KPMG

SEC reporting requirements for business combinations

Handbook

US GAAP

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SEC reporting requirements for business combinations can be complex

The acquisition of a business can be a significant event for a company and understanding the impact of an acquisition can be material to an investor. To ensure transparency and protect the interests of investors, the Securities and Exchange Commission (SEC) has established filing and reporting requirements for business acquisitions. However, the accounting and regulatory requirements associated with these transactions can be complex and challenging.

From the initial stages of the acquisition process to the final reporting, this Handbook provides detailed guidance on all aspects of SEC compliance. Using a Q&A format, it includes practical insights and examples to help you understand how the rules apply in real-world scenarios.

As the business landscape and regulatory environment continue to evolve, so too will the challenges associated with business acquisitions. We hope this Handbook will provide you with the knowledge and confidence to navigate these challenges successfully.

Timothy Brown and Erin McCloskey

Department of Professional Practice of KPMG LLP

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About this publication

This edition of SEC reporting requirements for business combinations provides guidance about filing and financial reporting requirements under the US federal securities laws concerning business acquisitions. When a company has acquired or will acquire a business and files registration statements, proxy material, or periodic reports with the Securities and Exchange Commission (SEC), management needs to consider what financial information these filings require.

This Handbook identifies the regulations requiring financial statements involving business acquisitions and discusses their application. The information presented, including interpretations and guidance, reflects our understanding of current SEC staff positions and practices. This Handbook is not, however, an SEC publication, nor has it been approved by the SEC.

The rules and interpretations

This Handbook includes references to various rules, regulations, forms, and interpretative positions under US federal securities laws.

Some of the information included is based on informal discussions with the SEC staff or on SEC interpretative guidance found in the SEC Division of Corporation Finance's Financial Reporting Manual (FRM) and may be affected by future changes in staff positions. If you have questions about the guidance and other issues related to financial reporting requirements for business combinations, please contact KPMG Department of Professional Practice.

In addition, several Topics from the FASB's Accounting Standards Codification® are referenced.

February 2025 edition

The February 2025 edition of our Handbook includes several new Questions & Answers in section 10.2 (transactions with shell companies) on how the SEC rules apply to special purpose acquisition companies (SPACs). Throughout the Handbook, new Questions and Examples are identified with ****** and items that have been significantly updated or revised are identified with **#**. The Index of changes identifies all significant changes.

Organization of the text

Our commentary is referenced to the rules and to other literature, where applicable. The following are examples.

- S-X Rule 11-01(d) is Rule 11-01(d) of Regulation S-X
- S-K Item 512 is Item 512 of Regulation S-K
- CFR 240.12b-2 is Section 12b-2 of Part 240 of the Code of Financial Regulation
- SEC Rel 33-10786 is SEC Release No. 33-10786

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— Form 8-K Item 2.01 (Instruction 1) is Instruction 1 to Item 2.01(a) of Form 8-K

— FRM 1220.6 is section 1220.6 of the Financial Reporting Manual of the Division of Corporation Finance of the SEC

— Form 8-K C&DI 102.04 is Question 102.04 of Exchange Act Form 8-K Compliance & Disclosure Interpretations

— SAB Topic 6K is Staff Accounting Bulletin Topic 6.K

— Regs Comm 10/2020 is the October 2020 meeting of the Center for Audit Quality SEC Regulations Committee

— 20XX AICPA Conference is the respective year's AICPA Conference on Current SEC and PCAOB Developments

— SEC T-Inter §H.Q 3 – 4 (7/01) is Question 3 and 4 of Topic H (Financial Statements) in the July 2001 Interim Supplement to the Manual of Publicly Available SEC Telephone Interpretations

— DCF and OCA: Frequently Requested Interpretations (11/8/00) is the Division of Corporation Finance and Office of Chief Accountant: Frequently Requested Interpretations of Rules for Business Combinations Accounted For as Pooling-of-Interests dated November 8, 2000

— IM-DCFO 1995-11 is SEC's Dear CFO letter 1995-11, Pro Forma Fee Tables and Capitalization Tables

Abbreviations

The following is a list of the abbreviations used in this publication.

'33 Act	Securities Act of 1933
'34 Act	Securities Exchange Act of 1934
AAG	AICPA Audit and Accounting Guide
AcSEC	AICPA Accounting Standards Executive Committee (now known as the Financial Reporting Executive Committee, or FinREC)
AICPA	American Institute of Certified Public Accountants
ASC	Accounting Standards Codification
ASU	Accounting Standards Update
AWMV	Aggregate worldwide market value
CAQ	Center for Audit Quality
CF-OCA	SEC's Division of Corporation Finance – Office of the Chief Accountant
EITF	Emerging Issues Task Force
EGC	Emerging growth company
EPS	Earnings per share
FASB	Financial Accounting Standards Board

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FPI	Foreign Private Issuer
FRM	SEC Financial Reporting Manual
GAAP	Generally accepted accounting principles
GAAS	Generally accepted auditing standards
IASB	International Accounting Standards Board
IFRS	International Financial Reporting Standards
IPO	Initial public offering
IPR&D	In-process research and development
LBO	Leveraged buyout
MD&A	Management's Discussion & Analysis
MJDS	Multi-Jurisdictional Disclosure System
MLP	Master limited partnership
NCI	Noncontrolling interest
NRV	Net realizable value
PBE	Public business entity
PCAOB	Public Company Accounting Oversight Board
PP&E	Property, plant and equipment
R&D	Research and development
REIT	Real estate investment trust
SEC	US Securities and Exchange Commission
SPAC	Special purpose acquisition company
SRC	Smaller reporting company
VIE	Variable interest entity
WKSI	Well-Known Seasoned Issuer

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1. Executive summary

SEC registrants have specific reporting requirements when they make significant acquisitions and dispositions of businesses. What information they have to provide related to such acquisitions and dispositions and when they have to provide that information is subject to a complex set of rules in Reg S-X.

Overview

There are two broad categories of required information.

Pre-acquisition financial statements of the acquiree (S-X Rule 3-05)

Pro forma financial information (S-X Article 11)

An acquiree's pre-acquisition financial statements are often called 'Rule 3-05 financial statements'. Which pre-acquisition financial statements are required for an acquisition transaction and how they must be prepared depends on many factors.

Pro forma financial information has a separate set of requirements, some of which overlap with the pre-acquisition financial statement requirements. Pro forma financial information may be required in either an acquisition or a disposition of a significant business.

This Handbook explains when Rule 3-05 financial statements and pro forma financial information is required. It also goes into depth about which pre-acquisition financial statements are required under Rule 3-05 and how they must be prepared. However, details about how pro forma financial information must be presented is outside the scope of this Handbook.

Reporting mechanisms

Rule 3-05 financial statements (and pro forma information reflecting a significant acquisition or disposition) are provided through the following documents filed with the SEC.

Form 8-K

Registration statement

Proxy statement

Form 8-K is used to report significant acquisitions and dispositions. Although the initial form must be filed within four days of the transaction, in most instances there is a grace period for providing the Rule 3-05 financial statements and pro forma information. However, if a registration statement becomes effective, or proxy materials are mailed, during this grace period, then these items may have to be included on the registration or proxy statement. Further, significant probable acquisitions sometimes have to be reported on a registration or proxy statement (but not on a Form 8-K).

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Significance

The significance of an acquisition or disposition is determined by applying significance tests in Reg S-X, which result in a transaction being assigned a percentage (e.g. 10% significant, 25% significant). Transactions that are deemed significant through these tests are individually reported via the above reporting mechanisms.

Transactions that are not individually significant or that have not yet occurred but are probable may also have to be reported, but only on a registration or proxy statement. Insignificant transactions are combined and reported if they are significant in the aggregate, and 'very' significant probable acquisitions are individually reported.

The following diagram summarizes the significance levels that trigger reporting requirements for various types of acquisitions and dispositions of businesses.

	Acquisition of business (transaction consummated)	**Disposition of business (transaction consummated)**	**Probable acquisition of business**	**Acquisition of individually insignificant businesses**
Form 8-K filing	Acquired business is > 20% significant	Disposed of business is > 20% significant	N/A	N/A
Registrant is filing a registration or proxy statement	Up to 74 days & > 50% significant* 75 or more days & > 20% significant**	N/A	To be acquired business is > 50% significant	Acquisitions and probable acquisitions meeting certain criteria in the aggregate are > 50% significant

Notes:

*This threshold applies if the registration statement is effective (or the mailing date of proxy materials is) within 74 days of the date the acquisition was consummated.

**This threshold applies if the registration statement is effective (or the mailing date of proxy materials is) more than 74 days from the date the acquisition was consummated.

To comply with these requirements, a registrant answers the following questions.

— Do the assets acquired or disposed of constitute a 'business', as defined in Reg S-X? Although the above table applies only to acquisitions and dispositions of businesses, there is a different set of reporting requirements for significant asset acquisitions. The SEC's definition of a business is very different than the FASB's definition in Topic 805 (business combinations). The SEC's definition is based on whether there is continuity of operations before and after the transaction.

— Is an unconsummated acquisition probable of occurring? Potential acquisitions are not subject to the above reporting requirements unless they cross the probability threshold.

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— Does the acquisition, probable acquisition or disposition of a business meet the significance thresholds outlined in the above diagram?

There are additional questions to ask, such as which acquisitions are aggregated for testing significance when a registration or proxy statement is filed. However, the above three are the primary issues to start with.

Read more: chapter 2

Significance tests

Significance of a consummated acquisition or disposition (or of a probable acquisition) is determined under three significance tests in Reg S-X Rule 1-02(w). These tests are used for a variety of purposes under Reg S-X, not just for testing the significance of business acquisitions and dispositions. S-X Rule 3-05 and Article 11 alter those tests somewhat when the tests are used to determine the significance of business acquisitions and dispositions.

Investment test

Income test

The income test has two component tests. The *lower of the two* component tests represents the result for the income test.

Pretax income component test

Revenue component test

Asset test

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The ratio produced by the formula for each test is the level of significance for that test. For example, if a registrant's share of an acquired business's consolidated total assets is $20 and the registrant's consolidated total assets are $100, the asset test indicates 20% significance (i.e. $20 ÷ $100).

The test with the highest level of significance determines the significance of the acquisition or disposition. For example, the significance of a transaction is 42% if the investment test indicates 28%, the income test indicates 32% and the asset test indicates 42%.

Related acquisitions

Related acquisitions are treated as a single transaction. Therefore, if they in the aggregate exceed 20%, the registrant has a Form 8-K filing requirement. Acquisitions are related if there was common control or common management of the acquired businesses, or when their acquisition is conditioned on:

— a single common event, such as an offering of securities; or
— the acquisition of another business.

Unrelated acquisitions

Acquisitions (and probable acquisitions) that are not related are not treated as a single transaction for significance testing, but instead are tested for significance individually. However, if they are not significant when tested individually, they still may have to be tested in the aggregate with other acquisition transactions if the acquiring registrant files a registration statement or certain proxy materials. In this event, the registrant evaluates whether certain of its consummated and probable acquisitions are greater than 50% significant in the aggregate. If so, it provides pro forma financial information for the aggregate impact of the acquisitions and, in certain cases, financial statements for some individual acquisitions that would not otherwise be required at the time of effectiveness absent the aggregate level of significance.

Read more: chapter 3

Financial statements required

Determining which financial statements Rule 3-05 requires involves answering two questions – the 'periods' question and the 'age' question.

'Periods' question

The periods question refers to how many periods of financial statements are required, which is based on an acquisition's significance. The following table summarizes the basic requirements for audited annual and unaudited interim financial statements of an acquired business, unless special circumstances exist (which are discussed in section 4.2.10).

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Acquisition's significance	Annual periods required	Interim periods required[1]
Does not exceed 20%	None	None
Exceeds 20% but not 40%	One fiscal year	Interim period subsequent to the required annual period (no comparative period required)
Exceeds 40%	Two fiscal years	Interim period subsequent to the latest required annual period **and** the comparative interim period of the prior year
Individually insignificant acquisitions with aggregate significance exceeding 50%	Audited financial statements for entities > 20% significant individually if not previously provided.	Most recent unaudited interim period for entities > 20% significant individually if not previously provided

Note:

1. Interim period financial statements of the acquired business may not be necessary based on the timing of the acquisition and type of filing.

'Age' question

The 'age' question refers to which periods the financial statements must cover – i.e. how old the most recent financial statements provided can be.

Essential to determining the required age of Rule 3-05 financial statements is identifying the required reporting mechanism (filing type) and a 'specific date' associated with that reporting mechanism.

Filing type	Specific date
Form 8-K	earliest of date when initially filed with the SEC and date on which it must be initially filed
Registration statement	date declared effective
Proxy material	date mailed

Age of audited annual financial statements required

The general rule is that the most recently completed fiscal year is required; however, when the 'specific date' falls 'shortly after' the acquired business's most recently completed fiscal year, the prior fiscal year may satisfy this requirement. The meaning of the term 'shortly after' is dependent on different factors (see further below).

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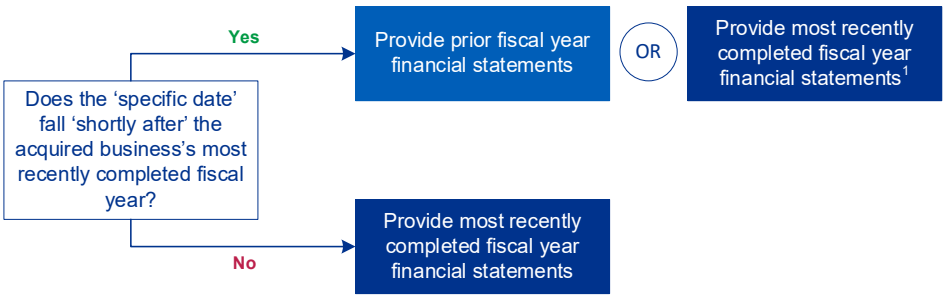


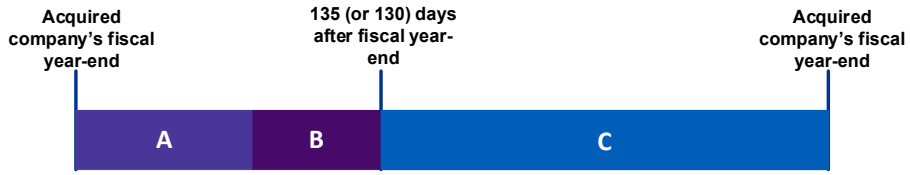
Note:

1. While the prior fiscal year financial statements would meet the age requirements, if audited financial statements for the most recently completed fiscal year are available, those statements must be included.

Age of unaudited interim financial statements required

Interim period financials are required if the required annual period financial statements are dated 135 days or more before the filing date of the Form 8-K, effective date of the registration statement or mailing date of proxy material. However, if the acquired business is a large, accelerated filer or an accelerated filer, the 135-day requirement is a 130-day requirement. If interim period financials are provided, they must be dated fewer than 135 days (or 130 days) before the relevant filing date.

These concepts are illustrated for a Form 8-K filing in the following timeline. The initial filing of the Form 8-K would be the 'specific date' in this timeline.



When the initial Form 8-K is filed in the above time frames, the following interim statements are required.

A — Interim financial statements from the prior year's third quarter required (this is the 'shortly after' period).

B — No interim financial statements required.

C — Interim financial statements required, dated within 135 (or 130) days of initial Form 8-K filing date.

'Specific date' falls 'shortly after' acquired business's most recently completed fiscal year

As noted above, there is a relief provision to the age requirements when the specific date falls 'shortly after' the acquired business's most recently completed fiscal year. What constitutes 'shortly after' depends on the type of filing – i.e. a Form 8-K, a registration statement or proxy material.

— **Form 8-K:** What constitutes shortly after depends on whether the acquired business is a large accelerated filer ('shortly after' means no more than 59 days after the end of the acquired business's fiscal year), an accelerated

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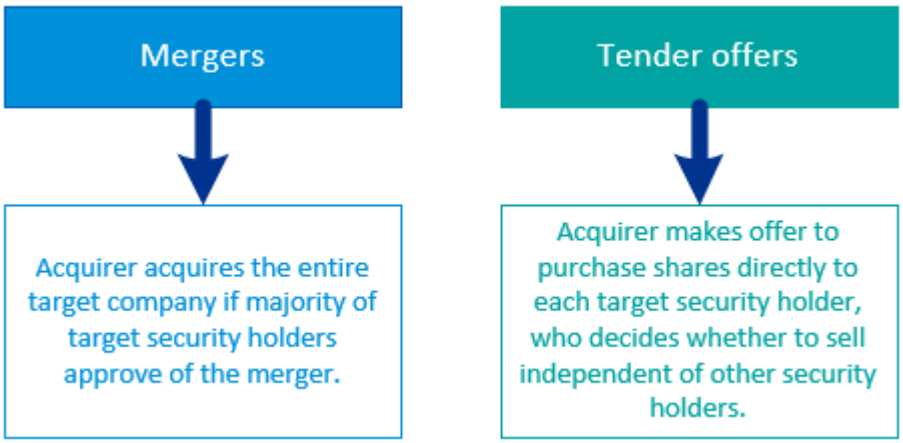
filer (no more than 74 days after) or a non-accelerated filer (including a nonpublic entity) (no more than 89 days after).

— **Registration statements and proxy materials:** Shortly after in this context means the specific date falls within 45 days after the end of the acquired business's fiscal year. Therefore, the 'shortly after' rules are triggered if a registration statement is effective within this 45-day period or the proposed mailing date of proxy material falls within this 45-day period. Additional relief may be available under Reg S-X Rule 3-01(c) if these specific dates fall outside the 45-day period.

Read more: chapter 4

S-4/F-4 merger proxy statements and registration statements

The SEC rules contemplate two primary business combination methods.



In either a tender offer or a merger, the offeror may offer cash, securities or a combination of each. The following table summarizes the typical filing requirements based on the type of business combination and type of consideration.

Type of business combination	Registration statement (Form S-4/F-4/N-14)	Proxy statement	Schedule TO
Cash merger		✔	
Stock merger	✔	✔	
Cash tender offer			✔
Exchange (stock tender offer)	✔		✔

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The forms used for certain of these types of business combinations (e.g. Form S-4) contain specific requirements for information about the business being acquired, including financial information. Although they may be similar in certain circumstances, these requirements are distinct from those in S-X Rule 3-05 and may differ from the general requirements described in chapters 2 to 4.

Read more: chapter 5

Acquisitions of and by foreign businesses

The above sections apply to acquisitions of domestic businesses by domestic (US) registrants. The requirement to provide Rule 3-05 financial statements also applies to:

- acquisitions of foreign entities by domestic registrants; and
- acquisitions of domestic (US) or foreign entities by foreign private issuers (FPIs).

However, an FPI that files its periodic reports on Form 20-F (or Form 40-F for Canadian registrants) does not have a Form 8-K filing requirement when it makes a significant acquisition.

The following table summarizes the similarities and differences in the requirements for Rule 3-05 financial statements in the above scenarios versus when a domestic registrant acquires a domestic business.

Significance tests	The significance tests and the significance thresholds that trigger Rule 3-05 financial statements are the same. However, when the acquiree's and registrant's financial statements are based on different GAAP, the relevant amounts from acquiree's financial statements are converted to amounts that conform to the GAAP used by the registrant.
Basis for preparation	Unlike Rule 3-05 financial statements of domestic acquirees, the financial statements of certain foreign acquirees do not need to be prepared under US GAAP.*
Number of periods	The number of periods required are the same for all significant acquisitions.
Age of financial statements	The age requirements for all significant acquisitions are in S-X Rule 3-01 and Rule 3-02, except when the acquiree is a foreign entity that meets the definition of a foreign business. In this latter scenario, the age requirements are in Item 8 of Form 20-F, regardless of whether the acquirer is a domestic registrant or an FPI.

Note

*The basis on which the financial statements of foreign acquirees may be prepared hinges on whether the acquiree meets the definition of a foreign business or would qualify as an FPI, if it were a registrant. These financial statements can always be

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prepared under US GAAP or under home country GAAP reconciled to US GAAP. However, in many instances, they alternatively can be prepared under IFRS® Accounting Standards as issued by the International Accounting Standards Board (IASB) or home country GAAP reconciled to IFRS Accounting Standards as issued by the IASB.

Read more: chapter 6

Initial registration statements

An entity may become a public registrant by filing a registration statement on the following forms (not exhaustive).

1933 Act	1934 Act
Form S-1 Form S-4 Form F-1 Form F-4	Form 10 Form 20-F

Generally, financial statements of an acquired business are included in an initial registration statement to comply with S-X Rule 3-05. However, certain portions of S-X Rule 3-05 for acquired businesses cannot be applied because the registrant filing an initial registration statement has not been a registrant in the past. The main points of departure are summarized in the following table.

Determining time periods over which to evaluate acquisitions for significance	Evaluate all acquisitions since the earliest year for which an entity's own audited financial statements are required. However, Rule 3-05 financial statements can be omitted if an acquiree's operations have been included in the entity's post-acquisition results for a sufficient period of time based on the acquisition's significance.
Determining significance of acquisitions	Normal significance tests are applied, but certain modifications to the financial statement period used to perform the significance tests for acquisitions 'shortly after' the registrant's year-end are not available.
Reporting put-together transactions	Put-together transactions use a shell company to purchase two or more unrelated businesses (or one of the operating entities acquires several other entities at one time). All of the acquired businesses are considered related and therefore tested for significance as a single transaction.

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Reporting combinations of entities under common control	Depending on the timing of the merger of entities under common control, the historical financial statements of the registrant and reorganized entities may have to be combined in the initial registration statement, as opposed to be presented separately. Further, a merger of this nature can impact: — the way the significance tests are performed; — the determination of the parent or predecessor entity; and — the form and content in which the financial statements are presented.
Evaluating the SAB 80 criteria	SAB 80 contains an election to provide different information than required by S-X Rule 3-05 for companies filing an initial registration statement; the election requires meeting certain criteria. Prior to 2021, a SAB 80 election was considered a relief provision, but after 2021 it might not be more advantageous than applying S-X Rule 3-05.

Read more: chapter 7

Real estate acquisitions

Acquisitions of certain real estate operations are in the scope of S-X Rule 3-14, instead of S-X Rule 3-05. An acquired set of assets and activities is in the scope of S-X Rule 3-14 if it:

— meets the SEC's definition of a business (discussed in chapter 2); and
— substantially all the revenues it generates are through leasing of real property.

The following table summarizes how the requirements in Rule 3-14 differ from those in Rule 3-05.

Acquired business Apply S-X Rule 3-05	— Determine significance using all three significance tests (asset, income and investment tests). — If acquisition is significant, provide acquired business's full financial statements.
Acquired real estate operation Apply S-X Rule 3-14	— Determine significance using only investment test. — If acquisition is significant (exceeds 20%), provide abbreviated financial statements of the acquired real estate operation.

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Generating substantially all revenues from leasing of real property requirement

Whether an acquired business meets this requirement depends on the type of revenues it generates from its real property. Under this requirement, real estate operations are premised on the continuity and predictability of cash flows ordinarily associated with commercial and apartment property leasing, and generally include shopping centers and malls. In contrast, businesses that are more susceptible to variations in costs and revenues over shorter periods due to market and managerial factors do not meet this requirement and therefore are not considered real estate operations. Examples of such businesses are nursing homes, hotels, motels, golf courses, auto dealerships and equipment rental operations.

Filing and reporting requirements

The following table summarizes the periods for which abbreviated financial statements are filed when a registrant acquires a significant real estate operation. This table outlines the period requirements only for filings of the Form 8-K and registration or certain proxy statements other than on Form S-4/F-4.

Significance	Periods required
Does not exceed 20%	None
Exceeds 20%	— Most recent audited fiscal year — Most recent unaudited interim period (no comparative interim period of the prior year is required).

Chapter 5 discusses the period requirements for the Form S-4/F-4 registration statement or merger proxy statement.

The reporting requirements for a significant acquisition of a real estate operation are summarized in the following table.

Information	Contents
Historical abbreviated financial statements	Audited statement of revenues and certain expenses. Expenses not expected to be comparable to the future operations may be excluded, such as: — mortgage interest; — leasehold rental; — depreciation; — amortization; — corporate overhead; and — income taxes. The other basic financial statements (e.g. statement of cash flows) are not required.

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Information	Contents
Pro forma financial information	Required in accordance with S-X Article 11.

There are also specific disclosure and supplemental information requirements.

Read more: chapter 8

Registered investment companies and business development companies

S-X Rule 6-11 – not S-X Rule 3-05 – applies when certain investment funds acquire other investment funds, or such acquisitions are probable.

Registrants subject to Rule 6-11	— Registered investment companies — Business development companies
Types of acquisitions subject to Rule 6-11	Acquisition of: — an investment company (defined in section 3(a) of the Investment Company Act of 1940); — a business development company; — a company that would be an investment company but for the exclusions provided by sections 3(c)(1) or 3(c)(7) of the 1940 Act; or — any private account managed by an investment adviser
Significance tests	— Modified versions of the investment and income tests apply — The asset test does not apply

Determining if financial statements are required to be filed for an acquired fund, and the periods that must be presented, is summarized by the following decision tree.

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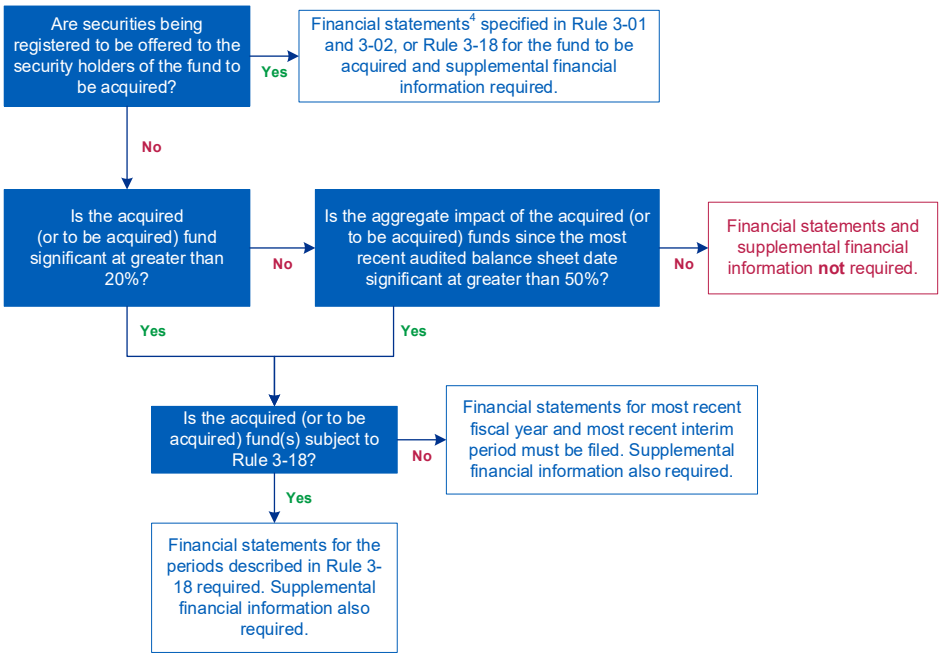

Read more: chapter 9

Other financial reporting matters

Reverse acquisitions and shell companies (e.g. SPACs)

The acquisition of a business can be structured in a way that results in a reverse acquisition and/or involves public shell companies. These scenarios may require special consideration to determine how and whether S-X Rule 3-05 (and related rules) apply. In addition, they may result in the identification of a predecessor to the registrant involved in the transaction.

Abbreviated financial statements

When a registrant acquires part of an entity that constitutes a business, it may be able to provide abbreviated financial statements of the acquired business (as opposed to full financial statements) to comply with S-X Rule 3-05.

The following decision tree is a high-level summary of the determination of whether abbreviated financial statements can be provided.

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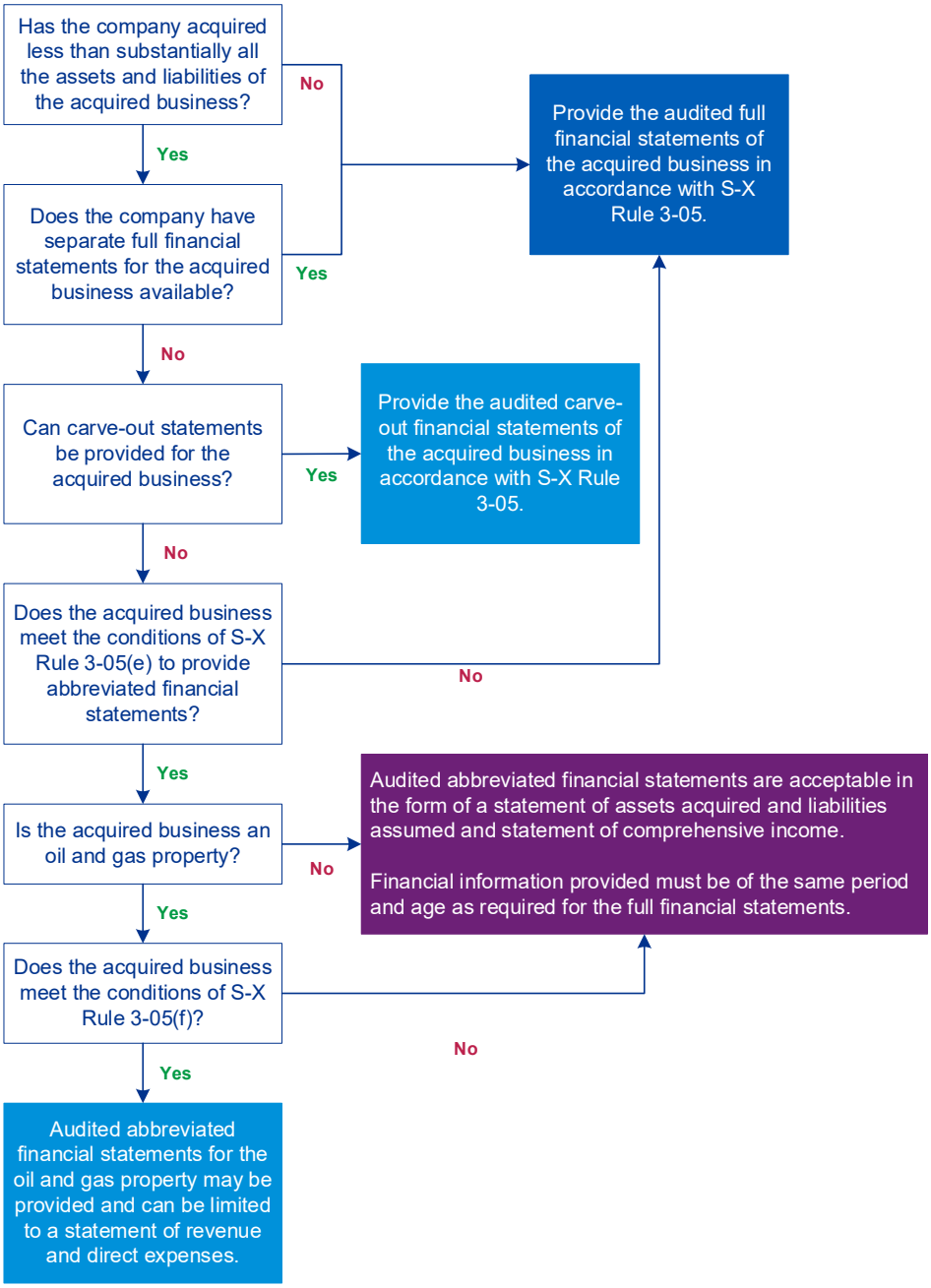

Inability to comply with financial statement requirements

In some instances, it may be impossible to obtain audited financial statements of an acquired entity for some or all of the periods required by S-X Rule 3-05 or obtaining such statements could involve unreasonable expense and effort. A registrant has two potential courses of action in this instance.

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Request a waiver

The SEC staff has the delegated authority to waive certain S-X Rule 3-05 requirements – e.g.:

- to provide a statement of revenue and direct expenses in lieu of full financial statements for a recently acquired business;
- to omit one or more years of historical financial statements for a recently acquired business; or
- to provide audited financial statements for a shorter time than is required under S-X Rule 3-05.

Seek a no action letter

By issuing a no action letter, the SEC staff agrees not to take action against a registrant solely as a result of noncompliance with S-X Rule 3-05.

Read more: chapter 10

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2.1 How the SEC Rules work

Reg S-X requires registrants to provide certain information about acquisitions and dispositions of businesses. The following diagram summarizes the most common circumstances that require filing financial information about an acquisition or disposition.

	Acquisition of business (transaction consummated)	**Disposition of business (transaction consummated)**	**Probable acquisition of business**	**Acquisition of individually insignificant businesses**
Form 8-K filing	Acquired business is > 20% significant	Disposed of business is > 20% significant	N/A	N/A
Registrant is filing a registration or proxy statement	Up to 74 days & > 50% significant 75 or more days & > 20% significant	N/A	To be acquired business is > 50% significant	Acquisitions and probable acquisitions meeting certain criteria in the aggregate are > 50% significant

To comply with these requirements, a registrant evaluates whether:

- the assets acquired or disposed of constitute a 'business' (see section 2.2.10);
- unconsummated acquisitions are probable (see section 2.2.20);
- acquisitions, probable acquisitions or dispositions of businesses meet the significance thresholds outlined in the above diagram (chapter 3 explains the significance tests).

