell company, SEC registrant) acquired Company B (a private operating company) in a transaction that will be accounted for as a reverse merger with Company B treated as the accounting acquirer. Company A meets the definition of a smaller reporting company. Company B does not meet the definition of a smaller reporting company.

Question: May Company B's disclosures included in the Form 8-K reporting the completion of the reverse merger follow the scaled disclosure requirements applicable to a smaller reporting company?

Analysis: No. The disclosures relating to Company B included in the Form 8-K reporting the completion of the reverse merger may not follow the scaled disclosure requirements applicable to a smaller reporting company. This is because the disclosure must be the same disclosure as if Company B were filing a registration statement on Form 10. If Company B were filing a registration statement on Form 10, it would

not be permitted to use the scaled disclosure requirements applicable to a smaller reporting company because it does not meet the definition of a smaller reporting company in S-K 10(f). Even though Company B may not follow the scaled disclosure requirements applicable to a smaller reporting company in the Form 8-K reporting the completion of the reverse merger, the combined company will continue to be a smaller reporting company until its next determination date. See SEC 7050.41 and SEC FRM 5230.3.

Example 2

Facts: Company A (an operating company, SEC registrant) acquired Company B (a private operating company) in a transaction that will be accounted for as a reverse merger with Company B treated as the accounting acquirer. Company A meets the definition of a smaller reporting company. Company B does not meet the definition of a smaller reporting company.

Question: May the Company B disclosures included in the Form 8-K reporting the completion of the reverse merger follow the scaled disclosure requirements applicable to a smaller reporting company?

Analysis: Yes. The disclosures relating to Company B included in the Form 8-K reporting the completion of the reverse merger may follow the scaled disclosure requirements applicable to a smaller reporting company. This is because the disclosure requirements applicable to a private company accounting acquirer in connection with the Form 8-K filed by an operating company registrant are driven by the characteristics of the legal acquirer/issuer. See Example 3 below for a situation in which the accounting acquirer is an SEC registrant.

Example 3

Facts: Company A (an operating company, SEC registrant) acquired Company B (an SEC registrant) in a transaction that will be accounted for as a reverse merger with Company B treated as the accounting acquirer. Company A meets the definition of a smaller reporting company. Company B does not meet the definition of a smaller reporting company.

Question: May the Company B disclosures included in the Form 8-K reporting the completion of the reverse merger follow the scaled disclosure requirements applicable to a smaller reporting company?

Analysis: No. The disclosures relating to Company B included in the Form 8-K reporting the completion of the reverse merger may not follow the scaled disclosure requirements applicable to a smaller reporting company. This is because the combined company loses its status as a smaller reporting company at the time of the merger because Company B is a pre-existing SEC registrant that does not meet the definition of a smaller reporting company.

.33 Age of financial statements in a Form 8-K reporting the completion of a reverse merger

If the legal acquirer/issuer is a shell company, then the age of financial statements is determined by reference to Item 13 of Form 10. If the accounting acquirer meets the definition of a smaller reporting company in S-K 10(f), then the age of the financial statements is governed by S-X 8-08. If the accounting acquirer does not meet the definition of a smaller reporting company, then the age of the financial statements is governed by S-X 3-12. See SEC 4600.

If the legal acquirer/issuer is an operating company, then the age of the financial statements is determined consistent with the guidance in SEC 3150.26.

See SEC 7050.36 for information relating to the updating requirements when there is a gap between the accounting acquirer's financial statements included in the Form 8-K reporting the completion of the reverse merger and the information that would be on file if the accounting acquirer had always been an SEC registrant.

.34 Due date of the Form 8-K reporting the completion of a reverse merger

The Form 8-K initially reporting a reverse merger must be filed within four business days after completing the reverse merger. This is true without regard to whether the legal acquirer/issuer is a shell company or an operating company.

If the legal acquirer/issuer is an operating company, then the historical financial statements and the associated pro forma financial information may be filed by an amendment to the initial Form 8-K within 71 calendar days after the initial Form 8-K due date. See SEC FRM 12220.2(b).

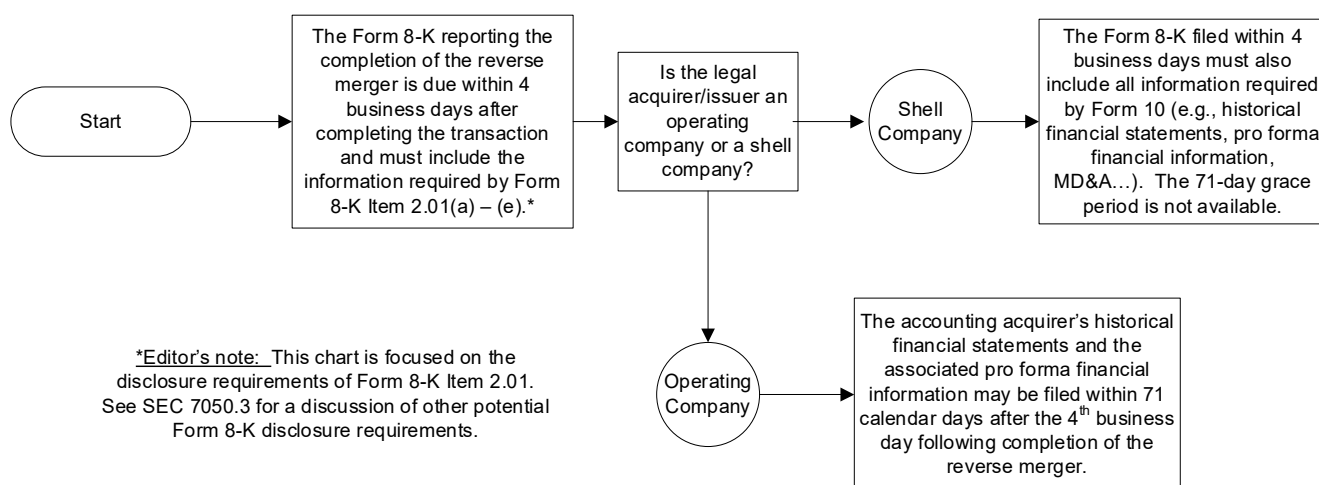
If the legal acquirer/issuer is a shell company, then all of the information required in a registration statement on Form 10 (including the historical financial statements and the associated pro forma financial information) must be filed within four business days after completing the reverse merger. The 71-day grace period is not available when the legal acquirer/issuer is a shell company. See Item 9.01(c) Form 8-K, SEC FRM 12220.1(b), and SEC FRM 12220.1(d).

As with any Form 8-K filing, Form 12b-25 may not be used to extend the due date of the filing. See SEC FRM 1330.3(d) and SEC FRM 5130.1.

[Editor's note: The SEC has indicated that it adopted the four-business day requirement applicable to shell companies because it believes shell companies should complete a transaction only when they can timely provide investors with adequate information to make informed investment decisions. The SEC further noted its belief that the shell company and its legal counsel generally control the pace and timing of the transaction, and that the difficulties in obtaining the acquired company's financial statements when the legal acquirer/issuer is a shell company are not as severe as when the legal acquirer/issuer is an operating company. See SEC Release 33-8587.]

.341 Flowchart for evaluating the due date of the Form 8-K reporting the completion of the reverse merger

The following flowchart may be used to evaluate the due date of the Form 8-K reporting the completion of the reverse merger.



.342 Examples

Example 1

Facts: On October 2, 2023, Company A (an operating company, SEC registrant) acquired Company B (a private operating company) in a transaction that will be accounted for as a reverse merger with Company B treated as the accounting acquirer.

Question: When is the Form 8-K reporting the completion of the reverse merger due?

Analysis: The Form 8-K reporting the completion of the reverse merger must be filed no later than October 6, 2023 (the fourth business day after completion of the reverse merger). Company A (i.e., the combined company) may make use of the 71-calendar day grace period for filing Company B's historical financial statements and the associated pro forma financial information because Company A was an operating company. Accordingly, Company A does not need to file Company B's historical financial statements and the associated pro forma financial information for purposes of complying with the requirements of Items 2.01 and 9.01 of Form 8-K until December 18, 2023 (because December 16, 2023—the 71st day after October 6, 2023 – is a Saturday).

Example 2

Facts: On October 2, 2023, Company A (a shell company, SEC registrant) acquired Company B (a private operating company) in a transaction that will be accounted for as a reverse merger with Company B treated as the accounting acquirer.

Question: When is the Form 8-K reporting the completion of the reverse merger due?

Analysis: The Form 8-K reporting the completion of the reverse merger must be filed no later than October 6, 2023 (the fourth business day after completion of the reverse merger). The 71-calendar day grace period is not available because Company A was a shell company. Accordingly, all of the information required by Form 10 (including Company B's historical financial statements, the associated pro forma financial information, MD&A, etc.) would need to be filed by October 6, 2023.

.35 Evaluating whether the accounting acquirer's financial statements included in the Form 8-K reporting the completion of the reverse merger need to be audited in accordance with PCAOB standards by a firm that is registered with the PCAOB

[Editor's note: This section does not address auditor independence requirements.]

If the legal acquirer/issuer is a shell company, then the audited financial statements of the accounting acquirer included in the Form 8-K reporting the completion of the reverse merger must be audited in accordance with PCAOB standards by a firm that is registered with the PCAOB. This is because the disclosure relating to the accounting acquirer must be the same as if the accounting acquirer were registering its securities on Form 10. If the accounting acquirer does not meet the PCAOB's definition of an issuer then the report on the separate financial statements of the accounting acquirer should refer to dual standards (both PCAOB and AICPA standards). See SEC FRM 12250.1a and SEC FRM 4110.5 #3a and #3b.

If the legal acquirer/issuer is an operating company, then the private operating company accounting acquirer's financial statements included in the Form 8-K reporting the completion of the reverse merger do not need to be audited in accordance with PCAOB standards or by a firm that is registered with the PCAOB. See SEC FRM 12250.2b and SEC FRM 4110.5 #3c. This is because the disclosure requirements are driven by compliance with S-X 3-05 (if the legal acquirer/issuer does not meet the definition of a smaller reporting company) or S-X 8-04 (if the legal acquirer/issuer meets the definition of a smaller reporting company). The audit of financial statements provided for a private operating company under S-X 3-05 or S-X 8-04 may be performed under AICPA standards and may be performed by an auditor that is not registered with the PCAOB. It is important to note that this conclusion applies only to the Form 8-K reporting the completion of the reverse merger. See SEC 7050.481 for information relating to the audit requirements in connection with

the reissuance of those financial statements (e.g., in a subsequent Form 10-K). Additionally, different considerations may apply in connection with a post-consummation registration statement. See the Editor's note to SEC 7050.4

[Editor's note: See Topic III.D from the March 2021 CAQ SEC Regulations Committee Meeting Highlights for a discussion of Critical Audit Matters (CAMs) requirements applicable to the target company's financial statements included in a Form 8-K prepared by a SPAC.]

.351 Examples

Example 1

Facts: Company A (an operating company, SEC registrant) acquired Company B (a private operating company) in a transaction that will be accounted for as a reverse merger with Company B treated as the accounting acquirer.

Question: Do Company B's financial statements included in the Form 8-K reporting the completion of the reverse merger need to be audited in accordance with PCAOB standards by a firm that is registered with the PCAOB?

Analysis: No. The financial statements of Company B included in the Form 8-K reporting the completion of the reverse merger may be audited in accordance with AICPA standards by a firm that is not registered with the PCAOB (see FRM 4110.5 #3c). See SEC 7050.481 for information relating to the audit requirements in connection with the reissuance of those financial statements (e.g., in a subsequent Form 10-K).

Example 2

Facts: Company A (a shell company, SEC registrant) acquired Company B (a private operating company) in a transaction that will be accounted for as a reverse merger with Company B treated as the accounting acquirer.

Question: Do Company B's financial statements included in the Form 8-K reporting the completion of the reverse merger need to be audited in accordance with PCAOB standards by a firm that is registered with the PCAOB?

Analysis: Yes. The financial statements of Company B included in the Form 8-K reporting the completion of the reverse merger must be audited in accordance with PCAOB standards by a firm that is registered with the PCAOB (see SEC FRM 4110.5 #3a and #3b). This is because the information included in the Form 8-K is required to be the same information that would be included in a Form 10. Since the accounting acquirer does not meet the PCAOB's definition of an issuer, then the report on the separate financial statements of the accounting acquirer should refer to dual standards (both PCAOB and AICPA standards).

.36 Requirements to update the information of the accounting acquirer to avoid a gap in reporting

In many cases, the age of financial statements requirements described in SEC 7050.33 will lead to a situation in which the information filed in the Form 8-K reporting the completion of the reverse merger does not include the accounting acquirer's information (e.g., financial statements) for its most recently completed fiscal quarter-end or year-end that preceded the completion of the reverse merger. This potential gap in reporting is addressed by filing an amended Form 8-K with the relevant information of the accounting acquirer for the fiscal quarter-end or year-end immediately preceding the completion of the reverse merger.

[Editor's note: The interpretive guidance regarding the requirement to avoid the gap in historical financial reporting is set forth in SEC FRM 12220.1c. That section specifically addresses a situation in which the legal acquirer/issuer is a shell company. We understand

that the requirement to eliminate the gap in historical reporting is interpreted similarly when the legal acquirer/issuer is an operating company.]

.361 Due date of the updated information relating to the accounting acquirer

If the accounting acquirer is an existing SEC registrant, then the information relating to the accounting acquirer for the most recent fiscal quarter-end or year-end immediately preceding the completion of the reverse merger should be filed by the later of (i) the date that the initial Form 8-K reporting the completion of the reverse merger is filed (i.e., no later than the fourth business day after consummation) or (ii) the same time the accounting acquirer is required to file its periodic report for that same period. This is true whether the legal acquirer/issuer is a shell company or an operating company.

[Editor's note: In the case of a legal acquirer/issuer that is an operating company, this could lead to a situation in which the historical financial statements of the accounting acquirer are required to be filed by the combined company before the due date of the pro forma financial information depicting the combined company (i.e., when the combined company makes use of the 71-calendar day grace period). In this instance, we understand that the SEC staff would not object to the fact that the historical financial statements of the accounting acquirer are filed before the related pro forma information, even though SEC FRM 3110.4 states that "[p]resentation of the acquiree's financial statements without accompanying pro forma information can be misleading...."].

If the legal acquirer/issuer is a shell company and the accounting acquirer is a private operating company, then the accounting acquirer's financial statements for its most recent pre-transaction quarter-end or year-end would be required to be filed within the following number of days after the end of that fiscal quarter/year:

Legal acquirer/issuer's accelerated-filer status	Period required to be updated	
	Annual	Quarterly
Large accelerated	60 days	40 days
Accelerated	75 days	40 days
Non-accelerated	90 days	45 days

The updated information would need to include all of the disclosures required by Form 10-Q or Form 10-K (as appropriate). See SEC FRM 12220.1c.

[Editor's note: Insofar as it relates to the requirement to update for an annual period, the model referred to above is consistent with the requirements that would apply to an operating company that had become an SEC reporting company by filing a Form 10. (See Exchange Act Rule 13a-1.) However, as it relates to the requirement to update for a quarterly period, the model referred to above is more restrictive than the corresponding requirements that would apply to an operating company that had become an SEC reporting company by filing a Form 10. See Exchange Act Rule 13a-13. We understand that this is because the SEC believes that a shell company should complete a transaction only when it can timely provide investors with adequate information to make informed investment decisions.]

If the legal acquirer/issuer is an operating company and the accounting acquirer is a private operating company, then we understand the accounting acquirer's financial statements for the most recent pre-transaction quarter-end or year-end would be required to be filed within the following number of days after the completion of the reverse merger:

REVERSE MERGERS
(Last updated June 2023)

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Legal acquirer/issuer's accelerated-filer status	Period required to be updated	
	Annual	Quarterly
Large accelerated	60 days	40 days
Accelerated	75 days	40 days
Non-accelerated	90 days	45 days

[Editor's note: It is possible that this timetable could require that financial statements for a more recent period are due before the date that financial statements for an earlier period are required to be on file (i.e., due to the 71-calendar day grace period). If that is the case, then, absent other considerations (e.g., change in fiscal year-end described below), we understand that the SEC staff will not object if the financial statements for the later period are filed at the same time as the financial statements for the earlier period. Companies should consider whether the earlier period financial statements are on file (e.g., as a part of a Form S-4/proxy statement). Companies with questions in this area should consider contacting the SEC staff.]

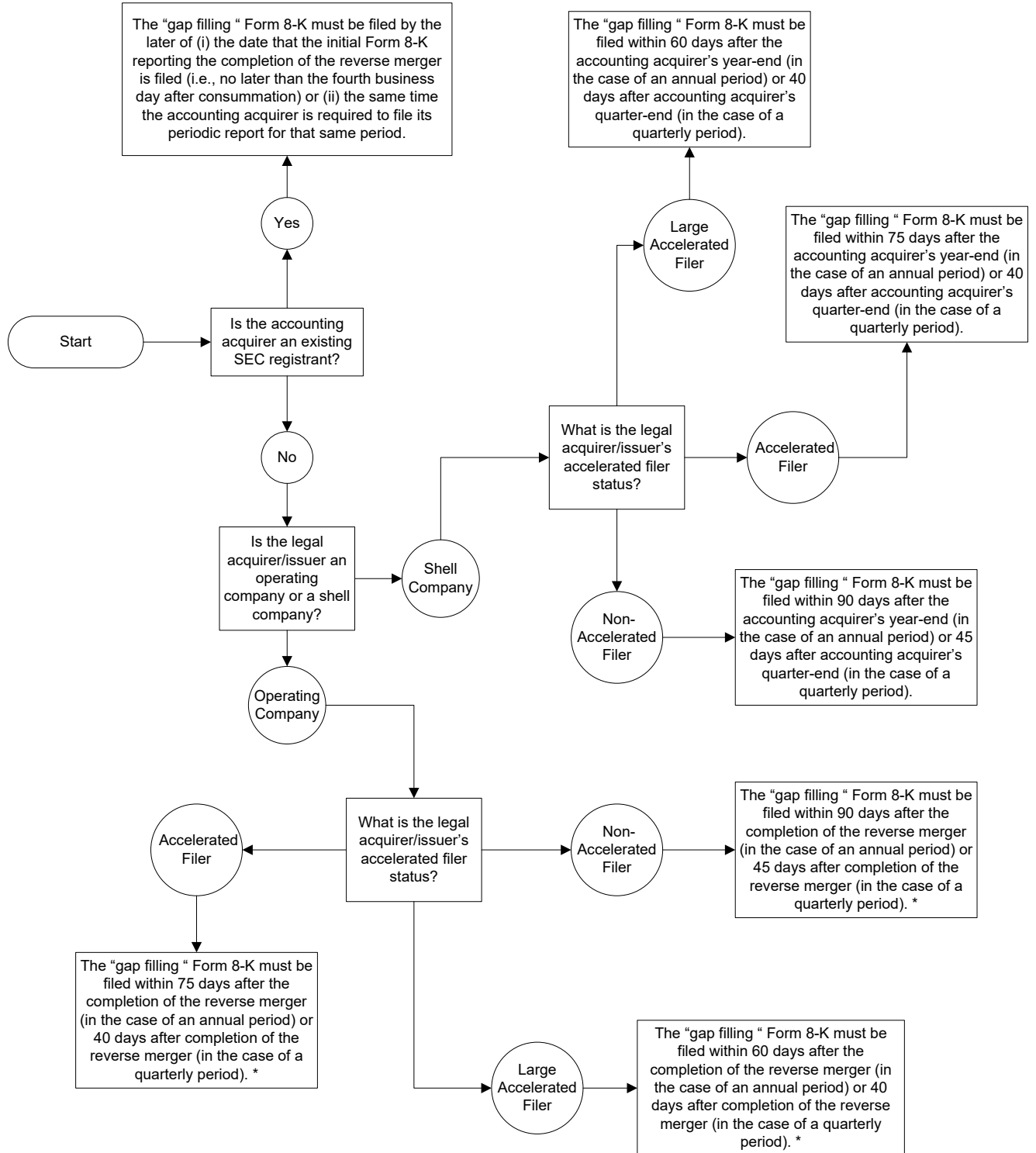
Absent special circumstances (e.g., in certain change in year-end situations), the updating requirement when the legal acquirer/issuer is an operating company is limited to the historical financial statements (e.g., not all of the disclosure that would be required in a Form 10-K or Form 10-Q, as would be the case if the legal acquirer/issuer were a shell company).

.362 Flowchart for determining the due date of the "gap filling" Form 8-K

The following flowchart may be used to determine the due date of the "gap filling" Form 8-K to be filed when the Form 8-K reporting the completion of the reverse merger does not include the accounting acquirer's information (e.g., financial statements) for its most recently completed fiscal quarter-end or year-end that preceded the completion of the reverse merger.

REVERSE MERGERS
(Last updated June 2023)

SEC 7050



*Refer to the third Editor's Note in SEC 7050.361 for a discussion of a potential temporary deferral of the due date of a "gap filling" Form 8-K during the pendency of the 71-day grace period.

.363 Examples

Example 1

Facts: On October 2, 2023, Company A (a calendar year-end, non-accelerated filer, operating company, SEC registrant) acquired Company B (a calendar year-end, private operating company) in a transaction that will be accounted for as a reverse merger with Company B treated as the accounting acquirer. Company A filed its Form 8-K reporting the completion of the reverse merger on October 6, 2023 (the fourth business day after the completion of the reverse merger). Neither Company A nor Company B is a smaller reporting company.

Question: What information relating to Company B must be filed in connection with the Form 8-K reporting the completion of the reverse merger?

Analysis: The age of financial statement requirements would be assessed using October 6, 2023 as the reference date. Based on that date, the financial statements to be included in the Form 8-K reporting the completion of the reverse merger would be:

- audited financial statements as of December 31, 2022 and 2021 and for each of the three years in the period ended December 31, 2022, and
- unaudited interim financial statements as of June 30, 2023 and for the six-month periods ended June 30, 2023 and 2022.

Because the reverse merger was completed after September 30, 2023, Company A's Form 10-Q for the quarter ended September 30, 2023 will include Company A's pre-consummation financial statements -- not Company B's financial statements. Accordingly, the first periodic report (e.g., Form 10-K/Form 10-Q) required to include Company B's historical financial statements will be the combined company's Form 10-K for the year ended December 31, 2023. This would result in a gap in reporting with respect to Company B's financial statements (because Company B's financial statements as of September 30, 2023 and for the nine-month periods ended September 30, 2023 and 2022 would not be separately reported).

In order to avoid a gap in Company B's historical financial statements, Company A would be required to amend its Form 8-K to include Company B's historical financial statements as of September 30, 2023 and for the nine-month periods ended September 30, 2023 and 2022. Ordinarily, these financial statements must be filed no later than November 16, 2023 (the 45th day after the completion of the reverse merger). However, if Company B's financial statements as of December 31, 2022 and 2021, and for each of the three years in the period ended December 31, 2022, have not yet been filed (e.g., because of the 71-day grace period), then we understand the SEC staff will permit Company B to file its September 30, 2023 and 2022 financial statements at the same time as the audited financial statements for the three years ended December 31, 2022.

If Company B's financial statements for the three years ended December 31, 2022 had previously been filed, then the amended Form 8-K would only be required to include the September 30, 2023 and 2022 unaudited financial statements. There would be no requirement to provide all of the information required in a Form 10-Q, nor would there be any requirement to update the pro forma financial information beyond those called for as of the original Form 8-K filing date.

Example 2

Facts: On October 2, 2023, Company A (a calendar year-end, non-accelerated filer, shell company, SEC registrant) acquired Company B (a calendar year-end, private operating company) in a transaction that will be accounted for as a reverse merger with Company B treated as the accounting acquirer. Company A filed its Form 8-K reporting the completion of the reverse merger on October 6, 2023 (the fourth business day after the completion of the reverse merger). Neither Company A nor Company B is a smaller reporting company.

Question: What information relating to Company B must be filed in connection with the Form 8-K reporting the completion of the reverse merger?

Analysis: The age of financial statements requirements would be assessed using October 6, 2023 as the reference date. Based on that date, the financial statements to be included in the Form 8-K reporting the completion of the reverse merger would be:

- audited financial statements as of December 31, 2022 and 2021 and for each of the three years in the period ended December 31, 2022, and
- unaudited interim financial statements as of June 30, 2023 and for the six-month periods ended June 30, 2023 and 2022.

Those financial statements (together with all other information that would be required in a Form 10) must be filed by October 6, 2023. The 71-day grace period is not available because Company A was a shell company.

Because the reverse merger was completed after September 30, 2023, Company A's Form 10-Q for the quarter ended September 30, 2023 will include Company A's pre-consummation information -- not Company B's information. Accordingly, the first periodic report (e.g., Form 10-K/Form 10-Q) required to include Company B's historical financial statements will be the combined company's Form 10-K for the year ended December 31, 2023. This would result in a gap in reporting with respect to Company B's information (because Company B's information as of September 30, 2023 and for the nine-month periods ended September 30, 2023 and 2022 would not be separately reported).

In order to avoid this gap in Company B's information, Company A would be required to amend its Form 8-K to include all of the information required to be included in Form 10-Q (including Company B's historical financial information as of September 30, 2023 and for the three- and nine-month periods ended September 30, 2023 and 2022 and the associated MD&A). This information must be filed no later than November 16, 2023.