This chapter includes an overview of the basic filing and reporting requirements in these common circumstances (see section 2.3) as well special considerations for certain unique or less common scenarios, including step acquisitions and combinations of entities under common control (see section 2.4).

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2.2 Scope – When reporting requirements are triggered

2.2.10 Definition of a business for SEC reporting purposes

Excerpt from S-X Rule 3-05

Financial statements of businesses acquired or to be acquired.

(a) *Financial statements required.* …

(2) For purposes of determining whether the provisions of this section apply:

(i) The determination of whether a business has been acquired should be made in accordance with the guidance set forth in § 210.11-01(d); and

(ii) 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.

(3) 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 must be treated under this section as if they are a single business acquisition. The required financial statements of related businesses may be presented on a combined basis for any periods they are under common control or management. For purposes of this section, businesses will be deemed to be related if:

(i) They are under common control or management;

(ii) The acquisition of one business is conditional on the acquisition of each other business; or

(iii) Each acquisition is conditioned on a single common event.

(4) This section does not apply to a real estate operation subject to § 210.3-14 or a business which is totally held by the registrant prior to consummation of the transaction.

Excerpt from S-X Rule 11-01

Presentation requirements.

(d) For purposes of this rule, the term business should be evaluated in light of the facts and circumstances involved and whether there is sufficient continuity of the acquired entity's operations prior to and after the transactions so that disclosure of prior financial information is material to an understanding of future operations. A presumption exists that a

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separate entity, a subsidiary, or a division is a business. However, a lesser component of an entity may also constitute a business. Among the facts and circumstances which should be considered in evaluating whether an acquisition of a lesser component of an entity constitutes a business are the following:

(1) Whether the nature of the revenue-producing activity of the component will remain generally the same as before the transaction; or

(2) Whether any of the following attributes remain with the component after the transaction:

(i) Physical facilities,
(ii) Employee base,
(iii) Market distribution system,
(iv) Sales force,
(v) Customer base,
(vi) Operating rights,
(vii) Production techniques, or
(viii) Trade names.

S-X Rule 3-05 applies only to the acquisition or disposition of a 'business', which is defined in S-X Rule 11-01(d). Therefore, the first step in applying S-X Rule 3-05 is to determine whether what the registrant has acquired, will acquire or has disposed of meets this definition of a 'business'. The acquisition need not be of an entire entity for the definition of a 'business' to apply; this definition can apply to the acquisition of an entire entity, part of an entity or individual assets or groups of assets.

An acquisition of an asset (or a group) that does not meet the SEC definition of a business is not subject to the requirements of S-X Rule 3-05 but may still result in a filing under Item 2.01 of Form 8-K for a significant acquisition of assets.

Question 2.2.10

What is the SEC's definition of the term 'business'?

Interpretive response: The SEC's definition of a business centers around whether there is continuity of the acquired entity's operations before and after the transaction. The definition includes a presumption that a separate entity, subsidiary or division represents a business; however, a lesser component may also constitute a business. We understand the SEC staff views this as a presumption that is not easily overcome based on other qualitative factors. [Regs Comm 09/2022]

Although a registrant considers all relevant facts and circumstances when determining if it has acquired a business, the focus of the analysis of whether there is continuity of the acquired entity's operations.

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Acquired entity has existing revenue-producing activities

The SEC staff has stated that if the revenue-producing activities of the acquired entity remain generally the same after the acquisition, it is presumed that a business has been acquired. [S-X Rule 11-01(d)(1)]

However, in some cases, a registrant may acquire revenue-producing activities, but believes that there will not be continuity of operations because:

- it does not expect to operate the acquired set in the same manner as the prior owner; or
- there has been or will be a distinct curtailment of or change in revenue-producing activities.

The registrant also considers whether the attributes in S-X Rule 11-01(d)(2) (described below) existed prior to and remain with the entity after the transaction.

The SEC staff encourages a registrant to obtain concurrence from the staff in advance of a filing if it intends to omit financial statements related to an acquisition when it has:

- succeeded to a revenue-producing activity by merger or acquisition; and
- acquired at least one of the S-X Rule 11-01(d)(2) attributes.

Registrants may direct requests related to appropriate financial statements of an acquired entity or group of assets to CF-OCA. [FRM 2010.2 note]

Acquired entity does not have existing revenue-producing activities

If an acquired entity is not producing significant revenue before the transaction, it may require judgment to conclude whether the entity is a business – i.e. whether there is sufficient continuity of its operations so that disclosure of prior financial information is material to an understanding of future operations.

The registrant considers whether any of the following attributes remain with the entity after the transaction: [S-X Rule 11-01(d)(2)]

- physical facilities
- employee base
- market distribution system
- sales force
- customer base
- operating rights
- production techniques
- trade names.

The acquisition of some, or all, of these attributes of the entity may suggest that there is sufficient continuity of operations such that prior financial information about the entity is material to understanding its future operations. Registrants consider all relevant facts and circumstances in this evaluation. For example, a registrant may acquire many of the entity's attributes listed in S-X Rule 11-01(d)(2) but may conclude that the entity is not a business because it does not intend to operate the entity in the same manner as the prior owner. [S-X Rule 11-01(d)]

We understand the SEC staff does not view the attributes above as a list of characteristics that define a business. The lack of one or more of these

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attributes does not impact the conclusion of whether an acquired entity meets the definition of a business. Rather, when present, these attributes are considered in the evaluation of continuity of an entity's operations. In other words, attributes that existed but were not acquired (or were acquired but will be discontinued or transformed) by a registrant would be indicators that an acquired entity is not a business.

Other considerations

It is not unusual following an acquisition for a registrant to establish new financial statement carrying amounts for acquired assets and liabilities, obtain new financing, change management, operational procedures or other aspects of the business. These changes typically do not eliminate the relevance of historical financial statements.

Example 2.2.10

Evaluating continuity of operations – Acquisition of television station

Company A is a broadcasting company that operates a single television station. The programming for the station consists solely of home shopping, infomercials, and other similar programs. Company A generates its revenue from sales of broadcast time for advertising.

Registrant markets merchandise to the public through television broadcast properties it owns and controls. It generates its revenue from merchandise sales. It does not sell broadcast time, nor does it broadcast infomercials or other programming directed at generating sales for other parties.

Registrant acquires Company A, intending to fulfill Company A's existing contracts, and assumes Company A's obligations to provide required public service programming. Registrant will not renew any expiring contracts and will not continue Company A's operations, but it will use the broadcast tower, facility and license to expand its direct sales of merchandise. Because the facility will have a different use, there will be changes in on-the-air personnel. However, Registrant will retain certain Company A staff, such as broadcast engineers.

For SEC reporting purposes, the SEC staff concluded that Registrant did not acquire a business because the change in the broadcast facility's intended use before and after the acquisition results in a lack of continuity.

Example 2.2.20

Evaluating continuity of operations – Acquisition of newspaper printing facility

Registrant sells a variety of consumer goods through its network of retail stores and eCommerce operations. Registrant acquires Company A, which is a local newspaper that operates a single printing facility.

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Scenario 1: Registrant converts the printing facility

Registrant will discontinue selling newspapers and convert the newspaper printing facility into a logistics and distribution warehouse. Registrant will retain most of Company A's employees. In addition, some of the printing equipment will be used to print internal information and marketing materials for Registrant's customers.

Registrant determines it has not acquired a business for SEC reporting purposes because there will not be continuity of operations.

Scenario 2: Registrant continues to operate the printing facility

Registrant plans to continue to operate the newspaper printing facility and undertakes the acquisition to expand its business model.

Registrant determines it has acquired a business for SEC reporting purposes.

Example 2.2.30

Evaluating continuity of operations – Acquisition of food processing business

Registrant is involved in a specialty food processing business and acquires Company A. Company A is another food processing and packaging business whose principal asset is its FDA food processing certification. Company A is presently winding down its operations but continues to fill enough customer orders to cover the cost of operating refrigeration units and other critical processing equipment so it can maintain the FDA certification and maximize the proceeds it could realize on the sale of its assets.

Although the acquisition includes the rights and obligations associated with Company A's existing customer contracts, Registrant acquires Company A primarily to expand its own food processing operations. Registrant attributes the entire purchase price to the fair value of the FDA certification.

The SEC staff noted that although Registrant is acquiring the current operations of the processing plant, it does not intend to continue Company A's business, but instead intends to use the assets to expand its own operations. Therefore, the staff concluded that Registrant had not acquired a business for SEC reporting purposes.

Example 2.2.40

Evaluating continuity of operations – Acquisition of food distribution business

Registrant is a commercial food products distributor that acquires 100% of the stock of Company A, another food products distributor. Registrant intends to merge its warehouse and distribution facilities with Company A's. Registrant will close or abandon 60% of Company A's physical facilities and terminate 75% of Company A's warehouse and distribution personnel. Registrant will

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retain all of Company A's mid-level managers and sales force and allocate most of the purchase price to customer lists and goodwill.

Registrant determines the acquisition constitutes a business for SEC reporting purposes because there is sufficient continuity of customer service and revenue-producing activity.

Example 2.2.50

Evaluating continuity of operations – Acquisition of molecules

Registrant is a biotechnology company pioneering and advancing treatments for certain diseases. Company A is a research-based biopharmaceutical company that, as with other R&D projects, holds molecules considered to be an 'early-stage asset'.

Registrant acquires these molecules from Company A, licenses to use the molecules in its business and de minimis equipment. At the time of the acquisition, the molecules are in various phases of development, and none have received regulatory approval.

Registrant determines the molecules do not meet the definition of a business for SEC reporting purposes because:

- Registrant is not acquiring a legal entity, distinct division or subsidiary of Company A.
- they are in various phases of clinical and preclinical development;
- no revenue was or is generated from them either before or after their acquisition by Registrant;
- they will be used as an input to Registrant's ultimate revenue-producing activities versus being revenue-producing themselves; and
- Registrant did not acquire any physical facility nor did any of Company A's employees focus on the molecules' development.

Additional considerations

If Registrant had acquired a legal entity that held the molecules, the presumption included in the SEC's definition of a business would need to be considered in the analysis (see Question 2.2.10).

Example 2.2.60

Evaluating continuity of operations – Acquisition of a service provider

Registrant, a service provider, purchases Company A's internal data processing equipment and hires all of Company A's data processing personnel. Registrant also enters into an agreement to provide data processing services to Company A for an extended period of time. Company A had operated the data processing function as a cost center that did not generate any revenue from external customers.

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Registrant concludes the acquisition is not a business for SEC reporting purposes because Company A operated the data center as a cost center that did not have its own revenue-producing activities.

Example 2.2.70

Evaluating continuity of operations – Acquisition of revenue-producing assets of a business

Registrant owns and charters 45 ships. It charters these ships on an hourly basis to generate revenue.

Registrant purchases an additional 12 ships from Company A. Three of the ships have existing long-term charter contracts with three-month remaining terms, but Registrant plans to use them for hourly-basis charters (like the other ships in its fleet) once the existing contracts expire. The remaining nine are not under existing contracts and are available for Registrant to charter immediately.

Registrant hires a limited number of employees from Company A but will otherwise operate the purchased ships using its own employees. Registrant acquires no additional assets or systems.

Registrant considers the following factors and concludes that the acquisition of the 12 ships is not an acquisition of a business for SEC reporting purposes.

Whether the nature of the revenue-producing activity will remain generally the same as before the transaction	The nature of the revenue-producing activity does not remain the same because Registrant's business model (hourly charters) differs from Company A's business model (longer-term charters). The difference in the business model requires different processes and cost structure to operate.
Other facts and circumstances	— Only the ships transfer in the transaction – all shore-based facilities remain with Company A. — Registrant is already in the business of chartering its existing fleet and the transaction serves to increase its capacity versus introduce a new line of business. — Only a limited number of employees are hired from Company A. — Only three existing customer relationships are acquired and those contracts (a) were executed as long-term contracts, and (b) extend only three more months from the acquisition date. — No other attributes are transferred to Registrant. — Due to the expected changes in people, processes and business model after the acquisition, Company A's historical operating performance (which was a result of its people, processes and business model) is not necessarily meaningful to an understanding of the future business or performance.

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Question 2.2.20

Is the definition of a business for SEC reporting purposes the same as the accounting definition under US GAAP?

Interpretive response: No. The definitions of a business under SEC Regulations and US GAAP are distinct, as summarized in the table below.

Definition of a business for SEC reporting purposes	Definition of a business for accounting purposes
Focuses on whether there is sufficient continuity of operations before and after the transaction. Under this definition, a key principle in determining whether a business has been acquired is whether disclosure of prior financial information is material to an understanding of future operations (see Question 2.2.10). [S-X Rule 11-01(d)]	Topic 805 (business combinations) defines a business for US GAAP in two steps. Step 1 requires an acquirer to conclude that a set is not a business when substantially all of the fair value of the gross assets acquired is concentrated in a single identifiable asset or a group of similar identifiable assets. If the acquirer cannot conclude the set is not a business under Step 1, it applies Step 2. A set is a business under Step 2 if it is an integrated set of activities and assets that: — is capable of being conducted and managed for the purpose of providing a return; and — includes inputs and processes applied to those inputs that have the ability to contribute to the creation of outputs. Under the US GAAP definition, the determination of a whether a set of assets and activities is a business is based on whether the integrated set is capable of being conducted and managed as a business by a market participant. For this purpose, it is irrelevant whether the seller operated the set as a business, or the acquirer intends to operate the set as a business. [805-10-55-3A – 55-9]

Because the Reg S-X definition and the US GAAP definition are not dependent on one another, an acquired set may be a business under US GAAP, but not be a business for SEC reporting purposes (or vice versa).

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Question 2.2.30

When is it necessary to identify a predecessor to a registrant for SEC reporting purposes?

Interpretive response: Designation of a predecessor is required if a registrant succeeds to substantially all of the business of another entity and the registrant's own operations before the succession appear insignificant relative to the operations assumed or acquired. [FRM 1170.1]

For example, when a public shell company (e.g. a SPAC) acquires an operating company and accounts for the transaction as a business combination, the acquired business is likely a predecessor for which pre-acquisition financial statements are required.

See section 10.2 for additional guidance and considerations related to acquisitions by shell companies, reverse acquisitions and other transactions that may involve the identification of a predecessor.

More than one acquisition

When a registrant (e.g. a SPAC) will acquire more than one business, a determination must be made as to which target entity (or in certain circumstances, entities) is the predecessor.

Given the significant judgment involved, the SEC staff expects robust disclosures about the predecessor determination and the specific facts and circumstances considered critical in reaching the conclusion. The staff has noted that some of the key factors to consider in making this determination may include:

— the relative size and fair value of the target companies;
— the historical and ongoing management structure; and
— the order in which the entities were acquired.

As with any judgmental analysis, all facts and circumstances should be considered, and no individual factor above outweighs the others. In certain circumstances, this analysis may result in a determination that multiple businesses represent co-predecessors of the registrant. [2015 AICPA Conf]

Question 2.2.40

Can a single asset (or group of assets) be a business?

Interpretive response: Yes. In some circumstances, the acquisition of an asset (or group of assets) that generates a revenue-producing activity may constitute the acquisition of a business – e.g. the acquisition of oil and gas interests (see Question 2.2.60) or property leasehold interests with in-place operations (see Question 2.2.100).

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Question 2.2.50

Is an acquisition of an asset that is not a business in the scope of S-X Rule 3-05?

Interpretive response: No. An acquisition of an asset (or a group of assets) that does not meet the SEC definition of a business is not subject to the requirements of S-X Rule 3-05. However, a registrant is required to report a significant (at the 10% level) asset acquisition under Item 2.01 of Form 8-K (see section 2.3.10).

Question 2.2.60

Is an investment in oil and gas interests the acquisition of a business?

Interpretive response: Generally, yes. The SEC staff has stated that it considers the acquisition of a working interest in a producing oil and gas property to be a business for SEC reporting purposes. [FRM 2010.4]

The SEC staff has not objected to the conclusion that a registrant has not acquired a business when it acquires undeveloped acreage with no associated production if the acquisition is not the acquisition of an entire entity or substantially all of the assets of an entity. [FRM 2065.11]

Single acquisitions of producing property and undeveloped acreage

In some cases, a registrant may purchase both a producing oil and gas property and undeveloped acreage in a single transaction. In these cases, the SEC staff has not objected to separating the transaction into two acquisitions (i.e. an acquisition of producing oil and gas properties and a separate acquisition of undeveloped acreage) but only if the acquisition is not the acquisition of an entire entity or substantially all the assets of an entity. If a registrant can separate the transaction into two acquisitions, it applies the definition of a business and evaluates the significance requirements for each acquisition separately.

Registrants that intend to apply this guidance on separating single transactions should consult with legal counsel and consider whether to seek pre-clearance of the position with the SEC staff.

See section 10.3.40 for additional guidance on the form and content of financial statements of a business that includes oil and gas producing activities.

Example 2.2.80

Acquisition of working interests in oil and gas properties

Registrant is in the business of acquiring working interests in oil and gas properties from major petroleum companies. Its strategy is to acquire interests

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in properties toward the end of their producing lives when less than 20% of the oil and gas reserves are remaining.

It determines that these interests in operating properties represent businesses because the properties produce a product for which there is a ready commodity market and production is in place.

Question 2.2.70

Is the acquisition of a bank branch the acquisition of a business?

Interpretive response: It depends. The SEC staff's position is the acquisition of part, or all, of a bank branch may be the acquisition of a business if the acquired activities are the primary source of revenue for the branch or the bank.

An assumption of the customer deposits of a branch (versus all of the operations) may also be the acquisition of a business – i.e. if substantially all of the historical revenue-producing activity of the branch is reasonably traceable to the management or customer and deposit base and that activity will remain generally the same following the acquisition. [FRM 2010.5]

However, if the branch's revenues are derived from other activities not acquired, the acquisition of customer deposits alone may not be the acquisition of a business for SEC reporting purposes.

Question 2.2.80

Is the acquisition of a block of insurance policies the acquisition of a business?

Interpretive response: It depends. The SEC staff has stated that an acquisition of a block of insurance policies by an insurance company, or the assumption of policy liabilities in reinsurance transactions, may be the acquisition of a business for SEC reporting purposes because the right to receive future premiums generally indicates continuity of historical revenues. When evaluating these transactions, registrants also should consider the degree of continuity between historical investment income streams and the assets acquired to fund the acquired policy liabilities. [FRM 2010.6]

Question 2.2.90

Is the acquisition of a bankrupt entity the acquisition of a business?

Interpretive response: It depends. There is no specific guidance for determining whether an acquisition of a bankrupt entity is the acquisition of a business. The method of acquisition, whether by purchase or foreclosure, does not determine whether a business has been acquired. A registrant evaluates

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these acquisitions using the same principle applicable to other acquisitions – i.e. whether the revenue-producing activity will be substantially the same after the acquisition.

A registrant would likely consider a bankrupt entity to be a business if the entity had revenue-producing activities during the bankruptcy period and will continue the same activities after the acquisition. However, if the bankrupt entity did not have revenue-producing activities during the bankruptcy period, the registrant needs to determine whether prior financial information about the entity is material to understanding its future operations.

Question 2.2.100

Is an acquisition structured in the form of a lease of operating assets the acquisition of a business?

Interpretive response: It depends. An acquisition of operations through the execution of a lease of the operating assets (instead of the purchase of the business) is the acquisition of a business for SEC reporting purposes if the lease transfers to the lessee substantially all the risks and rewards of the ongoing operations. In that case, there generally will be continuity of revenue-producing processes or activities after the acquisition such that prior financial information about operations is material to understanding their future operations.

A registrant-lessee will sometimes need to consolidate the lessor if the lessor is a VIE. See Question 2.2.110 for additional guidance on evaluating whether the consolidation of a VIE is the acquisition of a business.

Example 2.2.90

Business acquired in the form of a lease

Registrant manages nursing homes owned by third parties under long-term management contracts. Registrant renegotiates one of its management contracts such that Registrant will:

- lease all the real estate from the owner;
- assume all risks, rewards and responsibilities for providing and managing working capital for the managed facilities; and
- guarantee the debt of the managed facilities.

Registrant concludes it is acquiring a business for SEC reporting purposes. Although Registrant leases instead of owns the nursing home real estate, it has acquired substantially all the risks and rewards of owning the ongoing operations.

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Question 2.2.110

Is the consolidation of a VIE the acquisition of a business?

Interpretive response: It depends. The acquisition of a controlling financial interest in a VIE (or the initial consolidation of a VIE because of a reconsideration event under Subtopic 810-10) is the acquisition of a business if there is sufficient continuity of operations such that prior financial information about the entity is material to understanding its future operations (see Question 2.2.10). This is the case even if the registrant paid/issued no consideration. [FRM 2005.8]

However, if a registrant newly consolidates a VIE that is not a business for SEC reporting purposes, it may still have to report the consolidation on a Form 8-K if the consolidation is material to an investor's understanding of the registrant's future operations (see Questions 2.2.50 and 2.3.90). That decision is a legal determination. [Regs Comm 06/2009]

However, consolidation of a VIE (or other subsidiary) on adoption of a new or amended accounting standard that affects Subtopic 810-10 does not trigger the filing of a Form 8-K. [Regs Comm 03/2015, CAQ Alert 2010-20 (4/9/10)]

Question 2.2.120

Is the initial investment in a debt or equity security the acquisition of a business?

Interpretive response: No. An acquisition of a debt or equity security that is accounted for under Topic 320 (debt securities) or Topic 321 (equity securities) is not the acquisition of a business for SEC reporting purposes.

Question 2.2.130

Is the acquisition of an equity method investment the acquisition of a business?

Interpretive response: It depends. The initial purchase of an investment accounted for under the equity method is considered the acquisition of a business for SEC reporting purposes if the underlying investee is a business per the SEC's definition. This is also true in cases in which the registrant elects to account for the investment using the fair value option in lieu of the equity method. [S-X Rule 3-05(a)(2)(ii)]

However, if a registrant acquires an investment in an entity that is not a business for SEC reporting purposes, it may still have to report the acquisition on a Form 8-K if the acquisition is material to an investor's understanding of the registrant's future operations (see Question 2.2.50). That decision is a legal determination.

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Question 2.2.140

Is the increase in an existing equity investment (i.e. step acquisition) the acquisition of a business?

Interpretive response: Yes, if the underlying investee is a business (see Question 2.2.130). Increases in existing equity investments can have three outcomes and the S-X Rule 3-05 implications may depend on the outcome.

Financial instrument before and equity method or consolidation after

If a registrant increases its investment in an entity that is a business and the increase results in the registrant initially applying the equity method to (or consolidating) the investment, the purchase transaction represents the acquisition of a business. This includes an incremental investment in a business that was previously accounted for under Topic 320 (debt securities) or Topic 321 (equity securities).

Equity method investment before and equity method or consolidation after

Like an additional investment in a current financial instrument that results in initial application of the equity method or consolidation, if a registrant increases its ownership in a current equity method investee that is a business, that transaction is the acquisition of a business for SEC reporting purposes. This is the case if the investment remains an equity method investment or becomes a consolidated subsidiary after the transaction.

Consolidated subsidiary before and consolidated subsidiary after

An increase in an investment in a consolidated subsidiary that is a business also is the acquisition of a business. Therefore, when a noncontrolling interest is acquired, a registrant performs the significance tests to determine whether it has additional filing requirements. However, even if the acquisition of a noncontrolling interest is significant, the registrant may not have to file Rule 3-05 financial statements on the Form 8-K or in a registration statement because its consolidated financial statements already include the acquired business; however, pro forma financial statements may be required (see Question 2.4.30). [FRM 2020.5]

Question 2.2.150

Is the acquisition of joint venture interest the acquisition of a business?

Interpretive response: Yes. Two or more parties may enter into an agreement to contribute businesses to a venture to be operated jointly by the parties. Acquiring an interest in a joint venture is considered an acquisition of a business, regardless of the consideration exchanged by the registrant to acquire the interest.

A transaction that involves the formation of a joint venture is deemed to be two separate and distinct transactions:

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— the disposition of the assets or business contributed to the joint venture, to the extent of the other joint venture partner's economic interest in those assets or business. This component may require the filing of a Form 8-K, if the disposition is significant; and

— the acquisition of an equity method investment in a business, which is considered the acquisition of a business (see Question 2.2.130).

Section 3.7.30 addresses the significance calculation and considerations related to the acquisition of a joint venture interest.

Question 2.2.160

Is the acquisition of operating real estate the acquisition of a business in the scope of S-X Rule 3-05?

Interpretive response: No. S-X Rule 3-05 specifically excludes acquisitions of operating real estate, which are subject to the requirements of S-X Rule 3-14, Special Instructions for financial statements of real estate operations acquired or to be acquired (see chapter 8).

The SEC staff has noted that the reduced financial statement requirements available to real estate operations under Rule 3-14 are premised on the continuity and predictability of cash flows ordinarily associated with commercial (e.g. shopping centers and malls) and apartment property leasing. Other types of real estate investments are not considered real estate operations because they are more susceptible to variations in costs and revenues over shorter periods due to market and managerial factors – e.g. nursing homes, hotels, motels, golf courses, auto dealerships, equipment rental operations. [FRM 2305.2]

Example 2.2.100

Acquisition of real estate

Registrant is a real estate investment trust (REIT) that acquires real estate in two separate transactions.

Scenario 1: Acquisition involving real estate represents a business

Registrant acquires 10 operating hotels, including the land and buildings. Immediately after the acquisition, Registrant plans to (a) sell the hotel operations, and (b) lease the underlying property to hotel managers.

Registrant concludes it is acquiring a business for SEC reporting purposes and therefore S-X Rule 3-05 applies.

Scenario 2: Acquisition involving real estate represents real estate operations

Registrant acquires land and buildings from an individual who leases properties to a restaurant operator. The operator will continue to lease the facilities from Registrant.

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Registrant concludes it is acquiring real estate operations for SEC reporting purposes and therefore S-X Rule 3-14 applies.

Question 2.2.170

Is the acquisition of an equity interest in a preexisting legal entity that holds real estate the acquisition of a business in the scope of S-X Rule 3-05?

Interpretive response: It depends. The SEC staff has noted the following views on certain scenarios. [FRM 2305.3]

- The acquisition of an interest in a preexisting legal entity holding only real estate under lease and related debt represents the acquisition of real estate operations subject to S-X Rule 3-14. Therefore, a registrant must provide financial statements of the underlying properties meeting the requirements of Rule 3-14 if the acquisition is determined to be significant.
- The acquisition of an equity interest in a preexisting legal entity that engages in other activities, such as property management or development, in addition to holding real estate is evaluated to determine if it meets the SEC's definition of a business (i.e. is there a continuity of operations). If the entity is a business under the SEC definition, financial statements meeting the requirements of Rule 3-05 are required if the acquisition is significant.

Question 2.2.180

Is an investment in a newly formed legal entity that plans to acquire real estate the acquisition of a business in the scope of S-X Rule 3-05?

Interpretive response: Generally, no. The SEC staff views an investment in a newly formed partnership or corporation (whether consolidated or accounted for using the equity method) as the acquisition of real estate operations if the entity will acquire real estate properties under lease simultaneously with or soon after its formation. As a result, the SEC staff requires Rule 3-14 financial statements of the underlying property being acquired instead of Rule 3-05 financial statements of the newly formed entity.

The above result assumes the new entity has no other activities besides leasing real property. The presence of other activities could result in a different determination (see Question 2.2.170). [FRM 2305.4]

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2.2.20 Acquisition of a business

Excerpt from S-X Rule 3-05

Financial statements of businesses acquired or to be acquired.

(a) *Financial statements required.*

(1) Financial statements (except the related schedules specified in § 210.12) prepared and audited in accordance with Regulation S-X (including the independence standards in § 210.2-01 or, alternatively if the business is not a registrant, the applicable independence standards) must be filed for the periods specified in paragraph (b) of this section if any of the following conditions exist:

(i) During the most recent fiscal year or subsequent interim period for which a balance sheet is required by § 210.3-01, a business acquisition has occurred; or

(ii) After the date of the most recent balance sheet filed pursuant to § 210.3-01, consummation of a business acquisition has occurred or is probable.

(2) For purposes of determining whether the provisions of this section apply:

(i) The determination of whether a business has been acquired should be made in accordance with the guidance set forth in § 210.11-01(d); and

(ii) 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.

(3) 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 must be treated under this section as if they are a single business acquisition. The required financial statements of related businesses may be presented on a combined basis for any periods they are under common control or management. For purposes of this section, businesses will be deemed to be related if:

(i) They are under common control or management;

(ii) The acquisition of one business is conditional on the acquisition of each other business; or

(iii) Each acquisition is conditioned on a single common event.

(4) This section does not apply to a real estate operation subject to § 210.3-14 or a business which is totally held by the registrant prior to consummation of the transaction.

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Excerpt from S-X Rule 11-01

Presentation requirements.

(a) Pro forma financial information must be filed when any of the following conditions exist:

(1) During the most recent fiscal year or subsequent interim period for which a balance sheet is required by § 210.3-01, a significant business acquisition has occurred (for purposes of this section, this encompasses the acquisition of an interest in a business accounted for by the equity method);

(2) After the date of the most recent balance sheet filed pursuant to § 210.3-01, consummation of a significant business acquisition or a combination of entities under common control has occurred or is probable;

(3) Securities being registered by the registrant are to be offered to the security holders of a significant business to be acquired or the proceeds from the offered securities will be applied directly or indirectly to the purchase of a specific significant business;

(4) The disposition of a significant portion of a business either by sale, abandonment or distribution to shareholders by means of a spin-off, split-up or split-off has occurred or is probable and such disposition is not fully reflected in the financial statements of the registrant included in the filing;

(5) [Reserved]

(6) Pro forma financial information required by § 229.914 of this chapter is required to be provided in connection with a roll-up transaction as defined in § 229.901(c) of this chapter;

(7) The registrant previously was a part of another entity and such presentation is necessary to reflect operations and financial position of the registrant as an autonomous entity; or

(8) Consummation of other transactions has occurred or is probable for which disclosure of pro forma financial information would be material to investors.

Acquisitions of businesses can trigger the filing of financial statements under the following SEC rules.

— S-X Rule 3-05(a) requires a registrant to file the financial statements of the acquired business when it is significant.

— S-X Rule 11-01(a) requires a registrant to file pro forma information reflecting the combination of the registrant's and the acquired business's financial information.

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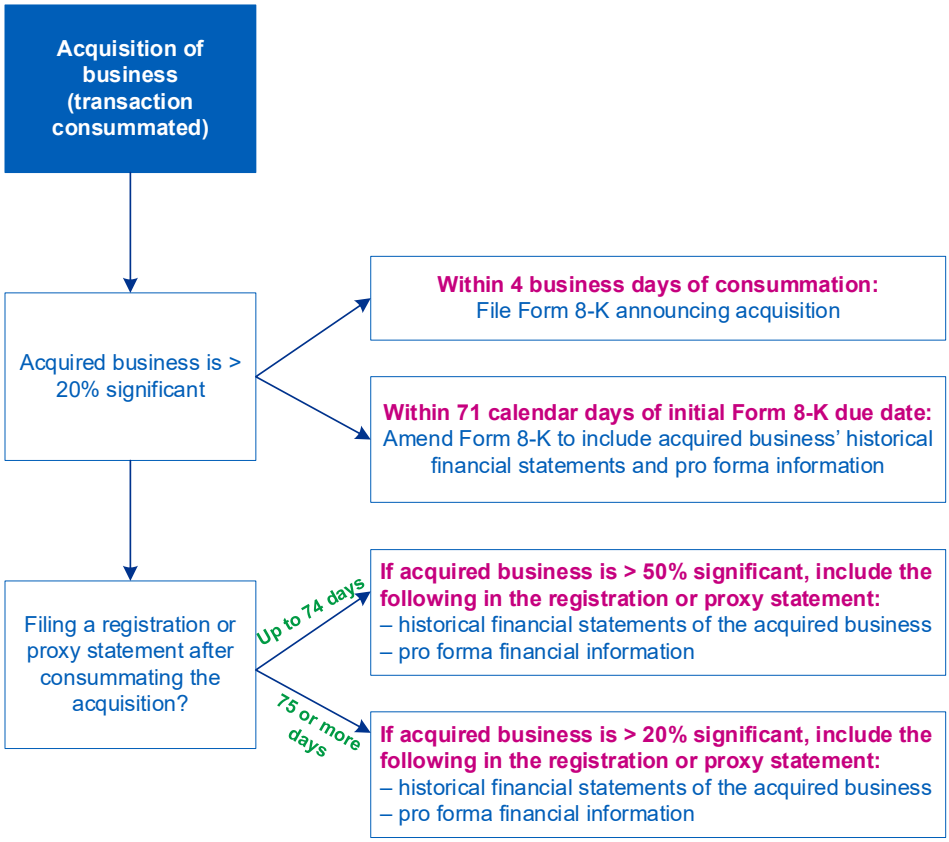
Question 2.2.190

When do the filing requirements in S-X Rule 3-05(a) and Rule 11-01(a) apply to an acquisition of a business?