.4 OTHER POST-CONSUMMATION REPORTING REQUIREMENTS

[Editor's note: The guidance set forth in SEC 7050.3 and SEC 7050.4 is focused on the Form 8-K and periodic reporting requirements under the Exchange Act. If the combined company intends to file a registration statement under the Securities Act or a proxy/information statement after the reverse merger is completed, the reporting requirements may be substantially different. Registrants that intend to file a post-consummation registration statement or proxy/information statement should consider contacting the SEC staff to discuss the relevant reporting requirements. See SEC FRM 12220.2d.]

.41 Smaller reporting company status following a reverse merger

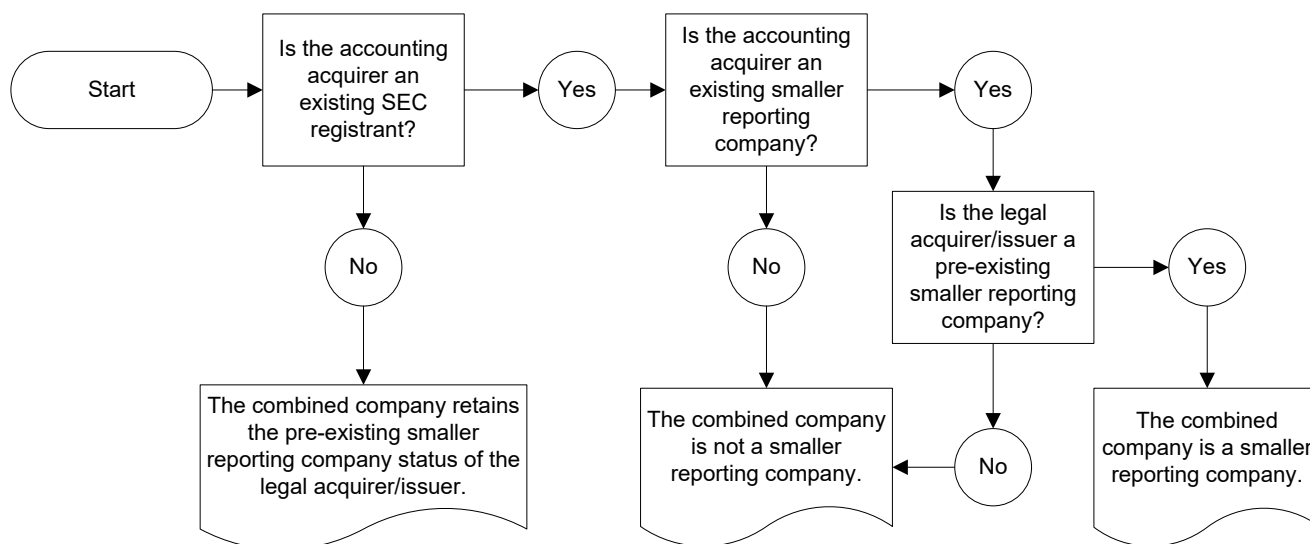
The completion of a reverse merger with an accounting acquirer that is a private operating company generally does not trigger a requirement to reassess the registrant's smaller reporting company status. If the legal acquirer/issuer is a smaller reporting company (as defined in S-K 10(f)), then it will generally retain that status until its next determination date. This is true even if the Form 8-K reporting the completion of the reverse merger did not use scaled disclosure because the legal acquirer/issuer was a shell company and the accounting acquirer does not meet the definition of a smaller reporting company.

If, however, the accounting acquirer was an existing SEC registrant that was not a smaller reporting company, then the combined company will not be a smaller reporting company once the reverse merger is complete. See SEC FRM 5230.2 through SEC FRM 5230.4.

[Editor's note: The analysis to determine the combined company's post-consummation smaller reporting company status is similar but not identical to the analysis to determine whether the information relating to the accounting acquirer included in the Form 8-K reporting the completion of the reverse merger may follow the scaled disclosure requirements applicable to a smaller reporting company. See SEC 7050.32.]

.411 Flowchart for evaluating smaller reporting company status following a reverse merger

The following flowchart may be used to evaluate the post-consummation smaller reporting company status of the combined company:



.412 Examples

Example 1

Facts: On October 2, 2023, Company A (a shell company, SEC registrant that is a smaller reporting company) acquired Company B (a private operating company that does not meet the definition of a smaller reporting company) in a transaction that will be accounted for as a reverse merger with Company B treated as the accounting acquirer.

Question: What is the combined company's post-consummation smaller reporting company status?

Analysis: The combined company will retain its status as a smaller reporting company until the next determination date. The combined company is not required to assume Company B's status (i.e., not a smaller reporting company) because Company B was a private company. This is true even though the Form 8-K reporting the completion of the reverse merger cannot be prepared using the scaled disclosure requirements applicable to smaller reporting companies. See SEC 7050.32 for guidance on determining whether the disclosure relating to the accounting acquirer included in the Form 8-K reporting the completion of the reverse merger can follow the scaled disclosure requirements applicable to a smaller reporting company.

Example 2

Facts: On October 2, 2023, Company A (an operating company, SEC registrant that is a smaller reporting company) acquired Company B (an SEC registrant that does not meet the definition of a smaller reporting company) in a transaction that will be accounted for as a reverse merger with Company B treated as the accounting acquirer.

Question: What is the combined company's post-consummation smaller reporting company status?

Analysis: The combined company is required to assume Company B's status (i.e., not a smaller reporting company) because Company B was an existing SEC registrant and was not a smaller reporting company. Accordingly, the combined company ceased being a smaller reporting company at the date of the reverse merger. Additionally, the Form 8-K reporting the completion of the reverse merger cannot be prepared using

the scaled disclosure requirements applicable to smaller reporting companies. See SEC 7050.32 for guidance on determining whether the disclosure relating to the accounting acquirer included in the Form 8-K reporting the completion of the reverse merger can follow the scaled disclosure requirements applicable to a smaller reporting company.

Example 3

Facts: On October 2, 2023, Company A (an operating company, SEC registrant that is not a smaller reporting company) acquired Company B (an SEC registrant that meets the definition of a smaller reporting company) in a transaction that will be accounted for as a reverse merger with Company B treated as the accounting acquirer.

Question: What is the combined company's post-consummation smaller reporting company status?

Analysis: The combined company would retain Company A's status (i.e., not a smaller reporting company). Accordingly, the combined company does not meet the definition of a smaller reporting company. This is true even though Company B was an existing SEC registrant. The combined company's post-consummation smaller reporting company status only changes when the accounting acquirer was an existing SEC registrant and it was not a smaller reporting company.

.42 Accelerated filer status following a reverse merger

We understand that the completion of a reverse merger does not trigger a requirement to reassess the registrant's accelerated filer status. Accordingly, an SEC registrant legal acquirer/issuer will retain its accelerated filer status until its next determination date. This is true even if the accounting acquirer was an existing SEC registrant and its accelerated filer status was more restrictive than the legal acquirer/issuer's accelerated filer status.

[Editor's note: The model used for determining post-consummation accelerated filer status is different from the model used for evaluating post-consummation smaller reporting company status.]

.421 Examples

Example 1

Facts: On October 2, 2023, Company A (an operating company, SEC registrant that is a non-accelerated filer) acquired Company B (an SEC registrant that is an accelerated filer) in a transaction that will be accounted for as a reverse merger with Company B treated as the accounting acquirer.

Question: What is the combined company's post-consummation accelerated filer status?

Analysis: The combined company retains the legal acquirer/issuer's accelerated filer status. Accordingly, the combined company will remain a non-accelerated filer until its next determination date.

Example 2

Facts: On October 2, 2023, Company A (an operating company, SEC registrant that is an accelerated filer) acquired Company B (an SEC registrant that is a non-accelerated filer) in a transaction that will be accounted for as a reverse merger with Company B treated as the accounting acquirer.

Question: What is the combined company's post-consummation accelerated filer status?

Analysis: The combined company retains the legal acquirer/issuer's accelerated filer status. Accordingly, the combined company will remain an accelerated filer until its next determination date.

.43 Periodic reports for periods that end before the reverse merger is completed

The legal acquirer/issuer must file all periodic reports as they become due for periods that ended before the completion of the reverse merger. This is true even if the reverse merger is completed and the accounting acquirer's historical financial statements are filed before the due date of the periodic report. If the reverse merger is completed before the periodic report is filed, the registrant should consider providing subsequent events disclosure. See SEC FRM 12210.2 and SEC FRM 12240.3.

Similarly, if the accounting acquirer was an existing SEC reporting company, it also must file all periodic reports for periods that ended before the reverse merger was completed in order to avoid a lapse in reporting. This is true even if the accounting acquirer would have been eligible to file a Form 15. See SEC FRM 12240.3 and SEC FRM 12240.4.

.431 Example

Facts: On October 23, 2023, Company A (a calendar year-end, SEC registrant) acquired Company B (also a calendar year-end SEC registrant) in a transaction that will be accounted for as a reverse merger with Company B treated as the accounting acquirer.

Question: Must Company A and Company B file their separate Form 10-Q filings for the quarterly period ended September 30, 2023?

Analysis: Yes. Since the reverse merger was completed after September 30, 2023, Company A and Company B must each file their separate Form 10-Q filings for the quarterly period ended September 30, 2023. This is true even if Company A files the Form 8-K reporting the completion of the reverse merger together with Company B's historical financial statements (and the associated pro forma financial information) before the due date of Company A's and Company B's September 30, 2023 10-Q filings. Company A's September 30, 2023 Form 10-Q will include Company A's pre-consummation historical financial statements (i.e., the information will not reflect the operations of Company B). Company B's September 30, 2023 Form 10-Q will include Company B's pre-consummation historical financial statements. Both companies should consider including a subsequent events footnote describing the transaction.

.44 Significance testing for business acquisitions and dispositions which take place after the completion of a reverse merger

The SEC staff's pre-existing guidance with respect to significance testing following the completion of a reverse merger is contained in SEC FRM 2025.7 (with respect to a reverse acquisition) and SEC FRM 2025.8 (with respect to a reverse recapitalization of a legal target).

[Editor's note: This guidance was issued prior to the adoption of SEC Release No. 33-10786, *Amendments to Financial Disclosures about Acquired and Disposed Businesses*. Questions regarding continued applicability should be addressed to the SEC staff.]

.45 Reporting on internal control over financial reporting

The Form 10-K of an SEC registrant that does not meet the definition of a "newly public company" (as defined in Instruction 1 to S-K 308) must include management's report on internal control over financial reporting. Additionally, an SEC registrant that is either an accelerated filer or a large accelerated filer (as defined in Exchange Act Rule 12b-2), but is not an emerging growth company, must include the report of an independent registered public accounting firm on the effectiveness of internal control over financial reporting.

[Editor's note: The evaluation of whether a company is a "newly public company" generally follows the legal characteristics of the transaction. For instance, the completion of a reverse merger between an SEC registrant (legal issuer) that is not a newly public company and a

private company (accounting acquirer) does not mean the combined company becomes a newly public company. This is true even though the financial statements included in the Form 10-K are those of the previously private company. This analysis is consistent with the model for evaluating the combined company's post-consummation accelerated filer status.]

Both management's and the auditor's conclusions with respect to the effectiveness of internal control over financial reporting are expressed as of the end of the period covered by the Form 10-K (i.e., the end of the latest fiscal year or the end of the transition period in the case of a change in fiscal year-end). As a general matter, both management's and the auditor's conclusions regarding the effectiveness of internal control over financial reporting should encompass the controls at all consolidated entities. However, in FAQ 3 of *Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports (Frequently Asked Questions) (revised 9/24/2007)*, the SEC staff recognized that it might not be possible to conduct an assessment of an acquired business's internal controls in the year in which the acquisition takes place. When that is the case, the SEC staff permits management and the auditor to exclude the internal controls of the acquired company from their respective internal control assessments.

The SEC staff has stated that the guidance in FAQ 3 does not specifically apply to reverse mergers. However, similar to "standard" acquisitions (i.e., when the legal acquirer is also the accounting acquirer), the SEC staff has acknowledged that it might not always be possible for management and the auditor to conduct an assessment of a private company accounting acquirer's internal control over financial reporting in the period between the date a reverse merger is completed and the date of management's assessment of internal control over financial reporting. If that is the case, the SEC staff may permit the combined company to exclude the controls of the accounting acquirer (e.g., a legal-acquiree private company) in the year of the acquisition.

We understand that internal control over financial reporting is generally evaluated in connection with a reverse merger in accordance with the legal characteristics (not the accounting form) of the transaction. For instance, in a reverse merger between an SEC registrant operating company (legal issuer) and a private operating company (accounting acquirer), the accounting acquirer is the legally acquired company and, accordingly, when considering the internal control reporting for the combined company, it is the controls of the private operating company (legal acquiree/accounting acquirer) that might be considered for exclusion from management's and, if required, the auditor's internal control assessments for the year in which the reverse merger is completed. In light of the legal and reporting complexities involved, companies should consider contacting the SEC staff to discuss their facts and circumstances.

[Editor's note: The evaluation of the internal control over financial reporting requirements in connection with a reverse merger is a complex matter that requires a thorough analysis of the legal characteristics of the transaction and the surrounding facts and circumstances. For instance, the evaluation described in the preceding paragraph might have been different if the legal acquirer were an operating company that is not a pre-existing SEC registrant and the accounting acquirer were an operating company that is an SEC registrant. In that fact pattern, the transaction might have been treated as a "succession" under Exchange Act Rule 12g-3 (and the legal acquirer might also "succeed" to the accounting acquirer's accelerated filer status and might be permitted to take into account the accounting acquirer's reporting history for purposes of determining eligibility to use Form S-3). In that case, the SEC staff might permit the combined company to exclude the controls of the legal acquirer from the combined company's internal control reporting in the year of the reverse merger. Given the complex nature of the analysis, companies should consider contacting the SEC staff to discuss their specific facts and circumstances.]

When the legal acquirer/issuer is a pre-existing SEC registrant-shell company and the accounting acquirer is a private operating company, the SEC staff recognizes that the internal controls of the legal acquirer/issuer may no longer exist as of the assessment date or the assets, liabilities, and operations of the legal acquirer/issuer may be insignificant when compared to the consolidated entity. In this instance, the SEC staff would not object if the surviving issuer (i.e., the combined entity) were to exclude management's assessment of internal control over financial reporting in the Form 10-K covering the fiscal year in which the reverse merger was consummated. In lieu of management's assessment of internal

control, the issuer should disclose why management's assessment has not been included in the report, specifically addressing the effect of the transaction on management's ability to conduct an assessment and the scope of the assessment if one were to be conducted. See Regulation S-K CDI 215.02.

[Editor's note: The potential to exclude management's and the auditor's internal control reports is specific to a situation in which the legal acquirer/issuer is a pre-existing SEC registrant-shell company and the accounting acquirer is a private operating company. As discussed in the preceding Editor's note, the legal characteristics of the transaction will weigh heavily into the evaluation of the internal control reporting requirements. For instance, if the legal acquirer/issuer is a shell company that is not a pre-existing SEC registrant and the accounting acquirer is an SEC registrant operating company, the transaction may be considered a "succession" under Exchange Act Rule 12g-3 and the internal controls of the legal acquirer/issuer might be considered for exclusion from the internal control reporting in the year in which the reverse merger is consummated.]

Even if management's report is excluded from the Form 10-K under the circumstances described above, the CEO/CFO Section 302 certifications must include the internal control over financial reporting language in the introductory portion of paragraph 4 as well as paragraph 4(b) because the issuer is subject to Section 404(a) of the Sarbanes-Oxley Act. In other words, the certification should include the entirety of Item 4 set forth in S-K 601(31) (including 4a through 4d).

The SEC staff has indicated that when the reverse merger is completed shortly after year-end and the combined company is required to file an amended Form 8-K to file the audited financial statements of the accounting acquirer for its most recent year-end, then that amended Form 8-K is considered equivalent to the first annual report subsequent to the completion of the transaction. Accordingly, future annual reports should not exclude management's report on internal control over financial reporting.

See Regulation S-K CDI 215.02.

[Editor's note: It is not clear whether the requirement to treat the updated Form 8-K as the equivalent of the "first annual report subsequent to the transaction" was intended to apply only to a situation in which the legal acquirer/issuer is a pre-existing SEC registrant-shell company, or whether it also was intended to apply to an operating company. Registrants should consider discussing their specific facts and circumstances directly with the SEC staff.]

.451 Examples

Example 1

Facts: Company A (a calendar year-end, large accelerated filer, operating company, SEC registrant) acquires Company B (a calendar year-end, private, operating company) on October 2, 2023 in a transaction that will be accounted for as a reverse merger with Company B treated as the accounting acquirer.

Question: May Company A (i.e., the combined company) omit management's assessment of internal control over financial reporting (and the associated auditor's report) in connection with its Form 10-K for the year ended December 31, 2023?

Analysis: We understand that the SEC staff would expect the combined company's Form 10-K for the year ended December 31, 2023 to include management's assessment of internal control over financial reporting and the associated auditor's report. The "as of date" for both reports will be December 31, 2023. However, if it is not possible to conduct an assessment of Company B's internal control as of December 31, 2023, then, similar to the relief provided in connection with a "standard" acquisition, the SEC staff might permit management and the auditor to exclude Company B's internal controls from their internal control assessments. This is true even though the financial statements included in the 2023 Form 10-K are those of Company B, with Company A treated as the acquired company. Additionally, the combined company is not considered a "newly public company."

[Editor's note: Company A should consider contacting the SEC staff to discuss its specific facts and circumstances.]

Example 2

Facts: Company A (a calendar year-end, large accelerated filer, SEC registrant shell company) acquires Company B (a calendar year-end, private operating company) on October 2, 2023. The transaction will be accounted for as a reverse merger with Company B treated as the accounting acquirer.

Question: May Company A (i.e., the combined company) omit management's assessment of internal control over financial reporting (and the associated auditor's report) in connection with its Form 10-K for the year ended December 31, 2023?

Analysis: Perhaps. Ordinarily, the combined company's Form 10-K for the year ended December 31, 2023 would need to include management's assessment of internal control over financial reporting and the associated auditor's report. The "as of date" for both reports would be December 31, 2023. However, if it is not possible to conduct an assessment of Company B's internal control as of December 31, 2023, then the SEC staff may permit management and the auditor to exclude Company B's internal controls from their internal control assessments.

Additionally, as described in Regulation S-K CDI 215.02, if the internal controls of Company A no longer exist as of December 31, 2023, or the assets, liabilities, and operations of Company A are insignificant when compared to the combined company, then the SEC staff would not object if the combined company were to exclude management's assessment of internal control over financial reporting and the associated auditor's report in their entirety from the December 31, 2023 Form 10-K. In that case, Company A should disclose why management's assessment and the associated auditor's report have been omitted, specifically addressing the effect of the transaction on management's ability to conduct an assessment and the scope of the assessment if one were to be conducted.

If the reverse merger had been completed between January 1, 2024 and February 14, 2024, and the Form 8-K filed to report the completion of the acquisition did not include Company B's audited financial statements for the year ended December 31, 2023, then the Form 10-K for the year ended December 31, 2023 would need to include management's report on internal control over financial reporting and the associated auditor's report. This is because the amended ("gap filling") Form 8-K filed with Company B's financial statements for the year ended December 31, 2023 would be considered the equivalent of the combined company's first annual report subsequent to the transaction. This is true even though the financial statements included in the amended Form 8-K are Company B's pre-acquisition financial statements.

.46 Changes in auditor

A reverse merger always results in a change in auditor, unless the same auditor reported on the most recent financial statements of both the legal acquirer/issuer and the accounting acquirer.

The Form 8-K filed to report the completion of the reverse merger should include (under Item 4.01) the relevant auditor change disclosures required by S-K 304. The auditor that will no longer be associated with the registrant's financial statements is treated as the predecessor auditor. If a decision as to which firm will be the continuing auditor has not been made at the time the initial Form 8-K reporting the completion of the acquisition is filed, then a separate Item 4.01 Form 8-K must be filed no later than four business days after the date that the decision is made. See SEC FRM 4520.3a. The registrant should consider indicating that a decision has not been made in the initial Form 8-K reporting the completion of the reverse merger.

In addition, the relevant disclosures required by S-K 304 must be made with respect to any changes in the accounting acquirer's auditor which occurred during the accounting acquirer's two most recently completed fiscal years or in any subsequent period up to the date of the reverse merger. Those disclosures must be included in the first filing containing the accounting acquirer's financial statements. This disclosure is in addition to the disclosures in the Item 4.01 Form 8-K. See SEC FRM 4520.3(b).

.461 Example

Facts: On October 2, 2023, Company A (a calendar year-end, accelerated filer, SEC registrant) acquires Company B (a calendar year-end, private operating company) in a transaction that will be accounted for as a reverse merger with Company B treated as the accounting acquirer. Company A's auditor is CPA X. Company B's auditor is CPA Y. At the time of completing the reverse merger, the company has determined that CPA Y will be the auditor of the combined company.

Question: How should Company A disclose the decision to retain CPA Y?

Analysis: The Form 8-K reporting the completion of the reverse merger should include (under Item 4.01) the relevant disclosures required by S-K 304 treating CPA X as the predecessor auditor. Additionally, if Company B had changed auditors at any time during the two years ended December 31, 2022, or during the subsequent period through October 2, 2023, then the first filing containing Company B's financial statements must also include the relevant disclosures required by S-K 304 with respect to that change.

If a decision as to the combined company's auditor had not been made at the date of filing the Form 8-K reporting the completion of the reverse merger, then a separate Item 4.01 Form 8-K would need to be filed within four business days after the decision is made. If this were the case, Company A should consider indicating that a decision as to which firm will be the continuing auditor has not been made in the Form 8-K reporting the completion of the reverse merger.

.47 Differences in fiscal year-end between the legal acquirer/issuer and the accounting acquirer

There are important financial reporting considerations whenever the legal acquirer/issuer and the accounting acquirer have different fiscal year-ends. The financial reporting requirements differ based on whether the combined company adopts the fiscal year-end of the legal acquirer/issuer or the fiscal year-end of the accounting acquirer.

.471 Combined company changes to the fiscal year-end of the accounting acquirer

If the legal acquirer/issuer changes its fiscal year-end to conform to the fiscal year-end used by the accounting acquirer, then the Form 8-K filed in connection with the completion of the reverse merger should disclose the change in the legal acquirer/issuer's fiscal year-end under Item 5.03. There would not be any specific transition report required.

.4711 Example

Facts: On October 2, 2023, Company A (a calendar year-end, large accelerated filer, operating company, SEC registrant) acquired Company B (a private operating company with a May 31 fiscal year-end) in a transaction that will be accounted for as a reverse merger with Company B treated as the accounting acquirer. Neither company is a smaller reporting company. The combined company has decided to use May 31 (Company B's fiscal year-end) as its fiscal year-end.

Question: What are Company A's (i.e., the combined company's) financial reporting requirements for the remainder of 2023 and 2024?

Analysis: Company A's financial reporting requirements for the remainder of 2023 and 2024 would be as follows:

1. Company A would file a Form 8-K reporting the completion of the reverse merger.
 - The Form 8-K would be filed no later than October 6, 2023 (the fourth business day after the completion of the reverse merger).

- The Form 8-K would report the change in the registrant's fiscal year-end (from December 31 to May 31) under Item 5.03.
 - The reference date for assessing the age of Company B's financial statements to be included in the Form 8-K is determined as of October 6, 2023. Based on the reference date of October 6, 2023, the Form 8-K would need to include Company B's audited financial statements as of May 31, 2023 and 2022, and for each of the three years in the period ended May 31, 2023 (but no interim financial statements would be required in the Form 8-K reporting the completion of the reverse merger because of the SEC's age of financial statements requirements).
 - Company A may include Company B's historical financial statements (and the associated pro forma financial information) in the Form 8-K filed by October 6, 2023, or Company A may file Company B's financial statements (and the associated pro forma financial information) in an amended Form 8-K no later than December 18, 2023 (because December 16, 2023 --the 71st calendar day after October 6, 2023-- is a Saturday).
2. Company A would file its September 30, 2023 Form 10-Q.
- The financial statements included in the Form 10-Q would be Company A's pre-consummation financial statements.
 - The Form 10-Q would be filed no later than November 9, 2023.
 - The Form 10-Q must be filed even though the acquisition was completed before the date the Form 10-Q was due. The Form 10-Q would need to be filed even if Company A had filed Company B's financial statements in the Form 8-K reporting the completion of the reverse merger before the due date of the Form 10-Q.
3. Company A would file Company B's unaudited financial statements as of August 31, 2023 and for the three-month periods ended August 31, 2023 and 2022 as an amendment to the Form 8-K.
- These financial statements ordinarily must be filed in an amended Form 8-K. See SEC FRM 12240.4 for information regarding the due date for any pre-consummation financial statements of the accounting acquirer that are not included in the Form 8-K reporting the completion of the reverse merger (e.g., due to the SEC's age of financial statements requirements). Registrants may wish to consider contacting the SEC staff with questions.
4. The combined company would file November 30, 2023 and February 29, 2024 Forms 10-Q, a May 31, 2024 Form 10-K, and subsequent periodic reports in the ordinary course.

.472 Combined company retains the fiscal year-end of the legal acquirer/issuer

If the combined company retains the fiscal year-end of the legal acquirer/issuer, then the combined company would file a transition report covering the transition period from the accounting acquirer's most recently completed fiscal year-end required to be included in the Form 8-K reporting the completion of the reverse merger to the date that corresponds with the next succeeding year-end of the legal acquirer/issuer (which may be a period that has already been filed).

If the transition period is six months or longer, then the transition report would be filed on Form 10-K (including audited financial statements). If the transition period is more than one month but less than six months, then the transition report may be filed on Form 10-Q (including unaudited financial statements) or Form 10-K (including audited financial statements). No transition report is required for a transition period of one month or less (although the transition period financial statements would be required to be separately stated -- and audited -- in a subsequent Form 10-K). The transition reporting would follow the same basic principles as any other change in year-end.

The transition report would need to be filed within the following number of days after the later of (i) the consummation date of the reverse acquisition or (ii) the close of the transition period.

REVERSE MERGERS
(Last updated June 2023)

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Legal acquirer/issuer's accelerated-filer status	Form used for transition report	
	Form 10-K	Form 10-Q
Large accelerated	60 days	40 days
Accelerated	75 days	40 days
Non-accelerated	90 days	45 days

See SEC 3185 for additional information on the requirements applicable to transition reports.

[Editor's note: When the legal acquirer/issuer is an operating company, the disclosure relating to the accounting acquirer that will be required in a transition report is more extensive than the disclosure that would otherwise have been required for the same periods included in the Form 8-K reporting the completion of the reverse merger (e.g., MD&A is required in a transition report, but not in the Form 8-K reporting the completion of the reverse merger when the legal acquirer/issuer was an operating company).]

If the end of the transition period is a date which has already passed, then there is no need to file separate quarterly reports during the transition period. If, however, the end of the transition period is a future date, then there may be a requirement to file interim financial information during the transition period. As with any change in year-end, the registrant may choose whether to file quarterly information during the transition period based on the new fiscal quarter structure or based upon the old structure. See Example 2 below.

.4721 Examples

Example 1

Facts: On October 2, 2023, Company A (a large accelerated filer, SEC registrant, operating company with a May 31 year-end) acquired Company B (a private company with a calendar year-end) in a transaction that will be accounted for as a reverse merger with Company B treated as the accounting acquirer. Neither company is a smaller reporting company. The combined company has decided to retain Company A's May 31 fiscal year-end.

Question: What are Company A's (i.e., the combined company's) financial reporting requirements for the remainder of 2023 and 2024?

Analysis: Based on the SEC's age of financial statements requirements, the most recent annual financial statements of Company B to be included in the Form 8-K reporting the completion of the reverse merger will be as of and for the year ended December 31, 2022. The next succeeding year-end of Company A is May 31, 2023. Accordingly, the transition period will be for the period from January 1, 2023 through May 31, 2023.

Company A's financial reporting requirements for the remainder of 2023 and 2024 would be as follows:

1. Company A would file a Form 8-K reporting the completion of the reverse merger.
 - The Form 8-K must be filed no later than October 6, 2023.
 - The age of Company B's financial statements to be included in the Form 8-K is determined as of the filing date of the initial Form 8-K (October 6, 2023 in this example). Based on the filing date of October 6, 2023, the Form 8-K would need to include Company B's audited financial statements as of December 31, 2022 and 2021 and for each of the three years in the period ended December 31, 2022. The Form 8-K would also need to include unaudited interim financial statements as of June 30, 2023 and for the six-month periods ended June 30, 2023 and 2022.
 - Company A may include Company B's historical financial statements (and the associated pro forma financial information) in the Form 8-K filed on October 6, 2023, or Company A may file the financial statements (and associated pro forma financial information) in an amended Form 8-K

no later than December 18, 2023 (because December 16, 2023 --the 71st calendar day after October 6, 2023-- is a Saturday).

2. Company A would need to file its August 31, 2023 Form 10-Q.

- The financial statements included in the Form 10-Q would be Company A's pre-consummation financial statements.
- The Form 10-Q must be filed no later than October 10, 2023 (the 40th day after the end of the quarter).
- The Form 10-Q must be filed even though the acquisition was completed before the date the Form 10-Q was due.

3. Company A would need to file a transition report.

- The transition report would include Company B's financial statements for the period from January 1, 2023 through May 31, 2023 and the comparative periods.
- Because the transition period is less than six months, the transition report can be filed on Form 10-K (including audited transition period financial statements) or Form 10-Q (including unaudited transition period financial statements).
- If the transition report is filed on Form 10-Q, it will be due no later than November 13, 2023 (because November 11, 2023 --the 40th day after October 2, 2023-- is a Saturday). The transition report may include unaudited financial statements.

[Editor's note: If this option is elected, the transition report on Form 10-Q would be due before the date that Company B's audited financial statements are required to be filed on Form 8-K. Company A should consider contacting the SEC staff if it cannot file Company B's annual audited financial statements prior to the due date of the transition report.]

- If the transition report is filed on Form 10-K, it will be due no later than December 1, 2023 (the 60th day after October 2, 2023). The transition report would need to include audited financial statements.

[Editor's note: Ordinarily, a transition report on Form 10-K would need to comply with the SEC's internal control reporting requirements. Company A should consider contacting the SEC staff to discuss the internal control reporting requirements.]

4. Company A (i.e., the combined company) would need to file a Form 8-K to provide the disclosure relating to Company B for the quarterly period ended August 31, 2023.

- The Form 8-K is due no later than November 13, 2023 (because November 11, 2023 --the 40th day after October 2, 2023-- is a Saturday).

[Editor's note: The "gap filling" Form 8-K would be due before the date that Company B's Form 8-K with its audited financial statements is required to be filed. See SEC 7050.361 for discussion of other situations in which financial statements for a later prior period may be required to be filed before financial statements of an earlier period. If the combined company had elected to report the transition period on Form 10-K, then the Form 8-K with the August 31, 2023 and 2022 information may be filed at the same time that the transition report on Form 10-K is filed.]

- This Form 8-K is required to include all of the information that would have been required for Company B in a Form 10-Q. This is because Company A would have already filed (or would be concurrently filing) a transition report including all the information required by Form 10-Q or Form 10-K (see #3 immediately above).

5. The combined company would file its November 30, 2023 and February 29, 2024 Forms 10-Q, a May 31, 2024 Form 10-K, and subsequent periodic reports in the ordinary course.

Example 2

Facts: On October 2, 2023, Company A (a calendar year-end, large accelerated filer, operating company, SEC registrant) acquired Company B (a private company with a May 31 fiscal year-end) in a transaction that will be accounted for as a reverse merger with Company B treated as the accounting acquirer. Neither company is a smaller reporting company. The combined company has decided to retain Company A's calendar fiscal year-end.

Question: What are Company A's (i.e., the combined company's) financial reporting requirements for the remainder of 2023 and 2024?

Analysis: Based on the SEC's age of financial statements requirements, the most recent annual financial statements of Company B to be included in the Form 8-K reporting the completion of the reverse merger will be as of and for the year ended May 31, 2023. The next succeeding year-end of Company A is December 31, 2023. Accordingly, the transition period will be for the period from June 1, 2023 through December 31, 2023.

Company A's financial reporting requirements for the remainder of 2023 and 2024 would be as follows:

1. Company A would file a Form 8-K reporting the completion of the reverse merger.
 - The Form 8-K must be filed no later than October 6, 2023.
 - The age of Company B's financial statements to be included in the Form 8-K is determined as of the filing date of the initial Form 8-K (October 6, 2023 in this example). Based on the filing date of October 6, 2023, the Form 8-K would need to include Company B's audited financial statements as of May 31, 2023 and 2022 and for each of the three years in the period ended May 31, 2023. No interim financial statements would be required in the Form 8-K because of the SEC's age of financial statements requirements.
 - Company A may include Company B's historical financial statements (and the associated pro forma financial information) in the Form 8-K filed on October 6, 2023, or Company A may file the financial statements (and associated pro forma financial information) in an amended Form 8-K no later than December 18, 2023 (because December 16, 2023 --the 71st calendar day after October 6, 2023-- is a Saturday).
2. Company A would need to file its September 30, 2023 Form 10-Q.
 - The financial statements included in the Form 10-Q would be Company A's pre-consummation financial statements.
 - The Form 10-Q must be filed no later than November 9, 2023.
 - The Form 10-Q must be filed even though the acquisition was completed before the date the Form 10-Q was due.
3. The combined company must file interim financial statements during the transition period.
 - The combined company may choose to follow either Company A's quarter structure or Company B's quarter structure during the transition period.
 - If the combined company were to choose to follow Company A's quarter structure, then during the transition period it would file unaudited financial statements for the three- and four-month periods ended September 30, 2023 and 2022 (as an amendment to the Form 8-K). Since those periods ended prior to the completion of the reverse merger, these financial statements would only reflect the operations of Company B. The Form 8-K would be required to separately state

the period from June 1, 2023 through June 30, 2023 (see Exchange Act Rule 13a-10(e)(4)). This Form 8-K would be due no later than November 13, 2023 (because November 11, 2023 (the 40th day after October 2, 2023) is a Saturday).

- If the combined company were to choose to follow Company B's quarter structure during the transition period, then it would file unaudited financial statements for the three-month periods ended August 31, 2023 and 2022 (as an amendment to the Form 8-K) and unaudited financial statements for the three- and six-month periods ended November 30, 2023 and 2022 (on Form 10-Q). Periods that ended before October 2, 2023 would only reflect the operations of Company B. Periods that end on or after October 2, 2023 will reflect Company B's operations through October 1, 2023 and the combined company's operations from October 2, 2023 forward.

[Editor's note: No matter which quarterly reporting model is selected, the Form 8-K with the updating information would be due before the date that Company A's Form 8-K with Company B's audited financial statements is required to be filed. If the audited financial statements have not yet been filed, we understand the SEC staff would not object if the Form 8-K with the updating information is filed at the same time as the Form 8-K with Company B's annual financial statements.]

4. The combined company must file a transition report.

- The transition period is June 1, 2023 through December 31, 2023.
- The transition report must be filed on Form 10-K because the transition period is seven months (i.e., six months or more).
- The audited financial statements included in the transition report will be as of December 31, 2023 and for the seven-month period from June 1, 2023 through December 31, 2023 and as of May 31, 2023 and 2022 and for each of the three years in the period ended May 31, 2023. Additionally, unaudited comparative financial information for the seven-month period from June 1, 2022 through December 31, 2022 must be provided. See SEC 3185.5.
- The due date of the transition report will be based on the combined company's accelerated filer status determined as of December 31, 2023. If the combined company retains its status as a large accelerated filer, then the transition report on Form 10-K will be due February 29, 2024.

5. The combined company will file its Form 10-Qs using calendar quarter-ends beginning with the quarter ended March 31, 2024.

.48 Future periodic reports (e.g., Forms 10-K and 10-Q)

All periodic reports (e.g., Forms 10-K and 10-Q) for periods that end on or after the date the reverse merger is completed should be filed within the time periods specified by the SEC's rules and forms. The financial statements included in periodic reports filed for periods that end on or after the date the reverse merger is completed should be the accounting acquirer's financial statements for all periods presented (reflecting the combined company beginning with the date of the reverse merger). This is because the accounting acquirer is considered to be the successor to the legal issuer's reporting obligation.

In certain circumstances, the due date of the first post-consummation periodic report may be before the date that the accounting acquirer's pre-consummation audited financial statements are required to be on file (e.g., if the reverse merger is completed shortly before the end of a quarter and the company takes advantage of the 71-day grace period with respect to financial statements to be included in the Form 8-K reporting the completion of the reverse merger).

- In the case of an annual period, this would have the effect of accelerating the due date of the financial statements to be included in the Form 8-K.

- In the case of a quarterly period, this would mean that the level of disclosure in the Form 10-Q may need to be more extensive than it would if the previous annual financial statements had already been filed. For instance, the portion of S-X 10-01(a)(5) which states that "[r]egistrants may presume that users of the interim financial information have read or have access to the audited financial statements for the preceding fiscal year and that the adequacy of additional disclosure needed for a fair presentation may be determined in that context" would not be applicable.

[Editor's note: The SEC's rules and forms were not designed for a situation in which interim financial information would be filed before the corresponding financial information for the preceding annual period. A registrant in this fact pattern should consider contacting the SEC staff to discuss its specific facts and circumstances. Registrants should consider whether they have filed the prior financial statements in other forms (e.g., in a Form S-4/proxy statement).]

.481 Auditor matters

[Editor's note: This section does not address auditor independence requirements.]

All financial statements of the accounting acquirer included in a Form 10-K filed for a period that includes the date on which the reverse merger was consummated must be audited in accordance with PCAOB standards. This is true even if those same financial statements were permitted to be audited in accordance with AICPA standards in connection with the Form 8-K filed to report the completion of the reverse merger. See SEC 7050.35.

[Editor's note: The reason for this difference is that the financial statements of the accounting acquirer included in a periodic report for a period ending on or after the date that the reverse merger was consummated are presented as the historical financial statements of the issuer. See Topic III.E of the highlights from the March 2018 meeting of the CAQ SEC Regulations Committee.]

.482 Example

Facts: Company A (a calendar year-end, operating company, SEC registrant) acquired Company B (a calendar year-end, private operating company) on April 6, 2023 in a transaction that will be accounted for as a reverse merger with Company B treated as the accounting acquirer. The Form 8-K reporting the completion of the reverse merger will include Company B's audited financial statements as of December 31, 2022 and 2021 and for each of the three years in the period ended December 31, 2022. Company B's pre-consummation financial statements were audited in accordance with AICPA standards.

Question: Can the AICPA audit report on Company B's pre-consummation financial statements be used in the combined company's Form 10-K for the year ending December 31, 2023?

Analysis: No. Company B's pre-consummation financial statements (2022 and 2021) to be included in the combined company's Form 10-K for the year ending December 31, 2023 are presented as the historical financial statements of the issuer, and therefore, must be audited in accordance with PCAOB standards. This is true even though the pre-consummation financial statements included in the Item 2.01 Form 8-K reporting the completion of the reverse merger were permitted to be audited in accordance with AICPA standards.

- .1 General
- .2 Financial statements requirements
- .3 Audit considerations
- .9 Frequently asked question

.1 GENERAL

.11 What is the difference between a proxy and a proxy statement?

A proxy is a device whereby a stockholder authorizes another person or group of persons to act for them at a meeting of stockholders. A proxy statement is the document containing the information necessary to assist a stockholder in voting on the matters for which their proxy is solicited. Although the SEC cannot require corporate management to solicit proxies, Section 14(a) of the Exchange Act gives the SEC authority to prescribe the manner in which proxies are solicited (including the form and content of the proxy statement).

The SEC's rules relating to the solicitation of proxies and the preparation of proxy statements are contained in Regulation 14A (Exchange Act Rules 14a-1 through 14a-104). The proxy statement disclosure requirements are set forth in Schedule 14A (Exchange Act Rule 14a-101) which is available at <https://www.ecfr.gov/current/title-17/chapter-II/part-240/section-240.14a-101>.

Companies should consider consulting with their legal counsel to determine when proxies must be solicited and the form and content of the proxy statement and accompanying materials.

.2 FINANCIAL STATEMENTS REQUIREMENTS

.21 Where can I find the historical financial statement requirements applicable to a proxy statement prepared in connection with a merger or acquisition?

Item 14 of Schedule 14A specifies the transaction-related disclosures and financial and other company-specific information required for proxy statements involving acquisitions and mergers. The requirements for acquirer and target financial statements in proxy statements depend on whose proxies are solicited and the nature of the consideration. See SEC FRM 1140.3-.4 and SEC FRM Topic 2200. See also SEC FRM 10220.6-.7 regarding situations in which the SEC staff will permit the inclusion of only two years of target financial statements.

[Editor's note: There are situations in which historical financial statements of the target business (or acquired business) may not be required in a proxy statement. However, registrants are required to comply with the S-X 3-05 financial statements requirements of an acquired business in a Form 8-K filing, even if audited financial statements of the acquired business are not presented in the proxy statement.]

See SEC 7100.901 for additional guidance.

.22 What are the historical financial statement requirements applicable to a proxy statement prepared in connection with a business to be disposed?

If authorization is sought from shareholders for the disposition of a significant business (including spin-offs), unaudited financial statements of the to be disposed business should be provided in the proxy materials for the same periods that are required for the registrant (along with pro forma information). However, audited financial statements of the to be disposed business should be provided if they are available.

See SEC FRM 1140.6 and SEC FRM 2120.2. See also Question 6 under section I.H of the third supplement to the SEC's Manual of Publicly Available Telephone Interpretations issued in July 2001

(includes interpretations issued July 2000) available at
<https://www.sec.gov/interps/telephone/phonesupplement3.htm>

[Editor's note: The SEC staff has not established a bright line threshold of significance. See Topic III.F. of the highlights of the July 2017 meeting of the CAQ SEC Regulations Committee.]

[Editor's note: If the registrant (seller) receives consideration for the disposal that includes unregistered securities of the acquirer, the acquirer's audited financial statements may need to be provided for each of the 2 most recent fiscal years plus unaudited interim periods. See SEC FRM 1140.6.]

.23 Where can I find the historical financial statement requirements applicable to a proxy statement prepared in connection with the authorization, issuance, exchange or modification of securities?

Item 13 of Schedule 14A specifies the financial and other company information required to be included or incorporated by reference in a proxy statement if action is to be taken to authorize, issue, exchange or modify securities. See SEC FRM 1140.2.

[Editor's note: See Note A to Schedule 14A for guidance in connection with a proxy solicitation for the purpose of approving the authorization of additional securities to be used to acquire another specified company and the registrant's securityholders will not have a separate opportunity to vote on the transaction.]

.24 What are the historical financial statement requirements relating to a recently acquired business of the target in connection with a proxy statement prepared in connection with a merger or acquisition?

The third supplement to the SEC's Manual of Publicly Available Telephone Interpretations issued in July 2001 (includes interpretations issued July 2000) contains SEC staff guidance on situations where the target or the acquired company recently completed an acquisition of a business.

See questions 3 and 4 under section I.H of the third supplement to the SEC's Manual of Publicly Available Telephone Interpretations issued in July 2001 (includes interpretations issued July 2000) available at <https://www.sec.gov/interps/telephone/phonesupplement3.htm>.

See SEC 7100.901 for additional guidance.

.3 AUDIT CONSIDERATIONS

.31 What are the audit considerations relating to a non-reporting target's financial statements?

In connection with a proxy statement, the financial statements of a non-reporting target other than a target of a SPAC must be audited for the latest fiscal year if practicable. The audit of those financial statements can be performed in accordance with AICPA auditing standards. See SEC FRM 4110.5 #6. The financial statements for prior years do not need to be audited if they were not previously audited.

In transactions where the registrant is a special-purpose acquisition company, the target's financial statements become those of the registrant upon consummation of the merger. In light of this fact and that the SEC staff considers the transaction to be equivalent to an initial public offering of the target, the SEC staff would expect the financial statements of the target included in the proxy statement to be audited in accordance with the standards of the PCAOB.

[Editor's note: Registrants are still required to comply with the financial statement requirements of an acquired business in the Form 8-K filing, even if audited financial statements of an acquired business are not presented in the proxy statement.]

See SEC FRM 1140.5.

.9 FREQUENTLY ASKED QUESTION

.901 Does the provision of S-X 3-06(a)(2) permitting the filing of an acquired company's financial statements covering a period of 9 to 12 months apply to Schedule 14A?

No. The provision of S-X 3-06(a)(2) permitting the filing of financial statements covering a period of 9 to 12 months to satisfy the one-year financial statement requirement for an acquired business does not apply to financial statements of target companies filed under Item 14(c)(2) of Schedule 14A. SEC FRM 1140.8.

[Editor's note: The SEC amended S-X 3-06 in 2020. Although the references in SEC FRM 1140.8 have not been updated to conform to the amended version of S-X 3-06, we understand that the guidance has not changed.]

- .1 How to access Regulation 14A
- .2 How to access Schedule 14A

.1 HOW TO ACCESS REGULATION 14A

The reprint of Regulation 14A is available at <https://www.ecfr.gov/current/title-17/chapter-II/part-240#240.14a-1>.

.2 HOW TO ACCESS SCHEDULE 14A

The reprint of Schedule 14A is available at <https://www.ecfr.gov/current/title-17/chapter-II/part-240#240.14a-101>.

- .1 General
- .2 Schedule TO
- .3 Additional information
- .9 Frequently asked question

.1 GENERAL

.11 How is the term tender offer defined?

The term tender offer has not been defined in the Exchange Act nor in any SEC rule. However, the SEC staff has published guidance which states that “[a] tender offer is typically an active and widespread solicitation by a company or third party (often called the “bidder” or “offeror”) to purchase a substantial percentage of the company’s securities.” For instance, if Company A makes an offer to the Registrant X’s shareholders to purchase all of their Registrant X equity shares (registered under Exchange Act Section 12) for \$100 per share, the offer would likely be considered a tender offer.

Notwithstanding the absence of a statutory or regulatory definition, courts and the SEC oftentimes consider an eight-factor test (sometimes referred to as the Wellman test) when determining whether a particular acquisition program constitutes a tender offer under the Exchange Act. The eight factors include whether the transaction:

1. involves an active and widespread solicitation of security holders;
2. involves a solicitation for a substantial percentage of the issuer’s stock;
3. offers a premium over the market price;
4. contains terms that are fixed as opposed to flexible;
5. is conditioned upon the tender of a fixed number of securities;
6. is open for a limited period of time;
7. pressures security holders to respond; and
8. would result in the bidder acquiring a substantial amount of securities.

[Editor’s note: All eight factors do not necessarily need to be present for a particular acquisition program to be considered a tender offer. Participants in an acquisition program should consider consulting with their legal counsel to determine whether the program is a tender offer. See footnote 3 to SEC Release No. 34-43069, *Commission Guidance on Mini-Tender Offers and Limited Partnership Tender Offers.*]

.12 How are US tender offers regulated?

US regulation of tender offers is generally based on three sections of the Exchange Act and the related SEC rules:

- Exchange Act Section 13(e) and Exchange Act Rule 13e-4;
- Exchange Act Section 14(d) and Regulation 14D; and
- Exchange Act Section 14(e) and Regulation 14E.

The applicability of each section and the underlying regulations depends on: (i) the party conducting the offer (e.g., the issuer or an affiliate vs. a third party), (ii) the nature of the subject security (e.g., equity security vs. debt security), (iii) whether the security is registered under Exchange Act Section 12, and (iv) whether or not the bidder would own more than five percent of the securities after the tender offer.

- Exchange Act Section 14(d) and Regulation 14D apply to tender offers for equity securities that are registered under Exchange Act Section 12 made by parties other than the target or affiliates of the target, if after consummation of the tender offer the bidder would beneficially own more than five percent of the class of securities subject to the offer. Regulation 14D requires the bidder to make specific disclosures to security holders and mandates certain procedural protections. Regulation 14D requires the bidder to file its offering documents and other information with the SEC and also requires the target to send to its security holders specific disclosure about its recommendation, file a Schedule 14D-9 containing that disclosure, and send the Schedule 14D-9 to the bidder.
- Exchange Act Rule 13e-4 applies to all tender offers by the issuer (or an issuer's affiliate) for the issuer's equity securities when the issuer has a class of equity securities registered under Exchange Act Section 12 (e.g., the securities are listed for trading on a national securities exchange such as the New York Stock Exchange) or when the issuer files periodic reports under Exchange Act Section 15(d). Exchange Act Rule 13e-4 provides for disclosure, filing and procedural safeguards similar to those provided under Regulation 14D.

Exchange Act Section 14(e) is the antifraud provision for all tender offers and prohibits fraudulent, deceptive, and manipulative acts in connection with a tender offer. Regulation 14E provides the basic procedural protections for all tender offers.

Tender offer participants should review the SEC's rules and regulations and associated interpretive guidance and should consider consulting with their legal counsel regarding the applicable disclosure requirements.

.2 Schedule TO

.21 What is Schedule TO and where can I find it?

Schedule TO is the Exchange Act disclosure form used for both issuer tender offers under Exchange Act Rule 13e-4 and third party tender offers under Regulation 14D. The disclosure requirements of Schedule TO are set forth in the form and related instructions. Rather than including the specific disclosure requirements in the form, Schedule TO generally leverages the provisions of Regulation M-A for its detailed disclosures.

You can find the text of Schedule TO in Exchange Act Rule 14d-100 at <https://www.ecfr.gov/current/title-17/chapter-II/part-240/section-240.14d-100>.

[Editor's note: An issuer tender offer also may meet the definition of a going private transaction (referred to as a Rule 13e-3 transaction) set forth in Exchange Act Rule 13e-3. In a tender offer that is also a Rule 13e-3 transaction, the bidder/offoror would also make the disclosures specified in Schedule 13e-3 (see Exchange Act Rule 13e-100). See SEC FRM 14210.2. The financial statement requirements of Schedule 13e-3 are set forth in Item 13 of that form. See SEC FRM 14320.]

.22 Where can I find the financial statement disclosure requirements applicable to Schedule TO?

Schedule TO's financial statement requirements are set forth under Item 10 of the form and call for the information required by Item 1010(a) and (b) of Regulation M-A for the issuer (in an issuer tender offer) and for the offeror (in a third-party tender offer), if material. The instructions to Item 10 of Schedule TO provide

additional guidance (e.g., Instruction 2 provides an example for which financial statements would be considered not material). See SEC FRM 14310 and 14410 through 14430.

[Editor's note: If the tender offer consideration includes securities, the offeror will likely need to register those securities under the Securities Act (e.g., a registered exchange offer), in which case the financial statement requirements of the registration form used (e.g., Form S-4) will need to be considered.]

.3 ADDITIONAL INFORMATION

.31 Where can I find additional information?

See SEC FRM Topic 14.

See a discussion of tender offers and going private transactions on the SEC's website at:

<https://www.sec.gov/answers/tender.htm>

<https://www.sec.gov/answers/gopriv.htm>

The text of Exchange Act Rules 13e-3, and 13e-4 can be found on Viewpoint under SEC Reporting / SEC Rules and Regulations / Regulation 13e.