Interpretive response: Once a registrant determines it has acquired a business, it must perform the significance tests in chapter 3 to determine its reporting requirements for the acquisition.



This decision tree applies only to acquisitions of businesses that have been consummated and are significant (see Question 2.2.200). There are different requirements for probable acquisitions of businesses (see section 2.2.30) and acquisitions by shell companies, including SPAC's (see section 10.2).

Further, when a registrant has acquired two or more 'related businesses', the related businesses are treated as a single business for purposes of applying the above decision tree and determining reporting requirements (see Question 2.2.210).

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Question 2.2.200

When is the acquisition of a business considered consummated?

Interpretive response: Consummation of a business acquisition generally coincides with a closing that involves the legal transfer of title to property or securities evidencing ownership in the business. The instructions to Item 2.01 of Form 8-K identify possible acquisitions such as a purchase, lease, exchange, merger, consolidation, succession or other acquisition transaction. Acquisitions do not include the construction or development of property (or the acquisition of materials for this purpose) by, or for, the registrant.

Consummation of an acquisition may involve transfer of legal ownership of a corporation's equity securities, or it may take other forms – e.g. through obtaining control of the business by contract or agreement.

The consummation date is the date on which title passes or ownership or control of the interest in the business is obtained.

Question 2.2.210

What is the definition of 'related' businesses for SEC reporting purposes?

Interpretive response: S-X Rule 3-05 requires acquisitions of related businesses to be evaluated for significance as though they were acquired in a single acquisition.

Businesses are 'related' if any of the following conditions apply: [S-X Rule 3-05(a)(3)]

- they are under common control or common management;
- the acquisition of one business is conditional on the acquisition of another business; or
- each acquisition is conditioned on a single common event.

Section 28 of KPMG Handbook, Business combinations, and chapters 3 and 8 of KPMG Handbook, Consolidation, provide guidance on evaluating whether companies are under common control or common management.

Acquisitions of businesses that would be considered 'related' are combined when performing the significance tests if the acquisitions occur within: [S-X Rule 3-05(a)(3), FRM 2020.8]

- any one fiscal year; plus
- the interim period after the date of the latest fiscal year-end, but before the filing of that fiscal year-end's audited financial statements.

See Question 3.3.200 for additional guidance on how to determine significance for acquisitions of related businesses.

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Example 2.2.110

Related businesses – Acquisitions are conditioned on a single common event

Registrant will acquire Companies A, B and C with the proceeds of a single planned offering of securities, but only if the offering is successful.

Because the acquisition of these companies is conditioned on the occurrence of a single event (i.e. the sale of securities), the companies are considered 'related' businesses. This is the case even if the companies are not under common control.

Example 2.2.120

Acquisition of related businesses under common control

Registrant acquires Companies A, B and C, which are each wholly owned by the same private equity investor at the time of the acquisition.

These companies are considered 'related' businesses because they were under common control immediately before their acquisition by Registrant.

Example 2.2.130

Acquisition of related businesses under common management

Registrant acquires controlling financial interests in two funds within an investment company complex that are managed by the same investment advisor but are not under common control.

These funds are considered 'related' businesses because they were under common management immediately before their acquisition by Registrant.

Question 2.2.220

Are the basic reporting requirements for the acquisition(s) of 'related' businesses different than for the acquisition of a single business of the same size?

Interpretive response: Generally, no. The reporting requirements for a group of related businesses are the same as those that apply for an acquisition of a single business of that size (see Question 2.2.190). Question 3.3.200 discusses how significance is determined for the acquisition of related businesses. Question 4.5.10 discusses when a registrant is permitted to present the required financial statements of the related businesses on a combined basis.

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Question 2.2.230

Are there reporting requirements for acquisition(s) of unrelated businesses that are significant in the aggregate?

Interpretive response: Sometimes. If a registrant files a registration statement or certain proxy materials, it evaluates whether certain of its consummated and probable (see section 2.2.30) acquisitions are greater than 50% significant in the aggregate. If so, the registrant provides pro forma financial information for the aggregate impact of the acquisitions and, in certain cases, financial statements for some individual acquisitions that would not otherwise be required at the time of effectiveness absent the aggregate level of significance. See Question 2.3.190 for additional guidance. [FRM 2035.1]

There is no Form 8-K filing requirement to report acquisitions of unrelated businesses that are significant in the aggregate (see Question 2.3.70).

2.2.30 Probable acquisition of a business

The probable acquisition of a business does not trigger the filing of the target's financial statements on a Form 8-K (see section 2.3.20), even if it is significant (see chapter 3). The Form 8-K filing requirement is triggered only upon consummation of the acquisition.

However, certain registration statements (including those filed on Forms S-4 or F-4, see chapter 5) require financial statements for a probable significant business acquisition under S-X Rule 3-05.

Question 2.2.240

When do the filing requirements in S-X Rule 3-05(a) and Rule 11-01(a) apply to a probable acquisition of a business?

Interpretive response: If at the time a registrant files a registration statement or mails certain proxy materials, it is probable that it will acquire a business, the registrant must perform the significance tests in chapter 3 to determine its reporting requirements.

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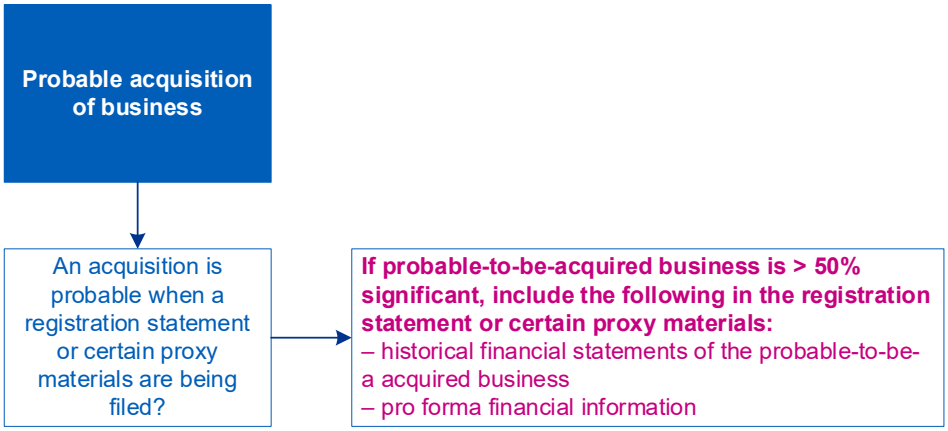

Even if the probable acquisition is individually less than 50% significant, there may be reporting requirements if certain of its consummated and probable acquisitions are greater than 50% significant in the aggregate (see Questions 2.2.230 and 2.3.190).

Question 2.2.250

How is the likelihood of a business acquisition determined for SEC reporting purposes?

Interpretive response: S-X Rule 3-05 does not provide a definition of the term 'probable'. However, we understand the SEC staff views the public announcement of an acquisition as strong evidence that the acquisition is probable.

In addition to considering public announcement of the acquisition, there may be other circumstances that influence a registrant's conclusion. We believe the following factors are important to consider when assessing the likelihood of an acquisition (in addition to the advice of the registrant's legal counsel):

— progress of the negotiations;

— economic and legal penalties associated with failure to consummate, including costs incurred to date in pursuing the acquisition; and

— significance of required regulatory approvals.

When evaluating progress, it may be useful to consider the following steps that are common in closing an acquisition.

1	Execute preliminary notice of interest
2	Meet and discuss the acquisition with the senior executives of the acquiree
3	Execute confidentiality and/or exclusivity agreements
4	Execute binding or nonbinding letters of intent
5	Conduct due diligence
6	Execute agreement in principle to acquire

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7	Obtain approval by boards of directors and/or shareholders
8	Submit to state, federal, and other regulators the appropriate information for acquisition approval

In addition, the SEC staff has stated the following in section 506.02(c)(ii) of the Codification of Financial Reporting Policies: [FRM 2005.4]

> "In essence, however, consummation of a transaction is considered to be probable whenever the registrants' financial statements alone would not provide investors with adequate financial information with which to make an investment decision."

Business acquisitions arising due to an event instead of a transaction

A business acquisition can occur when one entity obtains control of another through an event such as the expiration of noncontrolling rights held by others that precluded consolidation. A contract may state a date on which rights held by others that preclude consolidation will lapse. That date could be many years in the future. [Regs Comm 04/2008]

Determining whether such an acquisition is probable is based on facts and circumstances, including the current relevance of the target's financial statements to the registrant's investors. Generally, the further into the future control is expected to be obtained, the less likely (a) the acquisition is probable at the filing date, and (b) the current financial information of the target is relevant to the registrant's investors today. [Regs Comm 04/2008]

Example 2.2.140
Acquisition deemed not probable

Registrant plans to file a registration statement to sell equity securities. Registrant and Company A have signed a definitive agreement and announced Registrant's intention to acquire Company A. The acquisition is contingent on obtaining regulatory approval under foreign antitrust statutes. The agreement specifies that the acquisition will not close unless Registrant receives regulatory approval to acquire 100% of Company A's operations in all countries in which Company A does business.

The SEC staff concurred that the acquisition was not yet probable because obtaining multiple foreign regulatory approvals together with the condition of acquiring 100% of the company posed a significant impediment to consummation. These factors were significant enough that the acquisition was not yet probable even though the acquisition had been publicly announced.

Example 2.2.150
Acquisition deemed probable

Following several months of informal discussions of a possible merger, Registrant and Company A sign a nonbinding letter of intent. Although both

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companies recently commenced due diligence reviews, such reviews are expected to be perfunctory because the companies are already partners in several joint venture arrangements and are knowledgeable of the other's operations. The joint ventures are very significant to the assets and income of each of the companies. In addition, each company has one seat on the board of directors of the other company. Registrant issues a press release acknowledging that it is in advanced discussions with Company A. Following the announcement, Registrant's stock price increases 15%.

Registrant concludes the acquisition of Company A is probable, relying on the following factors to support its conclusion:

- the continuing mutual benefit of the companies' existing business relationships;
- mutual board representation;
- the public announcement of the discussions; and
- the execution of the letter of intent.

The nonbinding nature of the letter of intent and the fact that the acquisition will not close until the companies complete due diligence reviews would be indicators reducing the likelihood that the acquisition is probable. However, in this example, those factors were not significant enough to outweigh the preponderance of the cumulative evidence supporting the conclusion that the merger is probable.

Example 2.2.160

Probability of an acquisition arising from an event other than a transaction

Registrant holds a 55% ownership interest in Company A. Company B holds the remaining 45% in Company A and has noncontrolling veto rights that have previously kept Registrant from controlling Company A. The veto rights held by Company B expire in five years.

Although expiration of the veto rights precluding Registrant from consolidating Company A will happen with the passage of time, other conditions necessary for a business combination at that future time are unknown – e.g. whether Registrant will still own the interest in Company A on expiration of the veto rights.

Registrant concludes the acquisition is not probable and providing Company A's financial statements (and preparing pro forma information) is not relevant to investors at this time. Registrant will reconsider the likelihood of the acquisition as facts and circumstances change.

2.2.40 Disposition of a business

A disposition of a significant business may trigger pro forma reporting requirements under S-X Reg 11-01(a).

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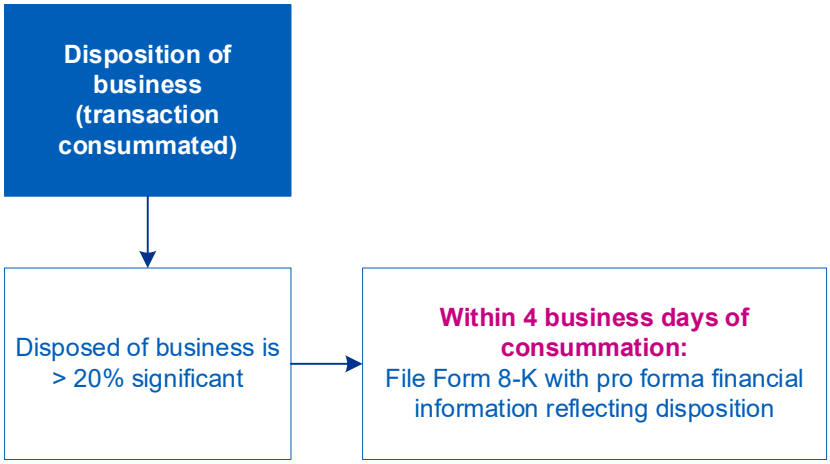
Question 2.2.260

When do pro forma filing requirements apply to the disposition of a significant business?

Interpretive response: When a registrant disposes of a business, it must perform the significance tests in chapter 3 related to that disposition to determine its reporting requirements.



If a disposition of a business is greater than 20% significant, S-X Article 11 requires the registrant to provide pro forma financial information reflecting the impact of the disposition, unless such impacts are fully reflected in the financial statements filed by the registrant (e.g. when the disposal has been presented separately as discontinued operations in the historical financial statements).

Comparison to legacy SEC rules

Significance of disposition

The legacy requirements of Article 11 established a significance threshold for the disposition of a business at 10%. The amendments to Article 11 increased this threshold to 20%. These amendments aligned the level at which a business that is either acquired or disposed is considered significant. The amendments became effective for fiscal years beginning after December 31, 2020. [SEC Rel 33-10786 § II.D.2]

However, the 10% significance threshold for the acquisition or disposition of assets that do not meet the definition of a business for SEC reporting purposes was not amended. Therefore, registrants must continue to provide disclosure under Item 2.01 of Form 8-K for asset acquisitions or dispositions that exceed 10% significance (see Question 2.3.110).

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2.3. Filing and reporting requirements – General

2.3.10 Overview

Section 2.2 discusses when certain SEC financial statement filing requirements are triggered. This section discusses those filing requirements.

- Form 8-K filing requirement for the acquisition or disposition of a business that exceeds the 20% significance threshold:
  - inclusion of the significant acquired business's historical financial statements (S-X Rule 3-05(a));
  - inclusion of pro forma information for the acquisition or disposition of a significant business (S-X Rule 11-01(a));
- Reg S-X filing requirement in registration and certain proxy statements for the acquisition (or probable acquisition) or disposition of a business that exceeds certain significance thresholds:
  - inclusion of the significant acquired (or to be acquired) business's historical financial statements (S-X Rule 3-05(a));
  - inclusion of pro forma information for the acquisition or disposition of a significant business (S-X Rule 11-01(a)).

This section discusses the basic requirements and the nature of the information to be provided. Chapter 4 addresses the detailed form and content of the information, including the financial statement periods required to be provided.

Question 2.3.10

Does a registrant include in its annual and quarterly reports the financial information of an acquired business?

Interpretive response: No. Annual and quarterly reports (e.g. Forms 10-K, 10-Q, and 20-F) do not require inclusion of the financial statements of a significant acquired (or probable-to-be-acquired) business.

However, Item 5 of Form 10-Q permits a registrant to use the Form to report information that otherwise must be reported on Form 8-K.

Question 2.3.20

Are the filing requirements the same for foreign private issuers (FPIs)?

Interpretive response: No. FPIs are not required to file periodic reports on a Form 8-K or to file proxy solicitation materials unless they elect to use the periodic filing forms of a domestic issuer. Therefore, absent that election, the filing of a registration statement is the only circumstance in which FPIs are required to file financial statements of a significant acquired or probable-to-be-acquired business.

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Chapter 6 provides more information about acquisitions by FPIs as well as acquisitions of foreign entities.

2.3.20 Form 8-K considerations

Excerpt from Form 8-K

General Instructions

B. Events to be Reported and Time for Filing of Reports.

1. A report on this form is required to be filed or furnished, as applicable, upon the occurrence of any one or more of the events specified in the items in sections 1 - 6 and 9 of this form. Unless otherwise specified, a report is to be filed or furnished within four business days after occurrence of the event. If the event occurs on a Saturday, Sunday or holiday on which the Commission is not open for business, then the four business day period shall begin to run on, and include, the first business day thereafter. A registrant either furnishing a report on this form under Item 7.01 (Regulation FD Disclosure) or electing to file a report on this form under Item 8.01 (Other Events) solely to satisfy its obligations under Regulation FD (17 CFR 243.100 and 243.101) must furnish such report or make such filing, as applicable, in accordance with the requirements of Rule 100(a) of Regulation FD (17 CFR 243.100(a)), including the deadline for furnishing or filing such report. A report pursuant to Item 5.08 is to be filed within four business days after the registrant determines the anticipated meeting date.

Information to be Included in the Report

Section 2 – Financial Information

Item 2.01 Completion of Acquisition or Disposition of Assets.

If the registrant or any of its subsidiaries consolidated has completed the acquisition or disposition of a significant amount of assets, otherwise than in the ordinary course of business, or the acquisition or disposition of a significant amount of assets that constitute a real estate operation as defined in § 210.3-14(a)(2) disclose the following information:

(a) the date of completion of the transaction;

(b) brief description of the assets involved;

(c) the identity of the person(s) from whom the assets were acquired or to whom they were sold and the nature of any material relationship, other than in respect of the transaction, between such person(s) and the registrant or any of its affiliates, or any director or officer of the registrant, or any associate of any such director or officer;

(d) the nature and amount of consideration given or received for the assets and, if any material relationship is disclosed pursuant to paragraph (c) of

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this Item 2.01, the formula or principle followed in determining the amount of such consideration;

(e) if the transaction being reported is an acquisition and if a material relationship exists between the registrant or any of its affiliates and the source(s) of the funds used in the acquisition, the identity of the source(s) of the funds unless all or any part of the consideration used is a loan made in the ordinary course of business by a bank as defined by section 3(a)(6) of the Act, in which case the identity of such bank may be omitted provided the registrant:

(1) has made a request for confidentiality pursuant to section 13(d)(1)(B) of the Act; and

(2) states in the report that the identity of the bank has been so omitted and filed separately with the Commission; and

(f) if the registrant was a shell company, other than a business combination related shell company, as those terms are defined in Rule 12b-2 under the Exchange Act (17 CFR 240.12b-2), immediately before the transaction in which the registrant acquired a business that is its predecessor, disclose the information that would be required if the acquired business or real estate operation that is its predecessor were filing a general form for registration of securities on Form 10 under the Exchange Act reflecting all classes of the registrant's securities subject to the reporting requirements of Section 13 (15 U.S.C. 78m) or Section 15(d) (15 U.S.C. 78o(d)) of such Act upon consummation of the transaction. However, when, at the time of filing, the predecessor meets the conditions of an emerging growth company, as defined in § 230.405 of this chapter (Rule 405 of the Securities Act) or § 240.12b-2 of this chapter (Rule 12b-2 of the Exchange Act), the registrant need not present audited financial statements for the predecessor for any period prior to the earliest audited period presented in its financial statements included in a previously filed registration or proxy statement for the transaction resulting in the loss of shell company status. Notwithstanding General Instruction B.3. to Form 8-K, if any disclosure required by this Item 2.01(f) is previously reported, as that term is defined in Rule 12b-2 under the Exchange Act (17 CFR 240.12b-2), the registrant may identify the filing in which that disclosure is included instead of including that disclosure in this report.

Instructions.

(1) No information need be given as to:

(i) any transaction between any person and any wholly-owned subsidiary of such person;

(ii) any transaction between two or more wholly-owned subsidiaries of any person; or

(iii) the redemption or other acquisition of securities from the public, or the sale or other disposition of securities to the public, by the issuer of such securities or by a wholly-owned subsidiary of that issuer.

(2) The term acquisition includes every purchase, acquisition by lease, exchange, merger, consolidation, succession or other acquisition, except that the term does not include the construction or development of property

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by or for the registrant or its subsidiaries or the acquisition of materials for such purpose. The term disposition includes every sale, disposition by lease, exchange, merger, consolidation, mortgage, assignment or hypothecation of assets, whether for the benefit of creditors or otherwise, abandonment, destruction, or other disposition.

(3) The information called for by this Item 2.01 is to be given as to each transaction or series of related transactions of the size indicated. The acquisition or disposition of securities is deemed the indirect acquisition or disposition of the assets represented by such securities if it results in the acquisition or disposition of control of such assets.

(4) An acquisition or disposition will be deemed to involve a significant amount of assets:

(i) if the registrant's and its other subsidiaries' equity in the net book value of such assets or the amount paid or received for the assets upon such acquisition or disposition exceeded 10 percent of the total assets of the registrant and its consolidated subsidiaries;

(ii) if it involved a business (see 17 CFR 210.11-01(d)) that is significant (see 17 CFR 210.11-01(b)). 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; or

(iii) in the case of a business development company, if the amount paid for such assets exceeded 10 percent of the value of the total investments of the registrant and its consolidated subsidiaries.

The aggregate impact of acquired businesses are not required to be reported pursuant to this Item 2.01 unless they are related businesses (see 17 CFR 210.3-05(a)(3)), related real estate operations (see 17 CFR 210.3-14(a)(3)), or related funds (see 17 CFR 210.6-11(a)(3)), and are significant in the aggregate.

(5) Attention is directed to the requirements in Item 9.01 (Financial Statements and Exhibits) with respect to the filing of:

(i) financial statements of businesses or funds acquired;

(ii) pro forma financial information; and

(iii) copies of the plans of acquisition or disposition as exhibits to the report.

The acquisition or disposition of a significant business triggers the filing of a Form 8-K for domestic registrants subject to the periodic filing requirements of the 1934 Act. Form 8-K is also required for an FPI that elects to use the periodic filing forms of a domestic issuer (see Question 2.3.20).

An acquisition or disposition of a business affects the following parts of Form 8-K.

Item 1.01, Entry into a Material Definitive Agreement	May be required prior to the consummation of the acquisition. See Question 2.3.60 for additional considerations.

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Item 2.01, Completion of Acquisition or Disposition of Assets	Requires reporting consummation of a significant (at the 20% level) acquisition or disposition of a business, fund (see chapter 9) or real estate operation (see chapter 8). Item 2.01 also requires reporting consummation of a significant (at the 10% level) acquisition or disposition of an asset (or group of assets).
Item 9.01, Financial Statements and Exhibits	Requires providing financial statements (at the 20% level) of a significant acquired business, fund or real estate operation (under Reg S-X) Requires providing registrant's pro forma financial information after a significant (at the 20% level) acquisition or disposition of a business or real estate operation (under S-X Rule 11-01(a)).

Question 2.3.30

In general, when is a Form 8-K required and what basic information is to be included?

Interpretive response: The following decision tree outlines the determination of when a Form 8-K filing is required and what basic information is to be included.

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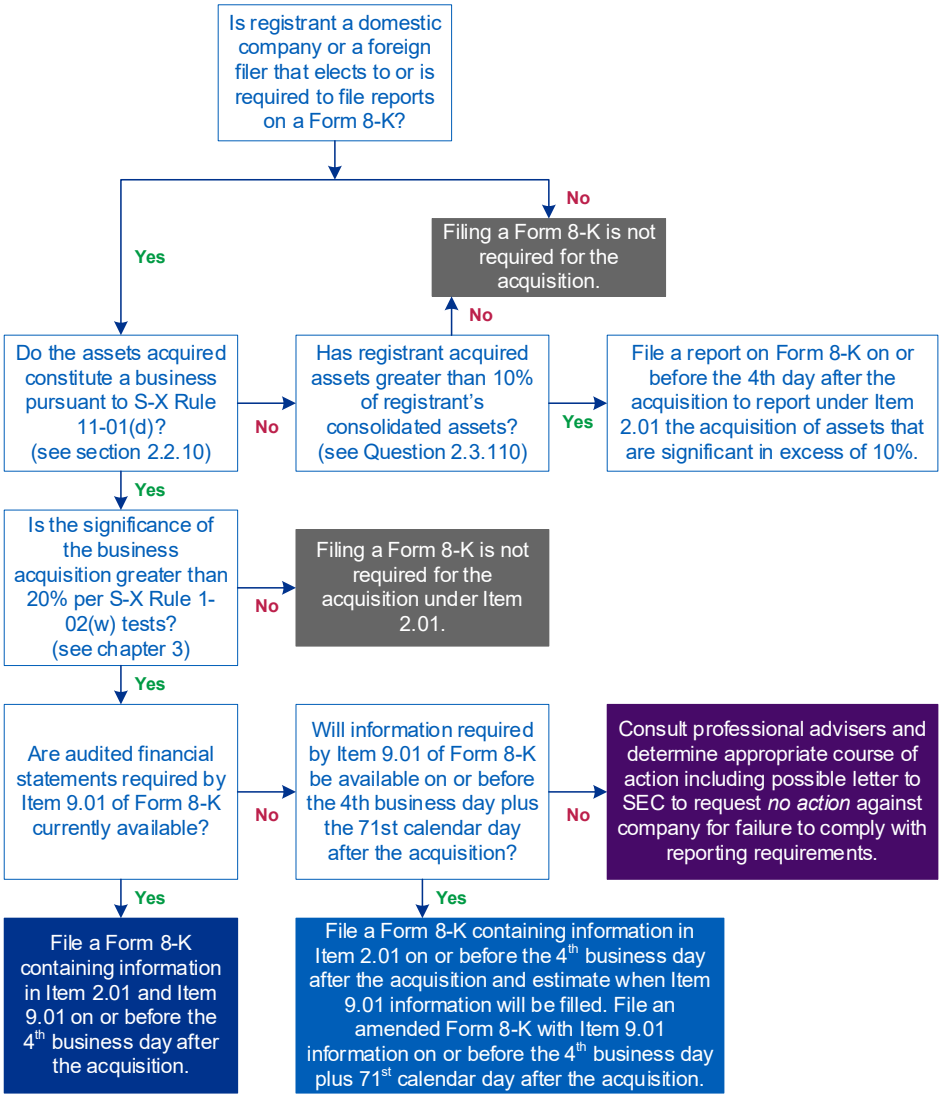

Notes:

1. The additional 71-day period to provide the required financial information is not available to shell companies (e.g. SPACs) (see section 10.2).
2. See Question 2.3.130 for guidance on whether the acquisition (or disposition) of a business at the 10 - 20% significance level requires filing under Item 2.01.
3. This guidance also generally applies to acquisitions of funds (see chapter 9) and real estate operations (see chapter 8).

Question 2.3.40

When is the Form 8-K for an acquisition of a significant business due?

Interpretive response: Registrants must file a Form 8-K to report the consummation of the acquisition of a significant business under the following timelines.

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Filing	Due date
See additional discussion following table and in Question 2.3.50	
Initial Form 8-K (Item 2.01)	Within four business days after the consummation of the acquisition
Amended Form 8-K (Item 9.01)	Not later than 71 calendar days after the initial Form 8-K due date. The additional 71-day period to provide the required financial information is not available to shell companies (e.g. SPACs) (see section 10.2).

Initial Form 8-K

The initial Form 8-K must be filed on or before the fourth business day following the consummation of a significant business acquisition (see Question 2.2.200 regarding the consummation date). This initial Form 8-K requires information reporting the significant acquisition and must contain, at a minimum, the information required by Item 2.01 of Form 8-K (see Question 2.3.30). [Form 8-K (gen instruction B(1))]

Item 9.01 of Form 8-K also requires audited historical financial statements of a significant acquired business as well as pro forma financial information. However, certain registrants are permitted to provide this financial information through an amendment to the Form 8-K. Shell companies (e.g. SPACs) must provide the information required by Item 9.01 in the initial Form 8-K.

Amended Form 8-K

The amended Form 8-K containing the required audited financial statements and unaudited interim financial statements of the acquired business and the registrant's pro forma financial information must be filed no later than 71 calendar days after the original Form 8-K was required to be filed (sometimes referred to as the '71-day extension period'). However, this additional 71-day period to provide the required financial information is not available to shell companies (e.g. SPACs) (see section 10.2). [Form 8-K Items 9.01(a)(3), (c)]

In summary, a registrant has a *maximum* of four business days plus 71 calendar days from the consummation date to file the required financial statements of a significant acquired business. This requirement generally results in a total number of days between the range of 75 to 77 calendar days, depending on whether weekends and/or holidays fall within the initial four-business-day or subsequent 71-calendar-day period.

Example 2.3.10
Timing of filing of Form 8-K

Registrant acquires Company A on Monday, April 1, 20X1. The acquisition is greater than 20% significant. On Wednesday, April 3, 20X1, Registrant files a Form 8-K to report the acquisition under Item 2.01. Registrant then has 71 calendar days from Friday, April 5, 20X1 to file an amended Form 8-K containing

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the financial statements and pro forma financial information related to the acquisition of Company A.

Although Registrant filed its original Form 8-K on the second day following the acquisition, instead of using the full four business days allowed, it may still file the amendment containing the financial statements of Company A on or before the 71st calendar day following the date that the initial Form 8-K was required to be filed (April 5, 20X1). If the 71st calendar day falls on a weekend day, filling is required the following business day at the latest.

Question 2.3.50

What information is included in the Form 8-K for an acquisition?

Interpretive response: Items 2.01 and 9.01 of Form 8-K require the filing of the following information.

Initial Form 8-K (Item 2.01)

The initial Form 8-K must contain the following minimum information under Item 2.01: [Form 8-K Item 2.01(a) – (f)]

- the date the transaction was completed;
- a brief description of what was acquired;
- the counterparty of the acquisition and any material relationships between the two parties, including their directors and officers;
- the nature and amount of consideration;
- additional information if any material relationships exist between the counterparties and the source(s) of funds; and
- additional information if the registrant was a shell company immediately before the transaction.

Amended Form 8-K (Item 9.01)

The following financial information must be provided under Item 9.01 of Form 8-K for acquisitions for which the Item is applicable. As discussed in Question 2.3.40, this additional information may be provided through a subsequent amendment to the Form 8-K if it is not available at the original filing due date:

- audited annual financial statements and unaudited interim financial statements (as applicable) of the acquired business (Rule 3-05 financial statements);
- registrant's pro forma financial information reflecting the acquisition (S-X Article 11 pro forma information).

The number of financial statement periods required depends on the significance of the acquisition to the registrant. Chapter 4 provides additional guidance on the financial statement periods required to be included in the Form 8-K.

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Question 2.3.60

What information is included in Form 8-K for a significant business acquisition that is probable?

Interpretive response: The requirements of Items 2.01 and 9.01 of Form 8-K (see Question 2.3.50) are triggered by the consummation date of the acquisition. These Items do not require a registrant to file a Form 8-K for a probable acquisition regardless of its significance level.

However, in certain cases, a registrant may be required to file a Form 8-K to comply with Item 1.01, *Entry into a Material Definitive Agreement*, at a point prior to the consummation of the acquisition. Registrants should consult with legal counsel in making such determinations.

Item 1.01 of Form 8-K requires a brief description of the terms and conditions of the agreement that are material to the registrant. The SEC staff has stated that although the materiality of a term or condition of the business acquisition agreement will ultimately depend on the particular facts and circumstances, the following terms should generally be viewed as material and disclosed in the Form 8-K: [Form 8-K C&DI.102.04]

- the nature and amount of consideration offered (or the method, exchange ratio, or formula for determining the consideration);
- any committed financing arrangements (e.g. PIPE – 'private investment in public equity' – investments), or the need for financing to close the transaction, and the material terms of such arrangements;
- any material terms regarding the securities ownership or management structure of the combined or surviving company after the closing of the transaction;
- any material conditions to the closing of the transaction; and
- the anticipated timeframes for:
  - filing any Securities Act registration statement, proxy or information statement, or tender offer materials; and
  - the closing of the transaction.

Item 1.01 of Form 8-K must include all other material information that is necessary to make the required disclosure, in light of the circumstances under which it is made, not misleading. For example, to ensure investors can evaluate the business acquisition agreement with the proper context, the SEC staff has stated the following disclosures should be considered. [Form 8-K C&DI.102.04]

- If a material term of the agreement has not yet been determined by the parties, the Form 8-K should affirmatively state so.
- If the registrant is the acquirer, the Form 8-K should briefly describe the nature of the target company's business, including, at a minimum, whether the target company has existing operations or has generated revenues, and any information disclosed by the target company in announcing the transaction.

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Further, the SEC staff encourages registrants to file the agreement as an exhibit to Item 1.01 of Form 8-K in the proper EDGAR format within a four-business day timeframe. Registrants are permitted to redact sensitive terms of a material definitive agreement without submitting a confidential treatment request. Registrants unable to prepare the agreement in the proper EDGAR format and file the agreement as an exhibit should provide an explanation in the Form 8-K. [Form 8-K C&DI.102.05, Form 8-K Item 1.01 (Instructions 5, 6)]

Question 2.3.70

Is a Form 8-K required for individually insignificant acquisitions that are significant in aggregate?

Interpretive response: No. Form 8-K is not required to be filed for individually insignificant acquisitions of businesses, regardless of their aggregate significance.

However, acquisitions of 'related' businesses are combined as one for purposes of determining significance. As a result, a Form 8-K must be filed if the registrant acquires 'related' businesses, and the aggregate significance of those businesses (viewed as the acquisition of a single business) is more than 20% (see Question 2.2.220).

Although a registrant generally does not consider aggregate significance for Form 8-K filings (other than for 'related' businesses), it must consider aggregate significance when filing a registration statement or certain proxy materials (see Question 2.3.190). [Form 8-K Item 2.01 (Instruction 4), FRM 2035.1]

Voluntary filing of a Form 8-K

Although filing a Form 8-K is not required for individually insignificant acquisitions, a registrant may want to use the Form 8-K to file pro forma financial information for the acquired (or probable-to-be-acquired) businesses if it makes several acquisitions that together are significant. For example, a registrant may want to do this if the acquisitions (or probable acquisitions) will, in the aggregate, exceed 50% significance and the registrant wishes to incorporate the Form 8-K information by reference into a future registration statement or an existing shelf registration statement to meet its requirements under Article 11 (see section 2.3.30).

In these circumstances, the registrant uses Item 8.01 of Form 8-K to voluntarily file other information it considers important to investors that is not otherwise required by Form 8-K. The choice of information to be included in this filing, including the choice of whether to include historical financial statements and pro forma financial information, is at the registrant's discretion.

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Question 2.3.80

Is a Form 8-K required for transactions between a parent and subsidiary?

Interpretive response: Generally, no. The instructions to Item 2.01 of Form 8-K indicate that information is not required for any transaction between a parent and any wholly owned subsidiary or between two or more wholly owned subsidiaries of a parent. [Form 8-K Item 2.01 (Instruction 1)]

However, if a wholly owned subsidiary acquires a significant amount of assets from its parent and both the subsidiary and the parent are reporting companies, the SEC staff has taken the position that the subsidiary is required to file a Form 8-K reporting the significant acquisition. This is because the SEC staff believes that the instructions are applied by referring to the company that has the obligation to file the report. As a result, a subsidiary with its own obligation to report that acquires a significant amount of assets from its parent cannot take advantage of the exemption to filing under Item 2.01 because it is not the parent.

Question 2.3.90

Is a Form 8-K required for an acquisition (or change in events) that results in consolidation of a VIE that is significant?

Interpretive response: Generally, yes. As discussed in Question 2.2.110, acquisition through consolidation is in the scope of the Form 8-K requirement for reporting significant acquisitions. This includes either the initial acquisition of a VIE or other reconsideration event that results in consolidation of a VIE. However, consolidation of a VIE or other subsidiary on adoption of a new or amended accounting standard that affects Subtopic 810-10 does not trigger a reporting requirement on Form 8-K.

For in-depth guidance on determining whether a VIE exists and must be consolidated, see KPMG Handbook, Consolidation.

The Form 8-K reporting requirements depend on whether the VIE meets the definition of a business for SEC reporting purposes. If the VIE is a business and is significant (see chapter 3), the Form 8-K must include S-X Rule 3-05 financial statements under Item 9.01 of Form 8-K, as well as pro forma financial information under S-X Rule 11-01(a).

If the VIE does not meet the definition of a business for SEC reporting purposes, the registrant reports the transaction under Item 2.01 of Form 8-K if it is significant under that Item. See Question 2.3.110.

VIE makes a significant acquisition

If a consolidated VIE acquires an asset (or group of assets) that is significant to the registrant (parent), Item 2.01 (and Item 9.01 if the asset(s) is a business for SEC reporting purposes) of Form 8-K applies to the acquisition. The SEC staff

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views this situation similar to a subsidiary of a parent acquiring an asset or a business. See Question 2.3.80.

Question 2.3.100

How do the Form 8-K filing requirements differ for a significant business disposition?

Interpretive response: The disposition of a significant business is reported in Form 8-K under Item 2.01. Like a significant acquisition of a business, pro forma financial information of the registrant reflecting the disposition is included under Item 9.01 of Form 8-K, unless the disposition is fully reflected in the registrant's previously filed historical financial statements (e.g. when the disposal has been presented separately as discontinued operations in the historical financial statements). However, historical financial statements of the disposed business are not required in Form 8-K.

The pro forma financial information reflecting the disposition is required to be filed on a Form 8-K within four business days of the disposition. The SEC staff's guidance has clarified that the 71-day extension period available for significant acquired business financial information does not apply to business dispositions. [FRM 2120.1, C&DI.129.01]

Question 2.3.110

How do the Form 8-K significance tests differ for an acquisition or disposition of assets that do not meet the definition of a business?

Interpretive response: When the registrant acquires or disposes assets that do not meet the definition of a business for SEC reporting purposes, the significance tests under S-X Rule 1-02(w) do not apply. Instead, a registrant determines significance under the instructions for Item 2.01 of Form 8-K. [FRM 2040.1]

The acquisition of an asset (or group of assets) that is not a business is significant if: [Form 8-K Item 2.01 (Instruction 4(i))]

- the registrant's share in the net book value (i.e. cost) of the assets acquired or disposed exceeds 10% of the registrant's consolidated total assets; or
- the amount paid or received (i.e. value) for the assets acquired or disposed exceeds 10% of the registrant's consolidated total assets.

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Question 2.3.120

How do the Form 8-K filing requirements differ for an acquisition or disposition of assets that do not meet the definition of a business?

Interpretive response: When a registrant acquires (or disposes of) an asset (or group of assets) that is significant at the 10% level (see Question 2.3.130), the disclosures in Item 2.01 of Form 8-K should clearly describe the assets acquired (or disposed of) and the anticipated effects on the registrant's financial condition. It also should indicate that the acquisition did not constitute the acquisition of a business as defined by S-X Rule 11-01(d). [Form 8-K Item 2.01]

The registrant is also required to include pro forma information reflecting the effects of the asset acquisition (or disposition) if such information is material to investors.

A registrant must make the Item 2.01 required disclosures within four days of consummation; the 71-day extension period for filing financial statements of an acquired business does not apply. [Form 8-K (gen instruction B.1)]

Question 2.3.130

Does a registrant report under Item 2.01 of Form 8-K for the acquisition or disposition of a business that is less than 20% significant?

Interpretive response: No. A registrant is required to disclose the acquisition (or disposition) of a business in a Form 8-K only if significance of the business exceeds 20%.

In other words, the significance tests for the acquisition (or disposition) of a business (as outlined in chapter 3) and the significance tests for the acquisition (or disposition) of assets (as outlined in Question 2.3.110) are mutually exclusive. [FRM 2040.1]

2.3.30 Registration and proxy statements

Excerpt from S-X Rule 3-05

Financial statements of businesses acquired or to be acquired.

(b) *Periods to be presented.*

(1) If registering an offering of securities to the security holders of the business to be acquired, then the financial statements specified in §§ 210.3-01 and 210.3-02 must be filed for the business to be acquired, except as provided otherwise for filings on Form N-14, S-4, or F-4 (§ 239.23, § 239.25, or § 239.34 of this chapter). The financial statements

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covering fiscal years must be audited except as provided in Item 14 of Schedule 14A (§ 240.14a-101 of this chapter) with respect to certain proxy statements or in registration statements filed on Forms N-14, S-4, or F-4 (§ 239.23, § 239.25, or § 239.34 of this chapter).

(2) In all cases not specified in paragraph (b)(1) of this section, financial statements of the business acquired or to be acquired must be filed for the periods specified in this paragraph (b)(2) or such shorter period as the business has been in existence. Determine the periods for which such financial statements are to be filed using the conditions specified in the definition of significant subsidiary in § 210.1-02(w), using the lower of the total revenue component or income or loss from continuing operations component for evaluating the income test condition, as follows:

(i) If none of the conditions exceeds 20 percent, financial statements are not required.

(ii) If any of the conditions exceeds 20 percent, but none exceed 40 percent, financial statements must be filed for at least the most recent fiscal year and the most recent interim period specified in §§ 210.3-01 and 210.3-02.

(iii) If any of the conditions exceeds 40 percent, financial statements must be filed for at least the two most recent fiscal years and any interim periods specified in §§ 210.3-01 and 210.3-02.

(iv) If the aggregate impact of 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 not required by paragraph (b)(2)(i) of this section or are not yet required based on paragraph (b)(4)(i) of this section, exceeds 50 percent for any condition, the registrant must provide the disclosure specified in paragraphs (b)(2)(iv)(A) and (B) of this section, however in determining the aggregate impact of the investment test condition also include the aggregate impact calculated in accordance with § 210.3-14(b)(2)(ii) of any acquired or to be acquired real estate operations specified in § 210.3-14(b)(2)(i)(C). In determining whether the income test condition (i.e. both the revenue component and the income or loss from continuing operations component) exceeds 50 percent, the businesses specified in this paragraph (b)(2)(iv) reporting losses must be aggregated separately from those reporting income. If either group exceeds 50 percent, paragraphs (b)(2)(iv)(A) and (B) of this section will apply to all of the businesses specified in this paragraph (b)(2)(iv) and will not be limited to either the businesses with losses or those with income.

(A) Pro forma financial information pursuant to §§ 210.11-01 through 210.11-02 that depicts the aggregate impact of these acquired or to be acquired businesses and real estate operations, in all material respects; and

(B) Financial statements covering at least the most recent fiscal year and the most recent interim period specified in §§ 210.3-01 and 210.3-02 for any acquired or to be acquired business or

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real estate operation for which financial statements are not yet required based on paragraph (b)(4)(i) of this section or § 210.3-14(b)(3)(i).

(3) The determination must be made using § 210.11-01(b)(3) and (4).

(4) Financial statements required for the periods specified in paragraph (b)(2) of this section may be omitted to the extent specified as follows:

(i) Registration statements not subject to the provisions of § 230.419 of this chapter and proxy statements need not include separate financial statements of an acquired or to be acquired business if neither the business nor the aggregate impact specified in paragraph (b)(2)(iv) of this section exceeds any of the conditions of significance in the definition of significant subsidiary in § 210.1-02 at the 50 percent level computed in accordance with paragraph (b)(3) of this section, and either:

(A) The consummation of the acquisition has not yet occurred; or

(B) The date of the final prospectus or prospectus supplement relating to an offering as filed with the Commission pursuant to § 230.424(b) of this chapter, or 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.

(ii) A registrant, other than a foreign private issuer required to file reports on Form 6-K (§ 249.306 of this chapter) or a shell company (other than a business combination related shell company), that omits from its initial registration statement financial statements of a recently consummated business acquisition pursuant to paragraph (b)(4)(i) of this section must file those financial statements and any pro forma information specified by §§ 210.11-01 through 210.11-03 (Article 11) under cover of Form 8-K (§ 249.308 of this chapter) no later than 75 days after consummation of the acquisition. When a predecessor to a shell company (other than a business combination related shell company) acquires a business and the financial statements of that recently consummated business are omitted from a registration statement or proxy statement pursuant to paragraph (b)(4)(i) of this section, refer to § 210.15-01(d)(2).

(iii) Separate financial statements of the acquired business specified in paragraph (b)(2)(ii) of this section need not be presented once the operating results of the acquired business have been reflected in the audited consolidated financial statements of the registrant for at least nine months. Separate financial statements of the acquired business specified in paragraph (b)(2)(iii) of this section need not be presented once the operating results of the acquired business have been reflected in the audited consolidated financial statements of the registrant for a complete fiscal year.

(iv) A separate audited balance sheet of the acquired business is not required when the registrant's most recent audited balance sheet

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required by § 210.3-01 is for a date after the date the acquisition was consummated.

Generally, registration statements under the 1933 and 1934 Acts require all financial statements required by Reg S-X. This requirement includes the registrant's financial statements required by S-X Rule 3-01 to 3-04, an acquired business's financial statements required by S-X Rule 3-05 and pro forma financial statements required by S-X Rule 11-01(a).

However, merger proxy materials or registration statements on Form S-4 or F-4 are subject to special requirements for financial statements. These special requirements are covered in chapter 5.

Question 2.3.140

When are financial statements of an acquired business and pro forma financial information required in a registration statement?

Interpretive response: The level of significance that triggers the filing of an acquired business's pre-acquisition financial statements and pro forma financial statements reflecting the acquisition depends on:

- whether the acquisition has already been consummated;
- whether it was consummated 75 or more days before effectiveness ('75-day grace period'); and
- the effective date of the registration statement or the mailing date of the proxy statement.

Registrants may omit some or all of the pre-acquisition financial statements of the acquired business if the acquired business's operating results have been reflected in the audited, consolidated financial statements of the registrant for specified periods of time at effectiveness, depending on significance (see Question 2.3.160).

The conditions that require financial information related to the acquisition of a business in a registration statement are summarized in the following tables. Although the requirements described below describe what must be included at the time of effectiveness of a registration statement (or mailing of proxy materials), they are first evaluated at the date the registrant submits the draft registration statement. The SEC staff may choose not to review registration statements that do not include all the required financial statements and pro forma financial information that would be required under Reg S-X at the filing date. However, in instances where the draft registration statement is submitted for nonpublic review, certain exceptions apply (see Question 7.2.60).

The specific content, number of periods and age of the financial statements of the acquired business are discussed in chapter 4.

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Acquisition of an individual business (or related businesses) – consummated 75 or MORE days before the effectiveness/mailing date		
Significance	**Financial statements of the acquired business are required**	**Pro forma financial information is required**
20% or less	No	No
Greater than 20% but not greater than 40%*	Yes	Yes
Greater than 40%*	Yes	Yes
*Based on the level of significance, the number of periods required varies. See chapter 4.		

Acquisition of an individual business (or related businesses) that either: — **is probable at the effectiveness/mailing date; or** — **consummated up to 74 days before the effectiveness/mailing date**		
Significance	**Financial statements of the acquired (or to be acquired) business are required**	**Pro forma financial information is required**
Does not exceed 50%*	No	No
Exceeds 50%	Yes	Yes
*This provision does not relieve a registrant of the requirement to file financial statements for acquired businesses that do not exceed 50% significance on Form 8-K on or before the 4th business day plus 71st calendar day following consummation. See section 2.3.20.		

Aggregate of all of the following: — **consummated and less than 20% significant;** — **consummated, greater than 20% but not greater than 50% significant, but financial statements are not yet required because of the 75-day grace period (see Question 2.3.150);** — **probable and less than 50% significant.**		
Significance	**Financial statements of the acquired business(es) are required**	**Pro forma financial information is required**
Does not exceed 50%	No	No
Exceeds 50%	Yes – for any individual acquisition that is > 20% significant	Yes – depicting the aggregate impact of all the acquired or to be acquired businesses, in all material respects

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When a registrant is required to file the financial statements of a significant business acquisition, such financial statements may be included in the registration statement or incorporated from a previously filed Form 8-K (if applicable) (see Question 2.3.180).

While registration statements generally must include acquired business's financial statements required by S-X Rule 3-05, certain offerings may proceed during the period after an acquisition has been reported on Form 8-K, but before the acquired business's financial statements have been filed (see Question 2.3.40). This includes the following offerings or sales of securities: [Form 8-K Instruction to Item 9.01]

- employee benefit plans;
- dividend or interest reinvestment plans;
- offerings or sales of securities upon the conversion of outstanding convertible securities or exercise of outstanding warrants or rights.

Example 2.3.20

Consummated 75 or more days before the filing or effective/mailing date

On January 1, 20X1, Registrant, with a calendar year-end, acquires Company A, in a significant acquisition. Registrant files the Form 8-K reporting this acquisition on January 5, 20X1 and files the audited historical financial statements of Company A required by Form 8-K on March 16, 20X1. Registrant files a registration statement on April 15, 20X1 (i.e. more than 75 days after the significant business acquisition was consummated). Registrant must include or incorporate by reference the audited historical financial statements of Company A in the registration statement.

Example 2.3.30

Consummated up to 74 days before the filing or effective/mailing date

On January 1, 20X1, Registrant, with a calendar year-end, acquired Company A, in an acquisition significant at 25%. Registrant files the Form 8-K reporting this acquisition on January 5, 20X1. Registrant files a registration statement on February 15, 20X1.

The audited historical financial statements of Company A are not required to be included in the registration statement unless the effective date of the registration statement is delayed to a date that is 75 or more days after January 1, 20X1. However, if the acquisition of Company A had been more than 50% significant, Company A's audited financial statements would need to be included in Registrant's registration statement.

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Regardless of whether Company A's financial statements are included in the registration statement, Registrant must file Company A's audited annual and unaudited interim financial statements on an amended Form 8-K on or before the 71st calendar day following January 5, 20X1.

Example 2.3.40

Probable acquisition

Registrant, with a calendar year-end, files a registration statement on April 15, 20X9. Company A, whose acquisition would be significant at 40%, is considered a probable acquisition at the date of filing. Company A's audited historical financial statements may be excluded from the registration statement. However, if the probable business acquisition had been significant at more than 50%, audited financial statements would be required for the years specified in S-X Rule 3-05 (see chapter 4).

Question 2.3.150

Is the 'not more than 74 days' provision for registration statements the same as the 'not more than four business days plus 71 calendar days' provision for Form 8-K?

Background: Form 8-K generally requires registrants to file Rule 3-05 financial statements within four business days plus 71 calendar days after consummating a significant acquisition. See Question 2.3.40.

A similar 75-day filing period ('not more than 74 days') applies to registration and certain proxy statements for acquired businesses requiring Rule 3-05 financial statements. See Question 2.3.140.

Interpretive response: Yes.

The period for filing Rule 3-05 financial statements on Form 8-K may exceed 75 calendar days because the first four days of that 75-day grace period are business days, which excludes weekends and holidays. However, the SEC staff has stated that it will consider the period for Form 8-K filings to be substantially equivalent to 'not more than 74 calendar days' for registration and proxy statements, solely for the purposes of evaluating whether financial statements of an acquired business that the registrant timely filed under Item 2.01 of Form 8-K are required in a not-yet-effective registration statement. [FRM 2050.1 (n 1), SEC Rel 33-10786 § I.14-15]

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Question 2.3.160

Are financial statements required in a registration statement after the acquired business is included in the registrant's financial statements?

Interpretive response: It depends. S-X Rule 3-05 permits a registrant to omit certain separate pre-acquisition financial statements of an acquired entity if the acquired business has been reflected in the audited consolidated financial statements of the registrant for specified periods of time, as follows.

Balance sheet

A separate pre-acquisition audited balance sheet of the acquired business is not required once the most recent audited balance sheet of the registrant is filed as of a date after the acquisition was consummated (i.e. the acquired business is reflected on the consolidated balance sheet of the registrant). [S-X Rule 3-05(b)(4)(iv)]

Income statement

Separate pre-acquisition statements of income or operations may be omitted once the acquired business has been included in the registrant's audited financial statements for nine months or a complete fiscal year, depending on significance.

Significance	Period included in registrant's consolidated audited financial statements
Greater than 20% but not greater than 40%	9 months
Greater than 40%	A complete fiscal year

If these criteria are not met, audited pre-acquisition financial statements must be provided for the full number of periods required based on the significance thresholds (see chapter 4). The number of pre-acquisition financial statement periods required may not be reduced by the number of months the acquired business has been included in the registrant's consolidated financial statements (see Question 4.4.90). [S-X Rule 3-05(b)(4)(iii)]

Question 2.3.170

Does the proxy statement for the annual shareholders' meeting require financial statements of significant acquired businesses?

Interpretive response: Generally, no. The proxy rules in the 1934 Act require that an annual report be furnished to shareholders in connection with a registrant's annual meeting of security holders. Those proxy rules also indicate that this annual report need not include financial statements otherwise required by S-X Rule 3-05 and Rule 11-01(a). [S-X Rule 14a-3(b)(1)]

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Schedule 14A specifies information that must be provided in proxy solicitation materials. If proxy solicitation materials are used for an annual meeting of shareholders at which directors will be elected, an annual report to shareholders must be furnished in advance of, or together with, the proxy materials. That annual report need not include financial statements of significant acquired or to be acquired businesses (see Question 2.3.10).

However, if proxy solicitation materials are used for any meeting of shareholders for which votes are solicited with respect to Item 11, *Authorization or Issuance of Securities Otherwise Than for Exchange, or Item 12, Modification or Exchange of Securities*, then Schedule 14A requires financial statements that fully comply with Reg S-X in proxy materials. The financial statement requirements under these Items include financial statements required by S-X Rule 3-05 as well as pro forma financial information under S-X Rule 11-01(a). Schedule 14A, Item 14, *Mergers, Consolidations, Acquisitions and Similar Matters*, includes complex financial statement requirements that depend on the facts and circumstances of the transaction (see chapter 5).

Question 2.3.180

May the financial statements of the acquired business be incorporated by reference in a registration statement?

Interpretive response: Yes, in certain circumstances. Forms S-3 and F-3 permit incorporation of financial statements by reference to another filing. If a registrant meets various criteria immediately before filing a Form S-1, S-11, or F-1, it may also elect to incorporate by reference information, including financial statements, into the registration statements on these forms.

The financial statements required by S-X Rule 3-05 must comply fully with Reg S-X, regardless of whether they are included directly in a filing or incorporated by reference. For example, if information included in a previously filed Form 8-K (or other document filed with the SEC) is not sufficiently complete or timely to meet the requirements of a registration statement that is filed later, additional information may be required. See section 4.4 for additional examples.

Incorporation by reference is a term used in the securities rules that refers to the practice of including a reference to a source of information instead of reproducing the information in the newly filed document. Incorporation by reference has the effect of establishing legal responsibility for inclusion of information in a document into which the information is incorporated. For example, if the financial statements and audit report that were included in the latest annual report on a Form 10-K are incorporated by reference into a later filed Form S-3, the legal status of the incorporated but not reproduced financial statements and audit report is the same as if the financial statements and audit report were included in the Form S-3.

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Question 2.3.190

Is financial information related to individually insignificant acquisitions that are significant in aggregate required in a registration statement?

Interpretive response: Yes. S-X Rule 3-05 requires a registrant filing a registration statement to consider the aggregate impact of acquired or probable-to-be-acquired businesses for which financial statements are not otherwise required due either to their individual insignificance or are not yet required due to the 75-day grace period (see Question 2.3.150).

To assess the aggregate impact of these acquisitions, a registrant must combine the following categories of acquired or to be acquired businesses and real estate operations since the date of the most recent audited balance sheet filed by the registrant: [S-X Rule 3-05(b)(2)(iv)]

- acquisitions consummated, but less than 20% significant;
- acquisitions between 20% and 50% significant, but for which financial statements are not yet required because of the 75-day grace period (and have not yet been provided);
- probable acquisitions less than 50% significant.

These three categories are commonly referred to as 'individually insignificant acquisitions' even though they may result in including certain acquisitions above the 20% significance threshold. [SEC Rel 33-10786 § II.B.3 (FN 201)]

If the aggregate impact of these acquisitions exceeds 50% significance, the registrant must provide the following in the registration statement: [S-X Rule 3-05(b)(2)(iv)]

- pro forma financial information depicting the aggregate impact of these acquired or probable-to-be-acquired businesses and real estate operations, in all material respects; and
- historical financial statements covering at least the most recent fiscal year and the most recent interim period for any acquired or probable-to-be acquired business or real estate operation that is greater than 20% significant.

See section 3.2.40 for considerations related to the determining aggregate significance.

Aggregating unrelated acquisitions for the purpose of the 50% test is required only for registration statement filings and certain proxy materials. Form 8-K requires aggregating acquisitions only if they are related businesses (see section 2.2.20). [Form 8-K Item 2.01 (Instruction 4)]

Comparison to legacy SEC rules

Substantial (or mathematical) majority

The legacy requirements of S-X Rule 3-05 required a registrant to provide audited historical financial statements and pro forma financial information

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representing the substantial majority of individually insignificant acquisitions when the aggregate impact of such acquisitions exceeded 50%. The requirement to provide financial statements for the substantial majority was eliminated. However, the requirement to aggregate individually insignificant acquisitions to determine the disclosure requirements for such acquisitions remains, as outlined in Question 2.3.190. While the requirements may result in an accelerated timeline to provide Rule 3-05 financial statements for a significant acquisition, they will no longer result in the potential for stand-alone Rule 3-05 financial statements of an insignificant acquisition to be required.

The SEC staff noted that the amendments that became effective January 1, 2021, were intended to reduce the burden of preparing disclosures and providing audited financial statements for immaterial acquisitions. As a balance to this change, the requirements to provide pro forma financial information were expanded to include the aggregate effect of all acquisitions, in all material respects, to make it easier for investors to understand the overall effect of the acquisitions on the registrant.

Example 2.3.50
Aggregation of acquisitions of unrelated businesses

During the first calendar quarter of 20X1, Registrant acquires five businesses. The acquisitions have the following individual significance levels: 16%, 8%, 9%, 11%, 13% – resulting in aggregate significance of 57%.

Scenario 1: No individually significant acquisitions

On May 15, 20X1, Registrant plans to file a registration statement to issue new debt securities. Under S-X Rule 3-05, Registrant determines the individually insignificant acquisitions made since the most recent balance sheet are greater than 50% significant in the aggregate. Therefore, Registrant is required to provide pro forma financial information in the registration statement depicting the aggregate impact of the five businesses acquired, in all material respects.

However, because none of the acquisitions are individually greater than 20% significant, no pre-acquisition audited financial statements of the acquired businesses are required in the registration statement.

Scenario 2: Subsequent individually significant acquisition consummated up to 74 days prior to effective date

In addition to the five acquisitions in the first quarter, on April 10, 20X1, Registrant consummates a sixth acquisition of Target, which is calculated to be significant at 21%. As a result of this individually significant acquisition, Registrant reports the acquisition of Target on Form 8-K on April 13, 20X1, and it will provide the historical financial statements of Target on an amended Form 8-K by June 24, 20X1 (within four business days plus 71 calendar days of consummation).

However, on May 15, 20X1, Registrant plans to file a registration statement to issue new debt securities. Under S-X Rule 3-05, Registrant determines that the six acquisitions made since the date of the most recent balance sheet (for which financial statements are either not required or not yet required) are

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greater than 50% significant in the aggregate. This includes the acquisition of Target, which is individually significant (greater than 20%), but the financial statements are not yet otherwise required because the acquisition was consummated not more than 74 days prior to the registration statement filing (and expected effectiveness) date.

As a result, Registrant is required to provide the following in the registration statement:

- pro forma financial information depicting the aggregate impact of the six businesses acquired; and
- Target's audited historical financial statements.

In this case, Target's historical financial statements are required on an accelerated timeline from what would otherwise be allowed by the Form 8-K requirements. Accordingly, in connection with any acquisition or merger, registrants should consider plans for future registration statement filings because such activity may result in an incremental or accelerated effort to prepare and file certain information.

Example 2.3.60
Aggregation of insignificant probable acquisitions

Since the date of its latest audited balance sheet, Registrant acquires Companies A, B, and C, each of which is individually insignificant. The significance of these acquisitions in the aggregate is 40%. Registrant will file a registration statement to offer its securities for sale. At the time of the filing (and expected effective date) of the registration statement, it is probable that Registrant will acquire Companies D and E, whose acquisitions would be at 15% and 10% significance, respectively.

Under S-X Rule 3-05, the aggregate impact of these acquisitions includes both acquired (Companies A, B and C) and probable-to-be acquired businesses (Companies D and E). As a result, the aggregate significance is 65%.

Because the aggregate impact is greater than 50%, Registrant is required to provide pro forma financial information depicting the aggregate impact of all five businesses acquired and to be acquired in the registration statement.

However, because none of the acquisitions are individually greater than 20% significant, no pre-acquisition audited financial statements of the acquired businesses are required in the registration statement.

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Question 2.3.200

Is separate financial information required in a registration statement for recently acquired subsidiaries that are issuers or guarantors of guaranteed securities?

Interpretive response: It depends. S-X Rule 3-05 does not provide any distinct requirements associated with acquired subsidiaries that are issuers or guarantors of guaranteed securities. However, S-X Rule 3-10 and Rule 13-01 outline the financial statement and disclosure requirements for issuers and guarantors of guaranteed securities, which must be considered in addition to the reporting requirements outlined in S-X Rule 3-05.

S-X Rule 13-01 provides special requirements associated with a registration statement for guaranteed securities when the parent company recently acquired a significant business and the acquired business and/or any of its subsidiaries are issuers or guarantors of the securities.

In these scenarios, the parent must provide pre-acquisition summarized financial information for each of the recently acquired subsidiary issuers or guarantors. S-X Rule 13-01 provides for the option to include these required disclosures outside of the financial statements (e.g. MD&A) on an unaudited basis. [S-X Rule 13-01(a)(5)]

This requirement will generally result in a requirement to provide summarized financial information for a recently acquired issuer or guarantor in addition to the acquired business' financial statements required under S-X Rule 3-05. The requirement to provide summarized financial information for a recently acquired issuer or guarantor may be on an accelerated timeline by comparison to the due date of the audited pre-acquisition financial statements of the significant acquired business. The SEC believes that investors in a registered debt offering should be provided with information about issuers and guarantors in advance of an investment decision even if the level of detail required in preparing the pre-acquisition summarized financial information will be less than full, audited financial statements. [SEC Rel 33-10762 § E]

Similar to the requirements described above for recently acquired subsidiary issuers or guarantors, registration statements for securities collateralized by securities of an affiliate require pre-acquisition summarized financial information of any recently acquired affiliate whose securities are pledged as collateral for the securities being registered if it is considered a significant business. [S-X Rule 13-02(a)(5)]

Under S-X Rule 13-01 and 13-02, registrants perform the same significance tests as those under S-X Rule 3-05 (chapter 3) to determine if the recently acquired subsidiary issuers or guarantors (or recently acquired affiliate) are greater than 20% significant.

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Question 2.3.210

What is the effect of not being able to comply with S-X Rule 3-05 in a registration statement under the 1934 Act?

Interpretive response: Registration statements under the 1934 Act (Forms 10 and 20-F) also must include audited financial statements of significant acquired businesses. If a 1934 Act registration statement is filed on a *nonvoluntary* basis (i.e. because the registrant has met the requirements under section 12(g) of the 1934 Act that requires a registration statement), but the registrant is unable to comply with the requirement to file audited financial statements of a significant acquired business, the SEC staff will generally take no action against the registrant if the registrant does not list its securities on an exchange or take action to promote trading in its shares. The SEC staff will object to the effectiveness of a deficient voluntary 1934 Act registration statement and will request that the registration statement be withdrawn if the registrant is unable to comply with the other financial statement requirements of the form.

Example 2.3.70

No financial statements available for a significant acquired entity

In June 20X6, Registrant, with a calendar year-end, acquires Company A. The acquisition is significant at 55%, but Company A is unable to provide financial statements.

Registrant is prohibited from filing a registration statement until Company A's operations have been included in Registrant's audited financial statements for the period ended December 31, 20X7 – i.e. Company A's operations have been included in audited consolidated results for a period of at least 12 months.

Comparison to legacy SEC Rules

Recently acquired subsidiary issuers or guarantors

In March 2020, the SEC adopted amendments to S-X Rule 3-10 and Rule 3-16, which include the financial disclosures required in registered offerings of guaranteed debt securities and collateralized securities, respectively. These amendments, which included the addition of new companion S-X Rule 13-01 and Rule 13-02, became effective on January 4, 2021.

Legacy S-X Rule 3-10(g) specifically required that the registration statement for guaranteed securities include one year of audited (and unaudited interim, if applicable) pre-acquisition financial statements for recently acquired subsidiary issuers and guarantors that were significant and had not been reflected in the parent company's audited results for at least nine months.

As part of the 2020 amendments to these rules, the SEC acknowledged the burdensome nature of this legacy requirement and the fact that S-X Rule 3-05

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already requires pre-acquisition financial statements of significant acquired businesses.

2.4 Other specific issues and considerations

2.4.10 Smaller reporting companies and Regulation A

Excerpt from S-X Rule 8-04

Financial statements of businesses acquired or to be acquired.

Apply § 210.3-05 substituting §§ 210.8-02 and 210.8-03, as applicable, wherever § 210.3-05 references §§ 210.3-01 and 210.3-02.

The SEC's rules on financial statements of issuers that qualify as Smaller Reporting Companies (SRCs) reside in S-X Article 8. In certain cases, the reporting requirements are scaled and tailored for SRCs to reduce the burden and compliance effort for these companies. However, requirements related to the acquisition of businesses are aligned for SRCs and other registrants.

This alignment was part of the amendments to S-X Rule 3-05 and related rules adopted by the SEC, effective January 1, 2021. The SEC noted these revisions were intended to ease compliance burdens and clarify the application with the more generally understood provisions of S-X Rule 3-05.

Question 2.4.10

Do the requirements to provide financial statements of an acquired or to be acquired business differ for SRCs?

Interpretive response: No. S-X Rule 8-04 outlines the requirements to provide financial statements of acquired or probable-to-be-acquired businesses. It directs SRCs to apply the same requirements as for larger registrants, as outlined in S-X Rule 3-05. Therefore, the requirements of S-X Rule 8-04 and Rule 3-05 are aligned. However, when an SRC concludes that an acquired business's financial statements are required, the specific form and content of the acquired business's interim and annual financial statements may follow the requirements applicable to SRCs; those requirements are in S-X Rule 8-02 and Rule 8-03. [S-X Rule 8-04]

One of the unique requirements under S-X Rule 8-02 is that only two annual periods are required for SRCs (versus three for non-SRC registrants). However, this unique provision does not result in any difference in the number of periods of annual financial statements that an SRC will provide for a significant business acquisition because other registrants that apply S-X Rule 3-05 also provide at most two years of pre-acquisition financial statements of an acquired business.

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The pro forma requirements in S-X Rule 8-05 for SCRs also are consistent with S-X Rule 11-01(a), which applies more broadly to other types of issuers.

Question 2.4.20

Do the requirements to provide financial statements of an acquired or probable-to-be-acquired business differ for issuers relying on Regulation A?