The SEC staff has also provided interpretive guidance relating to tender offers at:

<https://www.sec.gov/divisions/corpfin/guidance/13e-3-interps.htm>

https://www.sec.gov/interps/telephone/cftelinterps_tender.pdf

<https://www.sec.gov/interps/telephone/phonesupplement3.htm>

https://www.sec.gov/divisions/corpfin/guidance/ci111400ex_tor.htm

https://www.sec.gov/divisions/corpfin/guidance/ci033101ex_tor.htm

<https://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm#164-02>

<https://www.sec.gov/divisions/corpfin/guidance/cdi-tender-offers-and-schedules.htm>

.9 FREQUENTLY ASKED QUESTION

.901 Are previously issued financial statements of the issuer or bidder to be included in Schedule TO required to be recast to reflect a subsequent discontinued operation or change to its reportable segments?

The SEC staff has indicated that previously issued historical financial statements of the issuer (in an issuer tender offer) or of the bidder (in a third-party tender offer) to be included in Schedule TO are not required to be recast to reflect a subsequent discontinued operation or a subsequent organizational change causing a change to its reportable segments. This is due to the fact that previously issued financial statements are not considered to be "reissued" merely by disclosure included in a Schedule TO. However, the SEC staff has stated that sufficient information about the subsequent discontinued operation or change in reportable segments must be provided in the Schedule TO so that security holders are informed of those changes and their impact on the reported financial statements. The effect of the discontinued operation should be reflected through pro forma financial information prepared in accordance with S-X Article 11. Segment

information under both the old basis and the new basis of segmentation should be presented, to the extent practicable, for all periods for which an income statement has been filed in the Schedule TO. See SEC FRM 14310.3.

- .1 General
- .2 Financial statement requirements
- .3 Other financial information requirements
- .4 Use of International Financial Reporting Standards as issued by the IASB
- .5 Other reporting requirements
- .7 Accountants' consent
- .8 Experts language
- .9 Frequently asked questions

.1 GENERAL

.11 What is Form 20-F and where can I find it?

Form 20-F is both a registration form and an annual report form.

Form 20-F is the reporting form used by most foreign private issuers ("FPIs") to comply with the SEC's annual report requirements. See Exchange Act Rules 13a-1 and 15d-1, as applicable.

Form 20-F is also the primary form used by FPIs (other than asset-backed issuers) for filing registration statements under Section 12 of the Exchange Act.

The disclosure requirements of Form 20-F are set forth in the body of the form and the accompanying instructions.

The text of Form 20-F is available on the SEC's website (<https://www.sec.gov/files/form20-f.pdf>).

Form 20-F is also used as:

- a special report triggered by an initial registration statement under the Securities Act declared effective in the first quarter of a fiscal year. See SEC 8100.14.
- a transition report in connection with a change in fiscal year-end. See SEC 3185, SEC FRM 6250 and Exchange Act Rules 13a-10 and 15d-10 for more information relating to transition reports in connection with changes in fiscal year-end.
- a shell company report to provide information on a current basis related to certain shell companies that cease being shell companies. See SEC 8100.15.

.12 What is the due date of an annual report on Form 20-F?

A FPI must file its annual report on Form 20-F within four months after the end of the fiscal year covered by the report. See General Instruction A.(b) of Form 20-F.

When the last day of the issuer's fiscal year is the last day of a month, the annual report on Form 20-F is due four complete months after that day. For example, a December 31 fiscal year end results in a due date of April 30; and a February 28 fiscal year end results in a due date of June 30. When the last day of the issuer's fiscal year is other than the end of a month, the annual report on Form 20-F is due on the same day four months ahead. For example, a February 20 fiscal year end results in a due date of June 20. See Exchange Act Forms CDI 110.05.

.13 Is Form 12b-25 (Notification of Late Filing) available to provide a limited extension to the due date of an annual report on Form 20-F in appropriate circumstances?

Yes. Form 12b-25 applies to an annual report on Form 20-F. See SEC 3145.

.14 When does an initial registration statement trigger the filing of a special report on Form 20-F and when is it due?

Initial registration statements under the Securities Act that are declared effective in the first quarter of a fiscal year might not contain financial statements for the most recent fiscal year just ended.

If the registrant has registered a class of securities under Section 12 of the Exchange Act then a complete annual report on Form 20-F must be filed within four months after the most recent fiscal year end for which the registrant filed financial statements. The SEC does not allow the accommodations in Rule 15d-2, as described below, to apply to reporting obligations under Section 13(a) of the Exchange Act related to initial registration under Section 12 of the Exchange Act. See SEC FRM 6240.2.

Rule 15d-2 of the Exchange Act allows registrants that have registered under Section 15(d) of the Exchange Act, but have not registered a class of securities under Section 12 of the Exchange Act, to file a Special Financial Report on Form 20-F that includes only audited financial statements for the most recently completed fiscal year, that is due the later of 90 days from the effective date of the registration statement or the due date of the Form 20-F (i.e., four months after year end). The report is filed under cover of the facing sheet of the Form 20-F, indicates on the facing sheet that it contains only financial statements for the fiscal year in question, and includes the appropriate signatures in accordance with the requirements of Form 20-F. A complete annual report on Form 20-F is not required until the following fiscal year. See SEC FRM 6240.2.

If the registrant is permitted to file a Special Financial Report on Form 20-F under Section 15(d) of the Exchange Act, operating and financial review or other narrative disclosures are encouraged, but not required. Even if omitted from a special report, operating and financial review and other omitted information would otherwise need to be included in any subsequent registration statement.

[Editor's note: The Special Financial Report is considered an annual report for purposes of evaluating the company's status as a newly public company. See SEC 3125 and SEC FRM 1340.10 (Note to Section) for additional information.]

.15 When is a shell company report on Form 20-F triggered and when is it due?

A FPI that was a shell company (other than a business combination related shell company) that completes a transaction that has the effect of causing it to cease being a shell company (e.g., as a result of a reverse acquisition or merger) must file a report on Form 20-F. The terms "shell company" and "business combination related shell company" are defined in Exchange Act Rule 12b-2.

This report on Form 20-F must contain the same information that would be required in a registration statement on Form 20-F used to register the classes of the FPI's securities that are subject to the reporting requirements of Section 13 or Section 15(d) of the Exchange Act. Such information must reflect the registrant and its securities upon consummation of the transaction. See General Instruction A.(d) of Form 20-F.

The report must be filed within four business days of the completion of the transaction being reported. Rule 12b-25 is not available to extend the due date of such report on Form 20-F.

The accommodations in Form 20-F that in certain circumstances permit two years of financial statements rather than three years are applicable (e.g., primary financial statements reflect the first-time adoption of IFRS-IASB or are presented in accordance with U.S. GAAP in conjunction with an initial registration statement). See SEC Release No. 33-8587, *Use of Form S-8, Form 8-K, and Form 20-F by Shell Companies* and SEC FRM 6410.5a. The SEC's guidance related to reporting requirements for reverse acquisitions is included at SEC FRM Topic 12. See SEC FRM 12250.1 for certain auditor issues.

If a FPI shell company engages in a transaction that causes it to lose its status as a FPI at the same time it ceases to be a shell company, reports filed or furnished during the remainder of the fiscal year may continue to be made using forms and requirements applicable to FPIs. See SEC FRM 6410.5b.

[Editor's note: A number of foreign companies have obtained a listing in the U.S. by merging into a non-operating U.S. public shell company whose securities are already registered with the SEC. Notwithstanding that substantially all of the registrant's operations after the merger will be conducted outside of the U.S., the registrant is not a FPI and must comply with the rules applicable to U.S. public companies. Accordingly, the registrant must file a Form 8-K containing financial statements of the foreign company within four business days after completion of the transaction. The information to be included in the Form 8-K is the information that would be required to filed to register a class of securities under Section 12 of the Exchange Act using Form 10. See SEC 7050 for discussion of SEC reporting requirements relating to reverse acquisitions and reverse recapitalizations involving U.S. companies.]

.16 Will the SEC staff review a registration statement on Form 20-F on a non-public basis?

Yes, under certain circumstances. See SEC 8110.12.

.161 Where can I find additional information relating to draft registrations and non-public SEC staff review?

See SEC 8110.121.

.162 What registration statements may be submitted on a draft basis for non-public SEC staff review?

See SEC 2110.121.

.163 Will draft registration statements and associated SEC staff comments and issuer responses remain non-public?

See SEC 2110.122.

.2 FINANCIAL STATEMENT REQUIREMENTS

.21 Where can I find the financial statement requirements applicable to a FPI?

Item 8 of Form 20-F specifies financial statement requirements including the periods to be covered, the age of the financial statements, and other information of a financial nature.

Financial statements included in FPI filings with the SEC must comply with either Item 17 or Item 18 of Form 20-F.

FPIs are allowed to present their primary financial statements using:

- Accounting principles generally accepted in the United States of America (U.S. GAAP),
- International Financial Reporting Standards as issued by the International Accounting Standards Board (IFRS-IASB) (See SEC FRM 6310.1 and SEC FRM 6310.2), or
- Local GAAP (i.e., other than U.S. GAAP or IFRS-IASB) accompanied by a reconciliation to U.S. GAAP.

FPIs are also subject to the other disclosure requirements of the following rules of Regulation S-X, as summarized below:

- S-X 4-08(e) - Disclosure in financial statements of restricted net assets of subsidiaries (see SEC 4510.2). Such information is not applicable to companies that prepare IFRS-IASB financial statements.
- S-X 4-08(g) - Disclosure in financial statements of summarized financial information (as laid out in S-X 1-02(bb)) if any one of the significant subsidiary tests in S-X 1-02(w) are met at the 10 percent or greater level, measured on a U.S. GAAP basis, when both unconsolidated majority-owned subsidiaries and 50 percent or less-owned entities are considered as a single group. See SEC 4520.2 for discussion. Such information may be presented in the GAAP of the primary financial statements and disclosures are not required to reconcile such information to US GAAP. S-X 4-08(g) disclosures are not applicable to companies that prepare IFRS-IASB financial statements.

Article 12 schedules that are applicable to foreign registrants consist of schedules designated by S-X 12-04, S-X 12-09, S-X 12-15, S-X 12-16, S-X 12-17, S-X 12-18, S-X 12-28, and S-X 12-29. See SEC 8100.305.

Foreign issuers should also consider the disclosures required by the Industry Guides, where applicable. See SEC 6940.

In addition to consolidated financial statements of the issuer, Regulation S-X may require separate financial information of the following entities:

1. The registrant (parent company) pursuant to S-X 5-04(c), S-X 7-05(c), and S-X 12-04 (see SEC 4510 and SEC 8100.305);
2. Unconsolidated majority-owned subsidiaries pursuant to S-X 3-09 (see SEC 4520 and SEC 8100.301);
3. Fifty percent or less-owned persons accounted for by the equity method pursuant to S-X 3-09 (see SEC 4520 and SEC 8100.301);
4. Guarantors of registered securities pursuant to S-X 3-10 and S-X 13-01 (see SEC 4530 and SEC 8100.301);
5. Affiliates whose securities collateralize an issue of registered debt pursuant to S-X 3-16 or S-X 13-02 (see SEC 4540 and SEC 8100.301); and
6. Businesses acquired or to be acquired and real estate operations acquired or to be acquired pursuant to S-X 3-05 or S-X 3-14 (see SEC 4550, SEC 4555, SAB Topic 1-J and SEC 8100.302). S-X 3-05 and S-X 3-14 requirements do not apply to an annual report on Form 20-F.

.22 What periods of audited financial statements are specified by Form 20-F?

Items 8.A.1 and 8.A.2 of Form 20-F require that documents contain audited financial statements of the registrant/issuer covering the latest three financial years. Financial statements for each year in the three year period should be comprised of balance sheets as of the end of each year and statements of comprehensive income (either in a single continuous financial statement or in two separate but consecutive financial statements; or a statement of net income if there was no other comprehensive income), stockholders equity, and of cash flows, for each of the three most recent years. See SEC FRM 6210.1.

There are exceptions to the three year financial statement requirements related to the following:

- Balance sheet for the earliest of the three year-periods.
- U.S. GAAP financial statements included in an initial registration statement.
- First-time adoption of IFRS-IASB.

- Financial statements prepared by an EGC in an equity initial public offering (IPO).
- Financial statements included in a nonpublic draft registration statement.

[Editor's note: No balance sheet for the earliest of the three-year periods is required if the balance sheet is not required by a jurisdiction outside the U.S. See Instruction 1 to Item 8.A.2.]

.221 Can the earliest period be omitted from U.S. GAAP financial statements?

In initial registration statements, if the financial statements are prepared in accordance with U.S. GAAP, the earliest of the three years may be omitted if that information has not previously been included in a filing made under the Securities Act or the Exchange Act. See Instruction 3 to Item 8.A.2.

[Editor's note: The accommodation to allow two years of U.S. GAAP financial statements applies only to initial registration statements and is not applicable to existing FPI registrants. For example, a FPI registrant that has historically reported under IFRS-IASB might elect to voluntarily change its basis of accounting to U.S. GAAP in its annual report on Form 20-F. In this situation, the registrant would be required to provide three years of audited U.S. GAAP financial statements.]

.222 Can financial statements prepared upon first-time adoption of IFRS-IASB include only two years of financial statements?

Yes. An issuer that first-time adopts IFRS-IASB may file only two years of financial statements if it satisfies the conditions in General Instruction G of Form 20-F. See SEC 8100.4 for discussion of considerations related to first-time adoption of IFRS-IASB. An entity's first IFRS financial statements would include at least three statements of financial position (i.e., including an opening balance sheet at date of transition) under IFRS 1. See SEC FRM 6340.1.

.223 Can financial statements prepared by an EGC include only two years of financial statements in an equity IPO?

An EGC may prepare an equity IPO registration statement with only two years of audited financial statements. See Instruction 4 to Item 8.A.2.

See SEC 2170 for additional guidance on reporting by EGCs.

.224 Will the SEC staff permit a non-EGC to omit certain financial statements otherwise required from a draft registration statement?

Yes. See SEC 8110.22.

.23 Where can I find guidance on the age of the financial statements needed for a registration statement of an FPI?

Item 8.A of Form 20-F governs the timeliness of financial statements for FPIs. Item 8.A.4 of Form 20-F requires that the last year of audited financial statements may not be older than 15 months at the time of the offering or listing, except in the case of the company's IPO. In a FPI's IPO, the audited financial statements must also be of a date not older than 12 months at the time the registration statement is filed. However, the 12-month requirement applies only where the registrant is not public in any jurisdiction. In such cases, the registrant may comply with the 15-month requirement if the registrant is able to represent adequately that compliance with the 12-month requirement is not required in any other jurisdiction and it is

impracticable or involves undue hardship. (SEC FRM 6220.3). Instruction 1 to Item 8.A.4 clarifies that the 15-month requirement is based on the effective date of the document.

If the registration statement is filed more than nine months after the end of last audited year then it should contain interim financial statements, which may be unaudited, covering at least the first six months of the financial year. See SEC FRM 6220.1.

The table below summarizes the timeliness requirements described above. This summary table does not reflect financial statement periods that might be omitted in a draft registration statement prepared by an EGC (SEC 2170) or in a nonpublic filing under the SEC staff's expanded nonpublic review process.

Timetable

Requirements (b)

Filing within three months after year-end and audited statements not available for most recent fiscal year

Financial statements for the preceding fiscal year-end (not the most recently completed year-end), which must be audited, and comparative interim financial statements, which may be unaudited, covering at least the first six months of the most recent fiscal year. See exception in Note (a).

See additional requirements in Note (c) related to an IPO where the issuer is not public in any jurisdiction.

Filing within three to six months after year-end

Financial statements for the most recent fiscal year-end, which must be audited, except for securities referred to in Note (a).

Filing within six to nine months after year-end

Financial statements for the most recent fiscal year-end, which must be audited. No interim financial statements are required to meet nine-month timeliness criteria.

Filing within nine to twelve months after year-end

Financial statements for the most recent fiscal year-end, which must be audited. Interim financial statements, which may be unaudited, covering at least the first six months of the current fiscal year, are also required. However, for securities discussed in Note (a), interim financial statements are only required to bring the latest balance sheet to a date within 12 months of the date of the document and therefore no interim financial statements would be required.

Notes:

- (a) If the only securities to be offered are upon the exercise of outstanding rights granted on a pro rata basis pursuant to a dividend or interest reinvestment plan, conversion of convertible securities, or exercise of outstanding transferable warrants, audited financial statements for the latest fiscal year are not required until a period later than six months after year end. However, these provisions are not applicable if securities are to be offered or sold in a standby underwriting in the U.S. or similar arrangement. See Instruction 2 to Item 8 of Form 20-F.
- (b) If an issuer makes public any financial data more current than the timeliness requirements of Item 8.A, then Item 8.A.5 of Form 20-F requires that such more current data must be included in the document.
- (c) Item 8.A.4 of Form 20-F requires that in a company's IPO, the audited financial statements must be as of a date not older than 12 months at the time the document is filed or at effectiveness. Those

more recent audited financial statements may cover a period of less than a full year. A company may comply with only the 15-month requirement if the company is able to represent that it is not required to comply with the 12-month requirement in any other jurisdiction outside the U.S. and that complying with the 12-month requirement is impracticable or involves undue hardship. A company should file this representation as an exhibit to the registration statement. See Instruction 2 to Item 8.A.4 of Form 20-F and SEC FRM 6220.3.

.24 Does interim financial information need to be included in an annual report on Form 20-F?

No. Instruction 1 to Item 8.A.5 to Form 20-F provides guidance that interim financial information is not required in an annual report on Form 20-F.

.241 Where can I find guidance on interim financial information that needs to be included in a registration statement?

Item 8.A.5 of Form 20-F requires interim financial statements covering at least the first six months of the financial year, on a comparative basis, to be included in a registration statement when the registration statement is filed more than nine months after the end of the last audited financial year. Such interim financial statements may be unaudited (in which case that fact should be stated). This nine month requirement is extended to 12 months for the offerings indicated in Instruction 2 to Item 8. The interim financial statements are required to include: (a) a balance sheet, (b) a statement of comprehensive income (either in a single continuous financial statement or in two separate but consecutive financial statements; or a statement of net income if there was no other comprehensive income), (c) cash flow statement, and (d) a statement showing either (i) changes in equity other than those arising from capital transactions with owners or (ii) all changes in equity (including a subtotal of all non-owner items recognized directly in equity). If not included in the primary financial statements, a note should be provided analyzing the changes in each caption of shareholders' equity presented in the balance sheet.

Interim financial statements are required to include comparative statements for the same period in the prior financial year, except that the comparative balance sheet information may be satisfied by presenting the year-end balance sheet.

Interim period financial statements may, at the option of the issuer, be a complete financial statement presentation, or a condensed format and limited footnote disclosures as permitted by S-X Article 10 or compliant with the requirements of IAS 34, *Interim Financial Reporting*, for companies reporting under IFRS-IASB. The interim financial statements are required to include selected note disclosures that provide an explanation of events and changes that are significant to an understanding of the changes in financial position and performance of the enterprise since the last annual reporting date.

.242 Is there a requirement to comply with S-X Article 10 when interim financial information is prepared in accordance with IFRS-IASB when filed pursuant to Item 8.A.5 of Form 20-F?

No. A registrant that files interim period financial statements pursuant to Item 8.A.5 is not required to comply with Article 10 of Regulation S-X if that registrant prepares its annual financial statements in accordance with IFRS-IASB, prepares its interim period financial information in compliance with IAS 34, *Interim Financial Reporting*, and explicitly states its compliance with IAS 34 in the notes to the interim financial statements.

See Instruction 4 to Item 8.A.5 of Form 20-F.

.243 Is there a requirement in certain circumstances to provide more current financial information in a registration statement than is required to meet the age of financial statement timeliness requirements specified by Item 8.A.5 of Form 20-F?

Yes. If at the date of the registration statement the company has published interim financial information that covers a more current period than is otherwise required by Item 8.A.5 of Form 20-F ("more current published financial information") then the more current interim financial information must be included or incorporated by reference in the document.

Item 8.A.5 applies to annual as well as interim financial information. For example, if the FPI publicly distributes annual financial information before the audited statements are available, the registration statement should include such annual financial information.

See SEC FRM 6220.6.

.2431 Is there a requirement to reconcile more current published financial information prepared in accordance with IFRS-IASB to U.S. GAAP?

No. See Instruction 3 to the Instructions to Item 8.A.5 of Form 20-F and SEC FRM 6220.6a.

.2432 Is there a requirement to reconcile more current published financial information prepared in accordance with a local GAAP to U.S. GAAP?

No. The more current local GAAP information is not required to be reconciled to U.S. GAAP. However, a narrative explanation of differences in accounting principles should be provided, and material new reconciling items should be quantified. See Instruction 3 to the Instructions to Item 8.A.5 of Form 20-F and SEC FRM 6220.6a.

[Editor's note: Occasionally, the more current interim information (not required to meet timeliness) that is publicly distributed in the issuer's home country will be prepared using accounting standards that are different from those used in the registration statement. In this instance, the U.S. investor has not had the benefit of knowing the reconciling items between local GAAP and U.S. GAAP. Therefore, the information disclosed pursuant to Item 8.A.5 of Form 20-F would need to be supplemented with a description and quantification of differences in accounting principles. See SEC FRM 6220.6b.

For example, a foreign issuer uses U.S. GAAP in its primary financial statements in filings with the SEC, but reports in a local GAAP in its home country. The company releases more recent earnings information in its home country using its local GAAP. Item 8.A.5 of Form 20-F requires that information to be included in the prospectus. However, the issuer has never filed a reconciliation from the local GAAP to U.S. GAAP, so a U.S. investor cannot interpret the more current local GAAP information. In this situation, an issuer may either (a) reconcile the Item 8.A.5 information to U.S. GAAP or (b) provide a reconciliation from U.S. GAAP to the local GAAP (reverse reconciliation) for at least the most recent fiscal year required in the registration statement.]

.2433 Is more current published financial information required to be provided even if the information does not include a comparative period?

Yes. When complete financial statements related to the most recent quarter (but not the comparative period) are distributed in a foreign issuer's home country, that information must be included in the U.S. registration statement. Comparative prior period information is not required because the information provided is included only to comply with Item 8.A.5 of Form 20-F and not to meet timeliness requirements. However, the registrant should include disclosure explaining why the information is provided, particularly when the information is placed with other financial statements and may appear to be incomplete. See Topic III.D in the Highlights of the May 2016 meeting of the CAQ International Practices Task Force. If the

information provided contains a reconciliation to U.S. GAAP, the SEC staff no longer believes that inclusion of reconciled information for the comparative prior periods, if provided, is necessary to prevent the current information from being misleading.

[Editor's note: The related guidance at SEC FRM 6220.6d has not yet been updated.]

.25 Is there a requirement to revise annual financial statements in connection with a new or amended registration statement that includes more current published financial information that reflects events requiring retrospective application such as a change in accounting principle, discontinued operations or change in reportable segments?

If the company provides a full set of interim financial statements under (i) U.S. GAAP (i.e., includes all of the condensed primary statements and all footnotes required by ASC 270-10-50 and S-X Article 10), (ii) IFRS-IASB (e.g., consistent with IAS 34), or (iii) another local GAAP reconciled to U.S. GAAP for a more current period than otherwise required to meet the timeliness requirements under Item 8, the SEC staff would expect that prior year annual financial statements be revised when the more current interim financial information reflects events that require retrospective application, such as reporting a discontinued operation, a change in reportable segments, or a change in accounting principle for which retrospective application is either required or elected (assuming that the effects of the retrospective application are material to the financial statements). See SEC FRM 13100. See Topic III in the Highlights of the May 2021 meeting of the CAQ International Practices Task Force for guidance if the more current published financial information is not included in the same document as the audited financial statements.

When a material retrospective adjustment to provisional amounts in a purchase price allocation is required (e.g., under IFRS 3 for an IFRS-IASB filer) and the adjustment has not yet been reflected in more current financial statements, the registrant must also provide revised financial statements reflecting that material retrospective adjustment prior to effectiveness of a registration statement (other than on Form S-8). See Topic II.E in the Highlights of the November 2009 meeting of the CAQ International Practices Task Force.

.3 OTHER FINANCIAL INFORMATION REQUIREMENTS

.301 Do the financial information requirements of S-X 3-09, S-X 13-01, and S-X 13-02 apply to Form 20-F?

Yes. Both Item 17 and Item 18 of Form 20-F require every issuer registering securities or filing an annual report on Form 20-F to include the same financial statements and accountants' reports that would be required to be filed if the registration statement or annual report were filed on Form 10 or Form 10-K. Accordingly, both annual reports and registration statements on Form 20-F require financial statements or financial information under S-X 3-09 (SEC 4520), S-X 13-01 (SEC 4530) and S-X 13-02 (SEC 4540), if applicable.

.302 Do the financial information requirements of S-X 3-05, S-X 3-14, and S-X Article 11 apply to Form 20-F?

S-X 3-05 (SEC 4550), S-X 3-14 (SEC 4555) and S-X Article 11 (SEC 4560) requirements do not apply to an annual report on Form 20-F.

S-X 3-05, S-X 3-14 and S-X Article 11 requirements apply to a registration statement on Form 20-F.

.303 Does a FPI that provides more current published financial information that comprises a full set of interim financial statements prepared in accordance with U.S. GAAP, local GAAP or IFRS-IASB need to also update S-X Article 11 pro forma information or MD&A?

No. See Topic II.D in the Highlights of the November 2015 meeting of the CAQ International Practices Task Force for a discussion of interim financial statements prepared in accordance with U.S. GAAP and IFRS-IASB. See Topic II.D in the Highlights of the May 2016 meeting of the CAQ International Practices Task Force for interim financial statements prepared in accordance with local GAAP.