Interpretive response: No. Regulation A exempts certain offerings from the registration provisions of the 1933 Act. Issuers conduct offerings by filing Form 1-A with the SEC.

Part F/S of Form 1-A directs issuers relying on Regulation A to present financial information of acquired or probable-to-be-acquired businesses under S-X Rule 8-04 applicable to SRCs. As a result, Regulation A issuers apply the same requirements for acquired or probable-to-be-acquired businesses as any other registrant type (see Question 2.4.10).

However, Form 1-A does provide scaled requirements for the form and content of financial statements of an acquired or probable-to-be-acquired business by Regulation A issuers. For example, in certain cases, financial statements may be unaudited, cover shorter periods, and do not need to be updated if the most recent balance sheet is not older than nine months.

2.4.20 Step acquisitions

An increase in the investment of an existing subsidiary, sometimes referred to as a step acquisition, is considered the acquisition of a business (see Question 2.2.140). As a result, registrants need to evaluate whether such step acquisitions require filing of Rule 3-05 financial statements on Form 8-K and/or in a registration statement.

Question 2.4.30

Does a step acquisition of an existing subsidiary require reporting and financial information in a Form 8-K?

Interpretive response: It depends. An increase in an investment in a consolidated subsidiary does not ordinarily require filing separate financial statements because the consolidated financial statements already include the acquired business. However, pro forma financial information reflecting the impact of the transaction may be required.

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Historical financial statements of the acquired business

The SEC staff's view that financial statements are ordinarily not required is premised on S-X Rule 3-05(b)(4)(iii). This Rule states that separate financial statements of the acquired business need not be presented once the operating results of the acquired business have been reflected in the audited post-acquisition results of the registrant for at least:

- nine months for a business acquisition that exceeds 20% significance but does not exceed 40% significance; or
- a complete fiscal year for a business acquisition that exceeds 40% significance.

However, the SEC staff has noted certain scenarios that may require a registrant to provide historical financial statements of an acquired business in a step acquisition of an existing consolidated subsidiary, including when: [FRM 2020.5]

- the registrant's consolidated financial statements filed with the SEC have not included the subsidiary for a sufficient period of time and separate financial statements of the acquired business have not been previously filed; or
- S-X Rule 3-05 does not apply, e.g. when the registrant is preparing a merger proxy statement or Form S-4, and the requirement to present the target's financial statements for the same periods that would be required in an annual report applies (see chapter 5 for discussion of the special considerations for a merger proxy statement or Form S-4).

Pro forma financial information

The SEC staff has also noted that while S-X Rule 11-01(c) states that pro forma financial information reflecting the acquisition are not required if the financial statements of the acquired business are not presented, pro forma financial information is required under S-X Rule 11-01(a)(8) when that pro forma financial information would be material to investors. [FRM 2020.5]

Example 2.4.10
Step acquisition of an existing subsidiary

In 20X7, Registrant purchases 60% of Company A. The acquisition meets the significance threshold for filing a Form 8-K. Registrant files the Form 8-K with the required pre-acquisition financial statements of Company A.

In 20X9, Registrant acquires the remaining 40% of Company A and this transaction also meets the significance threshold.

Although the incremental acquisition of the remainder of Company A is significant under S-X Rule 3-05, Registrant is not required to provide separate audited financial statements of Company A because the subsidiary's operations have already been included in Registrant's consolidated financial statements for more than a year.

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However, Registrant must file pro forma financial information for all periods on Form 8-K reflecting the effects of the step acquisition if it determines the information would be material to investors.

2.4.30 Acquisitions by acquired businesses

Question 2.4.40

Does a registration statement require separate financial statements related to acquisitions made by an acquired business?

Interpretive response: Generally, no. An acquired business may have previously acquired another business that would have been considered significant if it had been directly acquired by the registrant. However, the requirements of S-X Rule 3-05 apply only to acquisitions made by the registrant or its predecessor(s). Therefore, the registrant generally is not required to evaluate 'indirect' acquisitions – i.e. the acquisitions made by its acquired businesses – as if they were made directly.

However, the SEC staff has stated that in some cases, it may be appropriate to provide financial information for these indirect acquisitions. Those cases are limited to situations in which the financial information would be considered material to an investor's understanding of the acquired business – i.e. omission of that financial information would result in the financial information of the business acquired directly by the registrant being misleading or substantially incomplete. [FRM 2005.5]

Various factors are considered in evaluating the materiality of the information, including, but not limited to the size of the indirect acquisition relative to the registrant's size and the timing of the indirect acquisition relative to the registrant's year-end (i.e. the length of the period of financial statements of the directly acquired business to be provided that include the operations of the indirect acquisition).

Example 2.4.20

Previously acquired business of an acquired business

Scenario 1: Previously acquired business of the acquired business is immaterial

On January 15, 20X1, Registrant acquires Company A (a private company). Both companies have a calendar year-end. Company A is significant to Registrant at the 50% level.

In the prior year, on June 30, 20X0, Company A acquired Company B. The acquisition of Company B would have been significant to Company A at the

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20% level (had Company A been a registrant and required to determine significance).

In these circumstances, Company B's audited historical financial statements would likely not be required in Registrant's filings unless other qualitative factors indicate that those financial statements would be material to an investor's understanding of Company A. In other words, the omission of that financial information would not result in the financial information of the business acquired directly by the registrant being misleading or substantially incomplete.

Scenario 2: Previously acquired business of the acquired business is material

On January 15, 20X1, Registrant acquires Company A. Both companies have a calendar year-end. The acquisition of Company A is significant to Registrant at the 80% level.

In the prior year, on December 31, 20X0, Company A acquired Company B. The acquisition of Company B would have been significant to Company A at 100%.

In these circumstances, Registrant would likely determine that Company B's audited historical financial statements should be filed because the information would likely be considered material to an investor's understanding of Company A's financial statements.

Question 2.4.50

Are financial statements of significant investees of an acquired business required to be included with the acquired business financial statements?

Background: S-X Rule 3-09 requires a registrant to file separate financial statements for its significant subsidiaries that are not consolidated and 50% or less owned investees accounted for by the equity method. This requirement applies for an equity method investee when the results of the income or investment tests of significance are greater than 20%.

Interpretive response: It depends.

A registrant may acquire a significant business that has its own significant equity method investees – i.e. investees for which separate S-X Rule 3-09 financial statements would be required if the acquired business was itself a registrant. S-X Rule 3-05 does not directly address if a registrant must file (along with the acquired business's financial statements) the separate financial statements of the acquired business's significant equity method investees. However, the SEC staff has required registrants to provide these financial statements if they are material to an investor's understanding of the acquired business – i.e. the omission of that information would result in the financial statements of the acquired business being misleading or substantially incomplete. [FRM 2005.5]

The SEC staff has also informally indicated that judgment is required to determine whether sufficient information about the acquired business has been reported by the registrant based on the particular facts and circumstances.

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Factors to consider when determining whether additional information about the equity method investee may be considered material to an investor's understanding of the financial statements of the acquired business include:

- the significance of the acquired business's equity method investees to the registrant;
- whether the significant equity method investment was acquired by the acquired business during the most recent fiscal year; and
- whether the equity method investment is the primary asset of the acquired business.

SAB Topic 6K provides guidance for determining the significance of an investee accounted for under the equity method by the registrant when applying S-X Rule 3-09. By analogy, a registrant should consider whether separate financial statements of an equity method investee of an acquired business may be required under S-X Rule 3-05 by determining the significance of the equity method investee to the registrant based on this guidance. [SAB Topic 6K.4.a]

2.4.40 Combinations of entities under common control

A combination of entities under common control is a transaction that involves the combination or merger of entities and/or businesses that are all ultimately controlled by the same common parent or ownership group before and after the transaction.

Question 2.4.60

What are the reporting considerations for a combination of entities under common control?

Interpretive response: Subtopic 805-50 provides guidance on accounting for common control transactions under US GAAP. For in-depth guidance on accounting for common control transactions, see section 28 of KPMG Handbook, Business combinations.

Some transfers of net assets or exchanges of shares between entities under common control result in changes in the reporting entity. A change in reporting entity is defined as a change that results in financial statements that, in effect, are those of a different reporting entity. This change is accounted for by recognizing the net assets received at the carrying amount (or ultimate parent's historical cost if pushdown accounting was not applied) and retrospectively revising all comparative periods presented. This accounting is sometimes referred to as the as-if pooling-of-interests method. [805-50-05-5, 250-10, FRM 13410.1]

If the equity interests or net assets transferred between entities under common control meet the definition of a business, the transaction will generally result in the acquisition of a business for SEC reporting. The registrant will be required to consider the filing requirements (e.g. Form 8-K, S-X Rule 3-05) for the initial acquisition of the business like any other acquisition. However, separate financial statements of the acquired business are no longer required (e.g. in a

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registration statement) after the financial statements of the combined 'new' reporting entity are filed because those financial statements have been retrospectively revised to reflect the combination in all comparative periods presented.

Combination occurring after balance sheet date

When a transaction will be accounted for as an as-if pooling-of-interests, a registrant may complete the receipt of the net assets or shares of an entity under common control after the latest balance sheet date and before post-combination operating results have been published. In these cases, the registrant normally does not reflect the transaction in its pre-acquisition financial statements. However, the registrant may elect to provide or may be required to provide, in connection with registration or proxy statements, supplemental audited financial statements giving effect to the transaction (i.e. applied retrospectively in all comparative periods presented). [FRM 1190.1]

Example 2.4.30
Combination of entities under common control

In October 20X8, Registrant, the issuing entity, merges with Company A in a combination of entities under common control (both Registrant and Company A are controlled by Parent B).

The acquisition of Company A is significant at more than 80% to Registrant and is reported on Form 8-K within four business days. An amendment to the Form 8-K is filed in December 20X8 to include audited historical financial statements of the acquired business (Company A).

In February 20X9, Registrant files its Form 10-K, which reflects the combination of entities under common control with Company A using the as-if pooling-of-interests method, retrospectively applied to all periods presented.

Then, in May 20X9, Registrant offers new debt securities through the filing of a registration statement that includes the audited as-if pooled restated financial statements as of December 31, 20X8 and 20X7, and for the three years ended December 31, 20X8.

Registrant determines that separate financial statements of Company A are not required in the registration statement because Registrant's historical financial statements have been restated to reflect the as-if pooling of interests.

Question 2.4.70
Are previously filed financial statements revised for a drop-down transaction considered a reorganization of entities under common control?

Interpretive response: It depends. A registrant may be required to retrospectively restate previously filed annual audited financial statements for a

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transaction accounted for as a reorganization of entities under common control when the as-if pooling-of-interests method is applied (see Question 2.4.60).

For example, assume a parent company contributes a business that is has carved-out of its consolidated financial statements to a newly formed subsidiary (i.e. NewCo). NewCo then conducts an IPO and becomes a separate reporting entity, but parent company retains its controlling financial interest. After NewCo's IPO, the parent company will contribute to it additional businesses at various times in exchange for cash or other consideration. These arrangements are often referred to as drop-down transactions.

NewCo would generally account for these drop-down transactions as reorganizations of entities under common control for which the as-if pooling-of-interests method is applied. NewCo's financial statements are retrospectively revised to include the dropped down businesses beginning at the date they were under the parent company's common control. These transactions commonly occur in the energy industry when a parent company forms a public master limited partnership (MLP) subsidiary.

The following table summarizes the requirements under different scenarios for recasting NewCo's prior year's annual financial statements included in a registration statement after a material transaction occurs that is accounted for under the as-if pooling-of-interests method. If NewCo does not file a new registration statement after its IPO and a drop-down transaction is not determined to represent a 'fundamental change' (see discussion in table below), NewCo's financial statements do not require recasting until its next annual report is filed on Form 10-K. This guidance is similar to the guidance that applies to other retrospective revisions required by US GAAP, including discontinued operations and changes in segments.

Scenario	Requirement
Initial registration statement on Form S-1, S-4, or S-11	Prior-period financial statements are retrospectively revised and reissued.
New registration statement – post-drop down interim financial statements have ***not*** yet been recast and filed	Prior-period financial statements are not retrospectively revised. [FRM 13110.2] Registrants may elect to present supplemental historical financial statements to reflect the drop-down transaction in the notes to the financial statements or otherwise. [DCF and OCA: Frequently Requested Interpretation (11/8/00)]
New registration statement - post-drop down interim financial statements have been recast and filed	Prior-period financial statements must be retrospectively revised. If interim financial statements have been retrospectively revised and the registrant intends to include retrospectively revised financials in its next annual report, the SEC staff would expect revised annual financial statements to be filed before filing a new or amended registration statement. [FRM 13110.2, Regs Comm 06/2012] Generally, the SEC staff has not required registrants to file revised interim financial statements for the additional historical periods before the drop-down transaction. However, as a reminder, Item 302 of Reg S-K does require summarized financial information for quarterly periods when

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Scenario	Requirement
	there is a material retrospective change impacting any of the quarters in the two most recent fiscal years or any subsequent period interim period for which financial statements are included in a filing. [S-K Item 302(a)]
Prospectus supplement to update an existing shelf registration statement – post-drop down interim financial statements have been recast and filed	Prior-period financial statements do not have to be retrospectively revised unless there has been a 'fundamental change'. [FRM 13110.2] Determination of what constitutes a fundamental change is a legal question and the registrant should consult with its legal counsel. Historically, some legal counsels have considered a drop-down transaction to represent a fundamental change because there is generally a change in the reporting entity.

Example 2.4.40

Combination of entities under common control: drop-down transaction

Registrant forms a master limited partnership (MLP) into which it contributes a business. In December 20X2, MLP completes an IPO and becomes a separate reporting entity with a calendar year-end. MLP continues to be consolidated by Registrant.

In July 20X3, Registrant contributes an additional business to MLP. The drop-down transaction will be accounted for using the as-if pooling-of-interests method in MLP's 20X3 annual financial statements. As a result, MLP's financial statements will be retrospectively revised to include the dropped-down business from the date MLP and the dropped down business were first under common control.

MLP's financial statements for the six-months ended June 30, 20X3 and 20X2 included in its second quarter Form 10-Q are not retrospectively revised because the drop down occurred after the balance sheet date reported in the Form 10-Q (June 30, 20X3).

However, MLP's financial statements for the nine-months ended September 30, 20X3 and 20X2 included in its third quarter Form 10-Q must reflect the retrospective revision for the current year and comparative prior year period because the drop-down transaction occurred during the period being reported on.

Scenario 1: No new registration statements

If MLP does not file a new registration statement before its 20X3 Form 10-K is filed in March 20X4, it is not required to file retrospectively revised annual financial statements until that time.

Scenario 2: New registration statement prior to Q3 Form 10-Q

If MLP files a new registration statement after the second quarter 20X3 Form 10-Q is filed but before the third quarter Form 10-Q is filed, it cannot

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retrospectively revise and refile previously filed annual financial statements for inclusion in the registration statement.

Scenario 3: New registration statement after Q3 Form 10-Q

If MLP files a new registration statement after the third quarter Form 10-Q is filed but before the 20X3 Form 10-K is filed, it is required to retrospectively revise and refile previously filed annual period financial statements for inclusion in the registration statement. Previously filed interim periods do not require revision and refiling.

Question 2.4.80

Does a drop-down transaction accounted for as a failed sale-leaseback transaction require reporting on Form 8-K?

Interpretive response: Generally, yes. As described in Question 2.4.70, public oil and gas companies often create and take public MLPs that it continues to consolidate after the MLP's IPO. In those structures, the parent company may regularly contribute (drop-down) assets to the MLP after the IPO and concurrently enter into a lease-back of the contributed assets.

The parent company eliminates the drop-down transaction in its consolidated financial statements, but the MLP must account for the common control transaction in its separate financial statements.

Before the adoption of Topic 842 (leases), the MLP typically accounted for these transactions as the acquisition of a business (or assets) in a common control transaction and an operating lease-back. As a result, these transactions had historically resulted in a requirement for the MLP to file a Form 8-K and report the acquisition under Item 2.01 (if significant) and evaluate the acquired set to determine whether it was a business for SEC reporting purposes.

After the adoption of Topic 842, many of these transactions between parent companies and MLPs require failed sale-leaseback accounting and therefore are accounted for as financing transactions under US GAAP.

Notwithstanding that the transaction may be accounted for as a financing under Topic 842, the SEC staff continues to believe that these drop-down transactions meet the requirements of an acquisition from the perspective of the MLP. As a result, the transaction remains subject to the reporting requirements under Item 2.01 of Form 8-K and the Item 9.01 financial statement requirements when the acquisition is that of a business under the SEC's definition.

Registrants entering into these arrangements may continue to contact the SEC staff when the specific facts and circumstances warrant. This may include either a request for interpretation of the SEC's definition of a business or a request for relief from providing financial information under S-X Rule 3-13. [Regs Comm 09/2019]

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3. Tests of significance

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3.6.10 Overview

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3.6.10 How is the asset test performed?

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3.6.30 Are working capital assets that are not acquired by the registrant included in the asset test?

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3.6.30 Working capital assets

3.6.40 Other than working capital assets

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3.7.10 Reverse acquisitions

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Questions

3.7.10 How are the significance tests performed after a reverse acquisition?

3.7.20 How is the investment test performed for the disposition of a business?

3.7.30 How is the investment test performed in a spin-off?

3.7.40 How is the numerator of the pretax income component of the income test determined for the disposition of a business?

3.7.50 How are the significance tests performed in a joint venture formation if each joint venture partner contributes a business?

3.7.60 How are the significance tests performed in a joint venture formation if a registrant does not contribute a business but the other venturer does?

Examples

3.7.10 Significance after a reverse acquisition

3.7.20 Significance test – Contribution of businesses to joint venture

3.7.30 Significance test – Contribution of assets and a business to joint venture

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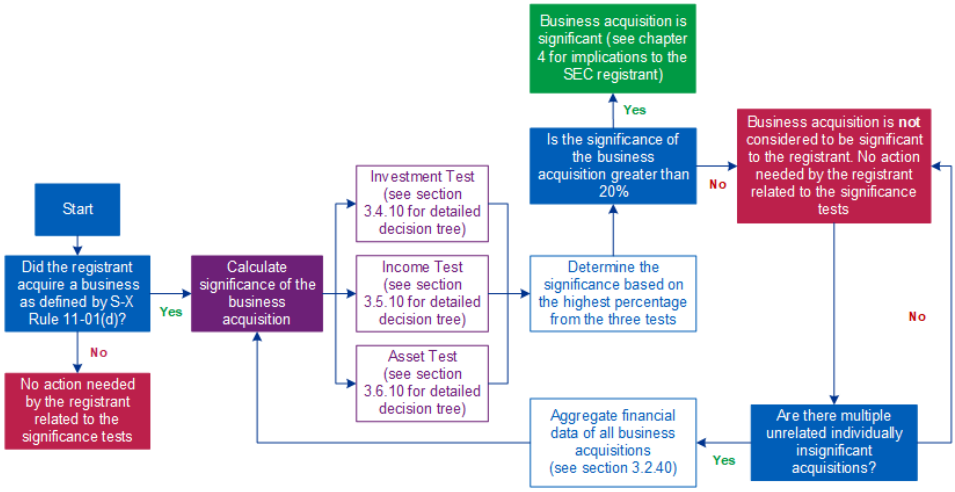
3.1 How the SEC Rules work

The significance tests in S-X Rule 1-02(w) are applied to determine whether the acquisition of a business is significant. These same tests are also applied to probable acquisitions and acquisitions of multiple related businesses.

This chapter explains how to perform the significance tests, while chapter 2 explains how to apply the results to bright-line thresholds in S-X Rule 3-05 to determine if the acquisition is considered significant, thereby triggering SEC filing requirements.

The following decision tree illustrates how the significance tests for business acquisitions are performed.



The significance tests are as follows (in simple terms).

Investment test (see section 3.4)

Purchase price ÷ **Registrant's Aggregate Worldwide Market Value (AWMV), if applicable; otherwise registrant's consolidated total assets**

Income test (see section 3.5)

The income test has two component tests. The *lower of the two* component tests represents the result for the income test.

Pretax income component test

Registrant's share of the acquired business's pretax income ÷ **Registrant's consolidated pretax income**

Revenue component test

Registrant's share of the acquired business's consolidated total revenue ÷ **Registrant's consolidated total revenue**

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Asset test (see section 3.6)

The ratio produced by a formula is the level of significance for the associated test. For example, if a registrant's share of an acquired business's consolidated total assets is $20 and the registrant's consolidated total assets are $100, the asset test indicates 20% significance (i.e. $20 ÷ $100).

The test with the highest level of significance determines the significance of the acquisition, which is used to determine what information is required to be filed under Rule 3-05.

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3.2 When to perform the significance tests

Excerpt from S-X Rule 1-02

Definitions of terms used in Regulation S-X (17 CFR part 210).

(w) *Significant subsidiary.*

(1) The term *significant subsidiary* means a subsidiary, including its subsidiaries, which meets any of the conditions in paragraph (w)(1)(i), (ii), or (iii) of this section; however if the registrant is a registered investment company or a business development company, the tested subsidiary meets any of the conditions in paragraph (w)(2) of this section instead of any of the conditions in this paragraph (w)(1). In an acquisition by a predecessor to a shell company, use the predecessor's consolidated financial statements instead of those of the shell company registrant in applying the significance tests in paragraphs (w)(1)(i), (ii), and (iii) of this section. A registrant that files its financial statements in accordance with or provides a reconciliation to U.S. Generally Accepted Accounting Principles (U.S. GAAP) must use amounts determined under U.S. GAAP. A foreign private issuer that files its financial statements in accordance with International Financial Reporting Standards as issued by the International Accounting Standards Board (IFRS-IASB) must use amounts determined under IFRS-IASB.

Excerpt from S-X Rule 3-05

Financial statements of businesses acquired or to be acquired.

(a) *Financial statements required.*

(1) Financial statements (except the related schedules specified in § 210.12) prepared and audited in accordance with this regulation (including the independence standards in § 210.2-01 or, alternatively if the business is not a registrant, the applicable independence standards) must be filed for the periods specified in paragraph (b) of this section if any of the following conditions exist:

(i) During the most recent fiscal year or subsequent interim period for which a balance sheet is required by § 210.3-01, a business acquisition has occurred; or

(ii) After the date of the most recent balance sheet filed pursuant to § 210.3-01, consummation of a business acquisition has occurred or is probable.

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(2) For purposes of determining whether the provisions of this rule apply:

(i) The determination of whether a business has been acquired should be made in accordance with the guidance set forth in § 210.11-01(d); and

(ii) 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.

(3) 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 shall be treated under this section as if they are a single business acquisition. The required financial statements of related businesses may be presented on a combined basis for any periods they are under common control or management. For purposes of this section, businesses will be deemed to be related if:

(i) They are under common control or management;

(ii) The acquisition of one business is conditional on the acquisition of each other business; or

(iii) Each acquisition is conditioned on a single common event.

(4) This rule does not apply to a real estate operation subject to § 210.3-14 or a business which is totally held by the registrant prior to consummation of the transaction.

(b) *Periods to be presented.*

(3) The determination must be made using § 210.11-01(b)(3) and (b)(4).

Excerpt from S-X Rule 11-01

Presentation requirements.

(b)(3) The determination must be made, except as noted in paragraph (b)(4) of this section for the continuous offerings described therein, by using:

(i) For amounts derived from financial statements, 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 or, if the fiscal years differ, the business's most recent fiscal year that would be required if the business had the same filer status as the registrant, however the determination may be made using:

(A) The financial statements for the business described in § 210.3-05(e) or (f) if the business meets the conditions for presenting those financial statements.

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(B) Pro forma amounts for the registrant for the periods specified in §210.11-01(b)(3) that only depict significant business acquisitions and dispositions consummated after the latest fiscal year-end for which the registrant's financial statements are required to be filed and only include Transaction Accounting Adjustments (see § 210.11-02(a)(6)(i)), provided that:

(1) The registrant has filed audited financial statements for any such acquired business for the periods required by § 210.3-05 or § 210.3-14 and the pro forma financial information required by § 210.11-01 through § 210.11-02 for any such acquired or disposed business. The tests may not be made by "annualizing" data; and

(2) If a registrant has used pro forma amounts to determine significance of an acquisition or disposition, it must continue to use pro forma amounts to determine significance of acquisitions and dispositions through the filing date of its next annual report on Form 10-K (§249.310 of this chapter) or Form 20-F (§ 249.220f of this chapter); or

(C) The registrant's annual consolidated financial statements, for the most recent fiscal year ended prior to the acquisition or disposition, that are included in the registrant's Form 10-K (§ 249.310 of this chapter) filed after the date of acquisition or disposition, but before the date financial statements and pro forma financial information for the acquisition or disposition would be required to be filed on Form 8-K (§ 249.308 of this chapter).

(ii) If the business is a related business (see § 210.3-05(a)(3)), combined pre-acquisition financial statements of the group of related businesses for the fiscal year specified in paragraph (b)(3)(i) of this section.

3.2.10 Overview

A registrant performs the significance tests when:

— a business acquisition is consummated; or

— filing a registration or proxy statement and one or more business acquisitions are probable or have been consummated since the beginning of the registrant's most recently completed fiscal year (for which audited financial statements have been filed).

As introduced in chapter 2, the diagram below summarizes the most common circumstances that require filing financial information about an acquisition.

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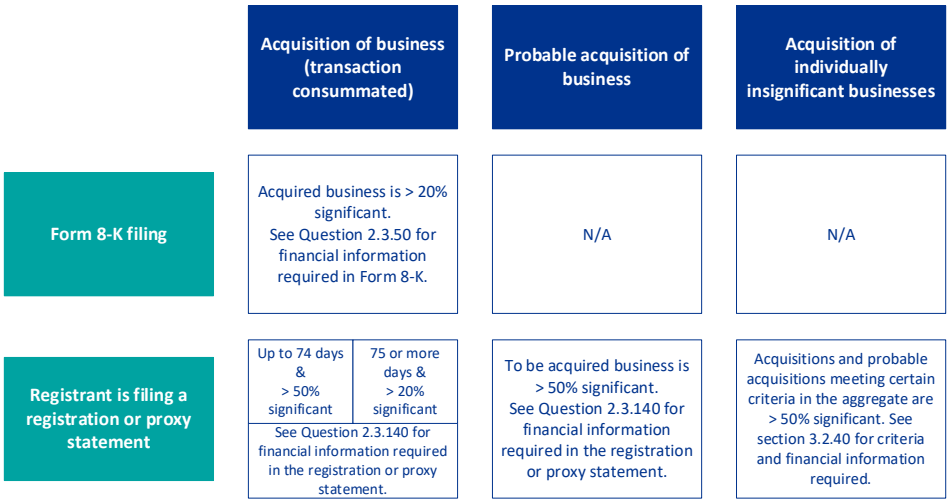

3.2.20 Consummated business acquisitions (Form 8-K)

Form 8-K must be filed when a significant business acquisition is consummated.

Question 3.2.10

When are the significance tests performed for a consummated business acquisition?

Interpretive response: The significance tests are performed on the business acquisition's consummation date, using information based on each test's instructions (see section 3.3). Consummation of a business acquisition generally is evident as a result of a closing that involves the legal transfer of title to property or securities evidencing ownership (see Question 2.2.200).

The results of these tests determine whether it is necessary to file a Form 8-K reporting the acquisition (and what information may be required), and whether information is required to be presented in a registration or proxy statement.

3.2.30 Registrant filing registration or proxy statement

If a registrant is filing a registration or proxy statement, it evaluates certain prior business acquisitions and probable business acquisitions for significance to determine whether to include information about these acquisitions in the registration or proxy statement.

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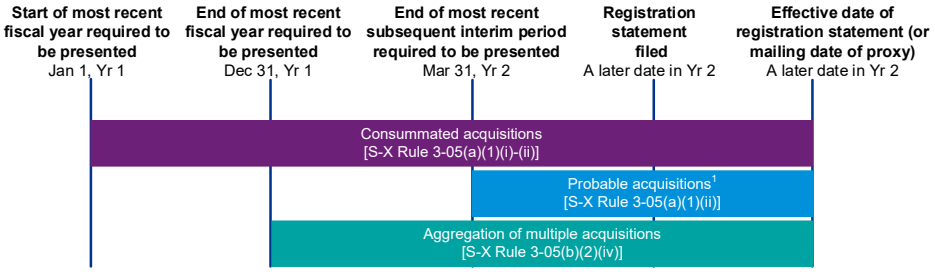
Question 3.2.20

What business acquisitions are evaluated for significance when filing a registration or proxy statement?

Interpretive response: The following diagram illustrates the time period during which acquisitions and probable acquisitions are evaluated for significance by existing registrants. All of the time periods end with the effective date of the registration statement or mailing date of the proxy material. Chapter 7 discusses how to determine significance for initial registration statements.



Note:

1. Probable acquisitions must be evaluated after the date of the most recent balance sheet filed pursuant to S-X Rule 3-01. For practical purposes, a potential acquisition is tested for significance if it is expected to be probable as of the effective date of the registration statement (or mailing date of proxy statement). Question 2.2.240 discusses when the filing requirements apply to a probable acquisition.

3.2.40 Individually insignificant acquisitions

Excerpt from S-X Rule 3-05

Financial statements of businesses acquired or to be acquired.

(b) *Periods to be presented.*

(2) In all cases not specified in paragraph (b)(1) of this section, financial statements of the business acquired or to be acquired must be filed for the periods specified in this paragraph (b)(2) or such shorter period as the business has been in existence. Determine the periods for which such financial statements are to be filed using the conditions specified in the definition of significant subsidiary in § 210.1-02(w), using the lower of the total revenue component or income or loss from continuing operations component for evaluating the income test condition, as follows:

(i) If none of the conditions exceeds 20 percent, financial statements are not required.

(ii) If any of the conditions exceeds 20 percent, but none exceed 40 percent, financial statements must be filed for at

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least the most recent fiscal year and the most recent interim period specified in §§ 210.3-01 and 210.3-02.

(iii) If any of the conditions exceeds 40 percent, financial statements must be filed for at least the two most recent fiscal years and any interim periods specified in §§ 210.3-01 and 210.3-02.

(iv) If the aggregate impact of 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 not required by paragraph (b)(2)(i) of this section or are not yet required based on paragraph (b)(4)(i) of this section, exceeds 50 percent for any condition, the registrant must provide the disclosure specified in paragraphs (b)(2)(iv)(A) and (B) of this section, however in determining the aggregate impact of the investment test condition also include the aggregate impact calculated in accordance with § 210.3-14(b)(2)(ii) of any acquired or to be acquired real estate operations specified in § 210.3-14(b)(2)(i)(C). In determining whether the income test condition (i.e. both the revenue component and the income or loss from continuing operations component) exceeds 50 percent, the businesses specified in this paragraph (b)(2)(iv) reporting losses must be aggregated separately from those reporting income. If either group exceeds 50 percent, paragraphs (b)(2)(iv)(A) and (B) of this section will apply to all of the businesses specified in this paragraph (b)(2)(iv) and will not be limited to either the businesses with losses or those with income.

(A) Pro forma financial information pursuant to §§ 210.11-01 through 210.11-02 that depicts the aggregate impact of these acquired or to be acquired businesses and real estate operations, in all material respects; and

(B) Financial statements covering at least the most recent fiscal year and the most recent interim period specified in §§ 210.3-01 and 210.3-02 for any acquired or to be acquired business or real estate operation for which financial statements are not yet required based on paragraph (b)(4)(i) of this section or § 210.3-14(b)(3)(i).

(3) The determination must be made using § 210.11-01(b)(3) and (4).

(4) Financial statements required for the periods specified in paragraph (b)(2) of this section may be omitted to the extent specified as follows:

(i) Registration statements not subject to the provisions of § 230.419 of this chapter and proxy statements need not include separate financial statements of an acquired or to be acquired business if neither the business nor the aggregate impact specified in paragraph (b)(2)(iv) of this section exceeds any of the conditions of significance in the definition

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of significant subsidiary in § 210.1-02 at the 50 percent level computed in accordance with paragraph (b)(3) of this section, and either:

(A) The consummation of the acquisition has not yet occurred; or

(B) The date of the final prospectus or prospectus supplement relating to an offering as filed with the Commission pursuant to § 230.424(b) of this chapter, or 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.

If a registrant is filing a registration statement or certain proxy materials, it must perform the significance tests on an aggregate basis when:

- multiple acquisitions of unrelated businesses have occurred or are probable; and
- individual financial statements are not otherwise required at the time due either to:
  - the individual acquisition is not significant (consummated and less than 20% or probable and less than 50%); or
  - the individual acquisition is significant, but financial statements are not yet required (because of the 75-day grace period).

See sections 3.4 to 3.6 for discussion of how to perform the significance tests when evaluating acquisitions and probable acquisitions in the aggregate.

Question 3.2.30

How are the significance tests applied to individually unrelated acquisitions in aggregate?

Interpretive response: The financial data for certain acquisitions are aggregated and tested for significance as a group under each of the three significance tests of S-X Rule 3-05 (see Question 2.3.190).

To assess the aggregate impact, a registrant considers the following categories of acquired or to be acquired businesses (and real estate operations) since the date of its most recently filed audited balance sheet: [S-X Rule 3-05(b)(2)(iv)]

- acquisitions consummated, but less than 20% significant;
- acquisitions between 20% and 50% significant, but for which financial statements are not yet required because of the 75-day grace period (and which have not yet been provided);
- probable acquisitions less than 50% significant.

These three categories are commonly referred to as 'individually insignificant acquisitions' even though they may result in including certain acquisitions above the 20% significance threshold. [SEC Rel 33-10786 § II.B.3 (FN 201)]

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Section 8.3.20 addresses how the tests apply when a registrant has multiple acquisitions some of which are in the scope of S-X Rule 3-05 (general businesses) and some in the scope of S-X Rule 3-14 (real estate operations).

If the aggregate impact of these acquisitions exceeds 50% significance, pro forma financial information of the group must be included in a registration statement and certain proxy materials. In addition, in some cases audited historical financial statements of an acquired or to be acquired business in the group may be required (see Question 2.3.140).

Because the acquired businesses are not related, Form 8-K is not required regardless of the group's level of significance (see Question 2.3.70). Form 8-K only requires aggregating individually insignificant acquisitions if they are related businesses and are, in aggregate, more than 20% significant (see Question 2.2.230 and section 3.3.30). [Form 8-K Item 2.01 (Instruction 4)]

Question 3.2.40

Over what period of time are individually insignificant acquisitions aggregated and tested for significance?

Interpretive response: Individual acquisitions that are aggregated include those that occur or are probable-to-occur from the balance sheet date of the most recently filed audited annual financial statements through the effective date of the registration statement or mailing date of certain proxy materials. Therefore, any acquisitions predating the most recently filed audited balance sheet date are disregarded.

The filing of a Form 10-K for any given fiscal year establishes a new balance sheet date for determining which prior acquisitions to aggregate. Further, the SEC staff has indicated in informal discussions that obtaining and filing audited interim period financial statements does not result in a 'fresh start date' for aggregating insignificant acquisitions.

Logistically, because the filing of a Form 10-K creates a new balance sheet date, the time over which individually insignificant acquisitions are aggregated from the prior balance sheet date through the effective date of the registration statement may exceed 12 months. This can occur when a registration statement is declared effective shortly after the most recently completed fiscal year, but before the date the Form 10-K is filed. [FRM 2035.4]

Example 3.2.10

Identifying individually insignificant acquisitions to aggregate

Registrant, with a calendar year-end, files a registration statement expected to become effective February 18, 20X2. Its Form 10-K for the fiscal year ended December 31, 20X1 will not be ready for filing until February 28, 20X2.

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Registrant acquires Companies A, B and C during the calendar year 20X1. Each of these acquisitions is below 20% significant individually, and the aggregate significance is below 50%.

Registrant acquires Company D and Company E on January 15, 20X2 and January 31, 20X2, respectively. Each of these acquisitions is below 20% significant individually. However, the aggregate significance of the acquisitions of Companies A, B, C, D and E is greater than 50%.

Aggregating unrelated individually insignificant acquisitions shortly after year-end

Because Registrant's 20X1 Form 10-K will not be filed before the February 18, 20X3 expected effective date of the registration statement, Registrant includes in the registration statement pro forma financial information depicting the aggregate effect of all individually insignificant businesses acquired from January 1, 20X1 to February 18, 20X2. This includes Companies A, B and C acquired in 20X1, and Companies D and E acquired in 20X2.

Aggregating unrelated individually insignificant acquisitions after a Form 10-K is filed

For any registration statements expected to become effective after the 20X1 Form 10-K is filed (i.e. on February 28, 20X2), the aggregate significance of individually insignificant acquisitions would be determined based solely on acquisitions since December 31, 20X1. This means the only acquisitions aggregated would be those of Companies D and E (and any future acquisitions up until the effective date of the registration statement).

3.2.50 Reissued financial statements

Question 3.2.50

Is a registrant required to reperform the significance tests when it reissues its own financial statements?

Interpretive response: It depends. A registrant must perform the S-X Rule 3-05 significance tests based on its newly filed revised financial statements in connection with a registration or proxy statement if the revised financial statements have been retrospectively adjusted for:

- discontinued operations under Subtopic 205-20;
- a change in accounting principle under Topic 250; or
- a reorganization of entities under common control to which as-if pooling is applied under Subtopic 805-50 (see Question 2.4.60 for additional guidance).

Subtopic 205-20 requires retrospective adjustment of all periods presented in the income statement to separately classify the operating results of a discontinued operation.

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In the absence of explicit transition requirements specific to a newly adopted accounting principle, Topic 250 requires retrospective application of a change in accounting principle to all prior-period financial statements presented, unless it is impracticable to do so.

To comply with S-X Rule 3-05 in a new registration or proxy statement, a registrant must perform the significance tests based on its newly filed revised financial statements that reflect the retrospective adjustment for: [FRM 2025.1]

- individual businesses acquired *after* the date the retrospectively adjusted financial statements are filed;
- probable acquisitions; and
- aggregate impact of all individually insignificant businesses that have occurred since the end of the most recently completed fiscal year.

Special provision for individual businesses acquired on or before the date the retrospectively adjusted financial statements are filed

To comply with S-X Rule 3-05 in a new registration or proxy statement, the SEC staff allows registrants to determine the significance of *individual* businesses acquisitions *on or before* the date the retrospectively adjusted financial statements are filed using either:

- the audited annual financial statements on file with the SEC before the registrant files revised audited annual financial statements; or
- the revised audited annual financial statements.

However, for a particular registration statement, a registrant must consistently use its chosen financial statements to determine significance of all individual acquisitions completed on or before the filing date of the retrospectively adjusted financial statements.

The choice for determining significance for individual acquisitions taking place before revised annual financial statements are filed offers an advantage for entities that may have filed Form 8-K for a business acquisition determined to be significant at the time of the acquisition but, as a result of the subsequent retrospective adjustments, would no longer meet the significance threshold (>20%). In that case only, a registrant may not have to update financial statements previously filed on Form 8-K (and possibly automatically incorporated by reference into a registration statement) to comply with the age of financial statement requirements in S-X Rule 3-12 or Rule 8-08, or provide updated pro forma financial information with the registration statement. See Questions 4.3.10 and 4.4.30 regarding the age of financial statement requirements.

As previously noted, to assess the aggregate impact of all individually insignificant acquisitions in a registration or proxy statement, the registrant must use the most recent revised financial statements filed with the SEC to determine significance (see Question 3.3.70). [FRM 2025.1]

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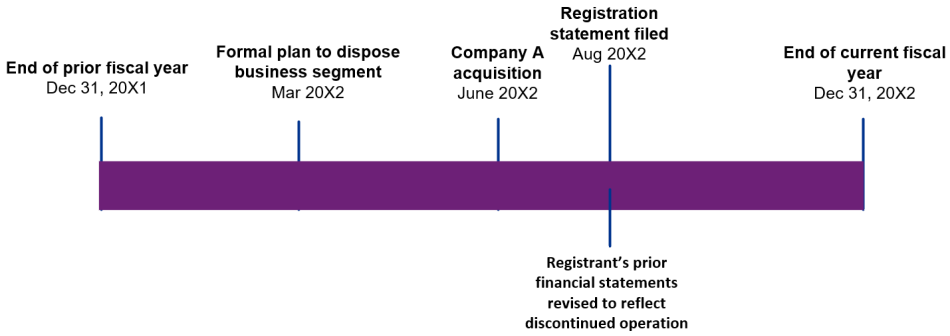
Example 3.2.20

Determining whether to reperform the significance tests after financial statements are revised

Scenario 1: Revised financial statements filed after an acquisition

Registrant has a December 31 year-end and has the following events occur in 20X2.



March 20X2: Registrant adopts a formal plan to dispose of a business segment during its quarter ended March 20X2 that meets the criteria to be presented in discontinued operations.

May 20X2: Registrant files its March 31, 20X2 Form 10-Q, which reflects the discontinued operation treatment for the quarters ended March 31, 20X2 and 20X1.

June 20X2: Registrant acquires Company A, but has no Form 8-K filing requirement because the acquisition is not significant at the time of the acquisition.

August 20X2: Registrant files a registration statement (expected to become effective in the same month) that includes its financial statements as of and for the three years ended December 31, 20X1 (and interim period ended June 30, 20X2). The financial statements filed in this registration statement have been revised to reflect the discontinued operation.

The significance of Registrant's acquisition of Company A is relevant for the purpose of complying with S-X Rule 3-05 in the registration statement. The significance of the Company A acquisition may be determined using either:

- Registrant's December 31, 20X1 financial statements before the revision to reflect the discontinued operation, because at the time of the acquisition, Registrant's revised annual financial statements had not been filed; or
- Registrant's revised audited December 31, 20X1 financial statements that reflect the discontinued operation.

Registrant is likely to continue to use the pre-revision financial statements to support its June 2022 determination that the acquisition of Company A was not significant. However, Registrant still has the option of re-determining significance of the previous acquisition based on the revised financial statements.

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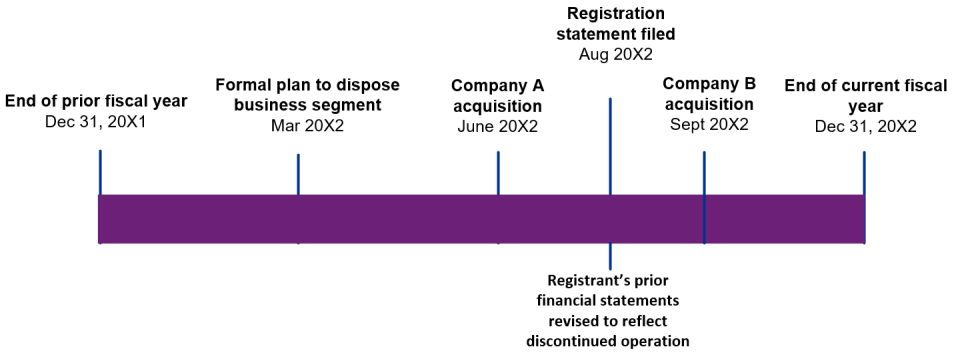
Scenario 1a: Second, unrelated acquisition

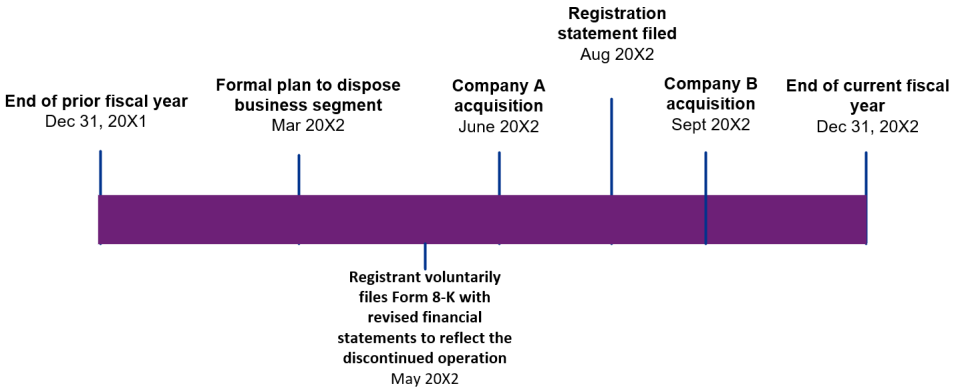
In September 20X2, Registrant also acquires Company B.



Registrant performs the significance tests to determine whether it is required to file a Form 8-K reporting this acquisition. Because that acquisition occurs after the filing of the registration statement with Registrant's revised December 31, 20X1 financial statements, the significance of Registrant's acquisition of Company B is determined using those revised financial statements.

Scenario 2: Revised financial statements filed before an acquisition

Assume the same facts as Scenario 1 except Registrant voluntarily files revised audited December 31, 20X1 financial statements on Form 8-K in May 20X2 to reflect the discontinued operation.



Because the acquisitions of Company A and Company B both occurred after the filing of the revised financial statements, significance of both acquisitions are determined using the revised financial statements.

Example 3.2.30

Determining significance after financial statements are revised

Registrant acquires 100% of Company A on July 2, 20X3 and makes the following filings during 20X3.

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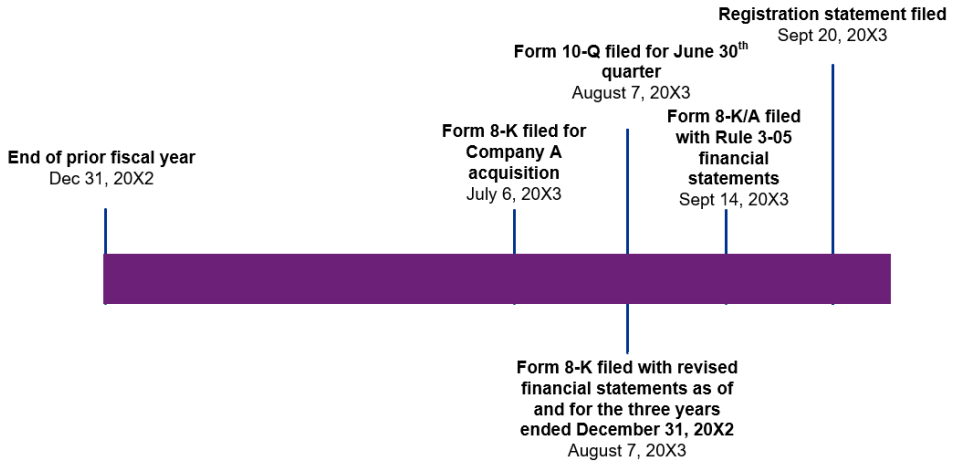

At the time of its initial filing of Form 8-K (on July 6, 20X3), Registrant determines the acquisition is significant because Company A's pretax income of $100 for the year ended December 31, 20X2 is 25% of Registrant's $400 pretax income. For purposes of this example, the results of the investment test, asset test and revenue component of the income test are not relevant.

Registrant's Form 8-K/A contains Company A audited financial statements as of and for the year ended December 31, 20X2 and unaudited interim period financial statements as of and for the three months ended March 31, 20X3.

During the second quarter of 20X3, Registrant records a disposition that meets the criteria to be reported as a discontinued operation. Registrant files the following on August 7, 20X3 reflecting its discontinued operations:

— the prior year's comparative interim period financial statements revised to reflect the discontinued operation are included in Form 10-Q for the quarter ended June 30, 20X3; and

— a Form 8-K including revised audited financial statements as of and for the years ended December 31, 20X2, 20X1, and 20X0 reflecting retrospective presentation of the discontinued operation. The revised 20X2 income statement reports pretax income of $600.

Registration statement

Registrant files a Form S-3 registration statement on September 20, 20X3. To determine the significance of its acquisition of Company A, Registrant may choose one of two options for determining significance.

— Option 1: Registrant continues to rely on the significance tests performed in July (25% significant). This option requires the financial statements filed on Form 8-K/A to be updated to include unaudited interim period financial statements for the six months ended June 30, 20X3 and pro forma financial information for the most recent interim period.

— Option 2: Registrant reperforms the significance tests using its revised reported pretax income of $600 (17%). This option would not require Registrant to update any financial statements or pro forma financial information in the registration statement. In addition, because significance is under 20%, Registrant would also not be required to include or

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incorporate by reference the financial statements of Company A previously filed on Form 8-K/A in another registration statement (e.g. Form S-1) that does not automatically incorporate by reference previous filings.

3.3 Information used in the significance tests

3.3.10 Financial statements used to perform significance tests

Significance is determined based on the definition of a significant subsidiary (in S-X Rule 1-02(w)), using information from the registrant's and acquired business's financial statements. This section discusses the financial statement period to be used to determine significance. In an acquisition by a predecessor to a shell company, the predecessor's consolidated financial statements are used instead of those of the shell company registrant in applying the significance tests. For additional considerations related to significance tests for business or real estate acquisitions unrelated to the de-SPAC transaction by the predecessor in a de-SPAC transaction, see Question 10.2.35 and Question 10.2.36.

Section 3.3.20 discusses the information in those financial statements that is used to determine significance.

Question 3.3.10

What financial statement period is used to perform the significance tests?

Background: The definition of a significant subsidiary refers to the use of the financial information for the registrant's 'most recently completed fiscal year'. However, S-X Rule 11-01(b) clarifies the period to be used to determine significance of an acquired business. [S-X Rule 1-02(w)]

Interpretive response: Significance tests are performed using the registrant's last annual audited financial statements that were *required to be filed* with the SEC *before* the tested business acquisition was consummated.

Ordinarily, the audited financial statements used are those included in the most recently filed annual report on Form 10-K. However, if an acquisition is consummated before the registrant's most recent fiscal year-end financial statements are required to be filed (also known as an acquisition occurring 'shortly after year-end'), the registrant may choose to use the prior fiscal-year financial statements (see Question 3.3.30). The ability to use the prior fiscal-year financial statements applies even if the company files its 10-K early. Question 3.3.110 discusses certain situations in which previously filed pro forma financial statements may be used. [S-X Rule 11-01(b)(3)]

The pre-acquisition financial statements of the acquired business used for the significance tests should be for the same fiscal year as the registrant. However, if the fiscal years differ, the registrant uses the acquired business's most recent

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fiscal year that would be required if that business had the same filer status as the registrant (see Question 3.3.60). [S-X Rule 11-01(b)(3)(i)]

Question 3.3.20

Can a registrant use interim periods to perform the significance tests?

Interpretive response: No. The SEC staff has prohibited registrants from using audited or unaudited interim period balances to perform the tests of significance even if there has been a significant change in the size or circumstances of an entity during the subsequent interim period(s) – e.g. completing an offering that significantly increases total assets. [FRM 2020.1]

Section 7.2.30 discusses considerations when determining significance for initial registration statements.

Example 3.3.10

Performing the significance tests – Offering completed in an interim period

Registrant has a calendar year-end and total assets of $40 million as of December 31, 20X1.

On April 1, 20X2, Registrant completes an IPO and raises additional capital of $30 million. Registrant reports total assets of $70 million in its Form 10-Q for the quarter ended June 30, 20X2.

On August 20, 20X2, Registrant acquires Company A, which had total assets of $10 million as of December 31, 20X1. Using December 31, 20X1 data, the acquisition is significant at 25% ($10 ÷ $40) under the asset test. Using June 30, 20X2 data, the asset test result would be 14% ($10 ÷ $70).

Registrant's acquisition of Company A is significant. However, if a registrant believes that the outcome is not representative of the specific facts and circumstances, it may request a waiver from the SEC staff.

Question 3.3.30

Can the financial information for a period not yet required to be filed be used to determine the significance of an acquisition?

Background: As discussed in Question 2.3.40, after a significant business acquisition, the registrant files Form 8-K on the following timeline:

— **Initial Form 8-K** (reporting the acquisition): within four business days of consummation. Shell companies (e.g. SPACs) must provide the information required by Item 9.01 in the initial Form 8-K.

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— **Amended Form 8-K** (containing the acquired business's financial statements and pro forma financial information): within 71 calendar days after the initial Form 8-K due date.

Interpretive response: Yes. As discussed in Question 3.3.10, a registrant generally determines significance by using the last annual audited financial statements that were required to be filed with the SEC *before* the tested business acquisition was consummated.

However, there is flexibility when an acquisition is consummated shortly after the registrant's most recent fiscal year-end and its most recent fiscal year-end financial statements are not yet required to be filed (e.g. on Form 10-K or in a registration statement). If a registrant initially files its fiscal year-end financial statements in its Form 10-K after the initial Form 8-K (reporting the acquisition), but before it files the amended Form 8-K (containing the acquired business's financial statements), the registrant has two options. It may determine significance based on:

— its financial statements for the most recently completed fiscal year, or
— its financial statements for the prior fiscal year.

The choice for determining significance offers an advantage to registrants that have experienced significant increases in the amounts that are used in the denominator of the significance tests (e.g. total assets, revenues, net income). [S-X Rule 11-01(b)(3)(i)(C), Regs Comm 03/2021]

This option may not be available in initial public offerings. See section 7.2.30 for additional considerations for initial registration statements.

Example 3.3.20

Identifying fiscal year to use to determine significance – Acquisition shortly after year-end (financial statements not yet required to be filed)

On February 10, 20X2, Registrant acquires Company A. To determine the acquisition's significance, Registrant first identifies what financial information to use to perform the significance tests. This determination depends on the timing of its Form 10-K filing for its year ended December 31, 20X1.

Scenario 1: Acquisition consummated after Registrant voluntarily files Form 10-K before due date

Registrant voluntarily files its Form 10-K early for the year ended December 31, 20X1 before the February 10th acquisition date.

Registrant may determine significance using either its financial statements for the year ended December 31, 20X0 or the year ended December 31, 20X1.

Scenario 2: Acquisition consummated before Form 10-K is filed (and before it is required to be filed)

As of February 10, 20X2, Registrant has not filed its Form 10-K for the year ended December 31, 20X1. Registrant also will not file the Form 10-K before the initial Form 8-K is filed reporting the acquisition. However, Registrant will

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file the Form 10-K before the amended Form 8-K is filed that includes Company A's financial statements.

Registrant may determine significance using either its financial statements for the year ended December 31, 20X0 or the year ended December 31, 20X1.

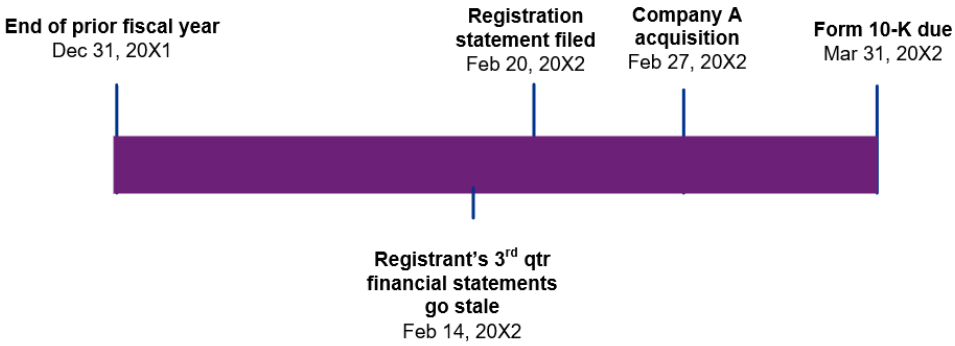
Example 3.3.30

Identifying fiscal year to use to determine significance – Acquisition shortly after year-end (financial statements required to be filed)

Registrant is a non-accelerated filer and loss corporation with a calendar year-end. Because Registrant is a loss corporation, it does not meet the conditions of S-X Rule 3-01(c) (see Question 4.4.130), and therefore its September 30, 20X1 financial statements go stale 45 days after its year-end (February 14, 20X2). On February 20, 20X2, Registrant files a registration statement. As a result, audited financial statements for the year ended December 31, 20X1 are required to be filed in the registration statement.

On February 27, 20X2, Registrant acquires Company A. Although Registrant's 20X1 annual financial statements were included in its February 20, 20X2 registration statement, Registrant's Form 10-K for the year ended December 31, 20X1 has not been filed as of the acquisition date.

The timeline is illustrated below.



Registrant determines the significance of the Company A acquisition based on its financial statements for the year ended December 31, 20X1. This is the case because the 20X1 annual financial statements are the most recent pre-acquisition financial statements required to be filed (in the registration statement) even though the Form 10-K is not yet due.

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Question 3.3.40

Can an acquired business's unaudited financial statements be used to perform the significance tests?

Interpretive response: Yes. A registrant can use the acquired business's unaudited financial statements to perform the significance tests. However, the unaudited financial statements used must reflect the necessary adjustments to comply with the relevant accounting standards and Regulation S-X. See Question 3.3.90 for considerations related to private company accounting alternatives and Question 3.3.190 for consideration of intercompany related adjustments between the registrant and acquired business.

If the acquired business is significant, then the registrant files audited financial statements (see section 4 for additional guidance about the required financial statements of an acquired business). If the audited financial statements differ from the unaudited statements that were used to compute the initial estimate of significance, the registrant must reperform the significance tests based on the audited financial statements to determine the actual significance. This actual significance based on the revised financial statements is to be used to determine which annual and interim periods are required (see section 4.3 for Form 8-K and section 4.4 for registration statements).

If the actual level of significance differs from the initial estimate to a degree that alters the financial statements required, the registrant could face increased effort to meet the 71-day extension period filing requirement for the amended Form 8-K (e.g. two years audited financial statements required if actual level of significance exceeds 40%). Failure to timely file the required audited financial statements for all required periods may affect the registrant's eligibility to use Form S-3.

Question 3.3.50

Must the significance tests be performed if there are no previous stand-alone financial statements for the acquired business?

Interpretive response: Yes. Often, an acquired business does not have its own separate, stand-alone financial statements because it was previously a division or product line of another entity. The lack of stand-alone financial statements does not relieve a registrant from the need to determine significance of the acquired business.

If available, the registrant may use 'carve-out' financial statements to determine significance in lieu of full financial statements. Carve-out financial statements are intended to reflect the acquired component's operating history as if that business had operated on a stand-alone basis. As a result, those financial statements must include allocations of certain indirect costs that were directly incurred by the seller. Section 10.3.20 provides additional guidance on when carve-out financial statements are acceptable and how to prepare them.

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When it is not practicable to use full or carve-out financial statements to determine significance for an acquired business that was previously a portion of a larger entity (e.g. a product line), abbreviated financial statements may be used in certain circumstances. Section 10.3.30 provides additional guidance on when abbreviated financial statements are acceptable and how to prepare them. [S-X Rule 11-01(b)(3)(i)(A)]

Question 3.3.60

Do the fiscal year-ends need to be consistent for the registrant and the acquired business?

Interpretive response: No. When the registrant and the acquired business have different fiscal year-ends, the registrant determines significance using: [S-X Rule 11-01(b)(3)(i)]

- its fiscal year-end financial statements that were required to be filed for the period before the acquisition (see Question 3.3.30); and
- the acquired business's most recent fiscal year-end financial statements that would have been required if the acquired business had the same filer status as the registrant.

Fiscal periods are not conformed for purposes of the significance tests – whether by adding partial periods from different fiscal years together or by annualizing a portion of the fiscal year results of the acquired business.

See Question 3.5.170 for guidance on situations that may involve using fewer than 12 months of operating results to determine significance under the income test.

Example 3.3.40

Different fiscal year-ends

Scenario 1

On July 1, 20X2, Registrant acquires Company A. Registrant has a June 30 year-end and Company A has a March 31 year-end. As of the acquisition date, Registrant's latest Form 10-K on file is for the year ended June 30, 20X1.

Registrant uses the following to determine significance:

- its June 30, 20X1 financial statements as filed in its latest Form 10-K; and
- Company A's March 31, 20X2 financial statements.

Company A's March 31, 20X2 financial statements are used regardless of whether it is a public or a private company.

Scenario 2

Assume the same facts as Scenario 1, except the acquisition date is August 18, 20X2. Company A's unaudited financial statements for the three-months ended

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June 30, 20X2 are available and therefore could be used to compile unaudited financial information for the 12 months ended June 30, 20X2.

Registrant uses the following to determine significance:

- its June 30, 20X1 financial statements as filed in its latest Form 10-K (or its June 30, 20X2 financial statements if voluntarily filed before the due date, see Question 3.3.30); and
- Company A's March 31, 20X2 financial statements.

Registrant may not perform the significance test using Company A's financial statements compiled for the 12 months ended June 30, 20X2 because June 30 is not Company A's fiscal year-end.

Question 3.3.70

Can the financial statement periods used to determine aggregate significance change from those used to determine the individual significance at the acquisition date?

Interpretive response: Yes. In a significance test performed for an individual acquisition (e.g. for determining whether a Form 8-K is required), a registrant uses its financial statements for the most recent fiscal year that are required to be filed as of the date of individual acquisition (see Question 3.3.10).

If an aggregate significance test needs to be performed at a later date (e.g. in connection with the filing of a registration statement), the registrant uses for that test its financial statements from the most recent fiscal year-end required to be filed as of the effective date of the registration statement.

This concept also applies when aggregating related business (see section 3.3.30).

Example 3.3.50

Financial statement periods used – Aggregate significance tests

Registrant acquires three companies in 20X3. Registrant determined the significance of each of the individual acquisitions using its most recent annual financial statements required to be filed at the date of the acquisition. Registrant and all the acquired companies have calendar year ends. Registrant files its Form 10-K in February 20X3.

The acquisition dates and financial statements used to determine significance for each of the individual acquisitions are as follows.

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Acquisition date	Financial statements used
Company A acquired in January 20X3	20X1 (20X2 not yet required to be filed)
Company B acquired in March 20X3	20X2
Company C acquired in September 20X3	20X2

Registrant performs the significance tests at each individual acquisition date and determines that none of the acquisitions were significant enough to require the filing of audited financial statements on Form 8-K.

Determining aggregate significance

In December 20X3, Registrant files a registration statement and needs to determine the aggregate significance of its three acquisitions. Registrant performs the aggregate significance tests using its 20X2 audited financial statements and the most recent pre-acquisition financial statements of Companies A, B and C (i.e. 20X2 financial statements).

Question 3.3.80

Do the amounts used in significance tests need to be determined under the same accounting standards?

Interpretive response: Yes. The financial information (e.g. total assets, revenue, net income) for both the acquired business and the registrant used to determine significance must be determined using the same comprehensive basis of accounting.

A registrant that files US GAAP financial statements (or is required to provide reconciliation to US GAAP) performs the significance tests using US GAAP (as applicable to PBEs) amounts for the acquired business. [S-X Rule 1-02(w)(1)]

For example, when a domestic registrant acquires a foreign business, it determines the numerator and denominator of the significance tests under US GAAP for PBEs even if the acquired business does not ordinarily prepare (or reconcile) its financial statements to US GAAP. Similarly, a registrant that files its financial statements under IFRS Accounting Standards-IASB performs the significance tests using amounts determined under those standards. [S-X Rule 1-02(w)(1), FRM 2015.3]

Question 3.3.90

Can a registrant use the unadjusted amounts of the acquired business if those amounts include the use of private company accounting alternatives?

Interpretive response: No. The financial information of the acquired business used to perform the significance tests may not be prepared using private company accounting alternatives available under US GAAP (with one exception,

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see below). That financial information must be based on PBE accounting standards. Therefore, if the acquired business's pre-acquisition financial statements have been prepared with private company alternatives, they must be adjusted to exclude the effects of those alternatives. [Regs Comm 03/2014]

For example, if the acquired business had elected to amortize goodwill in its pre-acquisition financial statements, to arrive at the amounts to use in its significance tests, the registrant must exclude the effects of the goodwill amortization and determine whether to include any impairment charges based on retrospective goodwill impairment tests.

Exception

The SEC staff has stated it will allow a registrant to determine significance using an acquired business's financial information that includes the effects of applying the 'risk-free rate' private company alternative in Topic 842. That alternative allows the use of a risk-free discount rate instead of the lessee's incremental borrowing rate or rate implicit in the lease. If a registrant acquires a business that had elected to use the risk-free rate, the registrant need not adjust the acquired business's financial statements. [Regs Comm 10/2020]

This exception is permitted only for purposes of performing the significance tests. If the results of the significance tests indicate that audited historical financial statements of the acquired business are required, those financial statements must comply with the US GAAP recognition and measurement principles applicable to a PBE. [Regs Comm 10/2020]

Example 3.3.60

Asset test – Private company becomes a PBE through acquisition

Registrant purchases 100% of the outstanding common stock of Company A. Company A is a private company and amortizes goodwill under the private company accounting alternative. Company A's total assets at December 31, 20X1 are $35, including $10 of accumulated amortization of goodwill.

Registrant's total assets at December 31, 20X1 are $200.

The asset test is performed as follows.

Asset test	Outcome
Total assets of Company A under US GAAP applicable to PBE (adding back goodwill amortization) ($35 + $10)	45
Divided by Registrant's total assets (before acquisition)	200
Significance	**23%**

This example assumes that Registrant tested Company A's goodwill for impairment for the relevant periods assuming that the goodwill was never amortized and concluded no impairment was necessary. If it finds the goodwill was impaired (had no amortization been recognized), it not only increases the numerator of the asset test by the amount of goodwill amortization, but also

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decreases the numerator by the goodwill impairment charge that would have been recognized had Company A not adopted the private company alternative.

Question 3.3.100

Is a registrant permitted to make adjustments to the financial statements of an acquired business?

Interpretive response: No. A registrant is not permitted to alter the amounts in the financial statements of an acquired business when determining significance, except for reversing the effects of a private company accounting alternative (see Question 3.3.90). For example, even if a registrant plans to dispose of certain assets of an acquiree after the acquisition, it cannot exclude the assets from the acquiree's total assets when performing the significance tests.

Example 3.3.70

Adjusting the financial statements of an acquired business

Registrant acquires a business and demonstrates objectively its intent to use or manage certain of the acquired assets in a manner different from the seller.

Registrant believes that the consideration transferred for the acquired business provides evidence that certain of the acquired assets are impaired and the results of the investment test are consistent with that view (i.e. the acquisition is not significant under the investment test). However, the use of the historical asset values of the acquired business results in a determination that the acquisition is significant under the asset test. If Registrant believes that this result is anomalous in light of all relevant facts and circumstances, it could request relief from the SEC staff to use the impaired asset value in the asset test.