.304 Does a FPI that provides more current published financial information that comprises a full set of interim financial statements prepared in accordance with U.S. GAAP or IFRS-IASB need to also provide related S-X 13-01 guarantor financial information?

The SEC staff has previously indicated that registrants are not required to include guarantor financial information in more current information provided to meet Item 8.A.5 requirements (but not required to meet 9 month timeliness requirements), regardless of whether such information is provided on an IFRS-IASB or a U.S. GAAP basis. See Topic III.C.2 in the Highlights of the May 2015 meeting of the CAQ International Practices Task Force.

If applicable, S-X 13-01 guarantor financial information would be required in connection with those financial statements provided to meet timeliness. See Topic VI in the Highlights of the November 2020 meeting of the CAQ International Practices Task Force.

.305 Do the financial statement schedules required by S-X Article 12 apply for Form 20-F?

Yes. Article 12 schedules that are applicable to foreign registrants consist of schedules designated by S-X 12-04, S-X 12-09, S-X 12-15, S-X 12-16, S-X 12-17, S-X 12-18, S-X 12-28, and S-X 12-29. See SEC FRM 6320.6.

The financial statement schedules:

- may be presented in the same GAAP as the primary financial statements and are not required to be reconciled to U.S. GAAP. See SEC FRM 6510.8;
- are required by registrants for all Securities Act and Exchange Act filings;
- are required for fiscal years or year-ends as specified by S-X and Form 20-F; and
- are not applicable to interim financial statements.

[Editor's note: To the extent that the information required by applicable schedules is included in the audited footnotes then a separate financial statement schedule is not required.]

See SEC 8100.403 for applicability to IFRS-IASB filers.

.306 What is the due date for S-X 3-09 financial statements that are required in an annual report on Form 20-F?

See SEC 4520.24.

If the S-X 3-09 financial statements would otherwise be due before the due date of the registrant's annual report on Form 20-F, then the S-X 3-09 financial statements need not be filed prior to the due date of the Annual Report Form 20-F. See SEC FRM 2405.9.

The 15 calendar day extension provided for the registrant to file its annual report on Form 20-F is not applicable to S-X 3-09 financial statements to be filed by amendment to a Form 20-F. See Note to SEC FRM 2405.9.

.307 How do the S-X 3-09 financial statement due date requirements apply to a registration statement?

S-X 3-09 financial statements are required to be updated on a more current basis for a registration statement as compared to the requirements for an annual report on Form 20-F. If the investee is a foreign business, S-X 3-09 financial statements may not be older than 15 months. This is the same timeliness requirement for a registrant that is a FPI. If the investee is not a foreign business, S-X 3-09 financial statements must be updated within the following number of days after the investee's fiscal year end: 60 days if the investee is a large accelerated filer; 75 days if the investee is an accelerated filer; or 90 days for all other investees. See SEC 4520.24 and SEC FRM 2405.11.

.308 How should the significance tests to determine the need for S-X 3-09 financial statements be performed when annual financial statements are retrospectively revised?

See SEC 4400.906.

.309 Which periods should be included in S-X 3-09 financial statements when a foreign business reports under U.S. GAAP?

If financial statements of a foreign business prepared in accordance with U.S. GAAP are provided, only two years are needed to satisfy the S-X 3-09 requirements for the first filing of those financial statements under S-X 3-09. This is based on the premise that the S-X 3-09 financial statements of the foreign business do not have to be provided for more periods than would be required of the entity if it were filing a first-time registration statement.

If the S-X 3-09 financial statements of a foreign business have been provided in prior years on an IFRS-IASB basis, and the foreign business changes its GAAP to U.S. GAAP, then the SEC staff has indicated that U.S. GAAP financial statements would be needed for three years because they do not constitute the first-time filing of S-X 3-09 financial statements.

See Topic III.D in the Highlights of the November 2016 meeting of the CAQ International Practices Task Force.

.310 Are there any accommodations applicable to S-X 3-09 financial statements of a foreign equity method investee?

See SEC 4520.26 and SEC FRM 6410.

.311 Is IFRS for Small and Medium-sized Entities (SMEs) an acceptable basis of accounting for financial statements of a foreign business filed pursuant to the requirements of S-X 3-09 and S-X 3-05?

The SEC staff indicated that IFRS SMEs is an acceptable basis of accounting for financial statements of a foreign business filed pursuant to the requirements of S-X 3-09 and S-X 3-05. However, such financial statements are subject to the same reconciliation requirements as any other local GAAP. See SEC FRM 6410.6d. See Topic II.D in the Highlights of the May 2010 meeting of the CAQ International Practices Task Force.

.4 USE OF INTERNATIONAL FINANCIAL REPORTING STANDARDS AS ISSUED BY THE IASB

.401 General

FPIs and other eligible entities (as defined below) are allowed to file financial statements with the SEC in accordance with IFRS-IASB without reconciliation to U.S. GAAP. Such financial statements are required to include an explicit and unreserved statement of compliance with IFRS-IASB.

The SEC's accommodation applies to:

- (1) FPIs that file documents under the Securities Act and the Exchange Act;
- (2) the financial statements of a foreign business (as defined in S-X 1-02(l)) that are prepared under S-X 3-05, S-X 3-09 and 3-14; and
- (3) the financial statements of a foreign target company in a business combination transaction that are included in:
 - (a) a Securities Act registration statement that is filed on Form S-4 or Form F-4, or
 - (b) a proxy or information statement that is filed under the Exchange Act.

Companies that are referenced in items (2) and (3) above are referred to as "other eligible entities."

Compliance with IFRS-IASB must be unreservedly and explicitly stated in the notes to the financial statements. The auditor's report must include an opinion as to whether the financial statements comply, in all material respects, with IFRS-IASB.

.402 Where can I find SEC guidance on the use of IFRS-IASB?

- SEC Release No. 33-8879, *Acceptance from foreign private issuers of financial statements prepared in accordance with International Financial Reporting Standards without reconciliation to U.S. GAAP*;
- Highlights of the CAQ International Practices Task Force meetings, including:
 - Appendix A in the Highlights of the March 2008 meeting of the CAQ International Practices Task Force;
 - Discussion Document A in the Highlights of the November 2008 meeting of the CAQ International Practices Task Force;
- Questions and answers relating to SEC Release No. 33-8567, *First-Time Adoption of IFRS*, included in Appendix B in the Highlights of the May 2005 meeting of the CAQ International Practices Task Force;
- General Instruction G to Form 20-F; and
- SEC FRM section 6300.

.403 Does a FPI that prepares its annual financial statements in accordance with IFRS-IASB need to comply with the presentation and disclosure provisions in Regulation S-X?

Generally, no. IFRS-IASB filers are required to comply with the IFRS-IASB requirements for financial statement form and content and are not subject to S-X Articles 4, 5, 6, 7, 9, and 10 that relate to specific presentation and disclosure provisions under Regulation S-X. See SEC FRM 6320.6.

However, FPIs must comply with all other applicable S-X requirements, including, but not limited to, the applicable Article 12 schedule requirements and the Article 3 requirements of financial statements of other entities. See SEC 8100.305 and SEC FRM 6320.6.

.404 What annual financial statement periods are required to be filed with the SEC upon first-time adoption of IFRS-IASB?

An issuer that first-time adopts IFRS-IASB may file in applicable filings only two years of statements of income, changes in shareholders' equity and cash flows prepared in accordance with IFRS-IASB, with appropriate related disclosures, if it satisfies the conditions set forth in General Instruction G. As a reminder, IFRS 1 requires an entity's first IFRS financial statements to include at least three statements of financial position. See SEC FRM 6340.1. The issuer must adopt IFRS-IASB for the first-time by an explicit and unreserved statement of compliance with IFRS as issued by the IASB.

However, an issuer that has published audited financial statements prepared in accordance with IFRS-IASB for each of the latest three financial years is required to include all three years of such audited IFRS-IASB financial statements in its SEC filings (see Instruction 4 to General Instruction G of Form 20-F), unless otherwise permitted to exclude the earliest year such as under separate accommodations available to Emerging Growth Companies.

.405 Does the guidance on first-time of adoption of IFRS-IASB also apply to annual financial statements prepared by a foreign business?

Yes. The accommodation available for first time adoption of IFRS-IASB and the guidance in Instruction G of Form 20-F also applies to the financial statements of a foreign business that are required under S-X 3-05, S-X 3-09 and S-X 3-14. See SEC FRM 6340.2.

.406 How does the accommodation provided in General Instruction G of Form 20-F apply when an entity qualifies as a "repeat IFRS-IASB first time adopter" under IFRS 1?

General Instruction G provides that an issuer may rely on its first-time application provisions if the issuer adopts IFRS for the first time by an explicit and unreserved statement of compliance with IFRS-IASB. This Instruction G provision was consistent with the "first-time adopter" definition provided in IFRS 1 in existence at the time of the final rule. Subsequent amendments to IFRS 1 allow an entity that has applied IFRS-IASB in a previous reporting period, but whose most recent annual financial statements were not prepared in accordance with IFRS-IASB, to re-adopt IFRS-IASB by choosing to either (i) re-apply IFRS 1, even if the entity applied IFRS 1 in a previous reporting period, or (ii) apply IFRS-IASB retrospectively in accordance with IAS 8, *Accounting policies, changes in accounting estimates and errors* (i.e., as if it had never stopped applying IFRS-IASB), to resume reporting under IFRS-IASB. An application of General Instruction G to meet SEC filing requirements could result in new registrants and foreign businesses having to select a much earlier date of transition to IFRS-IASB compared to what is permitted by the subsequently amended IFRS 1. The SEC staff has indicated that it is generally receptive to permitting the application of the accommodation provided in General Instruction G where an entity qualifies as a repeat first-time adopter based upon the amended "first-time adopter" definition in IFRS 1 and elects to re-apply the transition provisions of IFRS 1 rather than apply IFRS-IASB retrospectively. The ultimate determination will depend on the specific facts and circumstances. Companies that wish to apply the accommodation in General Instruction G under these circumstances should consult with the SEC staff prior to filing.

See Topic II.A in the Highlights of the November 2012 meeting of the CAQ International Practices Task Force.

.407 Where can I find SEC guidance for situations where interim financial information is prepared in accordance with IFRS-IASB reflecting first-time IFRS-IASB adoption but annual financial statements reflecting first-time IFRS-IASB are not yet prepared?

An issuer that is changing to IFRS-IASB, but that has not yet prepared its annual IFRS-IASB financial statements reflecting its first-time adoption, may have annual financial statements prepared under its previous GAAP and interim financial statements prepared under IFRS-IASB. Given that the most recent annual and interim periods may therefore not be comparable, financial statements that are required to satisfy the interim financial statement timeliness requirements in a registration statement may follow one of the three financial statement options described in General Instruction G.(f)(2)(B) of Form 20-F. See SEC FRM 6340.4.

A registrant following the options in General Instruction G.(f)(2)(B)(i) or (iii) is required to include, in its audited financial statements for the years prepared under its previous GAAP, a reconciliation to U.S. GAAP for such years. See Q&A 16 to Frequently Asked Questions included in Appendix A in the Highlights of the March 2008 meeting of the CAQ International Practices Task Force for clarification of the reconciliation requirement for the option under General Instruction G.(f)(2)(B)(iii).

An issuer that is unable to provide information that complies with one of the three options in General Instruction G.(f)(2)(B) but has available comparable financial information should contact the Office of International Corporate Finance in the Division of Corporation Finance, in writing and well in advance of any filing deadlines, to discuss its interim period financial information. See Instruction to General Instruction G.(f)(B).

General Instruction G.(f)(2)(A) is applicable for any financial information for any interim or annual financial period that the issuer publishes that is prepared with reference to IFRS-IASB. It provides that Instruction 3 to Item 8.A.5 shall not apply to published financial information prepared with reference to IFRS-IASB. Accordingly, for more current IFRS-IASB financial information that is published, but is not required to meet timeliness requirements, there is no need to describe or quantify the differences in accounting principles, practices and methods that vary materially with U.S. GAAP.

There is likewise no need to describe or quantify differences with U.S. GAAP for interim financial information that is provided to meet timeliness requirements when such information is prepared under IFRS-IASB and the issuer's audited annual financial statements are on such basis. This results from the application of the guidance in Item 17(c) of Form 20-F.

See Topic II.A in the Highlights of the May 2011 meeting of the CAQ International Practices Task Force and SEC FRM 6404.4 and 6340.5.

.408 Can a first-time IFRS-IASB adopter elect to include, refer to, or incorporate by reference financial information prepared in accordance with its previous GAAP?

Yes. An issuer may elect to include, refer to, or incorporate by reference, financial information prepared in accordance with its previous GAAP. See guidance in General Instruction G.

.409 Should a reconciliation between a previous GAAP and IFRS-IASB be included in first-time IFRS-IASB adoption financial statements?

Yes. Instruction 3 to Item 8, *Financial Information* requires that the reconciliation from a previous GAAP to IFRS-IASB, required by IFRS 1, be presented in the notes to the IFRS-IASB financial statements in a form and level of information sufficient to explain all material adjustments to the balance sheet and income statement, and, if presented under previous GAAP, to the cash flow statement. Additionally, the IFRS-IASB footnotes should disclose each exception used that is permitted or required by IFRS 1, including the items or class of items to which the exception was applied and a description of what accounting principle was used and how it was applied.

.410 What additional considerations might apply when a FPI changes its primary financial reporting in its SEC filings from U.S. GAAP to IFRS-IASB?

The SEC staff requires that if a FPI that previously used U.S. GAAP in its SEC filings concludes that a local GAAP is its previous GAAP for transitioning to IFRS-IASB for SEC reporting purposes, then additional disclosure would be required under Instruction 3 to Item 8 of Form 20-F to provide U.S. investors with information to bridge from the previously filed U.S. GAAP financial statements to IFRS-IASB.

Similarly, bridging information from U.S. GAAP to IFRS-IASB would be required in circumstances in which an issuer begins to file IFRS-IASB financial statements with the SEC that was not a first-time adopter of IFRS-IASB under IFRS 1 (e.g., previously prepared IFRS-IASB financial statements but filed U.S. GAAP financial statements historically with the SEC).

Alternative methods of disclosure are discussed below and such additional disclosure is required to be audited either in the footnotes to the financial statements or in a separate financial statement schedule.

Situation 1 – FPI adopts IFRS-IASB in the current period for both local and SEC reporting purposes:

Alternative 1: An analysis of the differences between U.S. GAAP and IFRS-IASB in a format consistent with the form and content provisions of Item 17 for the same periods and dates for which the IFRS 1 reconciliations are required. This analysis would disclose differences between US GAAP and IFRS-IASB for equity as of the beginning and end of the most recent comparative period to the year of adoption and of profit or loss for the most recent comparative year then ended. A description of differences between U.S. GAAP and IFRS-IASB as they relate to the statement of cash flows would not be necessary, since, under its accommodation to FPIs, the SEC accepts without reconciliation to U.S. GAAP a cash flow statement prepared in accordance with IAS 7, *Cash Flow Statements*, as amended.

Alternative 2: "Two-step reconciliations" of equity as of the beginning and end of the most recent comparative period to year of adoption and of profit or loss for the most recent comparative year then ended. The two-step reconciliations would present: (Step 1) a quantitative analysis of the differences between U.S. GAAP and Previous GAAP, consistent with an Item 17 format for the same periods and dates for which IFRS 1 reconciliations are required; and (Step 2) the IFRS 1 reconciliation from Previous GAAP to IFRS-IASB. In addition to this reconciliation, an explanation of the material differences between the cash flow statement under US GAAP and the cash flow statement under Previous GAAP for the most recent comparative period to the year of adoption should also be provided.

Although generally the SEC staff would expect to see the analysis in either of the formats above, registrants should reach out to the SEC staff if they consider using an alternative presentation, based on unique or unusual circumstances.

Situation 2 – FPI adopted IFRS-IASB in a period preceding the earliest period for which audited financial statements are required to be included in the current SEC filing:

The SEC staff believes that additional disclosure between U.S. GAAP and IFRS-IASB is necessary. Alternative 1 above is the more practicable option of providing disclosure, since there is no relevant previous GAAP information for Alternative 2 reconciliation. The additional disclosure would be provided for equity as of the end of the most recent comparative period in the Form 20-F, and of profit or loss for the two most recent comparative years then ended. However, if the company presents a balance sheet as of the end of the third preceding year in accordance with IFRS-IASB, then the additional disclosure also would be provided for equity as of that date.

See SEC FRM 6345. See Appendix A in the Highlights of the March 2008 meeting of the CAQ International Practices Task Force and Discussion Document A in the Highlights of the November 2008 meeting of the CAQ International Practices Task Force.

.5 OTHER REPORTING REQUIREMENTS

.51 What disclosure considerations relate to Item 16F “Changes in Registrant’s Certifying Accountant”?

Item 16F of Form 20-F requires disclosure when there is a change in a registrant’s certifying accountant. The disclosures required by Item 16F are required in annual reports on Form 20-F, as well as registration statements on Form 20-F, Form F-1, Form F-3 and Form F-4.

Changes in the issuer’s certifying accountant that occur after the issuer’s fiscal year-end, but before the Form 20-F is filed, are required to be disclosed in the issuer’s Form 20-F. See footnote 125 to SEC Release No. 33-8959, *Foreign Issuer Reporting Enhancements*.

[Editor’s note: Item 16F of Form 20-F does not specifically address when change in auditor disclosures are required in situations where there is mandatory audit firm rotation. We believe that in countries where it is known that the auditor will rotate after a given time period and there are no provisions for re-tendering, it would be reasonable to provide the disclosure in the Form 20-F in the last year that the auditor is issuing an audit report on the registrant, even in those situations for which the process for the change will not take place until after the Form 20-F is filed. In countries where the auditor is subject to mandatory rotation, but the auditor is terminated or resigns early, or when there is a mandatory re-tender situation but not a requirement to change auditor, the guidance in Item 16F of Form 20-F should be followed. Companies should consider discussing such matters with their legal counsel.]

[Editor’s note: In certain jurisdictions a change in auditor is subject to shareholder approval. In some cases, the audit committee and/or the board of directors may have approved the dismissal of the certifying accountant and/or the engagement of a new certifying accountant at the time of filing an annual report or registration statement, yet the termination and/or the engagement remains subject to shareholder approval which has not yet occurred at the time of the filing. In the interest of providing timely information about the decisions made by those charged with governance, including any related reportable events, companies likely should disclose the change and provide the related Item 16F disclosures in the Form 20-F for the period in which a decision to dismiss or appoint a new auditor has been made by the audit committee or those charged with governance. See Topic III.C in the Highlights of the May 2018 meeting of the CAQ International Practices Task Force. Companies should consider discussing such guidance with their legal counsel.]

[Editor’s note: Form 8-K CDI 114.02 provides the SEC staff’s view that a change in certifying accountant is considered to have taken place when a change is made from one member firm to another member firm of the same network, because the new principal accountant is a different legal entity from the former principal accountant and is separately registered with the PCAOB. Although this CDI is written in the context of a domestic registrant for which Item 4.01 Form 8-K requirements are applicable, we understand that the SEC staff would take the same view with regard to FPIs reporting such changes under Item 16F of Form 20-F. Companies should consider discussing such guidance with their legal counsel. See SEC 6150.904]

See SEC 6150 for detailed guidance related to reporting changes in registrant’s certifying accountant which is directed toward US domestic SEC registrant public companies. The Item 16F disclosures are the same disclosures required by domestic SEC registrants, except that domestic SEC registrants are required to include such information more timely on Form 8-K. The following guidance regarding changes in accountant disclosures for domestic SEC registrants is applicable to FPIs, modified as noted:

- The disclosure requirements of S-K 304(a) are discussed at SEC 6150.2, which are the same requirements of Item 16F(a)(1)(i)-(iii).

- "Disagreements" and "reportable events" are defined the same for domestic SEC registrants and FPIs.
- Guidance on letters to the SEC for inclusion with Form 8-K is included at SEC 6150. Such guidance should be modified accordingly, for inclusion as an exhibit to be filed as part of the related foreign registration statement, annual report or Form 6-K, reporting the change in accountants.

All letters related to both former accountants and new accountants that are submitted to a FPI registrant for filing as an exhibit must be addressed to the SEC.

Issuers are required to file the former accountant's letter addressed to the SEC as an exhibit to the annual report on Form 20-F or registration statement if such change in accountant was made 30 days or more prior to the filing of the annual report or registration statement.

For changes in accountants made within 30 days of the filing of the annual report on Form 20-F or registration statement and the former accountant's letter is unavailable at the time of the filing, the former accountant's letter is required to be filed by amendment as an exhibit within 10 business days of the original filing. We believe that the SEC will also require a currently dated consent related to an amendment made to a registration statement to provide the former accountant's letter as an exhibit

See SEC 8105.901 and Topic IV. in the Highlights of the May 2023 meeting of the CAQ International Practices Task Force for additional guidance when the change in auditor is furnished on a Form 6-K.

.511 Example Item 16F disclosure

The following is an example of an Item 16F disclosure in a Form 20-F in a situation in which there were no opinion modifications or qualifications, and no disagreements or reportable events.

(a) Previous independent registered public accounting firm

- (i) On June 6, 2023, XYZ Corporation (the "Registrant") dismissed CPA LLP as its independent registered public accounting firm. The Registrant's Audit Committee [and/or Board of Directors, if applicable] participated in and approved the decision to change XYZ's independent registered public accounting firm.

or [On June 6, 2023, CPA LLP resigned as the independent registered public accounting firm for XYZ Corporation.]

or [On June 6, 2023, CPA LLP declined to stand for re-election as the independent registered public accounting firm for XYZ Corporation.]

[Editor's note: See SEC 6150.909 for a discussion relating to date of termination. That date is to be used in this paragraph. If the auditor's resignation, declination to stand for re-election, or dismissal will become effective upon completion of procedures on a Form 20-F, a second sentence is added to the disclosure above, as follows: "Such dismissal/resignation/declination to stand for re-election will become effective upon completion by CPA LLP of its audit of the financial statements of XYZ Corporation as of and for the year ended XXX and the filing of the related Form 20-F."]

- (ii) The reports of CPA LLP on the financial statements for the fiscal years ended December 31, 2022 and 2021 contained no adverse opinion or disclaimer of opinion and were not qualified or modified as to uncertainty, audit scope or accounting principle.
- (iii) During the fiscal years ended December 31, 2022 and 2021 and the subsequent interim period through June 6, 2023, there have been no disagreements with CPA LLP on any matter of accounting principles or practices, financial statement disclosure, or auditing scope or procedure, which disagreements if not resolved to the satisfaction of CPA LLP would have caused them to make reference thereto in their reports on the financial statements for such years.

[Editor's note: If a disagreement or reportable event (see (iv) below) is required to be reported, the registrant must provide the disclosures required by Item 16F(a)(1)(iv). See SEC 6150.233 for a description of the required disclosures.]

- (iv) During the fiscal years ended December 31, 2022 and 2021 and the subsequent interim period through June 6, 2023, there have been no reportable events (as defined in Item 16F(a)(1)(v) of Form 20-F).

[Editor's note: Although many companies make the disclosure included in (iv) above, we understand the absence of reportable events is not a disclosure required by Item 16F(a). See Regulation S-K CDI 111.02.]

- (v) The Registrant has requested that CPA LLP furnish it with a letter addressed to the SEC stating whether or not it agrees with the above statements. A copy of such letter, dated June 12, 2023, is filed as Exhibit XX to this Form 20-F.

(b) New independent registered public accounting firm

- (i) The Registrant engaged ABC & Co. as its new independent registered public accounting firm as of June 6, 2023. During the fiscal years ended December 31, 2022 and 2021 and the subsequent interim period through June 6, 2023, the Registrant has not consulted with ABC & Co. regarding either (i) the application of accounting principles to a specified transaction, either completed or proposed; or the type of audit opinion that might be rendered on the Registrant's financial statements, and neither a written report was provided to the Registrant nor was oral advice provided that ABC & Co. concluded was an important factor considered by the Registrant in reaching a decision as to the accounting, auditing or financial reporting issue; or (ii) any matter that was either the subject of a disagreement, as that term is defined in Item 16F(a)(1)(iv) and the related instructions to Item 16F of Form 20-F, or a reportable event, as that term is defined in Item 16F(a)(1)(v) of Form 20-F.

[Alternatively, the second sentence above could be replaced with the following sentence: "During the fiscal years ended December 31, 2022 and 2021 and the subsequent interim period through June 6, 2023, the Registrant has not consulted with ABC & Co. regarding any of the matters described in Item 16F(a)(2)(i) or Item 16F(a)(2)(ii) of Form 20-F."]

[Editor's note: The disclosure that there have been no consultations with the new auditor is optional. Only a description of consultations is required.]

.52 What are the disclosure requirements related to Item 16I "Disclosure Regarding Foreign Jurisdictions that Prevent Inspections"?

Item 16I was added to Form 20-F to implement the disclosure and submission requirements of the Holding Foreign Companies Accountable Act. Item 16I applies only to annual reports on Form 20-F and does not apply to registration statements. See Item 16I for disclosure requirements and see SEC 3130.35 for further discussion.

.53 On what basis of accounting should pro forma information be presented in connection with a reverse merger when the legal acquirer and the accounting acquirer use different bases of accounting to prepare their financial statements?

See SEC 4560.914 for pro forma financial statement considerations related to reverse mergers when the legal acquirer and the accounting acquirer use different bases of accounting.

.54 What are some considerations for transition to FPI status of a foreign public shell immediately upon its reverse merger with a foreign operating company?