Question 3.3.110

When may a registrant use pro forma information to perform the significance tests?

Interpretive response: A registrant may use previously filed pro forma information to perform the significance tests for a probable or consummated acquisition (or completed disposition) if the registrant previously filed (e.g. in a Form 8-K or registration statement): [S-X Rule 11-01(b)(3)(i)(B)]

- audited Rule 3-05 or Rule 3-14 financial statements for an earlier acquired business; and
- the pro forma financial information required by S-X Article 11 for that earlier acquisition.

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The registrant also may use previously filed pro forma information to perform the significance tests for a probable or consummated acquisition (or completed disposition) if the registrant previously filed S-X Article 11 pro forma information for an earlier disposition.

Section 7.2.20 discusses the considerations for using pro forma financial information to determine significance in connection with initial registration statements.

If a registrant chooses to determine the significance of an acquisition (or disposition) using its pro forma financial information, it must use pro forma financial information when performing all three significance tests and continue to do so for all subsequent acquisitions and dispositions until the next annual report on Form 10-K or Form 20-F is filed. [S-X Rule 11-01(b)(3)(i)(B)(2)]

Contents of pro forma financial information used in significance tests

Pro forma financial information used in the significance tests is limited to the amounts that reflect the combination of the historical financial information of the registrant and the acquired business, and the transaction accounting adjustments (see Question 3.3.120). Pro forma financial information used to determine significance may not give effect to autonomous entity adjustments, management's adjustments, if any, or other transactions, such as the receipt or use of proceeds from an offering. Probable acquisitions are also excluded from pro forma information used in performing the significance tests. [S-X Rule 11-01(b)(3)(i)(B), FRM 2020.6, SEC Rel 33-10786 § II.B.2.c. (pg 75)]

Example 3.3.90 illustrates using previously filed pro forma financial information to determine whether financial statements must be filed for individually insignificant acquisitions that may be significant in the aggregate.

Question 3.3.120

Does the pro forma information used in significance tests include the effects of financing the prior acquisition(s)?

Interpretive response: Yes. Pro forma financial information used in the significance tests includes amounts that reflect the combination of the historical financial information of the registrant and the previously acquired business, and the transaction accounting adjustments. We understand the SEC staff has commented that these pro forma amounts include the effects of material financing transactions directly related to the previous acquisition(s) for which the pro forma financial information was filed. For example, the pro forma amounts may give effect to the increased interest costs that will result from the financing of the previous acquisition.

However, there may be other pro forma effects that are not included, such as the proceeds of an unrelated, subsequent offering (see Question 3.3.110).

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Example 3.3.80
Use of pro forma information – Previous significant acquisition

Scenario 1: Acquisition of businesses in same fiscal year

Registrant acquires Company A in February 20X2 for $51. Company A is determined to be a business and the acquisition is significant.

In April 20X2, Registrant files a Form 8-K/A with Company A's historical financial statements and Registrant's pro forma financial information under S-X Article 11. The pro forma financial information is prepared as if the acquisition had been consummated as of and for the year ended December 31, 20X1.

Combined total assets in the pro forma financial information is $151 as shown below.

	Registrant 12/31/X1	Company A 12/31/X1	Pro forma transaction accounting adjustments	Pro forma combined
Assets	100	31	20	151

Registrant acquires Company B in September 20X2. Company B's total assets are $23. There were no other acquisitions or dispositions during the fiscal year.

Registrant may perform the significance tests for the Company B acquisition using the pro forma financial information filed on Form 8-K/A reporting the acquisition of Company A. Significance under the asset test is 15% ($23 ÷ $151).

Registrant may also perform the significance tests using its historical 20X1 financial statements. Under that approach, significance under the asset test is 23% ($23 ÷ $100).

Scenario 2: Acquisition of businesses in two consecutive years

Assume the same facts as Scenario 1, except that instead of acquiring Company B in September 20X2, Registrant acquires Company B in 20X3. Registrant is not required to file its 20X2 financial statements until the Form 10-K due date (i.e. it files no other registration statements in 20X3 that would require earlier filing).

If Registrant acquires Company B before its 20X2 financial statements are required to be filed on Form 10-K, it determines significance using one of the two methods described in Scenario 1.

If Registrant acquires Company B after its 20X2 financial statements are filed on Form 10-K, it determines significance using those filed financial statements.

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Example 3.3.90
Use of pro forma information – Series of acquisitions

Registrant has a calendar year-end. It files its 20X0 Form 10-K in February 20X1 and its March 31, 20X1 Form 10-Q in May 20X1.

Insignificant acquisitions – Companies A and B

Registrant acquires Company A and Company B during its first quarter of 20X1 but those acquisitions are not individually significant.

Significant acquisition – Company C

Registrant acquires Company C on April 7, 20X1 and concludes that the acquisition is significant. It files its initial Form 8-K (reporting the acquisition) within four business days and files its amended Form 8-K (Form 8-K/A) on June 16, 20X1. The Form 8-K/A includes Company C's audited financial statements and pro forma financial information giving effect to the acquisition.

The pro forma financial information in the Form 8-K/A as of and for the year ended December 31, 20X0 reflects purchase accounting for Company C as follows.

	Registrant 12/31/X0	Company C 12/31/X0	Pro forma transaction accounting adjustments	Pro forma combined
Assets	1,000	210	20	1,230
Pretax income	100	25	(15)	110

Note: Pro forma financial information as of and for the interim period ended March 31, 20X1 may be required based on the timing, but for illustrative purposes, this example only includes the annual period.

Subsequent insignificant acquisitions – Companies D and E – pro forma used to determine significance

After its acquisition of Company C in April, Registrant acquires Company D on July 3. Because Registrant has pro forma financial information on file (reflecting its acquisition of Company C) when Company D was acquired in early July, it decides to use that pro forma information to perform the individual significance tests for the Company D acquisition and determines that the acquisition is not significant.

In early July, Registrant also has a planned acquisition of Company E that is considered probable.

Registration statement to be filed

Registrant files a registration statement on July 14, 20X1, which incorporates by reference audited financial statements for its latest year ended December 31, 20X0 and unaudited interim period statements for the three months ended March 31, 20X1. The registration statement will also incorporate by reference the Form 8-K/A, which includes the audited financial statements of Company C and pro forma financial information described above. The probable acquisition of Company E is not expected to be individually significant.

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Registrant next determines the aggregate significance of its consummated and probable acquisitions for the registration statement.

Aggregate significance determination for registration statement – use of pro forma information

Because Registrant chose to determine significance of acquired Company D using pro forma financial information giving effect to the acquisition of Company C, it continues to apply that method subsequent to July 3rd (until it files its next annual report on Form 10-K or Form 20-F) when determining:

- individual significance for all subsequent acquisitions (and probable acquisitions); and
- aggregate significance for the group of individually insignificant acquisitions.

Registrant uses the following financial information to determine significance:

- December 31, 20X0 financial statements as reported in its 20X0 Form 10-K for the acquisition of Company C; and
- December 31, 20X0 pro forma financial information as reported in its June 16, 20X1 Form 8-K/A for the aggregated group of individually insignificant acquisitions and probable acquisitions (which include Companies A, B, D, and E).

Registrant uses its pro forma financial information for the aggregated group of individually insignificant and probable acquisitions even though it previously used its December 31, 20X0 financial statements as reported in its 20X0 Form 10-K to test some of the individual acquisitions in the group for individual significance (e.g. Companies A and B).

Based on the results of the aggregate significance tests, Registrant determines that the group is significant (i.e. significance exceeds 50%). As a result, Registrant must include in the registration statement pro forma financial information depicting the aggregate effects of all the individually insignificant and probable acquisitions.

Had the aggregate significance been less than 50% using pro forma information, no additional pro forma information would be required in the registration statement.

For detailed discussion on how the significance tests are applied in aggregate circumstances, see Question 3.4.140 (Investment test) and Questions 3.5.60 and 3.5.110 (Income test).

Question 3.3.130

Can pro forma information of probable or insignificant acquisitions filed in a voluntary filing of a Form 8-K be used to determine significance for a subsequent acquisition?

Background: As discussed in Question 2.3.70, a registrant preparing to file a shelf registration statement may use Form 8-K to file pro forma financial

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information for acquired or to be acquired businesses if it makes several individually insignificant acquisitions that together are significant.

Interpretive response: No. S-X Rule 3-05 does not permit significance to be determined using pro forma financial information that gives effect to probable or individually insignificant acquisitions. Therefore, a registrant is required to use the financial statements in its most recent Form 10-K to determine significance. However, previously filed pro forma amounts reflecting significant acquisitions and dispositions completed since the last fiscal year-end may be used to determine the significance of a newly probable acquisition (and must be used if pro forma amounts have already been used to determine significance of other acquisitions in the current year – see Question 3.3.110). [S-X Rule 11-01(b)(3)(i)(B)]

Question 3.3.140

What is required when previously filed pro forma information does not include a balance sheet as of the latest fiscal year-end?

Background: The pro forma balance sheet included in a Form 8-K for previous acquisitions or dispositions might not be prepared as of the registrant's latest fiscal year-end. This is because S-X Rule 11-02(c)(1) requires a consolidated pro forma balance sheet as of the end of the most recent period for which a consolidated balance sheet of the registrant is required to be filed, which is often an unaudited interim period.

Further, a pro forma balance sheet is not required if the transaction has been reflected in a post-acquisition consolidated balance sheet. In that situation, a registrant files only pro forma income statements in a Form 8-K or a registration statement for a significant acquisition. [S-X Rule 11-02(c)(1)]

Interpretive response: A registrant choosing to use the previously filed pro forma financial information in its significance tests must prepare a pro forma balance sheet for its most recently completed fiscal year-end. It uses that pro forma balance sheet (which was not previously filed) in its significance tests. [FRM 2025.3]

If a registrant prepares and uses a pro forma balance sheet for its most recently completed fiscal year-end, it must use the pro forma income statement amounts for that same completed fiscal year.

Example 3.3.100

Year-end pro forma balance sheet not filed

In May 20X2, Registrant acquires Company A and concludes the acquisition is significant.

Registrant has a calendar year-end and files the following pro forma information giving effect to the acquisition:

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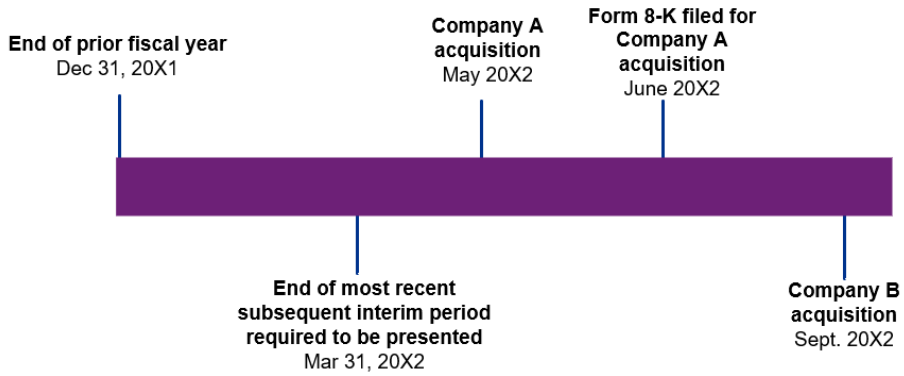
— income statements for the year ended December 31, 20X1, and the three months ended March 31, 20X2; and
— balance sheet as of March 31, 20X2.

The timeline is illustrated below.



In September 20X2, Registrant acquires another potentially significant subsidiary, Company B. Registrant prepares a pro forma balance sheet as of December 31, 20X1 that includes the effect of the Company A acquisition and uses that balance sheet for the asset significance test (or investment significance test if there was not an AWMW, such as in an IPO scenario) for the Company B acquisition. This is permitted even though the December 31, 20X1 pro forma balance sheet was never filed with the SEC.

Further, if Registrant uses a December 31, 20X1 pro forma balance sheet, it must use the 20X1 pro forma income statement amounts. Also, if Registrant determines significance based on pro forma financial information, it must continue to use pro forma financial information for all subsequent acquisitions until it files its next annual report on Form 10-K or Form 20-F.

Question 3.3.150#

Can pro forma information be used to determine significance for a subsequent acquisition by a shell company?

Interpretive response: Generally, no. In an acquisition made by a shell company registrant (e.g. a SPAC) that is not a reverse acquisition, the legal and accounting acquiree may be deemed to be the registrant's predecessor. Therefore, in future filings, the historical financial statements of the registrant will be those of the predecessor. See Question 10.2.36 for consideration of subsequent acquisitions and the impact to the significance test and see section 10.2 for further discussion related to reverse acquisitions.

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3.3.20 Financial information of the registrant and acquired business

Section 3.3.10 addresses what financial statements a registrant should use when performing the significance tests. This section discusses what financial information from those financial statements a registrant should use when performing the significance tests

To achieve consistent application and fair treatment across all registrants and industries, the SEC does not accept alternative significance tests. The tests must be performed based on the requirements of S-X Rule 3-05 and related rules. If after determining significance, a registrant believes the tests specify periods beyond those necessary to adequately inform investors, it may make a written request to the SEC staff (CF-OCA) to waive one or more years of financial statements. [FRM 2020.1]

Question 3.3.160

What information is used to perform the significance tests?

Interpretive response: The information a registrant uses in the numerator and denominator of each of the three significance tests is summarized in the following tables.

In an acquisition by a predecessor to a shell company, the predecessor's consolidated financial statements are used instead of those of the shell company registrant in applying the significance tests. For additional considerations related to significance tests for business or real estate acquisitions unrelated to the de-SPAC transaction by the predecessor in a de-SPAC transaction, see Question 10.2.35 and Question 10.2.36. [S-X Rule 1-02(w)(1)]

Investment test (See section 3.4)		
	Numerator	**Denominator**
Market value	Registrant's and its other subsidiaries' investments in, and advances to, the acquired business (US GAAP purchase price)	The aggregate worldwide market value (AWMV) of the registrant's voting and non-voting common equity AWMV is calculated daily from the last five trading days of the most recently completed month ending prior to the earlier of: — the date the registrant announces the acquisition; or — the date of the acquisition agreement. All publicly available shares worldwide are included in the calculation.

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Investment test (See section 3.4)		
	Numerator	**Denominator**
		The registrant's consolidated total assets for the most recently completed fiscal year is used if there is no AWMV.

Income test (See section 3.5)		
	Numerator	**Denominator**
Lower of:		
Pretax income component[1]	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 controlling interests for the most recently completed fiscal year	Absolute value of the registrant's and its subsidiaries' consolidated income or loss from continuing operations before income taxes (after intercompany eliminations) for the most recently completed fiscal year
OR		
Revenue component[1,2]	Registrant's and its other subsidiaries' proportionate share of the tested subsidiary's consolidated total revenues (after intercompany eliminations) for the most recently completed fiscal year	Registrant's and its subsidiaries' consolidated total revenues (after intercompany eliminations) for the most recently completed fiscal year

Notes:

1. The lower of the pretax income component or the revenue component is used in performing the income test.
2. The revenue component does not apply if the registrant or the acquired business do not have material revenue in each of the two most recently completed fiscal years.

Asset test (See section 3.6)		
	Numerator	**Denominator**
Asset value	Registrant's and other subsidiaries' proportionate share of total consolidated assets of the tested subsidiary (after intercompany eliminations) as of end of the most recently completed fiscal year	Registrant's and subsidiaries' consolidated total assets (after intercompany eliminations) as of the end of the most recently completed fiscal year

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Section 8.5.10 addresses how the tests apply when a registrant conducts a blind pool offering either in the scope of S-X Rule 3-05 (general businesses) or in the scope of S-X Rule 3-14 (real estate operations).

Question 3.3.170

Is a registrant permitted to round the results of the significance tests?

Interpretive response: No. The SEC staff has stated the results of the significance tests should not be rounded. As a result, if the significance of an acquisition is greater than 20% by any amount (e.g. 20.1%), it is considered significant. Similarly, if the significance of an acquisition is less than 20% by any amount (e.g. 19.9%), it is not considered significant. [FRM 2015.13]

Question 3.3.180

Does a registrant include the acquired business's assets, income or revenues in the denominator when performing the significance tests?

Interpretive response: No, except for in certain acquisitions involving shell companies as discussed in Question 10.2.36. The denominator in each significance test generally excludes assets, income or revenues of the acquired business from the registrant's consolidated financial information as of the prior year-end. [FRM 2015.10]

Example 3.3.110

Acquired business excluded from registrant's base

Registrant acquires Company A. Registrant determines that the asset test yields the highest level of significance. Company A and Registrant have total assets of $21 and $100, respectively.

The asset test is performed as follows.

Asset test – correct example	Outcome
Company A's total assets	21
Divided by Registrant's total assets (before acquisition)	100
Significance	**21.0%**

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It would be *incorrect* to perform the asset test in the following manner.

Asset test – incorrect example	Outcome
Company A's total assets	21
Divided by Registrant's total assets (including acquisition: $100 + $21)	121
Significance	**17.4%**

Based on the correct example above, the acquisition of Company A is significant under the asset test (21%).

Question 3.3.190

Are intercompany transactions between the registrant and the acquired business excluded when performing the significance tests?

Interpretive response: Yes. When a registrant performs the significance tests, intercompany transactions between the registrant and acquired business are eliminated as if the acquired business had always been consolidated. The elimination could affect the numerator, the denominator, or both depending on the nature of the intercompany transaction. [S-X Rule 1-02(w), FRM 2015.11]

Eliminating intercompany transactions between the registrant and the acquired business is done solely for purposes of performing the significance tests. If the acquisition is significant, the historical financial statements of the acquired business filed with the SEC are not adjusted to eliminate transactions with the registrant.

Example 3.3.120

Excluding intercompany preferred stock dividends from significance tests

Registrant is considering acquiring Company A, a private company. Company A owns preferred stock of Registrant (reported on Company A's books as Investment in Registrant). Company A currently receives preferred stock dividends from Registrant.

To perform the significance tests, Registrant excludes the preferred stock dividends received from Company A's income from continuing operations before income taxes. Further, the SEC staff has stated that when performing the asset test, Registrant excludes Company A's investment in Registrant from Company A's total assets. The rationale is that the dividends and investment will be eliminated in consolidation in future periods.

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Example 3.3.130
Excluding intercompany inventory transactions from significance tests

Registrant is considering acquiring Company A in April 20X2. For the year ended December 31, 20X1, Registrant has pretax income of $1,300 from continuing operations and revenues of $9,000.

For the year ended December 31, 20X1, Company A sold $200 of inventory to Registrant, resulting in Company A recognizing $10 and $250 of pretax income and revenue, respectively. Total pretax income and revenues for Company A for the year ended December 31, 20X1 were $530 and $1,800, respectively.

Company A's total assets are $2,000 as of December 31, 20X1. Company A had no outstanding receivables from Registrant at December 31, 20X1. Registrant had not yet sold the inventory as of December 31, 20X1 so the inventory purchased from Company A remained in Registrant's total assets of $10,000 at the balance sheet date.

The income test

Under the pretax income component of the income test, Registrant excludes the intercompany profit from Company A's pretax income from continuing operations to arrive at the numerator. There is no adjustment required to Registrant's pretax income.

The pretax income component of the income test is performed as follows.

Pretax income component	Outcome
Company A's unadjusted pretax income	530
Minus intercompany profit	(10)
Company A's adjusted pretax income (after eliminations)	520
Divided by Registrant's pretax income	1,300
Significance	**40.0%**

Under the revenue component of the income test, intercompany revenue is excluded from Company A's total revenues. There is no adjustment required to Registrant's revenues.

The revenue component of the income test is performed as follows.

Revenue component	Outcome
Company A's unadjusted revenues	1,800
Minus intercompany revenue	(250)
Company A's adjusted revenues (after eliminations)	1,550
Divided by Registrant's revenues	9,000
Significance	**17.2%**

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The acquisition of Company A is not significant under the income test (17.2% as the lower of the pretax income and revenue components).

The asset test

Under the asset test, the $200 carrying amount of inventory is excluded from Registrant's $10,000 of total assets as of December 31, 20X1.

The asset test is performed as follows.

Asset test	Outcome
Company A's assets to be acquired	2,000
Divided by Registrant's adjusted total assets (after eliminations)	9,800
Significance	**20.4%**

The acquisition of Company A is significant using the asset test (20.4%).

Registrant is also required to perform the investment test, which has been excluded from this example because it is not impacted by the intercompany inventory transactions. The overall significance of the acquisition of Company A will be based on the highest level of significance across the three tests.

Example 3.3.140

Excluding intercompany receivables from the asset test – Acquired business is previously consolidated subsidiary

Registrant currently owns 51% of the common stock of Company A and is considering acquiring the remaining 49% in March 20X2. Registrant's total assets are $10,000.

Company A has $100 of receivables from Registrant, which are included in its $2,000 of total assets as of December 31, 20X1.

To perform the asset test, Registrant excludes intercompany receivables from Company A's total assets. No adjustment to Registrant's total assets is necessary because intercompany transactions have been eliminated in consolidation.

The asset test is performed as follows.

Asset test	Outcome
Proportionate share of Company A's assets to be acquired ($2,000 – $100) × 49%	931
Divided by Registrant's total assets	10,000
Significance	**9.3%**

The acquisition of Company A is not significant under the asset test (9.3%).

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Example 3.3.150

Excluding intercompany profit from the income test – Acquired business is previously consolidated subsidiary

Registrant currently owns 51% of the common stock of Company A and is considering acquiring the remaining 49% in March 20X2. For the year ended December 31, 20X1, Registrant had pretax income from continuing operations of $1,300 and revenue of $9,000.

For the year ended December 31, 20X1, Company A had $10 and $150 of pretax income and revenue from sales to Registrant, respectively. Company A's total pretax income from continuing operations is $530 and revenue is $5,500.

The pretax income component

Under the pretax income component of the income test, Registrant excludes intercompany profit from Company A's pretax income from continuing operations. No adjustments to Registrant's pretax income from continuing operations are necessary because intercompany transactions would have been eliminated in consolidation.

The pretax income component of the income test is performed as follows.

Pretax income component	Outcome
Proportionate share of Company A's adjusted pretax income (($530 – $10) × 49%)	255
Divided by Registrant's pretax income from continuing operations	1,300
Significance	**19.6%**

The revenue component

Under the revenue component of the income test, Registrant excludes intercompany revenues from Company A's total revenues. No adjustments to Registrant's revenues are necessary because intercompany transactions would have been eliminated in consolidation.

The revenue component of the income test is performed as follows.

Revenue component	Outcome
Proportionate share of Company A's adjusted revenues (($5,500 – $150) × 49%)	2,622
Divided by Registrant's revenues	9,000
Significance	**29.1%**

The acquisition of Company A is not significant under the income test (19.6% as the lower of the pretax income and revenue components).

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3.3.30 Acquisition of related businesses

Question 3.3.200

How is significance determined for the acquisition of related businesses?

Interpretive response: A registrant performs the significance tests by comparing the financial statements of each business, or group of 'related' businesses, to the registrant's most recent annual financial statements required to be filed.

Businesses are considered related if there is common control or common management of the acquired businesses, or when their acquisition is conditioned on:

- a single common event, such as an offering of securities; or
- the acquisition of another business.

See Question 2.2.210 for additional guidance on when businesses are 'related'.

If acquired businesses are related, the registrant determines significance based on the as-if combined financial statements of all the related businesses.

When multiple related businesses are acquired at different times during the year, a test of the cumulative significance of the related businesses is performed at the consummation date of each new acquisition in the series.

The cumulative significance of the related acquisitions is determined based on the registrant's last audited annual financial statements that were required to be filed with the SEC (see Question 3.3.10). When related acquisitions continue after audited financial statements for a new fiscal year are filed with the SEC, the registrant starts over at the filing date of those new fiscal year financial statements. In other words, related businesses that are acquired after those new fiscal-year financial statements are filed comprise a new group of related businesses – separate from the group that was accumulated before the new fiscal year financial statements were filed. The cumulative significance of the new group of related acquisitions is determined using the newly filed audited financial statements.

Asset test

To perform an aggregate asset test for a group of related business acquisitions, a registrant separately performs an asset test for each individual business in the group and adds the results together to arrive at a combined asset test result. [FRM 2020.9]

Investment test

To perform an aggregate investment test for a group of related business acquisitions, a registrant separately performs an investment test for each individual business in the group and adds the results together to arrive at a combined investment test result. [FRM 2020.9]

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Income test

S-X Rule 3-05 indicates that related businesses are treated as if they are a single business combination for purposes of the income test (for both the pretax income and revenue components of the test). Therefore, the pretax income component is performed by first combining the income or loss from continuing operations before income taxes of all of the related businesses (to arrive at the combined income or loss) and then taking the absolute value of the combined income or loss.

Like the pretax income component, the revenue component is performed using the combined revenue of all of the related businesses. If the combined revenue for the related businesses is material for each of the last two years, the quantitative result of the revenue component applies. If the revenue component applies, financial statements would not be required unless both the revenue and the pretax income components exceed 20%. See Question 3.5.110 for further discussion of performing the revenue component in an aggregate income test.

The combined pretax income or loss and combined revenue is used to perform the income significance test regardless of whether the related businesses are under common control or management. [FRM 2020.10]

Question 3.3.210

How is significance determined on acquisitions that follow a combination of entities under common control?

Interpretive response: A registrant may acquire an entity under common control, which is accounted for at historical cost using the as-if pooling-of-interests method. After completing this transaction, the registrant is required to retrospectively adjust the financial statements for the most recently completed fiscal year (see Question 3.3.10).

If the registrant acquires a business after the combination of an entity under common control, it determines significance of that acquisition based on the retrospectively restated financial statements (which give effect to the as-if pooling-of-interests with the commonly controlled entity). [FRM 2025.1]

The investment test is performed differently for transactions involving combination of entities under common control (i.e. the registrant and the acquired business were previously under common control) than it is for all other transactions discussed in this Handbook; see Question 3.4.150 for additional guidance.

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Example 3.3.160
Significance calculation following a combination of entities under common control

May 2022 mergers

In May 20X2, Company A merges with Company B in a combination of entities under common control. The combination is accounted for using the as-if pooling-of-interests method. Company A's total assets, as originally reported, are $40 at December 31, 20X1. After the merger, Company A's as-if pooled adjusted assets are $80 at December 31, 20X1.

Also in May 20X2, Registrant merges with Company C, an entity under common control with Registrant. Registrant's total assets, as originally reported, are $175 at December 31, 20X1. After the merger, Registrant's as-if pooled adjusted total assets are $250 at December 31, 20X1.

October 2022 acquisition

Registrant acquires Company A in October 20X2. Registrant and Company A are unrelated and the transaction is accounted for as a business combination. The transaction is also the acquisition of a business for SEC reporting purposes. Both Registrant and Company A have December 31 year-ends.

The significance of the acquisition of Company A in October 20X2 is determined by Registrant using the retrospectively revised as-if pooled financial statements at December 31, 20X1. Company A's total assets of $80 (as retrospectively adjusted) are divided by Registrants total assets of $250 (as retrospectively adjusted) for a significance of 32%. Therefore, the acquisition of Company A is significant to Registrant under the asset test. The income and investment significance tests would also be performed to determine the overall significance of the acquisition.

3.4 Investment test

Excerpt from S-X Rule 1-02

Definitions of terms used in Regulation S-X (17 CFR part 210).

(w) *Significant subsidiary.*

(1)(i) *Investment test.*

(A) For acquisitions, other than those described in paragraph (w)(1)(i)(B) of this section, and dispositions this test is met when the registrant's and its other subsidiaries' investments in and advances to the tested subsidiary exceed 10 percent of the aggregate worldwide market value of the registrant's voting and non-voting common equity, or if the registrant has no such aggregate worldwide market value the total assets of the registrant and its

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subsidiaries consolidated as of the end of the most recently completed fiscal year.

(1) 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 if required to be recognized at fair value by the registrant at the acquisition date under U.S. GAAP or IFRS-IASB, as applicable; however if recognition at fair value is not required, it must include all contingent consideration, except contingent consideration for which the likelihood of payment is remote.

(2) For dispositions, the "investments in" the tested subsidiary is the fair value of the consideration, including contingent consideration, for the disposed subsidiary when comparing to the aggregate worldwide market value of the registrant's voting and non-voting common equity, or, when the registrant has no such aggregate worldwide market value, the carrying value of the disposed subsidiary when comparing to total assets of the registrant.

(3) When determining the aggregate worldwide market value of the registrant's voting and non-voting common equity, use the average of such 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.

(B) For a combination between entities or businesses under common control, this test is met when either the net book value of the tested subsidiary exceeds 10 percent of the registrant's and its subsidiaries' consolidated total assets or the number of common shares exchanged or to be exchanged by the registrant exceeds 10 percent of its total common shares outstanding at the date the combination is initiated.

(C) In all other cases, this test is met when the registrant's and its other subsidiaries' investments in and advances to the tested subsidiary exceed 10 percent of the total assets of the registrant and its subsidiaries consolidated as of the end of the most recently completed fiscal year.

3.4.10 Overview

The first of the three significance tests is the investment test. Significance under the investment test is met when the registrant's and its other subsidiaries' investments in, and advances to, the acquired business (the

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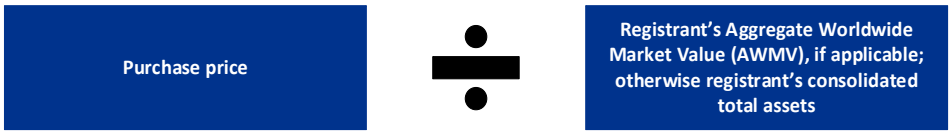
'tested subsidiary') exceed 20% of the aggregate worldwide market value (AWMV) of the registrant's voting and non-voting common equity. This section explains how to perform this test.

Question 3.4.10

How is the investment test performed?

Interpretive response: The investment test is performed by dividing the registrant's and other subsidiaries' investments in and advances to the acquired business (which for an acquisition is typically the purchase price) by the registrant's AWMV, if available (or, if not available, the registrant's consolidated total assets).



Because the purchase price (numerator) is an indicator of the fair value of the acquisition, the use of AWMV (denominator, see Question 3.4.110) is intended to provide a meaningful measure of significance in acquisitions by comparing measures that are generally consistent with fair value.

The following decision tree summarizes the steps in performing the investment test.

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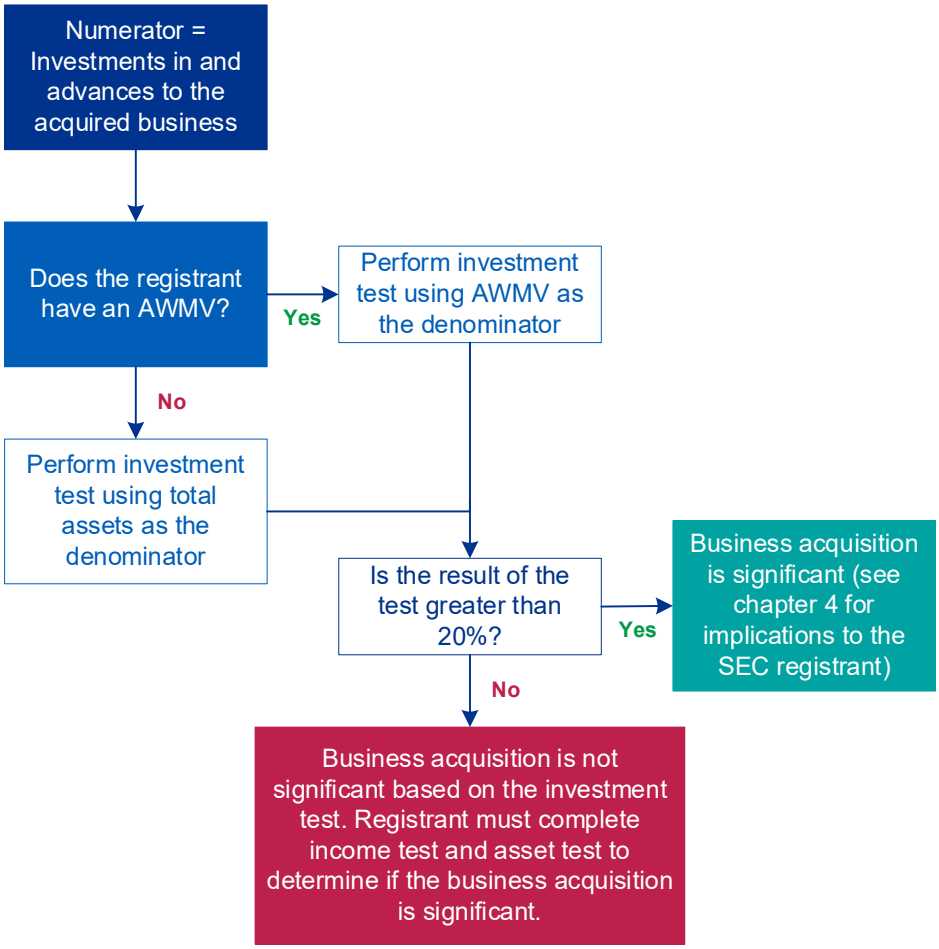

3.4.20 Determining the numerator

The numerator in the investment test is the 'investments in and advances to the acquired business' by the registrant and its other subsidiaries. It is generally the consideration paid for the entity, as determined under applicable GAAP. However, acquisitions involving contingent consideration or other payments made in connection with the acquisition may require additional analysis. [S-X Rule 1-02(w)(1)(i)(A)(1)]

Question 3.4.20

How are the investments in and advances to the acquired business determined?