See Topic II in the Highlights of the November 2019 meeting of the CAQ International Practices Task Force addressing transition to FPI status of a foreign public shell immediately upon its reverse merger with a

foreign operating company and basis of accounting reported by the operating company in conjunction with the transaction.

.7 ACCOUNTANTS' CONSENT

.71 Where can I find information relating to the SEC's requirements for accountants' consents?

See SEC 2400 for a discussion of accountants' consents.

.8 EXPERTS LANGUAGE

.81 Where can I find information relating to experts language in a registration statement on Form 20-F?

See SEC 2300 for a discussion of experts language, including SEC 2300.3 for considerations when reports on reviews of interim information are included or incorporated by reference in a registration statement.

.9 FREQUENTLY ASKED QUESTIONS

.901 Do FPIs need to comply with the supplemental oil and gas disclosures?

Yes. Publicly traded companies that have significant oil- and gas-producing activities shall also disclose in their annual financial statements certain unaudited supplemental information which includes, among other items, disclosures related to proved oil and gas reserve quantities. Item 18 of Form 20-F is silent as to whether these proved reserve quantities must be determined in accordance with the SEC's definition of reserves. Such proved reserve disclosures are required to comply with the SEC definition of reserves as the result of specific rule changes provided in SEC Release No. 33-8995, *Modernization of Oil and Gas Reporting*.

[Editor's note: IFRS-IASB FPIs in the oil and gas industry are also required to comply with the supplemental oil and gas disclosures in ASC 932 to satisfy the Item 18 requirement. See Instruction 2 to Item 18 of Form 20-F.]

.902 May a FPI incorporate by reference into an annual report on Form 20-F information that has previously been filed with the SEC?

Yes. Information that has previously been filed with the SEC (e.g., such as on a Form 6-K) is permitted to be incorporated by reference in answer, or partial answer, to any item required to be disclosed in an annual report on Form 20-F, subject to the limitations set forth in Exchange Act Rule 12b-23. Issuers using incorporation by reference are required to identify with specificity the information that is being incorporated by reference. See Exchange Act Forms CDI 110.07.

.903 Is incorporating by reference or cross-referencing to information outside of the financial statements permitted in financial statements?

Generally, no. See SEC 2110.908 and Securities Act Rule 411(a).

.904 Does Form 20-F specifically require disclosure of a selected financial data table?

No. In SEC Release No. 33-10890, *Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information*, the SEC eliminated the requirement for selected financial data that was previously set forth in Item 3.A of Form 20-F.

See SEC 2110.910 for additional guidance.

.905 Where can I find guidance related to the preparation of a "capitalization table" called for by Item 3.B of Form 20-F?

Item 3.B of Form 20-F requires a capitalization table prepared on an actual basis as of a date within 60 days of the effectiveness of a registration statement. However, Item 8 of Form 20-F permits the most recent balance sheet (from which a capitalization table is ordinarily derived) to be as much as 9 months old. The SEC staff will not object if a FPI presents its capitalization table on an actual basis as of the same date as the most recent balance sheet required in its registration statement. See SEC FRM 6270. If applicable, capitalization is also shown "as adjusted" to reflect the sale of new securities being issued and the intended application of the net proceeds therefrom. See Instruction 1 and 2 to Item 3.B of Form 20-F.

See Topic VII.C. in the Highlights of the May 2000 meeting of the CAQ International Practices Task Force.

.906 What are the disclosure requirements related to unresolved written SEC staff comments (Item 4A of Form 20-F)?

See SEC 3130.31.

.907 How can companies comply with the requirement to XBRL tag certain information relating to the principal auditor in an annual report on Form 20-F?

See SEC 3130.911.

.908 What are the disclosure requirements related to sanctionable activities required by the Iran Threat Reduction and Syria Human Rights Act of 2012 in an annual report on Form 20-F?

See SEC 3130.33.

.909 Is management's report on internal control over financial reporting or an auditor's attestation report required in an annual report on Form 20-F?

Perhaps.

Item 15(b) of Form 20-F requires inclusion of management's report on internal control over financial reporting for an issuer that is an accelerated filer or a large accelerated filer, except for EGCs.

Item 15(c) of Form 20-F requires inclusion of the registered public accounting firm's attestation report on the issuer's internal control over financial reporting for an issuer that is an accelerated filer or a large accelerated filer, except for EGCs.

See SEC 3125.4 for guidance related to the requirements to include a management's report on internal control over financial reporting and an auditor's attestation report in an annual report on Form 20-F.

[Editor's note: SEC Release No. 33-8809, *Amendments to Rules Regarding Management's Report on Internal Control Over Financial Reporting*, amended S-K 308 and S-X 2-02 to conform the Section 404 auditor reporting requirements for U.S. domestic issuers to

PCAOB AS 2201. That release did not specifically amend the corresponding auditor reporting requirements set forth in Item 15(b)(4) or (c) of Form 20-F. The SEC staff has indicated that such changes were meant to be equally applicable to FPIs. Accordingly, the phrase "management's assessment" in the reference in Item 15(b)(4) and (c) of Form 20-F should be deleted in applying the guidance for "attestation report on management's assessment of the issuer's internal control over financial reporting."]

[Editor's note: For FPIs that file local GAAP financial statements, management's evaluation of internal control over financial reporting should consider controls related to both preparation of the primary local GAAP financial statements and controls related to the preparation of the U.S. GAAP reconciliation, because the reconciliation is a required element of the financial statements. See SEC FRM 4310.11.]

.910 What are some considerations regarding disclosure of changes in a company's internal control over financial reporting in the annual report on Form 20-F prior to the company being required to provide management's annual report on internal control over financial reporting?

The certifying officers are required to indicate in their Section 302 certification whether there was any change in the company's internal control over financial reporting that occurred during the period covered by the annual report that has materially affected, or is reasonably likely to materially affect, the company's internal control over financial reporting. Although disclosure (related to changes in internal control over financial reporting identified in connection with the evaluation required by paragraph (d) of Rule 13a-15 or Rule 15d-15) under Item 15(d) of Form 20-F is not required until the first Form 20-F filed after the Form 20-F containing the Item 15(b) requirements are applicable, the certifying officers are nevertheless still required to make the paragraph 4(d) certifications. See paragraph 4(d) in the Certifications section included in Item 12 in the Instructions as to Exhibits of Form 20-F.

.911 What are some distinctions between Section 302 and 906 certifications?

See SEC 3126 for a brief overview of these two certifications. Item 12 in the Instructions as to Exhibits of Form 20-F includes the exact format of the text of the Section 302 certification that is required separately from each principal executive officer and principal financial officer of the registrant and included as an exhibit to an annual report on Form 20-F. Unlike the Section 302 certifications, the Section 906 certifications are required only in periodic reports that contain financial statements. Therefore, amendments to periodic reports that do not contain financial statements would not require a new Section 906 certification, but would require a new Section 302 certification to be filed with the amendment. In addition, unlike the Section 302 certifications, the Section 906 certifications may take the form of a single statement signed by a company's chief executive and financial officers.

.912 Does a FPI need to repeat information in its Item 5 "Operating and Financial Review and Prospects" disclosure that is already included in its IFRS-IASB financial statements?

No. Instruction 5 to Item 5 of Form 20-F requires an issuer filing IFRS-IASB financial statements to provide disclosures that satisfy the objective of the item's disclosures in responding to paragraphs of those items that refer to pronouncements of the FASB. If information called for by the non-financial statement requirements of Form 20-F duplicates information contained in the IFRS-IASB financial statements, the company need not duplicate such information but may instead cross reference to the appropriate footnote in the audited financial statements. The applicable IFRS standards that correlate with the related U.S. GAAP pronouncement and the item's objective are not provided in Form 20-F.

.913 Do local GAAP financial statements of an acquired business (S-X 3-05) or an equity investee (S-X 3-09) need to include a statement of cash flows?

Yes. Item 8 of Form 20-F requires a cash flow statement with respect to separate S-X 3-05 and S-X 3-09 financial statements. If the local GAAP does not require inclusion of a cash flow statement, such statement

is still required for any financial statements required to be filed with the SEC, even if such financial statements are not required to be reconciled to U.S. GAAP, including when significance is not exceeded at the 30 percent level for significant acquirees and investees. See Topic VII.D in the Highlights of the May 2000 meeting of the CAQ International Practices Task Force. The SEC staff has advised that the cash flow statement has to be presented on an audited basis for the same periods that statements of comprehensive income are required to be presented. A cash flow statement that complies with either (i) ASC 230, (ii) IAS 7, or (iii) local GAAP reconciled to ASC 230 for only the required periods would be acceptable. If such ASC 230 or IAS 7 presentation would not be acceptable under the local GAAP then the audit report may be qualified for such departure from local GAAP and such a departure would be acceptable to the SEC.

.914 Can a FPI prepare its primary financial statements in a currency other than the U.S. dollar?

Yes. S-X 3-20(a)(1) allows a FPI to state amounts in its primary financial statements in any currency which it deems appropriate. Specific disclosure is required in a note to the financial statements if the currency in which the issuer expects to declare dividends is different from the reporting currency, or there are material exchange restrictions affecting the reporting currency, the currency of the Issuer's domicile, or the currency in which dividends are paid. Changes in the reporting currency require that financial statements of periods presented prior to the change be recast as if the new reporting currency had been used. Additionally, the decision to change and the reason for the change in the reporting currency must be disclosed in a note to the financial statements in the period in which the change occurs.

[Editor's note: S-X 3-20(a)(2) requires an issuer that is not a FPI to present financial statements in U.S. dollars. Historically, the SEC staff has not objected to the use of a different reporting currency. Those instances have been limited to situations where the U.S.-incorporated registrant had little or no assets and operations in the U.S., substantially all the operations were conducted in a single functional currency other than the U.S. dollar, and the reporting currency selected was the same as the functional currency. The SEC staff has also not objected when a foreign issuer that does not meet the definition of a FPI applies this approach in similar circumstances. See SEC FRM 6640.]

See SEC FRM 6610 and SEC FRM 6620 for additional guidance.

.915 Where can a company preparing financial statements under local GAAP find guidance on the measurement of transactions denominated in a non-hyperinflationary currency?

See S-X 3-20. Although S-X 3-20 allows a FPI to use any reporting currency which it deems appropriate, transactions denominated in a non-hyperinflationary currency are required to be measured and translated pursuant to the guidance in S-X 3-20(d).

[Editor's note: This measurement and translation process is the same as that prescribed by U.S. GAAP. Accordingly, if such method is different from the method used in the local GAAP financial statements, then the difference would have to be quantified in the U.S. GAAP reconciliation required pursuant to Item 17 and Item 18 of Form 20-F.]

.916 Where can a company preparing financial statements under local GAAP find guidance on the measurement of transactions denominated in a hyperinflationary currency?

S-X 3-20 is silent with respect to how to measure the transactions of operations located in a hyperinflationary environment. See S-X 3-20(d) for a definition of a hyperinflationary environment. Pursuant to Form 20-F requirements, a FPI presenting local GAAP financial statements must follow its local GAAP in measuring such transactions in order for the audit report to be acceptable to the SEC (i.e., no exception is allowed in the audit report related to the primary local GAAP financial statements). Footnote 10 to SEC Release No. 33-7117, *Selection of Reporting Currency for Financial Statements of Foreign Private Issuers and Reconciliation to U.S. GAAP for Foreign Private Issuers With Operations in Hyperinflationary Economy* (SEC Release 33-7117) indicates that an issuer with a material operation in a hyperinflationary environment would measure the transactions of the operation in the reporting currency pursuant to ASC 830, except that

no U.S. GAAP reconciliation to that method will be required in the circumstances discussed in Section III of the SEC Release 33-7117. See Item 17(c)(2)(iv) of Form 20-F. The requirements of Item 17(c)(2)(iv) and Item 18 of Form 20-F are identical.

SEC Release No. 33-7117 allows a FPI to use the U.S. dollar (or other stable reporting currency) as the reporting currency for entities operating in a hyperinflationary environment using ASC 830 for measurement into the reporting currency. However, if this option is elected, the SEC would require the issuer to present its primary financial statements on a U.S. GAAP basis if the local GAAP does not permit the use of ASC 830 for translating primary financial statements from a hyperinflationary currency to a stable currency. Reporting on local GAAP financial statements in which ASC 830 is applied would not be accepted by the SEC if such presentation would result in a local GAAP exception in the auditor's report. Technically, presentation of such primary financial statements using ASC 830 is also not prescribed by ASC 830, which addresses measurement/translation of the results of foreign operations in hyperinflationary environments for inclusion in an issuer's primary financial statements presented in a stable currency, as opposed to translation to primary financial statements of the issuer itself operating in a hyperinflationary environment. However, with the adoption of the SEC Release 33-7117, such ASC 830 presentation is considered to be U.S. GAAP. Accordingly, no exception needs to be made in the audit report on U.S. GAAP financial statements related to this matter.

If the domicile country is hyperinflationary and the registrant's financial statements have not been recast or supplemented with inflation adjusted data, then supplementary information presenting and quantifying the effects of inflation upon its financial condition and results of operations is required to be included.

See SEC FRM 6700 for additional guidance.

.917 Where can a company find guidance related to the presentation of dollar equivalent or convenience translations?

See SEC FRM 6620.5.

If a convenience translation is provided then the rate at the most recent balance sheet date should be used unless that rate has changed materially, in which case a more current rate at the most recent date practicable is appropriate. The rate used should be prominently disclosed.

When convenience translation amounts are given, an explanatory note usually contains a statement such as the following:

"In this [document] certain (local currency) amounts have been translated into United States dollars at the rate of ____ to the dollar. Such translations should not be construed as representations that the (local currency) amounts represent, or have been or could be converted into, United States dollars at that or any other rate."

.918 Does a FPI need to amend previously issued financial statements if the company's local GAAP financial statements are price level adjusted for inflation?

If a company's local GAAP financial statements are price level adjusted for inflation, all financial information (including the financial statements) should be presented in equivalent purchasing power units of the reporting currency as of the date of the most recent balance sheet information in the filing. A company that incorporates by reference a prior annual report on Form 20-F need not amend the prior filing, but must file restated financial statements in the registration statement or under a cover of a Form 6-K that is incorporated by reference.

If the interim information is included in a registration statement solely to comply with the current information requirement of Item 8 of Form 20-F, and is not presented in or reconciled to U.S. GAAP, we understand that the SEC staff encourages but does not insist that prior periods be restated in units of equivalent purchasing power as of the most recent date. The SEC does expect companies to provide disclosure necessary to prevent the updated data from being misleading in relation to prior period financial information.

If the rate of inflation during the interim period is very low, such that the effect of restatement does not materially affect apparent trends and is clearly immaterial, we understand that the SEC staff has not insisted that prior period financial information be restated. If the information is not restated, the SEC staff would expect disclosure of the rate of inflation and the reason why restatement was not considered to be necessary.

See SEC FRM 6720.

.919 Should the financial statements of a significant acquired business (S-X 3-05) or a significant equity investee (S-X 3-09) be prepared using the same currency as the registrant?

No, not necessarily. Financial statements of an acquired businesses or an equity method investee may be prepared using the same reporting currency as the registrant's primary financial statements or the currency in which the acquiree or investee normally prepares its financial statements.

However, if the currency selected for the separate financial statements of acquirees or investees differs from that of the registrant, pro forma information related to an acquisition (S-X Article 11) and summarized financial data of an equity investee (S-X 4-08(g) for U.S. GAAP filers and IFRS 12 for IFRS filers) included in the footnotes of the registrant are presented using the reporting currency of the registrant.

.920 Are FPIs subject to the non-GAAP requirements of S-K 10(e)?

Yes. References to "GAAP" in the definition of non-GAAP financial measures refer to the principles under which the primary financial statements of the FPI are prepared. See Note in SEC FRM 8140.

FPIs are subject to S-K 10(e) requirements related to the use of non-GAAP financial measures in information "filed" with the SEC (e.g., in Form 20-F and in Securities Act registration statements). A non-GAAP measure that would otherwise be prohibited under S-K 10(e)(1)(ii) is permitted in a filing if the measure is:

1. Related to the GAAP used in the registrant's primary financial statements included in its filings with the SEC;
2. Required or expressly permitted by the standard-setter that is responsible for establishing the GAAP used in such financial statements; and
3. Included in the annual report prepared by the registrant for use in the jurisdiction in which it is domiciled, incorporated, or organized, or for distribution to its shareholders.

The financial measure is required to be presented outside of the financial statements unless the financial measure is required or expressly permitted by the standard setter that is responsible for establishing the GAAP used in such financial statements.

See SEC FRM 8140.

See SEC 6020 for additional guidance on non-GAAP financial measures.

.921 How is "expressly permitted" defined in the context of the use of non-GAAP financial measures under S-K 10(e)?

See Non-GAAP Financial Measures CDI 106.01.

.922 Is there a requirement to reconcile local GAAP interim financial information to U.S. GAAP when filed to satisfy the timeliness of financial statements pursuant to Item 8.A.5 of Form 20-F?

Yes. Interim financial statements prepared on a local GAAP basis and filed to meet the timeliness of financial information requirements of Item 8.A.5 of Form 20-F should be reconciled to U.S. GAAP pursuant to the same Item 17 or Item 18 requirements being followed in the audited annual financial statements. All qualitative disclosures relating to U.S. GAAP and Regulation S-X required for such interim local GAAP financial statements would be necessary for an Item 18 reconciliation. For example, the segment disclosures required by U.S. GAAP would be applicable.

.923 Does the information provided under S-X 13-01 by a parent company that prepares its financial statements on a comprehensive basis of accounting other than U.S. GAAP or IFRS-IASB need to be reconciled to U.S. GAAP?

There is no requirement in S-X 13-01 for a parent company that prepares its financial statements on a comprehensive basis of accounting other than U.S. GAAP or IFRS-IASB to reconcile such S-X 13-01 information to U.S. GAAP. However, in SEC Release No. 33-10762, *Financial Disclosures about Guarantors and Issuers of Guaranteed Securities and Affiliates Whose Securities Collateralize a Registrant's Securities* it is noted that although there is no reconciliation requirement, S-X 13-01(a)(6) and (7) require the parent company to disclose additional financial information about each guarantor if the information would be material for investors to evaluate the sufficiency of the guarantee, as well as sufficient information so as to make the financial and non-financial information presented not misleading.

.924 What are some of the distinctions between Item 17 and Item 18 reconciliations?

Financial statements included in FPI filings with the SEC must comply with either Item 17 or Item 18 of Form 20-F.

The distinction between Item 17 and Item 18 is premised on a classification of the requirements of U.S. GAAP and Regulation S-X into those that specify the methods of measuring the amounts shown on the face of the financial statements and those prescribing disclosures that explain, modify or supplement the accounting measurements.

Item 17 and Item 18 of Form 20-F both require the quantified reconciliation of the "measurement" differences between local and U.S. GAAP and a discussion of such differences.

Disclosures required by U.S. GAAP but not required under a local GAAP need not be furnished pursuant to Item 17.

Item 18 requires an issuer to provide all other qualitative disclosure information called for by U.S. GAAP and S-X not otherwise disclosed in the local GAAP accounts. SAB Topic 1.D provides guidance to clarify the distinction between Item 17 and Item 18.

Compliance with Item 18 of Form 20-F is required for all financial statements of the issuer in all Securities Act registration statements, Exchange Act registration statements on Form 20-F, and annual reports on Form 20-F (see General Instruction E.(c) to Form 20-F). Certain financial statement schedules are also applicable to foreign registrants. See Item 17(a) of Form 20-F. See SEC FRM 6410.2(a). Also see SEC 8100.305.

.925 Can a non-issuer's financial statements prepared to comply with S-X 3-05, S-X 3-09, S-X 3-14, and S-X Article 11 be reconciled pursuant to Item 17?

Yes. Item 17 compliance is permitted for non-issuer financial statements such as those pursuant to S-X 3-05, S-X 3-09 and S-X 3-14, as well as non-issuer target company financial statements included in Form S-4, Form F-4, and proxy statements.

Item 17 is permitted for pro forma information pursuant to S-X Article 11. See SEC FRM 6410.2(a) for circumstances when the reconciliation may reconcile to U.S. GAAP for only the two most recently completed fiscal years and any interim periods required in the registration statement.

.926 What are some examples of disclosures necessary for a reconciliation of local GAAP financial statements prepared pursuant to either Item 17 or Item 18 ?

The SEC staff has advised that they consider certain disclosures necessary for all financial statements filed with the SEC under both Item 17 and Item 18.

Local GAAP must comprise a "comprehensive body" of accounting principles, and disclosure of the information in Items 17(c)(1) and 17(c)(2) is required. This includes:

- Disclosure in the auditor's report and financial statement footnotes of the body of accounting principles used in the preparation of the financial statements.
- A statement of cash flows covering all periods for which an income statement is required.
- Discussion in the footnotes of the material variations between such principles and U.S. GAAP.
- A tabular reconciliation, in substantially the same format as shown in Item 17 of Form 20-F, of the differences affecting net income, for each year and any interim periods presented.
- Differences in accounting principles which affect the balance sheet captions. When presented in a footnote, this generally takes the form of a reconciliation of the shareholders' equity section. The reconciliation of shareholders' equity should be in sufficient detail to allow an investor to determine the differences between a balance sheet prepared using local GAAP and one prepared using U.S. GAAP. See note to SEC FRM 6510.2.
- Basic and fully diluted earnings per share computed according to U.S. GAAP, if required to be presented by U.S. GAAP guidance for earnings per share, if materially different from local GAAP. See SEC FRM 6510.5.
- For issuers in hyperinflationary economies (cumulative actual inflation over three years exceeding 100 percent or the expectation thereof occurring in the current year), the financial statements must either include the effects of general price-level changes on a comprehensive basis or the data required by S-X 3-20 must be provided.

Disclosure of the accounting principles being used should include the consolidation principles being applied. The SEC staff has noted instances where majority-owned subsidiaries were not consolidated, yet disclosure for the reasons for non-consolidation was not made. The SEC staff has objected to the use of boilerplate disclosures regarding an enterprise's consolidation policy when majority-owned subsidiaries are appropriately excluded from consolidation. The disclosure should allow an investor to clearly understand why the registrant does not control the subsidiary.

The SEC staff also believes that a comparable level of disclosure should be provided when a registrant appropriately consolidates a less-than majority-owned subsidiary. The SEC staff believes the disclosure in this area is necessary to meet the requirement for an information content that is substantially similar to U.S. GAAP.

Certain differences between local GAAP and U.S. GAAP are not required to be included in the U.S. GAAP reconciliation as described in Item 18 of Form 20-F. These include: (1) the effects of inflation included in the local GAAP financial statements pursuant to a comprehensive basis of accounting for inflation; (2) the effects of translation of financial statements pursuant to local GAAP that translates amounts in financial statements stated in a currency of a hyperinflationary economy into the issuer's reporting currency in accordance with IAS 21 using the historical cost/constant currency approach; and (3) the effects of differences in classification or display that result from using proportionate consolidation for investments in

joint ventures pursuant to a local GAAP (however, summarized balance sheet, income statement and cash flow information relating to the joint venture is required).

Where the differences in accounting principles are pervasive and significantly affect the financial statements, the SEC may require the foreign issuer to present a condensed or full set of financial statements under U.S. GAAP. See SEC FRM 6520.2.

Notwithstanding the absence of a requirement for certain disclosures within the body of the financial statements, some matters routinely disclosed pursuant to U.S. GAAP may rise to a level of materiality such that their disclosure is required by Item 5, "Operating and Financial Review and Prospects," of Form 20-F. See SAB Topic 1.D for matters that may warrant discussion under Item 5.

.927 Does pro forma financial information prepared under local GAAP need to be reconciled with U.S. GAAP?

A FPI reporting under local GAAP reconciled to U.S. GAAP must reconcile its S-X Article 11 pro forma financial information to U.S. GAAP. The SEC staff generally has not objected if an issuer, that otherwise would present its pro forma financial information based on local GAAP with a reconciliation to U.S. GAAP, elects to present the pro forma financial information directly in U.S. GAAP. See SEC FRM 6360.2 and SEC FRM 6410.11.

There are some inherent issues in the application of the current rules. For example, a registrant whose annual financial statements comply with IFRS-IASB is required to measure significance on such IFRS basis. If applicable, the financial statements of an acquired or to be acquired foreign business (as defined in S-X 1-02(I)) are required to be provided under S-X 3-05, and such financial statements could be presented on any of the following basis: (a) US GAAP; (b) local GAAP (reconciled to US GAAP or IFRS-IASB if 30 percent threshold is met); or (c) IFRS-IASB, without reconciliation to US GAAP. Financial statements presented under option (a) are not required to be reconciled to IFRS-IASB. Financial statements under option (b) generally are not required to include a reconciliation if the 30 percent threshold of significance is not met, or could be reconciled to US GAAP. However, in each of these situations, reconciliation to IFRS-IASB would need to be done to compute the related significance thresholds in applying such tests. Furthermore, IFRS-IASB information for the acquired or to be acquired business is needed for the registrant to present S-X Article 11 pro forma information.

In some cases, it could be necessary for the acquiree financial statements to include an audited reconciliation to IFRS-IASB to enable management's inclusion of such information in the S-X Article 11 pro forma information.

If the prior interim period is voluntarily provided on a pro forma local GAAP basis other than IFRS-IASB, such pro forma financial information is required to be reconciled to U.S. GAAP.

- .1 General
- .9 Frequently asked questions

.1 GENERAL

.11 What is Form 6-K and where can I find it?

Form 6-K is an Exchange Act reporting form used by foreign private issuers (FPIs) to report material information that an issuer:

- makes or is required to make public pursuant to the law of the jurisdiction of its domicile or in which it is incorporated or organized,
- files or is required to file with a stock exchange on which its securities are traded and which was made public by that exchange, or
- distributes or is required to distribute to its security holders.

The text of Form 6-K is available on the SEC website (<https://www.sec.gov/files/form6-k.pdf>).

.12 What are examples of information required to be disclosed in Form 6-K?

Information required to be disclosed is that which is material concerning: changes in business; changes in management or control; acquisitions or dispositions of assets; bankruptcy or receivership; changes in registrant's certifying accountants; the financial condition and results of operations; material legal proceedings; changes in securities or in the security for registered securities; defaults upon senior securities; material increases or decreases in the amount outstanding of securities or indebtedness; the results of the submission of matters to a vote of security holders; transactions with directors, officers or principal security holders; the granting of options or payment of other compensation to directors or officers; material cybersecurity incident; and any other information which the registrant deems of material importance to security holders. See General Instruction B to Form 6-K.

.13 Is a Form 6-K considered “furnished” or “filed”, and what is the difference?

The Exchange Act requires FPIs to “furnish” reports on Form 6-K. Information in Form 6-K is considered “furnished” and not deemed “filed” unless the registrant specifically incorporates it by reference into a filing made under the Securities Act or the Exchange Act, such as into a Form F-1, Form F-3 or Form 20-F.

The difference between the concepts of “furnished” and “filed” is a legal matter that registrants should consider discussing with their legal counsel. As a general matter, we understand that information that is furnished and not deemed filed is not subject to a right of action under Section 18 of the Exchange Act. Additionally, information that is furnished in a Form 6-K is not subject to some of the elements of S-K 10 (e.g., relating to non-GAAP measures), whereas filed information would generally be subject to those requirements.

.9 FREQUENTLY ASKED QUESTIONS

.901 Does an FPI need to report a change in auditors in an Annual Report on Form 20-F if a Form 6-K is filed?

Each of the U.S. exchanges requires that notice be given to the exchange if a listed company changes independent accountants. Furnishing such information on Form 6-K does not eliminate the requirement to

subsequently disclose the change in the registrant's certifying accountant pursuant to the requirements of Item 16F of Form 20-F. See SEC 8100.51 for Item 16F related guidance.

[Editor's note: The disclosures required by Item 16F of Form 20-F are required in annual reports on Form 20-F, as well as in registration statements filed on Form 20-F, Form F-1, Form F-3, and Form F-4.]

See SEC 6150 for additional guidance on change in auditors.

See Topic IV in the Highlights of the May 2023 CAQ International Practices Task Force meeting.

.902 Are there circumstances where FPIs are exempted from Regulation G requirements for Non-GAAP Financial Measures?

FPIs are exempt from Regulation G if three conditions are met:

1. The securities of the FPI are listed or quoted on a securities exchange or inter-dealer quotation system outside the U.S.;
2. The non-GAAP financial measure is not derived from or based on a measure calculated and presented in accordance with U.S. GAAP; and
3. The disclosure is made by, or on behalf of, the FPI outside the U.S., or is included in a written communication that is released by, or on behalf of, the FPI outside the U.S.

[Editor's note: Information "furnished" under Regulation G that is subsequently included or incorporated by reference into an annual report on Form 20-F or a registration statement becomes subject to the requirements of S-K 10(e).]

See SEC 6020.22 for a discussion of the Regulation G presentation and disclosure model.

See SEC FRM 8140 for additional guidance.

.903 Is a FPI required to file information with respect to significant business acquisitions under the Exchange Act?

No. Unlike a U.S. domestic registrant, a FPI is not required to file information with respect to significant business acquisitions under the Exchange Act, unless such information is (a) required to be disclosed in the local jurisdiction; (b) required to be disclosed by an exchange on which the issue is traded; or (c) otherwise voluntarily disclosed to shareholders. If so, such information should be furnished to the SEC on Form 6-K.

- .1 General
- .2 Financial statement requirements
- .7 Accountants' consent
- .8 Experts language
- .9 Frequently asked questions

.1 GENERAL

.11 What is Form F-1 and where can I find it?

Form F-1 is the basic registration form under the Securities Act for foreign private issuers (FPIs). It is generally used when a FPI undertakes an initial public offering of its common stock under the Securities Act and in situations where no other Securities Act form is prescribed.

The disclosure requirements of Form F-1 are set forth under the various items within the body of the form and generally cross-reference to Regulation S-X, Regulation S-K and Form 20-F for the specific requirements.

The text of Form F-1 is available on the SEC's website (<https://www.sec.gov/files/formf-1.pdf>).

Other sources that issuers should consider when preparing a Form F-1 include the General Instructions to Form F-1 and Regulation C, which contains the general requirements for preparing and filing a registration statement under the Securities Act. Additionally, the SEC staff has published extensive interpretive guidance including various Compliance & Disclosure Interpretations and Industry Guides.

.12 Will the SEC staff review a Form F-1 on a non-public basis?

Yes, under certain circumstances. Section 6(e) of the Securities Act provides that certain registration statements prepared by Emerging Growth Companies (EGCs) (as defined in Securities Act Rule 405) may be submitted to the SEC for non-public review.

The SEC staff also permits first-time foreign registrants, upon request, to submit their initial Securities Act or Exchange Act registration statements for staff review on a non-public basis. Under this policy, the SEC staff reviews initial registration statements of foreign issuers that are submitted on a non-public basis only where the registrant is:

- a foreign government registering its debt securities;
- a FPI that is listed or is concurrently listing its securities on a non-US securities exchange;
- a FPI that is being privatized by a foreign government; or
- a FPI that can demonstrate that the public filing of an initial registration statement would conflict with the law of an applicable jurisdiction.

Shell companies, blank check companies, and issuers with no, or substantially no, business operations are not permitted to use the nonpublic submission process.

Additionally, the SEC's Division of Corporation Finance permits all issuers (i.e., not just EGCs) to submit certain registration statements for non-public review. Registration statements submitted for non-public review are referred to as draft registration statements.

The non-public review process is intended to facilitate the formation of capital by allowing companies to work through SEC comments before their registration statement is publicly available.

.121 Where can I find additional information relating to draft registrations and non-public SEC staff review?

The announcement of the nonpublic submission process for FPIs can be found at <http://www.sec.gov/divisions/corpfin/internatl/nonpublicsubmissions.htm>.

Foreign issuers would submit their draft registration statements in the same manner as EGCs, as described in <http://www.sec.gov/divisions/corpfin/cfannouncements/drsfilingprocedures101512.htm>.

The announcement of the Division of Corporation Finance policy for non-public review can be found at <http://www.sec.gov/corpfin/announcement/draft-registration-statement-processing-procedures-expanded>.

The SEC staff has published FAQs on voluntary submission of draft registration statements available at <http://www.sec.gov/corpfin/voluntary-submission-draft-registration-statements-faqs>.

The SEC staff has published Securities Act Forms CDIs 101.04 and 101.05.

SEC 2170 contains a discussion of requirements applicable to EGCs.

.122 What registration statements may be submitted on a draft basis for non-public SEC staff review?

See SEC 2110.121.

.123 Will draft registration statements and associated SEC staff comments and issuer responses remain non-public?

See SEC 2110.122.

.13 Does Form F-1 permit issuers to incorporate information by reference?

Yes, under certain circumstances. Form F-1 allows registrants that meet the requirements in General Instruction VI to provide the information required by Items 3 and 4 of Form F-1 through incorporation by reference of previously filed Exchange Act filings (e.g., Form 20-F). This mechanism is sometimes referred to as “backward incorporation” because the documents that are incorporated by reference have been previously filed. If the registrant elects to incorporate information by reference, Item 4A of Form F-1 requires the registrant to describe all material changes in the registrant's affairs that have occurred since the end of the latest fiscal year and have not been described in a Form 10-Q, Form 8-K or Form 6-K filed under the Exchange Act and incorporated by reference.

[Editor's note: When a Form 20-F is incorporated by reference into a Form F-1, the SEC requires the financial statements to be current as of both the filing and effective dates of the registration statement. Therefore, separate financial statements may be required in a Form F-1 prospectus if the financial statements incorporated by reference do not reflect certain events subsequent to the date of those financial statements. SEC 8130.23 includes a discussion of the types of subsequent events that may require revised financial statements.]

.2 FINANCIAL STATEMENT REQUIREMENTS

Financial statement requirements of the registrant are addressed in Item 8 of Form 20-F.

In addition to consolidated financial statements of the issuer, Regulation S-X may require separate financial information in Form F-1 for one or more of the following situations:

1. The registrant (parent company) pursuant to S-X 5-04(c), S-X 7-05(c), and S-X 12-04 (see SEC 4510);
2. Unconsolidated majority-owned subsidiaries pursuant to S-X 3-09 (see SEC 4520);
3. Fifty percent or less-owned persons accounted for by the equity method pursuant to S-X 3-09 (see SEC 4520);
4. Guarantors of registered securities pursuant to S-X 3-10 and S-X 13-01 (see SEC 4530);
5. Affiliates whose securities collateralize an issue of registered debt pursuant to S-X 3-16 or S-X 13-02 (see SEC 4540); and
6. Businesses acquired or to be acquired and real estate operations acquired or to be acquired pursuant to S-X 3-05 or S-X 3-14 (see SEC 4550, SEC 4555 and SAB Topic 1-J).

See SEC 8100.2 for discussion of SEC financial statement requirements in a registration statement. See SEC 8100.23 for information on the age of financial statement requirements.

[Editor's note: Special accommodations for EGCs which allow them to provide only two years of financial statements may apply to the separate financial information described above (see SEC FRM 10220.5).]

[Editor's note: Companies contemplating an IPO and auditors should evaluate the specific independence matters related to performing an audit in accordance with SEC independence requirements.]

.22 Will the SEC staff permit a non-EGC to omit certain financial statements otherwise required by Form F-1 from a draft registration statement?

Yes. See SEC 2110.22.

.23 May an EGC preparing an initial public offering of its equity securities omit certain financial statements otherwise required by Form F-1 from a draft registration statement or from a publicly filed registration statement?

Yes. See SEC 2110.23.

.24 Do the financial statements of the registrant included in a Form F-1 need to comply with the accounting guidance applicable to public companies?

Yes. The required financial statements and related footnotes for a private company filing an initial registration statement in connection with an IPO should be reviewed for compliance with relevant GAAP requirements and accounting standards that apply specifically to public companies (e.g., earnings per share). In particular, the company's financial statements included in the registration statement generally must comply with the accounting standards (including transition provisions) that are applicable to SEC registrants as if the company had always been an SEC registrant, subject to transition guidance in the applicable accounting basis used for preparing the financial statements.

.25 Does a company need to include interim financial statements in a Form F-1?

Maybe. Depending upon the date of filing, the registrant may also be required to provide unaudited interim financial statements. See SEC 8100.23 for a detailed discussion regarding age of financial statements for

FPIs and foreign businesses in Securities Act filings. See SEC 8100.24 and .243 for discussion of requirements related to interim financial statement and more current published financial information.

.7 ACCOUNTANTS' CONSENT

.71 Where can I find information relating to the SEC's requirements for accountants' consents?

See SEC 2400 for a discussion of accountants' consents.

.8 EXPERTS LANGUAGE

.81 Where can I find information relating to experts language?

See SEC 2300 for a discussion of experts language.

.9 FREQUENTLY ASKED QUESTIONS

.901 Does S-X 3-06 permit a company preparing a Form F-1 in connection with its initial public offering of common stock to provide its audited financial statements for a nine-month period in lieu of its financial statements for a full a fiscal year even if there is no change in fiscal year-end?

No. See SEC 2110.903.

.902 Is a registrant required to provide additional disclosures and pro forma information when the offering proceeds may or will be used to finance an acquisition?

Reference should be made to Item 3.C of Form 20-F if Form F-1 is used to raise funds that may or will be used to finance an acquisition of a business.

SEC 4550 and SEC 4560 contain a discussion of the requirements under S-X 3-05 and S-X Article 11 to include historical financial statements and pro forma financial information for the business to be acquired.

.903 Is a registrant required to provide pro forma earnings per share or pro forma financial information when the offering proceeds are used to retire debt or preferred stock?

See SEC 2110.905.

.904 Is a registrant required to provide pro forma financial information when distributions at or prior to closing of an IPO are expected?

See SEC 2110.906.

.905 Is a registrant required to provide pro forma financial information when there is a change in capitalization at or prior to closing?

See SEC 2110.907 and Item 3.B of Form 20-F.

.906 Is incorporating by reference or cross-referencing to information outside of the financial statements permitted in financial statements?

See SEC 2110.908.

See General Instruction VI of Form F-1 and Securities Act Rule 411(a).

.907 Does Form F-1 require disclosures of changes in a registrant's certifying accountants?

Yes. Item 4(d) of Form F-1 requires disclosure of changes in a registrant's certifying accountants in accordance with the information requirements of Item 16F of Form 20-F. See related guidance on Item 16F disclosures at SEC 8100.51.

See SEC 6150 for additional disclosure guidance related to changes in auditors.

.908 Does Form F-1 specifically require disclosures of a selected financial data table?

No. In SEC Release No. 33-10890, *Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information*, the SEC eliminated the requirement for Selected Financial Data which was previously set forth in Item 3.A of Form 20-F. See SEC 2110.910.

- .1 General
- .2 Financial statement requirements
- .7 Accountants' consent
- .8 Experts language
- .9 Frequently asked questions

.1 GENERAL

.11 What is Form F-3 and where can I find it?

Form F-3 is a short-form Securities Act registration statement that was primarily designed for foreign private issuer (FPI) registrants that have been in the Exchange Act reporting system for at least one year and have timely filed all reports required to be filed during the 12 calendar months, and any portion of a month, immediately preceding the filing of the registration statement.

A Form F-3 registration statement can be used to register the sale of many different types of securities, including common and preferred stock, options, warrants, debt (convertible and non-convertible) and debt guarantees. Form F-3 can be used to register primary offerings (i.e., when an issuer sells its own securities) and secondary offerings (i.e., the resale of securities by a selling security holder that is not the issuer).

When preparing a registration statement on Form F-3, issuers should consider the general instructions to the form and the general rules and regulations under the Securities Act, including Regulation C, which contains the general requirements for preparing and filing a registration statement under the Securities Act.

The text of Form F-3 is available on the SEC's website (<https://www.sec.gov/files/formf-3.pdf>).

.12 Where can I find the eligibility requirements for using Form F-3?

The eligibility requirements for use of Form F-3 are set forth in General Instruction I of Form F-3. To be eligible to use Form F-3, an issuer must meet the form's "Registrant Requirements" (included in General Instruction I.A) and the transaction must meet one of the form's "Transaction Requirements" (included in General Instruction I.B).

Majority-owned subsidiaries should refer to General Instruction I.A.5.

.13 What is a shelf registration statement?

See SEC 2120.13 for additional discussion.

.131 What is an automatic shelf registration statement?

The specific requirements relating to automatic shelf registration statements are set forth in General Instruction I.C to Form F-3.

See SEC 2120.131 for additional discussion.

.2 FINANCIAL STATEMENT REQUIREMENTS

.21 Where can I find the financial statement requirements applicable to Form F-3?

Form F-3 makes use of the integrated approach under the Securities Act and Exchange Act disclosure systems, in that it principally relies upon incorporation by reference of financial statements and other information previously filed with the SEC.

Item 6(a) of Form F-3 requires incorporation by reference of the latest Form 20-F, Form 40-F, Form 10-K or Form 10. Any report on Form 10-Q or Form 8-K filed since the date of filing of the annual report incorporated by reference must also be incorporated by reference.

Item 6(b) of Form F-3 requires the prospectus to state that all subsequent annual reports filed on Form 20-F, Form 40-F or Form 10-K, and all subsequent filings on Form 10-Q and Form 8-K filed pursuant to the Exchange Act prior to the termination of the offering, shall be deemed to be incorporated by reference into the prospectus.

The registrant may incorporate by reference any Form 6-K that contains information meeting the requirements of Form F-3. If the registrant intends to incorporate future Forms 6-K subsequently submitted to the SEC then the prospectus should state that the registrant may incorporate such forms by identifying in the Form 6-K that it is being incorporated by reference into the Form F-3. See Item 6(c) of Form F-3.

Rules 411, 412, and 439 of Regulation C discuss various aspects of incorporation by reference.

The principal mechanism for providing financial statements in Form F-3 at the time of filing and effectiveness is through incorporation by reference of the financial statements included in previously filed Exchange Act reports. There are, however, certain instances described in Item 5(b) of Form F-3 in which the previously filed financial statements will need to be updated prior to filing a Form F-3 and/or that new or more current financial information may be required to be included or incorporated by reference into the Form F-3. See SEC 8130.23 regarding the requirements of Item 5(b)(1) of Form F-3. See SEC 8130.22 regarding the SEC's age of financial statements requirements.

.22 Given that Form F-3 generally relies on incorporation by reference of previously filed Exchange Act reports for its financial statement requirements, does an issuer still need to consider the SEC's age of financial statements requirements prior to filing a Form F-3?

Yes. Item 5 (b)(2) of Form F-3 requires financial statements to comply with the age of financial statement requirements of Item 8.A of Form 20-F. See SEC 8100.23 regarding the SEC's age of financial statement requirements.

.23 Are there circumstances when financial statements included in previously filed Exchange Act reports must be updated prior to filing a new or amended Form F-3?

Yes. The SEC requires financial statements to be current as of the filing date and effectiveness date. Therefore, revised financial statements and/or other financial information may be required to be included or incorporated by reference in a Form F-3, such as when financial statements included in the most recent Form 20-F do not reflect certain material events subsequent to the date of those financial statements.

Item 5(b)(1) of Form F-3 provides examples of material changes that would require financial statements to be provided or for the financial statements included in previously filed Exchange Act reports to be updated. See SEC 2120.23 for additional guidance.

The IPTF has also previously discussed the restatement of financial statements for retrospective accounting changes. See Topic 6.(c) in the Highlights of the March 2005 IPTF meeting, Topic II.D. in the Highlights of the November 2009 IPTF meeting and Topic III in the Highlights of the May 2021 IPTF meeting.

.231 Are there circumstances when interim financial statements must be prepared prior to filing a new or amended Form F-3?

Yes. Item 6 of Form F-3 indicates that if the financial statements included in the Form F-3 are not sufficiently current to comply with the requirements of Item 8.A of Form 20-F then financial statements necessary to comply with that rule shall be presented (i) directly in the prospectus, (ii) through incorporation by reference of a Form 6-K identified in the Form F-3 as containing such financial statements, or (iii) through incorporation by reference of an amended Form 20-F, Form 40-F or Form 10-K, in which case the Form F-3 shall disclose that the Form 20-F, Form 40-F or Form 10-K has been so amended. See further discussion of age of financial statement requirements at SEC 8100.23 and discussion of interim financial statements at SEC 8100.24.

See SEC 8100.243 for discussion of considerations related to published information more current than that provided to meet the required age of financial statement requirements, including considerations related to retrospective adjustments at SEC 8100.25.

.232 How are revised financial statements typically made a part of the Form F-3?

Most companies include the revised financial statements and other financial information in a Form 6-K that is then incorporated by reference into the Form F-3. Companies should consult with their legal counsel about the proper mechanism to place revised financial statements and other financial information on file.

[Editor's note: The previously filed Form 20-F generally should not be amended unless that Form 20-F is otherwise being amended to correct a material error in previously issued financial statements. See SEC 3130.916 and SEC FRM 13110.6. However, a registrant should consider if its MD&A needs to be revised in conjunction with the filing if it contains revised financial statements. The MD&A is usually revised when annual audited financial statements are updated for a change in segments. See SEC FRM 13310.1.]

.24 Are there any incremental financial statement requirements associated with a Form F-3 which registers guarantees or collateralized securities?

If the Form F-3 is registering securities (usually debt) that are guaranteed by one or more subsidiaries or a parent company, the guaranty is generally considered a security under US securities laws and, therefore, is also subject to the SEC's registration and reporting requirements. As a result, the Form F-3 may need to include or incorporate by reference additional information that was not previously required. See SEC 4530 and SEC 8100.301.

If the Form F-3 is registering securities that are collateralized by the securities of one or more of a registrant's affiliates (e.g., the stock of a consolidated subsidiary), then the Form F-3 may be required to include or incorporate by reference information that was not previously required. See SEC 4540 and SEC 8100.301.

.25 What financial statement considerations apply at the time of a takedown from an already effective Form F-3 and how are those different from the considerations that applied when the F-3 was originally declared effective?

The considerations outlined in SEC 8130.23 are in the context of the time of filing and effectiveness of a registration statement on Form F-3. There are different considerations associated with a shelf takedown.

Most Form F-3 registration statements include the undertaking specified in S-K 512(a)(1)(ii). Accordingly, when preparing to take securities off the shelf by means of a prospectus supplement, the registrant will consider whether there have been any facts or events arising after the effective date of the registration statement (or most recent post-effective amendment thereof) which, individually or in the aggregate, represent a "fundamental change" in the information set forth in the registration statement. If there have been one or more fundamental changes, the registrant would need to consider whether a post-effective

amendment must be filed prior to the takedown. The determination of what constitutes a "fundamental change" is a legal matter.

Generally, registrants and their legal counsel have concluded that discontinued operations, segment changes, and changes in accounting principle do not represent "fundamental changes" to the information set forth in the registration statement. Accordingly, those registrants generally do not retrospectively adjust their prior period annual financial statements in connection with a takedown, even if they would have been required to do so in connection with a new or amended registration statement (e.g., because the effects of changes on the previously issued financial statements are material).

The SEC staff has indicated that the S-K 512(a)(4) requirement for keeping financial statements current applies to all required financial statements included in Form F-3, including those of the registrant and those provided under S-X 3-05, 3-09, 3-10 and 3-14, as well as disclosures required by S-X 13-01 and 13-02. See SEC FRM 6230.2. See SEC 8100.23 regarding the SEC's age of financial statement requirements.

.251 What are the considerations for S-X 3-05 financial statements at the time of a takedown from an already effective Form F-3?

S-K 512(a)(4) requires the company to keep current those financial statements that it originally filed upon effectiveness of the registration statement and does not create an obligation to file financial statements for the first time. For example, financial statements for a significant acquisition that is consummated subsequent to the effective date of the F-3 registration statement, but before a take-down, would generally not be required to be provided under S-K 512(a)(4) if such financial statements were not previously required to be provided under S-X 3-05 criteria at the effective date of the registration statement. Such financial statements would be required to be provided, however, if such event was considered a "fundamental change" under S-K 512(a)(1). The determination of what constitutes a "fundamental change" for such purposes should be made by the company and their legal counsel.

A company would be required to keep current any separate S-X 3-05 financial statements that it originally filed upon effectiveness of the registration statement, before completing a take-down. The age of annual audited financial statements of an acquired foreign business should follow the 15-month rule of Form 20-F Item 8.A. Accordingly, if a take-down is being done later than three months after the acquiree's year-end, the registrant would be required to provide audited financial statements of the related foreign business for the most recent fiscal year. As a result, a registrant may be required to file annual audited financial statements of an acquired foreign business (as defined in S-X 1-02(l)) sooner than that business would be required to file annual audited financial statements if it were a FPI filing Form 20-F (four months after year-end). See SEC FRM 6220.4 and Topic 6.(b) in the Highlights of the September 2004 IPTF meeting.

S-K 512 applied to a take-down from an effective shelf registration statement by domestic registrants only requires updating of information that constitute a "fundamental change"; whereas for FPIs the guidance under S-K 512(a)(4) requires the FPI to keep current those financial statements that it originally filed upon effectiveness of the registration statement and does not create an obligation to file financial statements for the first time. In connection with a take-down this can result in more stringent reporting requirements to keep current S-X 3-05 financial statements for a FPI than for a domestic registrant. For example, assume the following scenario:

- A domestic registrant and a FPI each acquire a foreign business on July 3, 2023 – each acquisition was significant above the 30 percent level.
- The domestic registrant has filed a Form S-3 and the FPI has filed a Form F-3, each of which are declared effective on September 26, 2023. The audited financial statements of the acquired foreign businesses for the year ended December 31, 2022 are incorporated by reference into both registration statements. No interim financial statements are required.
- Both registrants prepare prospectus supplements for a takedown off the shelf on December 1, 2023. The domestic registrant does not need to provide June 30, 2023 financial statements for the acquiree unless this information represents a "fundamental change." The FPI needs to provide June 30, 2023 financial statements for the acquiree under S-K 512(a)(4).

The SEC staff has indicated that they may consider requests for relief in circumstances resulting in the need for FPIs to provide financial statements of other entities more current than those that would be provided by a similarly-situated domestic registrant. See SEC FRM 6230.2.

.252 What are the considerations for S-X 3-09 financial statements at the time of a takedown from an already effective Form F-3?

The Regulation S-K 512(a)(4) requirement of keeping financial statements current applies to all financial statements included in a registration statement, including those related to significant equity investees that are required to be provided under S-X 3-09. However, the SEC staff has indicated that FPIs need not update a shelf registration statement with more current S-X 3-09 financial statements than would be required by a similarly situated domestic registrant, which would have six months after the end of the equity investee's fiscal year to file such financial statements if the equity investee is a foreign business. See Topic 4 in the Highlights of the November 2003 IPTF meeting. For a calendar year registrant, this means that the registrant could take off the shelf for the period of April 1 to June 30 without providing current financial statements under S-X 3-09 of a foreign business, even though the registrant's audited annual financial statements would have to be provided after March 31. See SEC FRM 2405.10.

.253 What are the considerations for S-X 3-10 and 13-01 disclosures at the time of a takedown from an already effective Form F-3?

The SEC staff has indicated that the S-K 512(a)(4) requirement for keeping financial statements current applies to all required financial statements included in Form F-3, including those provided under 3-10 as well as disclosures required by S-X 13-01. See SEC FRM 6230.2. Also see Topic VI in the Highlights of the November 2020 meeting of the IPTF for discussion of updating disclosures required by S-X 13-01.

.7 ACCOUNTANTS' CONSENT

.71 Where can I find information relating to the SEC's requirements for accountants' consents?

See SEC 2400 for a discussion of accountants' consents.

.8 EXPERTS LANGUAGE

.81 Where can I find information relating to experts language?

See SEC 2300 for a discussion of experts language.

.9 FREQUENTLY ASKED QUESTIONS

.901 Is an accountants' consent required in a prospectus supplement?

Generally, no. See SEC 2400.41.

.902 Does Form F-3 require disclosures of changes in a registrant's certifying accountants?

Yes. Instruction 2 to Item 5(a) of Form F-3 provides that changes in, and disagreements with, a registrant's accountant is considered a material change pursuant to Item 5(a). Compliance with Item 16F of Form 20-F is required as of the date of the registration statement. Accordingly, any changes in accountant that occurred subsequent to the filing of the registrant's annual report on Form 20-F, but prior to the filing of the

registration statement, is required to be provided in (or incorporated by reference to) the registration statement prior to effectiveness in accordance with the information requirements of Item 16F of Form 20-F. See related guidance on Item 16F disclosures at SEC 8100.51.

See SEC 6150 for additional guidance on changes in auditors.

.903 Where can I find guidance on the required pro forma financial information requirements when the offering proceeds are used to (i) finance an acquisition, or (ii) retire debt or preferred stock?

See SEC 2110.904 and .905.

.904 How does the use of Form 12b-25 (Notification of Late Filing) impact an issuer's eligibility to use Form F-3?

See SEC 3145.14 for discussion of eligibility when a registrant has filed a Form 12b-25.

.905 Is Form SD (Specialized Disclosure) automatically incorporated by reference into Form F-3?

No. See General Instruction B.4. of Form SD.

.906 Is incorporating by reference or cross-referencing to information outside of the financial statements permitted in financial statements?

Generally, no. We understand that disclosure in the text of the Form F-3 does not eliminate the need for similar disclosure, when required by US GAAP or International Financial Reporting Standards as issued by the International Accounting Standards Board (IFRS as issued by the IASB), in the notes to the financial statements. In any financial statements, incorporating by reference or cross-referencing to information outside of the financial statements is not permitted unless otherwise specifically permitted or required by SEC rules, US GAAP or IFRS as issued by the IASB.

We understand that the non-financial statement portions of the Form F-3 may contain cross-references to the financial statements.

See Securities Act Rule 411(a).

.907 Can an issuer with an effective automatic shelf registration statement continue to use that registration statement if it does not meet the definition of a well-known seasoned issuer at the time the issuer files its Form 20-F?

See SEC 2120.906.

.908 Does the fact that an automatic shelf registration statement becomes effective immediately upon filing alter an auditor's responsibilities under PCAOB AS 4101?

No. Auditors must still perform their responsibilities under PCAOB AS 4101.

- .1 General
- .2 Information with respect to the registrant
- .3 Information with respect to the company being acquired
- .4 Financial statement requirements
- .5 Pro forma financial information
- .6 Roll up transactions
- .7 Accountants' consent
- .8 Experts language
- .9 Frequently asked questions

.1 GENERAL

.11 What is Form F-4 and where I can find it?

Form F-4 is a Securities Act form used by foreign private issuers ("FPIs") to register securities in connection with business combination transactions and exchange offers. See General Instruction A of Form F-4 for additional details regarding the types of transactions which may be registered using Form F-4.

[Editor's note: See SEC 7050 for information relating to reverse mergers.]

The disclosure requirements of Form F-4 are set forth in the body of Form F-4, which is available on the SEC website (<https://www.sec.gov/files/formf-4.pdf>). Many of the disclosures called for by Form F-4 cross-reference to Regulations S-X and S-K, and Form 20-F for specific requirements. Other sources of guidance that issuers should consider when preparing a Form F-4 include the General Instructions to Form F-4 and Regulation C, which contain the general requirements for preparing and filing a registration statement under the Securities Act.

.12 Does Form F-4 permit the issuer to provide information using the incorporation by reference method?

Yes, in certain circumstances. Form F-4 was designed to make full use of the SEC's integrated disclosure system. The manner of presentation is dependent on whether the registrant and/or target company meet specified eligibility criteria for using Form F-3 (see General Instructions B and C to Form F-4). For registrants that meet these qualifications, specific information that had previously been included in Exchange Act reports may be incorporated by reference and need not be included in the prospectus. Registrants that do not satisfy these criteria must present all company information in the prospectus.

.13 Will the SEC staff review Form F-4 on a non-public basis?

Yes, in certain circumstances. FPIs may be eligible to submit a draft registration statement on Form F-4. Companies should consider discussing this situation with their legal counsel before submitting a draft registration statement to SEC staff for review.

See SEC 8110.12.

.2 INFORMATION WITH RESPECT TO THE REGISTRANT

.21 Where can I find the Form F-4 disclosure requirements related to the registrant?

The Form F-4 disclosure requirements (including the financial statement requirements) relating to the registrant are addressed in General Instruction B of Form F-4. If the registrant "meets the requirements for

use of Form F-3", it may provide the information required by Items 10 and 11, Items 12 and 13, or Item 14 of Form F-4.

If the registrant does not meet the requirements for use of Form F-3, it must provide the information required by Item 14 of Form F-4.

Item 10(a) of Form F-4 requires disclosure in the prospectus of any material changes in the registrant's affairs that have occurred since the end of the latest fiscal year for which audited financial statements are incorporated by reference in accordance with Item 11 and that have not been described in a report on Form 6-K, Form 10-Q or Form 8-K filed under the Exchange Act. See SEC 8105.13 for discussion of whether a Form 6-K is considered "furnished" or "filed".

Some subsequent events may be of such a nature that they must be disclosed in the financial statements to keep the financial statements from being misleading. See ASC 855-10-50 and PCAOB AS 2801.

.3 INFORMATION WITH RESPECT TO THE COMPANY BEING ACQUIRED

.31 Where can I find the Form F-4 disclosure requirements related to the company being acquired?

The Form F-4 disclosure requirements (including the financial statement requirements) relating to the company being acquired are addressed in General Instruction C of Form F-4. If the company being acquired "meets the requirements for use of Form F-3", its information may be provided in accordance with Item 15, Item 16, or Item 17 of Form F-4.

[Editor's note: See the discussion in SEC 8135.41 regarding material changes and the potential need to revise financial statements for subsequent events.]

If the company being acquired does not meet the requirements for use of Form F-3, its information must be provided in accordance with Item 17.

[Editor's note: For foreign reporting companies being acquired, the information requirements are identical to those of reporting registrants discussed above, except that the financial statements of the company being acquired need only comply with the reconciliation requirements of Item 17 of Form 20-F. However, when a U.S. company is being acquired, Form S-1 or Form S-3 information would be substituted.]

4. FINANCIAL STATEMENT REQUIREMENTS

.41 Where can I find the financial statement requirements applicable to the registrant in a Form F-4 filing?

The financial statement requirements of the registrant are addressed in various items of Form F-4 and are generally prepared to comply with Item 8.A of Form 20-F. See SEC 8100.2 for discussion of SEC financial statement requirements in a registration statement. See SEC 8100.23 for information on the age of financial statement requirements.

The registrant's most recent audited financial statements may need to be revised for certain subsequent events. See Item 10(c) of Form F-4. See SEC 8130.23 for a discussion of subsequent events that may require separate financial statements or other financial information and for a discussion of reporting post year-end stock splits, reverse splits and stock dividends.

.42 Are there circumstances under which the preparation of interim financial statements would be necessary prior to filing a Form F-4?

Yes. Item 10(b) of Form F-4 indicates that if the financial statements included in the Form F-4 are not sufficiently current to comply with the requirements of Item 8.A of Form 20-F, financial statements necessary to comply with that rule shall be presented in either the Form F-4, in an amended Form 20-F, Form 40-F or Form 10-K (in which case the Form F-4 shall disclose that the Form 20-F, Form 40-F or Form 10-K has been so amended) or in a Form 6-K, Form 10-Q or Form 8-K. See further discussion of age of financial statement requirements at SEC 8100.23 and discussion of interim financial statements at SEC 8100.24.

See SEC 8135.47 related to timeliness of financial statement requirements for offerings on Form F-4 which are considered to be offered on a delayed or continuous basis pursuant to Rule 415 of Regulation C.

See SEC 7050 and SEC FRM 12260 for guidance related to reverse mergers.

.43 Where can I find the financial statement requirements applicable to a target company that is not an SEC reporting company?

[Editor's note: The guidance in this section is intended to be applied when the acquirer is not a shell company or special purpose acquisition company. Additional analysis would be required when the acquirer is a shell company or special purpose acquisition company.]

Item 17(b) of Form F-4 provides the financial statement requirements for a non-reporting target.

If the target is a non-reporting company and either (i) the registrant's security holders are voting or (ii) the transaction is a roll-up transaction (as described in S-K 901), then the non-reporting target company's annual financial statements should be the same as those that would be required in an annual report sent to security holders under Exchange Act Rules 14a-3(b)(1) and (b)(2) if an annual report was required. See SEC FRM 2200.4.

If the target is a non-reporting company and (i) the registrant's security holders are not voting and (ii) the transaction is not a roll-up transaction (as described in S-K 901), then the non-reporting target company's financial statement requirements are determined based on its significance to the registrant and whether the Form F-4 will be used for resales by persons considered underwriters under Securities Act Rule 145(c):

- If (i) the non-reporting target company is significant to the registrant above the 20% level (as determined under S-X 3-05) and (ii) the Form F-4 is not to be used for resales by persons considered underwriters under Securities Act Rule 145(c), then the target company's financial statements (prepared in accordance with GAAP) for the latest fiscal year should be provided. In addition, if the non-reporting target company provided its security holders with financial statements prepared in conformity with GAAP for either or both of the two fiscal years before the latest fiscal year, then those financial statements must be provided as well. See Item 17(b)(5)(i).
- If (i) the non-reporting target company is significant to the registrant above the 20% level (as determined under S-X 3-05) and (ii) the Form F-4 is to be used for resales by persons considered underwriters under Securities Act Rule 145(c), then the target company's financial statements (prepared in accordance with GAAP) for the periods required by S-X 3-05(b)(2) should be presented. See *Instructions to paragraph (b)(5)* of Item 17(b) of Form F-4 and SEC FRM 2200.5. In addition, if the non-reporting target company provided its security holders with financial statements prepared in conformity with GAAP for either or both of the two fiscal years before the latest fiscal year, then those financial statements must be provided as well.
- If the non-reporting target company is significant to the registrant at or below the 20% level, then no financial information for the target company is required. See Item 17(b)(5)(ii). The registrant should, however, consider the non-reporting target when evaluating aggregate significance under S-X 3-05. See SEC FRM 2200.5 and Division of Corporation Finance: Manual of Publicly Available Telephone Interpretations, Third Supplement (July 2001) Section H. Financial Statements, Question 2.

See SEC 8135.905 for audit considerations related to financial statements required by Item 17(b)(5) of Form F-4.

In addition to the target's annual financial statements, the following financial information may need to be provided for the target:

- (1) the interim financial and other information specified by Item 8.A of Form 20-F (Item 17(b)(6) of Form F-4); and
- (2) schedules required by S-X 12-15, S-X 12-28, and S-X 12-29 (Item 17(b)(7) of Form F-4).

.44 Is a reconciliation to U.S. GAAP required if the foreign target's financial statements are prepared using a basis other than U.S. GAAP or IFRS-IASB?

If the foreign target's financial statements are prepared using a basis of accounting other than U.S. GAAP or IFRS-IASB, a reconciliation to U.S. GAAP is required unless a reconciliation is unavailable or not obtainable without unreasonable cost or expense. Companies should consider all relevant facts and circumstances in determining whether the U.S. GAAP reconciliation is unavailable or not obtainable without unreasonable cost or expense. For example, the SEC staff has objected to the omission of the U.S. GAAP reconciliation in circumstances where the target company was a subsidiary or investee of a larger reporting company reporting under U.S. GAAP and considerable reconciling information for the target would have been necessary for the parent company's U.S. GAAP reporting.

If a company believes that the U.S. GAAP reconciliation cannot be provided without unreasonable cost or expense, then a company could consider contacting the SEC staff prior to filing for relief. Companies that obtain such relief will still need to provide, at a minimum, a narrative description of the material variations in accounting principles, practices, and methods used in preparing the local GAAP financial statements from those accepted in the U.S. See Instructions to Items 17(b)(5) and 17(b)(6) of Form F-4.

If the foreign target's financial statements are prepared using a basis of accounting other than U.S. GAAP or IFRS-IASB, and the registrant prepares its financial statements using IFRS-IASB, then a company could consider contacting the SEC staff to discuss whether providing a reconciliation of the target's financial statements to IFRS-IASB (or a narrative description of any such differences) instead of a reconciliation to U.S. GAAP would be acceptable. See Topic VI. in the Highlights of the May 2022 meeting of the CAQ International Practices Task Force.

.45 Does Form F-4 require financial information required by S-X 3-05 and S-X Article 11?

Items 10(c)(1) and 12(a)(3) of Form F-4 require providing the financial information required by S-X 3-05 and S-X Article 11 regarding businesses acquired or to be acquired in addition to the transaction pursuant to which the securities being registered are to be issued. See SEC 4550 and SEC 4560.

.46 Is a non-reporting target company required to provide financial statements of its significant business acquisitions?

Item 17(b)(5) of Form F-4 (and Item 17(b)(7) of Form F-4) does not specifically require a non-reporting target to furnish financial statements of its significant business acquisitions (e.g., pursuant to S-X 3-05). However, when security holders of the acquirer are voting, the SEC staff has indicated that for domestic reporting registrants filing a Form S-4 a non-reporting target company must furnish financial statements under S-X 3-05 in the Form S-4 if the omission of those financial statements renders the target company's financial statements substantially incomplete or misleading (see SEC FRM 2200.4(e)). We understand that this guidance would be equally applicable to filings on Form F-4.

.47 Is there a requirement to maintain timeliness of financial statements after the effective date of a registration statement on Form F-4?

Yes. Item 22 of Form F-4 requires that a FPI's registration statement complies with S-K 512. To comply with S-K 512(a)(4) a FPI would either file a post-effective amendment to its registration statement or incorporate by reference information related to any financial statements required by Item 8.A. of Form 20-F at the start of a delayed offering or throughout a continuous offering under Securities Act Rule 415. See SEC FRM 6230.1. "F-3 eligible" issuers filing on Form F-4 may incorporate by reference updated financial statements rather than file a post-effective amendment. See SEC FRM 6230.4. First-time registrants filing an exchange offer on Form F-4 would not be able to incorporate by reference such information, as they would not be F-3 eligible. Rather, such companies would have to file a post-effective amendment to keep their financial information current (if such updating is required subsequent to the filing of the initial Form F-4).

Exchange offers on Form F-4 are considered delayed or continuous offerings under Securities Act Rule 415. Financial statements must remain current throughout the entire time that an exchange offer is outstanding. In a merger or acquisition transaction, financial statements must remain current until shareholder approval has occurred. See SEC FRM 6230.1. The SEC staff consider the shareholder approval date to be the end of the period that the offer is outstanding because the investing decision is made at such date. Accordingly, the requirement to keep current the financial statements in a Form F-4 business combination effected through a merger applies only through the shareholder approval date, and does not extend through the consummation date of the merger or termination date for the mechanical process of exchanging share certificates after the closing. See Topic II.2 in the Highlights of the November 2015 meeting of the CAQ International Practices Task Force.

For F-3 eligible issuers that file Form F-4, the requirement to maintain timeliness of financial statements after the effective date of the registration statement could require the FPI to incorporate by reference more current interim financial statements into the Form F-4. Such interim financial statements might reflect discontinued operations, changes in accounting principles, or other retroactive accounting changes that would ordinarily result in retroactive restatement of the primary financial statements and/or the U.S. GAAP reconciliation when the company files its next annual report on Form 20-F. "F-3 eligible" issuers that incorporate by reference would only be required to update the prospectus for an effective registration statement in accordance with S-K 512(a)(1) for a "fundamental change". The determination as to what constitutes a "fundamental change" under S-K 512 should be made by the company and its legal counsel. Legal counsel may conclude, in some circumstances, that discontinued operations, changes in accounting principles, or other matters that will result in retroactive restatement of the primary financial statements and/or the U.S. GAAP reconciliation when the company files its next annual report on Form 20-F, would not represent a "fundamental change" to the information set forth in the registration statement. See SEC 2120.24.

The SEC staff has also indicated that the S-K 512(a)(4) requirement for keeping financial statements current applies to all required financial statements included in a registration statement, including those of the registrant and those provided under S-X 3-05, 3-09, 3-10 and 3-14, target company financial statements, as well as disclosures required by S-X 13-01 and 13-02. See SEC FRM 6230.2. See SEC 8100.23 regarding the SEC's age of financial statement requirements. Also see SEC 8135.49.

.48 How are updated financial statements typically provided in order to meet timeliness requirements for a continuous offering under an already effective Form F-4?

Financial statements required to be provided by "F-3 eligible" issuers to maintain timeliness can be provided on a Form 6-K and incorporated by reference into the Form F-4 on the date that such financial statements are required to meet timeliness, to avoid suspension of the offering. See SEC FRM 6230.4. Continuous offerings must be suspended during the periods that the financial statements are not current. See SEC FRM 6230.1. For example, a calendar year "F-3 eligible" issuer that had a Form F-4 declared effective on September 15, 2023, would be required on October 1, 2023, to maintain the timeliness of its financial information, to provide interim comparative financial statements for the June 30, 2023 interim period, which could be filed on Form 6-K and incorporated by reference into the Form F-4.

A FPI that is not "F-3 eligible" (e.g., a first-time registrant filing an exchange offer on Form F-4) would not be able to incorporate by reference such information into its Form F-4. Instead, the FPI would be required to file a post-effective amendment to include such financial statements to maintain the timeliness of the financial information. Furthermore, for such companies this filing of a post-effective amendment would result in a requirement to retroactively restate the previously filed annual audited financial statements to reflect any retroactive accounting changes that were reflected for the first time in the latest interim financial statements.

For example, a registration statement on Form F-4 could relate to an offer by a first-time registrant to exchange registered debt securities for non-registered debt securities with the same terms, where the non-registered debt securities were previously issued pursuant to a Rule 144A private placement with registration rights. In such transactions there is generally a period that the exchange offer is open -- typically, 20 business days. This is considered a continuous offering pursuant to Rule 415 of Regulation C. Accordingly, during the entire period that the offer is outstanding (e.g., between the effective date of the registration statement and the date the exchange offer expires), the financial statements need to be current. A post-effective amendment would need to be filed by the FPI during this offering period to provide, if necessary, financial statements that are current through the offer period.

.49 What are the timeliness considerations under S-K 512 for S-X 3-05 financial statements included or incorporated by reference in a Form F-4?

S-K 512(a)(4) requires a registrant to keep current those financial statements that it originally filed upon effectiveness of the registration statement, and does not create an obligation to file financial statements for the first time. For example, financial statements for a significant acquisition that is consummated subsequent to the effective date of the Form F-4 registration statement, but before the consummation date of the exchange, would not be required to be provided under S-K 512(a)(4) if such financial statements were not previously required to be provided pursuant to S-X 3-05 at the effective date of the registration statement. Such financial statements would be required to be provided only if such event was considered a "fundamental change" under S-K 512(a)(1). The determination of what constitutes a "fundamental change" for such purposes should be made by the company's legal counsel. See SEC FRM 6230.3 and Topic 6.(b) in the Highlights of the September 2004 meeting of the CAQ International Practices Task Force.

.5 PRO FORMA FINANCIAL INFORMATION

See Item 5 of Form F-4 for the pro forma financial statement requirements applicable to a registration statement on Form F-4. Also see SEC 8135.45 and SEC 2121.4.

.6 ROLL-UP TRANSACTIONS

General Instruction G of Form F-4 requires compliance with the disclosure provisions of S-K 901 through 915 for roll-up transactions in addition to the other requirements of Form F-4. See SEC 2121.6 for further discussion.

.7 ACCOUNTANTS' CONSENT

.71 Where can I find information relating to the SEC's requirements for accountants' consents?

See SEC 2400 for a discussion of accountants' consents.

.8 EXPERTS LANGUAGE

.81 Where can I find information relating to experts language?

See SEC 2300 for a discussion of experts language.

.9 FREQUENTLY ASKED QUESTIONS

.901 Would a reincorporation of a FPI as a U.S. entity result in a loss of FPI status?

Yes. Reincorporation of a FPI as a U.S. entity will result in loss of FPI status and generally requires a Securities Act registration statement on a domestic form (e.g., Form S-4) for the exchange of existing shares with the new domestic issuer. Financial statements of the registrant for all periods in the Form S-4 would be prepared under U.S. GAAP and presented in U.S. dollars. The company's legal counsel should determine the Securities Act registration statement requirements for such a re-domiciliation transaction, including any related registration statement form to be used. The U.S. incorporated issuer must also immediately begin filing Exchange Act reports on domestic issuer forms. See SEC FRM 6120.8 and SEC 8105. Also see Exchange Act Rules CDI 110.01.

.902 Does Form F-4 require disclosure of changes in a registrant's certifying accountants?

Yes. Disclosure pursuant to Item 16F of Form 20-F is required to be provided as of the date of the registration statement. See Item 12(b)(3)(ix) of Form F-4. Also see SEC 8100.51.

.903 Is incorporating by reference or cross-referencing to information outside of the financial statements permitted in financial statements?

Generally, no. We understand that disclosure in the text of the Form F-4 does not eliminate the need for similar disclosure, when required by U.S. GAAP or IFRS-IASB, in the notes to the financial statements. In any financial statements, incorporating by reference or cross-referencing to information outside of the financial statements is not permitted unless otherwise specifically permitted or required by SEC rules, U.S. GAAP or IFRS-IASB.

We understand that the non-financial statement portions of the Form F-4 may contain cross-references to the financial statements.

See Securities Act Rule 411(a).

.904 How might the auditor approach references to the auditor in connection with a fairness opinion or other disclosures?

See SEC 2121.909.

.905 Do the financial statements prepared by a non-reporting target company need to be audited?

The financial statements of a non-reporting target company required by Item 17(b)(5) of Form F-4 (see SEC 8135.4) for the latest fiscal year need be audited only to the extent practicable. The financial statements for the fiscal years before the latest fiscal year need not be audited if they were not previously audited. See Instruction 1 to Item 17(b)(5) of Form F-4. However, the SEC staff has indicated that financial statements that have been previously audited in accordance with a local GAAS must be audited in accordance with AICPA standards when filed under Item 17(b)(5) of Form F-4. The SEC staff has also indicated that they would consider requests for relief on a case-by-case basis when the registrant demonstrates that obtaining

an AICPA standards audit of the target company would require undue effort or expense. One such area of concern relates to the challenges of determining independence under U.S. rules. See Topic 14 in the Highlights of the May 2002 of the CAQ International Practices Task Force meeting.

[Editor's note: The SEC staff has stated that the financial statements of an operating company (predecessor) whose financial statements are filed by a special purpose acquisition company ("SPAC") must be audited by a PCAOB registered firm using PCAOB standards. See SEC FRM 4110.5 #6 and #3a.]

.906 Are target company financial statements in a Form F-4 provided pursuant to S-X 3-05?

Generally no. Although there are references to S-X 3-05 throughout Form F-4, the financial statements of the target are generally not being provided in the Form F-4 pursuant to S-X 3-05. Accordingly, various SEC rules that apply only to financial statements provided under S-X 3-05 would not be applicable to the target company's financial statements. See, for example, SEC 8135.907.

.907 Do the provisions of S-X 3-06(a)(2) which permit the filing of financial statements covering a period of nine to 12 months to satisfy a one-year financial statement requirement for an acquired business apply to financial statements of a target company in a Form F-4?

No. See SEC 2121.905

.908 Is a private target company whose financial statements are included in a Form F-4 considered a public business entity under the FASB's definition in U.S. GAAP?

Yes. The definition of a public business entity (PBE) includes business entities whose financial statements or financial information are required to be or are included in an SEC filing. A private target company included in a Form F-4 is generally considered a PBE.

[Editor's note: If an entity meets the definition of a PBE solely because its U.S. GAAP financial statements or financial information are included in another entity's filing with the SEC, then entity is only a PBE for purposes of U.S. GAAP financial statements that are filed or furnished with the SEC.]

.909 Are there any incremental disclosure requirements if either the registrant or the company being acquired is a real estate entity?

Yes. Form F-4 specifies incremental disclosure requirements if either the registrant or the company being acquired are real estate entities of the type described in General Instruction A to Form S-11. See General Instruction B.2. of Form F-4 with respect to the registrant and General Instruction C.2. of Form F-4 with respect to the company being acquired.

.1 General

.1 GENERAL

.11 What is Form F-6 and where can I find it?

Form F-6 is the form used by foreign issuers to register depositary shares evidenced by American Depositary Receipts (“ADRs”).

The text of Form F-6 is available on the SEC website (<https://www.sec.gov/files/formf-6.pdf>).

.12 Where can I find additional information related to the registration and use of ADRs?

See Section V. of Accessing the U.S. Capital Markets — A Brief Overview for Foreign Private Issuers available on the SEC website (<https://www.sec.gov/divisions/corpfin/international/foreign-private-issuers-overview.shtml>).