Interpretive response: The registrant's and its other subsidiaries' 'investments in and advances to' the acquired business generally equals the US GAAP (or IFRS Accounting Standards-IASB) purchase price. The purchase price represents the 'consideration transferred' as that term is used in Topic 805 (or

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IFRS 3) or, if no consideration is transferred, the acquisition-date fair value of the interest received.

The purchase price is adjusted to exclude the financial statement carrying amount of assets transferred by the acquirer to the acquired business that will remain with the combined entity after the acquisition.

A registrant may also need to make adjustments to the consideration transferred for contingent consideration.

— Contingent consideration that is required to be recognized and measured at fair value at the acquisition date under relevant GAAP is included in the numerator of the investment test.

— When contingent consideration is not measured at fair value and recognized under the applicable GAAP, the numerator is adjusted to include *all* the contingent consideration, except for the amount of any payment(s) for which the likelihood of payment is considered remote. This generally occurs if a registrant acquires a business for SEC reporting purposes that is accounted for as an asset acquisition under US GAAP (see Question 3.4.50) or in an acquisition of an equity method investment (see Question 3.4.40). [S-X Rule 1-02(w)(1)(i)(A)(1), FRM 2015.5]

There may also be circumstances in which other arrangements are executed in connection with the acquisition and the associated payments under those arrangements are included in the purchase price (see Question 3.4.60).

Example 3.4.10
Consideration transferred – Working capital loan

Registrant's AWMV is $3,000. Registrant agrees to acquire a 90% interest in Company A for $550.

In contemplation of the business acquisition (and before consummation), Registrant makes a working capital loan to Company A of $100. The working capital loan is not repaid by Company A before, or at, consummation of the acquisition.

Because the working capital loan is made in contemplation of the business acquisition (i.e. it is not a preexisting contractual relationship effectively settled by the business combination), it is considered part of the 'consideration transferred' under Topic 805.

Registrant includes the working capital loan in determining consideration transferred and determines the significance of its investment in Company A as shown in the table below.

Consideration paid at acquisition date	$ 550
Plus working capital loan	100
Total consideration transferred	**$ 650**

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Total investment in Company A	$ 650
Divided by Registrant's AWMV	3,000
Significance	**21.7%**

The acquisition of Company A is significant under the investment test (21.7%).

Example 3.4.20
Consideration transferred – Long-term notes

Registrant acquires Company A in a transaction in which it pays $100 in cash and lends $500 (via long-term notes) to the selling shareholders of Company A. Company A is designated as the lender.

The consideration transferred is $600, which is the total of the cash paid plus the acquisition-date fair value of the advances to Company A to fund loans to its former owners.

Contingent consideration and other payments

Question 3.4.30
Are contingent consideration and transaction costs included in the purchase price for the investment test?

Background: An acquisition agreement may require the issuance of additional shares, the payment of additional cash, or payment of other consideration that is contingent on specified future events or transactions – e.g. earnings, security prices or asset values.

Interpretive response: It depends. The following table summarizes the treatment of contingent consideration and transaction costs (see Questions 3.4.70 to 3.4.90) based on the accounting transaction type.

Accounting transaction type	Contingent consideration included in numerator?	Transaction costs included in numerator?
Business combination	✔	✘
Equity method investment	? Question 3.4.40	✔
Asset acquisition under GAAP (that meets the definition of a business for SEC reporting purposes)	? Question 3.4.50	✔

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The purchase price must include the fair value of contingent consideration if it is required to be recognized at fair value by the registrant at the acquisition date under the applicable GAAP (US GAAP or IFRS Accounting Standards-IASB). If the applicable GAAP does not require recognition at fair value (e.g. for some acquisitions of equity method investments or asset acquisitions under US GAAP, see Questions 3.4.40 and 3.4.50), the purchase price includes all contingent consideration, except for amounts where the likelihood of payment is considered remote. [S-X Rule 1-02(w)(1)(i)(A)(1)]

For a business combination (under Topic 805), a registrant records any asset or liability resulting from a contingent consideration arrangement as part of the fair value of consideration transferred to the selling shareholders at the acquisition date. Therefore, the fair value of contingent consideration is included in the investment test numerator because it will be part of the fair value of consideration transferred to the selling shareholders.

The SEC staff has stated significance does not need to be remeasured for subsequent adjustments for changes in the estimate of the fair value of contingent consideration if the registrant made a good faith estimate at the time of acquisition. [Regs Comm 04/2008]

However, the pre-acquisition financial statements for the most recently completed fiscal year includes measurement period adjustments for acquisitions completed within the most recently completed fiscal year when new information obtained about facts and circumstances that exists at the acquisition date is known: 1) prior to the effectiveness of an IPO of a new registrant; or 2) on or before the date the initial Item 2.01 Form 8-K reporting the acquisition must be filed for an existing registrant. [FRM 2020.2]

Example 3.4.30

Issuing additional shares of common stock as payment – Business combination under Topic 805

Registrant issues 10,000 shares of its common stock to acquire Company A in 20X2. Company A is a business for SEC reporting and US GAAP purposes. The market price of Registrant's common stock at the date of the acquisition is $10 per share. The purchase agreement requires Registrant to issue 1,000 additional shares of its common stock to the former shareholders of Company A if Company A's earnings are at least $125,000 in 20X3 and $150,000 in 20X4. As of the acquisition date, the fair value of this contingent consideration is $9,000.

The numerator used in the investment test is $109,000 – equal to $100,000 ($10 × 10,000 shares) of fair value in the shares issued at the acquisition plus $9,000 of fair value in contingent consideration.

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Question 3.4.40

Is contingent consideration included in the purchase price when acquiring an equity method investment?

Interpretive response: It depends. For acquisitions of investments accounted for under the equity method, contingent consideration that is not measured at fair value (see below) is included in the numerator if the likelihood of payment is more than remote. The amount included in the numerator is equal to the gross amount of the payments that are deemed more than remote of being paid. [S-X Rule 1-02(w)(1)(i)(A)(1), FRM 2015.5 note]

The amount included in the numerator may be different than the amount included in the cost of the investment under Subtopic 323-10. Subtopic 323-10 prohibits an investor from including contingent consideration in the initial measurement of the equity method investment unless:

- the contingent consideration is required to be recognized by US GAAP other than Topic 805 (e.g. Topic 450 (contingencies)); or
- the fair value of the investor's share of the investee's net assets exceeds the investor's initial cost (i.e. the acquisition is a bargain purchase).

The contingent consideration guidance in Subtopic 323-10 that applies to the acquisition of equity method investments differs from the guidance in Topic 805 that applies to business combinations. Under Topic 805, the fair value of contingent consideration at the acquisition date is included in the consideration transferred.

Contingent consideration measured at fair value

In some cases, the acquisition of an equity method investment will include an arrangement to pay contingent consideration that is in the scope of Topic 815 (derivatives). In that case (as discussed above), the contingent consideration is measured at fair value and included in the cost of the investment under Subtopic 323-10 (because it is required to be recognized by US GAAP other than Topic 805). That contingent consideration is also included in the purchase price used in numerator of the investment test because the purchase price must include the fair value of contingent consideration that is required to be recognized at fair value by the registrant at the acquisition date under the applicable GAAP (US GAAP or IFRS Accounting Standards-IASB).

For in-depth guidance on accounting for equity method investments, see chapter 3 of KPMG Handbook, Equity method of accounting. [323-10-25-2A, 30-2A]

Example 3.4.40

Contingent consideration when acquiring an equity method investment

Registrant acquires 30% of Company A on June 30, 20X2. Registrant pays $100,000 cash for its investment on the acquisition date and agrees to pay additional consideration after the acquisition if Company A achieves a specific

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volume of sales revenue throughout the remainder of 20X2. If the specified targets are achieved, Registrant will pay Company A's selling shareholders an additional $50,000 in cash. If the specific sales target is not reached, no additional consideration will be paid.

Registrant will account for its investment in Company A under the equity method and recognizes only the $100,000 cash purchase price as its initial investment – i.e. there is no accounting for the contingent consideration at the acquisition date.

Both Registrant and Company A have calendar year ends. Registrant's AWMV is $600,000.

Scenario 1: Contingent consideration is remote

Registrant determines that the likelihood of achieving the revenue targets that would trigger payment of the contingent consideration is remote.

The investment test is performed as follows.

Purchase price of 30% ownership interest acquired	$100,000
Divided by Registrant's AWMV	600,000
Significance	**16.7%**

The acquisition of Company A is not significant under the investment test (16.7%).

Scenario 2: Contingent consideration is more than remote

Registrant determines that the likelihood of achieving the revenue targets that would trigger payment of the $50,000 of contingent consideration is more than remote.

The investment test is performed as follows.

Purchase price of 30% ownership interest acquired	$100,000	
Plus: Contingent consideration that is considered more than remote	50,000	
Purchase price used in the investment test		$150,000
Divided by Registrant's AWMV		600,000
Significance		**25%**

The acquisition of Company A is significant under the investment test (25%).

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Question 3.4.50

Is contingent consideration included in the purchase price if the transaction is accounted for as an asset acquisition?

Interpretive response: It depends. Contingent consideration that is not measured at fair value (see below) is included in the numerator if the likelihood of payment is more than remote. [S-X Rule 1-02(w)(1)(i)(A)(1)]

Similar to the guidance in Question 3.4.40 on the acquisition of an equity method investment, the amount included in the numerator for the investment test may be different than the amount recognized under Subtopic 805-50 for asset acquisitions. For asset acquisitions, the acquirer generally recognizes contingent consideration when it is probable and estimable. An exception to that is when the arrangement is required to be recognized and measured at fair value under other US GAAP – e.g. Topic 815 (derivatives).

Contingent consideration measured at fair value

In some cases, a business acquisition (for SEC reporting purposes) that is accounted for as an asset acquisition under US GAAP will include an arrangement to pay contingent consideration that is in the scope of Topic 815 (derivatives). In that case (see Question 3.4.40), the contingent consideration is measured at fair value and included in the cost of the asset. That contingent consideration is also included in the purchase price used in numerator of the investment test because it must include the fair value of contingent consideration required to be recognized at fair value by the registrant at the acquisition date under the applicable GAAP (US GAAP or IFRS Accounting Standards-IASB).

For in-depth guidance on accounting for asset acquisitions, see section 3.5 of KPMG Handbook, Asset acquisitions.

Question 3.4.60

Are other payments negotiated in contemplation of the acquisition included in the purchase price?

Interpretive response: Yes. In addition to contingent consideration (see Question 3.4.30), other payments are included in the numerator of the investment test if they:

- are made under agreements executed in connection with the business acquisition; and
- would not have been made had there been no acquisition.

Such payments may include those paid pursuant to royalty agreements, noncompete agreements, long-term lease agreements, and agreements to acquire assets owned separately by the shareholders of the acquired entity.

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Example 3.4.50

Agreements in connection with a business acquisition

Registrant and the sole shareholder of Company A negotiate a sale of Company A to Registrant and agree on a cash purchase price of $20,000,000, which is payable at closing. Registrant accounts for the acquisition as a business combination.

In a series of separate, but related, agreements, Registrant and the sole shareholder of Company A agree to execute a noncompete agreement. The terms require Registrant to pay the sole shareholder $1,200,000 in three equal annual installments.

In a similar fact pattern, the SEC staff concluded that payments made under the agreement (which would not have been negotiated had there been no business acquisition) are included in the numerator (total equal to $21,200,000) for the investment test when determining significance.

Treatment of transaction costs

Question 3.4.70

Are transaction costs included in the purchase price when the acquisition is a business combination?

Interpretive response: No. For business acquisitions that are accounted for as business combinations under US GAAP, the numerator in the investment test (the purchase price) is the consideration transferred under Topic 805. Under Topic 805, transaction costs are accounted for as expenses in the periods they are incurred and the services are received – i.e. they are not included in the fair value of consideration transferred to the selling shareholders. [Regs Comm 04/2008]

Question 3.4.80

Are transaction costs included in the purchase price when acquiring an equity method investment?

Interpretive response: Yes. Transaction costs are included in the numerator when performing the investment test because they are included in the initial cost of the equity method investment under Subtopic 323-10. [FRM 2015.5 note, 323-10-30-2]

For in-depth guidance on accounting for equity method investments, see chapter 3 of KPMG Handbook, Equity method of accounting.

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Question 3.4.90

Are transaction costs included in purchase price if the transaction is accounted for as an asset acquisition?

Interpretive response: Yes. Transaction costs are included in the numerator when performing the investment test because they are included in the initial cost of the asset under Subtopic 805-50.

For in-depth guidance on accounting for transaction costs in asset acquisitions, see section 3.2 of KPMG Handbook, Asset acquisitions.

Applying the investment test to business acquisitions achieved in stages (step acquisition)

Question 3.4.100

How is the purchase price determined for a business acquisition achieved in stages?

Background: An increase in an investment in a consolidated subsidiary does not ordinarily require filing separate financial statements of the subsidiary because the consolidated financial statements already include the acquired business. However, a registrant may still need to file pro forma financial information on a Form 8-K when information giving effect to the step acquisition would be material to investors. A registrant still must perform the significance tests when acquiring NCI to determine if it must file a Form 8-K and provide pro forma financial information (see Question 2.2.140).

Interpretive response: Consistent with the guidance at Question 3.4.20, the investment test for acquisitions achieved in stages uses the purchase price (fair value of consideration transferred) of the incremental interests acquired. The numerator equals the purchase price of the additional ownership interest acquired and the denominator equals the AWMV of the registrant.

If a registrant increases its investment in an existing business that it acquired in a previous year, it bases the tests of significance on the increase in its proportionate interest in the business during the year, not on the cumulative interest acquired to date. However, the registrant must aggregate any step acquisitions that are part of a single plan to be completed in a 12-month period, because they would represent the acquisition of related businesses under the rules (see Question 2.2.210). [FRM 2020.3]

This requirement to base significance on the increase in the registrant's proportionate interest applies even if the registrant must change the method of accounting for the investment (e.g. start applying the equity method or consolidation) because of the increase. [FRM 2020.3]

Under Topic 805, the acquirer remeasures its previously held equity interest in the acquiree at its acquisition-date fair value and recognizes any resulting gain

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or loss in earnings. The remeasurement of the previously held equity interest is not included in the numerator for the investment test or any other significance tests. See Question 3.6.50 for guidance about performing the asset test and Question 3.5.120 for guidance about performing the income test in acquisitions achieved in stages. [FRM 2020.4]

See Questions 3.4.70 and 3.4.80 for discussion of the treatment of transaction costs.

Example 3.4.60

Investment test in step acquisition as part of a single plan completed within a 12-month period

In April 20X2, Registrant enters into an acquisition agreement to acquire 80% of Company A for $800. The acquisition will be executed in two stages. Registrant will acquire the first 60% in April 20X2 for $600 and the remaining 20% in October 20X2 for $200.

Registrant's AWMV on the earlier of the announcement date or the agreement date of the acquisition is $3,000.

The investment test is performed as follows.

Cumulative purchase price of 80% ownership interest acquired as part of single plan completed in 12-month period (60% in April 20X2 and 20% in October 20X2)	$ 800
Divided by Registrant's AWMV	3,000
Significance	**26.7%**

The acquisition of Company A is significant under the investment test (26.7%).

Example 3.4.70

Investment test in step acquisition without obtaining control

Registrant owns a 20% equity investment in Company A. Registrant purchased its investment several years ago and accounts for it under the equity method. The current equity method investment account balance is $100.

In the current year, Registrant acquires an additional 10% of Company A for $110. Registrant's AWMV on the earlier of the announcement date or the agreement date of the acquisition is $2,000.

The investment test is performed as follows.

Purchase price for additional interest acquired	$ 110
Divided by Registrant's AWMV	2,000
Significance	**5.5%**

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The acquisition of Company A is not significant under the investment test (5.5%).

Example 3.4.80
Investment test in step acquisition obtaining control

Registrant acquires a 40% interest in Company A on February 1, 20X2 for $800 (total acquisition-date fair value of Company A's equity, ignoring any control premium, is $2,000). Registrant recognizes its investment in Company A at the acquisition-date fair value of $800.

On June 1, 20X3, Registrant acquires an additional 20% interest in Company A for $1,000, resulting in control and consolidation of Company A with a total ownership interest of 60%.

Registrant's AWMV on the earlier of the announcement date or the agreement date of the June 1, 20X3 acquisition is $9,000.

The gain from remeasurement that Registrant recognizes at the acquisition date is not considered in the investment test.

The investment test is performed as follows.

Purchase price of 20% ownership interest acquired	$1,000
Divided by Registrant's AWMV	9,000
Significance	**11.1%**

The acquisition of Company A is not significant under the investment test (11.1%).

3.4.30 Determining the denominator

The denominator in the investment test is the registrant's AWMV, unless a registrant does not have a AWMV or the acquired businesses are under common control.

Question 3.4.110
How is a registrant's AWMV determined?

Interpretive response: The AWMV is calculated by multiplying:

- the aggregate number of publicly traded voting and non-voting common equity shares the registrant has outstanding in any public market, by
- the price at which the common equity was last sold (or the average of the bid and ask prices of such common equity) in the principal market for the common equity.

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The AWMV used in the denominator of the investment test is the five-day average of AWMV for the prior five trading days of the registrant's most recently completed month ending before the earlier of the announcement date or the agreement date of the acquisition. References to 'month' means a calendar month, not a company's fiscal month.

Only publicly traded common shares are included in the AWMV calculation, regardless of the exchangeability or any conversion rights associated with non-traded shares. For example, the following table illustrates whether different types of common shares are considered in the AWMV based on their relationship to exchange-traded common shares.

Types of shares	Description	Included in AWMV?
Class A	Exchange-traded common shares	✔
Class B	Not publicly traded common shares but may be exchanged for Class A shares	✘
Class C	Preferred shares convertible into Class A common shares	✘

The AWMV differs from the value currently used by registrants to determine accelerated filer status under Exchange Act Rule 12b-2 because AWMV includes the value of equity held by affiliates and is calculated as a five-day average. Rule 12b-2 considers the value of common equity held only by non-affiliates and is determined as of the last business day of the registrant's most recently completed second fiscal quarter.

Question 3.4.120

How are the terms 'announcement date' and 'agreement date' defined?

Interpretive response: Rule 1-02(w) does not provide a specific definition of the terms announcement date or agreement date for use in determining the AWMV. The SEC staff has stated that the terms 'announcement date' and 'agreement date' are used throughout other SEC rules, and are intended to be applied consistently regardless of the context. However, consultation with legal counsel may be necessary to determine these dates.

Relevant date	What the date represents?
Announcement date	Generally represents the date the event or transaction is first publicly announced in any form of communication. For example, under the SEC's rules related to takeovers and when certain filing obligations are incurred, the phrase 'public announcement' is defined as "any communication by a party to the transaction, or

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Relevant date	What the date represents?
	any person authorized to act on a party's behalf, that is reasonably designed to, or has the effect of, informing the public or security holders in general about the transaction." [17 CFR § 230.165(f)(3)]
Agreement date	Generally represents the date when a contract or agreement has been executed and becomes legally binding on the parties to the agreement. For example, in the separate context of the requirements to report certain information within four business days of entry into a material definitive agreement, that phrase is defined as "provides for obligations that are material to and enforceable against the registrant … whether or not subject to conditions." In that separate context, the staff noted that customary closing conditions, such as delivery of legal opinions or regulatory approval, would not impact the required disclosure date if the agreement is enforceable against or by the company. [Form 8-K Item 1.01(b), SEC Rel 34-49424 (fn 39)]

Question 3.4.130

Is the AWMV re-calculated after the announcement date if there is a significant delay or change in the transaction terms before the agreement date?

Interpretive response: No. The AWMV is determined based on the earlier of the announcement date or the agreement date. A registrant may consider consulting with the SEC staff if it believes a change to the date used to determine AWMV is warranted because of significant changes to the terms of a transaction after the announcement date. [2020 AICPA Conf]

Example 3.4.90

Determining AWMV

On July 31, 20X2, Registrant announces the acquisition of 100% of the outstanding shares of Company A.

The binding acquisition agreement is signed on August 15, 20X2 for a purchase price of $100,000 and sets a closing date of September 30, 20X2.

Registrant uses the last five trading days of June 20X2 (the most recently completed month ending before the July 31, 20X2 announcement date) to calculate the average of the AWMV (Note: June 29 and 30, 20X2 are weekend, non-trading days).

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The AWMV used in the investment test is shown in the following table.

Trading date	Share price ($)	Average # of common shares outstanding daily	AWMV ($)
June 24, 20X2	60.40	9,500	573,800
June 25, 20X2	61.20	9,500	581,400
June 26, 20X2	62.10	10,000	621,000
June 27, 20X2	60.90	10,000	609,000
June 28, 20X2	60.10	10,000	601,000
Average			**597,240**

The investment test is performed as follows.

Purchase price of 100% ownership interest acquired	$100,000
Divided by Registrant's AWMV	597,240
Significance	**16.7%**

The acquisition of Company A is not significant under the investment test (16.7%).

Question 3.4.140

How is the denominator determined when performing an aggregate investment test?

Background: Certain scenarios require the significance of multiple acquisitions to be evaluated in the aggregate. This includes acquired businesses that are determined to be related (see Question 2.2.210) and unrelated acquisitions that are otherwise individually insignificant (see Question 2.2.230).

Interpretive response: When performing an aggregate investment test for multiple acquisitions, a registrant first performs a separate investment test for each of the individual acquisitions and then adds them together, unless the acquired businesses are under common control (see Question 3.4.150).

Because each test is performed separately, the registrant computes AWMV separately for each one based on its individual announcement or agreement date. For separate acquisitions that are conditioned on one other, the AWMV used likely will be the same because the announcement or acquisition dates will be the same. See Question 3.4.120 for guidance on the announcement or agreement date. [FRM 2020.9]

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Question 3.4.150

How is the investment test performed when the acquisition is a combination of entities under common control?

Interpretive response: The acquisition of a business that was previously under common control with the Registrant (i.e. a separate entity has a controlling interest in both) is often referred to as a combination of entities under common control.

The investment test is performed differently for combinations of entities under common control.

For combinations of entities under common control, the investment test is met when either: [S-X Rule 1-02(w)(1)(i)(B)]

- the net book value of the tested subsidiary exceeds 10% of the registrant's and subsidiaries' consolidated total assets; or
- the number of common shares exchanged or to be exchanged by the registrant exceeds 10% of its total common shares outstanding at the date the combination is initiated.

However, Rules 3-05 and 11-01 clarify that the requirements to provide financial statements of the acquired business and pro forma financial information apply when the conditions in Rule 1-02(w) exceed 20% (instead of 10%).

Example 3.4.100

Significance calculation for combination of entities under common control

Registrant and Affiliate enter into a transaction considered to be the combination of entities under common control, as both Registrant and Affiliate were, and remain, under the control of Parent.

Under the merger agreement, Registrant exchanges 12,500 shares of its common stock for all the outstanding common stock of Affiliate. Registrant has 85,000 shares of common stock outstanding at the date the combination was initiated (i.e. before issuing the 12,500 shares).

Affiliate had a net book value of $5,000 and assets of $13,000 at the end of its most recent fiscal year-end. Registrant had consolidated assets of $36,000 at the end of its most recent fiscal year-end.

Registrant performs the investment test for its merger with Affiliate as follows.

Affiliate net book value	$ 5,000
Divided by Registrant's consolidated total assets	$36,000
Significance	**13.9%**

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Registrant's shares exchanged in the combination	12,500
Divided by Registrant's outstanding shares at initiation date	85,000
Significance	**14.7%**

This highest level of significance using the investment test is 14.7% based on the number of shares being exchanged. Based on this calculation, the combination of entities under common control is not significant under the investment test (14.7%).

Question 3.4.160

How is the investment test performed when the registrant does not have an AWMV?

Interpretive response: A registrant may not have an AWMV. For example, a company conducting an initial public offering does not have common equity that is publicly traded. In this situation, the registrant uses its consolidated total assets as of the end of the most recent fiscal year for which financial statements are required to be filed for the denominator. The registrant determines the consolidated total assets consistent with the asset test (see section 3.6).

Question 3.4.170

Are there exceptions to using the AWMV in the investment test?

Interpretive response: Yes. AWMV is used in the investment test for the acquisition of a business, including the acquisition of an interest in a business accounted for under the equity method or fair value option. However, it is not used for making ongoing assessments under:

- S-X Rule 3-09 (separate financial statements of subsidiaries not consolidated and 50% or less owned persons); and
- S-X Rule 4-08(g) (summarized financial information of subsidiaries not consolidated and 50% or less owned persons).

Instead, the registrant's consolidated total assets are used as the denominator when calculating the investment test for S-X Rule 3-09 and Rule 4-08(g).

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3.5 Income test

Excerpt from S-X Rule 1-02

Definitions of terms used in Regulation S-X (17 CFR part 210).

(w) *Significant subsidiary.*

(1)(iii) *Income Test.*

(A) This test is met when:

(1) 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 exceeds 10 percent of the absolute value of such income or loss of the registrant and its subsidiaries consolidated for the most recently completed fiscal year; and

(2) The registrant's and its other subsidiaries' proportionate share of the tested subsidiary's consolidated total revenue from continuing operations (after intercompany eliminations) exceeds 10 percent of such total revenue of the registrant and its subsidiaries consolidated for the most recently completed fiscal year. This paragraph (w)(1)(iii)(A)(2) 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.

(B) When determining the income component in paragraph (w)(1)(iii)(A)(1) of this section:

(1) 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, exclude the equity in the income or loss from continuing operations before income taxes (after intercompany eliminations) of the tested subsidiary attributable to the controlling interest from such income or loss of the registrant and its subsidiaries consolidated for purposes of the computation;

(2) Compute the test using the average described in this paragraph (w)(1)(iii)(B)(2) if the revenue component in paragraph (w)(1)(iii)(A)(2) of this section does not apply and the absolute value of the registrant's and its subsidiaries' consolidated income or loss from continuing operations before income taxes (after intercompany eliminations) attributable to the controlling interests for the most recent fiscal year is at least 10 percent lower than the average of the absolute value of such amounts for each of its last five fiscal years; and

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(3) Entities reporting losses must not be aggregated with entities reporting income where the test involves combined entities, as in the case of determining whether summarized financial data must be presented or whether the aggregate impact specified in §§ 210.3-05(b)(2)(iv) and 210.3-14(b)(2)(i)(C) is met, except when determining whether related businesses meet this test for purposes of §§ 210.3-05 and 210.8-04.

3.5.10 Overview

The income test is the second of the three tests used to determine the significance of acquired businesses. The income test includes two components:

— a pretax income component under which the registrant compares its portion of the acquired business's income to its total income; and
— a revenue component under which the registrant compares its portion of the acquired business's revenue to its total revenue.

This section explains how to apply the income test, including its many nuances.

Question 3.5.10

How do the two components of income test interact?

Interpretive response: There is only one level of significance for the income test. To determine that level of significance, a registrant performs both the pretax income and revenue components, and the lower percentage resulting from these calculations is the significance level for the income test. Therefore, for the income test to indicate a business acquisition is significant, both components must exceed 20%.

However, only the pretax income component applies (and must be modified in certain circumstances) if the registrant and the acquired business do not both have material recurring annual revenue in each of the two most recently completed fiscal years. See guidance on what constitutes material recurring annual revenue at Question 3.5.90.

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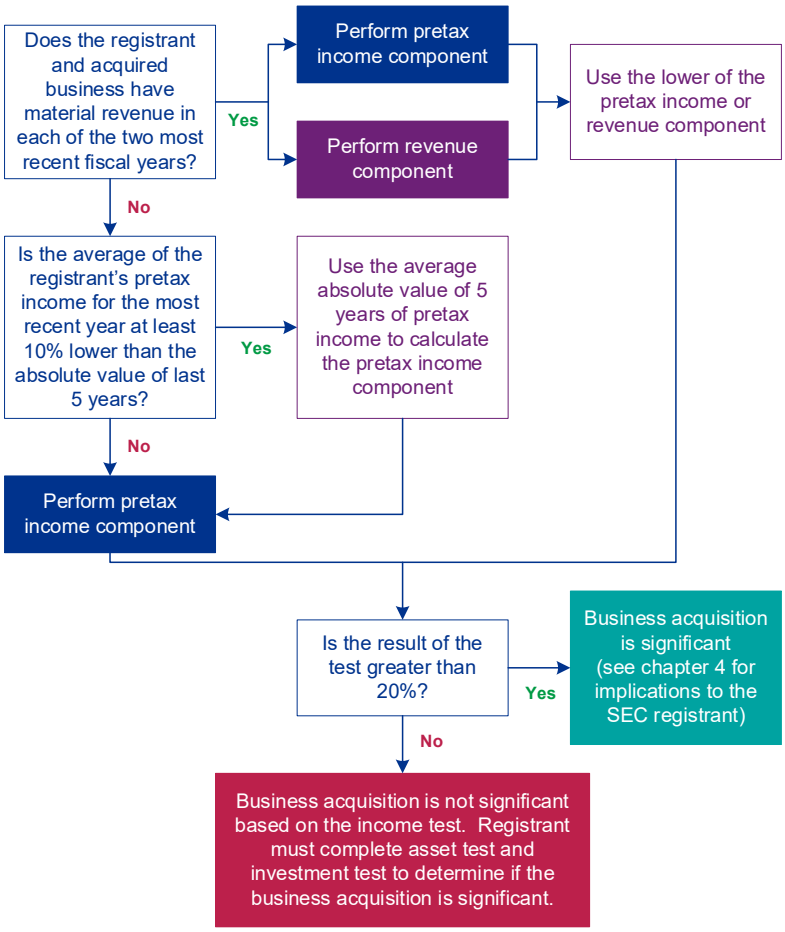
The following decision tree can assist in performing the income test.



3.5.20 Pretax income component

Question 3.5.20

How is the pretax income component performed?

Interpretive response: The pretax income component is performed as follows.

Registrant's share of the acquired business's pretax income ÷ **Registrant's consolidated pretax income**

This formula is applied using absolute values, meaning a pretax loss from continuing operations is a positive number in the calculation.

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Numerator

The registrant's share of the acquired business's pretax income includes direct and indirect ownership interests (see Question 3.5.30). Pretax income for purposes of this test is income from continuing operations *before* income taxes, but *after* (a) eliminating transactions between the registrant and the acquired business (see Question 3.3.190), and (b) attributing amounts to the acquired business's NCI. Pretax income cannot be adjusted for nonrecurring or special charges or credits (see Question 3.3.100).

Denominator

The registrant's consolidated pretax income excludes the income of the acquired business (see Question 3.3.180). The registrant's pretax income is income from continuing operations income before taxes, but after (a) eliminating transactions between the registrant and the acquired business (see Question 3.3.190), and (b) attributing amounts to the registrant's NCI. Like the registrant's share of the acquired business's pretax income, the registrant's pretax income cannot be adjusted for nonrecurring or special charges or credits.

Modified denominator

A modified denominator is used if the revenue component does not apply (see Question 3.5.90) and the registrant's income (or absolute value of its loss) from continuing operations for the most recent fiscal year is at least 10% lower than the average of its income from continuing operations for the last five years. In that case, the registrant uses the five-year average as the denominator (see Question 3.5.50). Income averaging of the acquired business is not permitted. [S-X Rule 1-02(w)(1)(iii)(B)(2)]

Question 3.5.30

How is the registrant's share of pretax income calculated when there is NCI?

Interpretive response: If a registrant acquires 100% of a business and that business has consolidated subsidiaries that are less than wholly owned (i.e. the acquired business presents NCI in its financial statements), the registrant uses the pretax income *attributable to controlling interest* as reported on the acquired business's financial statements.

If a registrant acquires less than 100% of a business, the numerator is the acquired business's pretax income (or pretax income attributable to controlling interest if the acquired business has its own NCI) multiplied by the percentage of the business that the registrant has acquired. This method of calculating the numerator would also apply if a registrant's consolidated, but less than wholly-owned subsidiary acquires 100% of a business. [Regs Comm 03/2022]

This guidance is similar to the guidance on the asset test (see Question 3.6.20) and the revenue component of the income test (see Question 3.5.100).

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Example 3.5.10

Pretax income component of income test – Direct interest only

Registrant purchases 51% of Company A. Pretax income for Company A and Registrant is $35 and $100, respectively. Company A reports no NCI.

The pretax income component of the income test is performed as follows.

Scenario	Outcome
Registrant's proportionate share of Company A's pretax income ($35 × 51%)	17.9
Divided by Registrant's pretax income	100
Significance	**17.9%**

The acquisition of Company A is not significant under the pretax income component. It is also not significant under the income test because the lower of the results of the pretax income component and the revenue component (not shown and if applicable) does not exceed 20%.

Example 3.5.110 illustrates the revenue component of the income test for this scenario.

Example 3.5.20

Pretax income component of income test – Direct and indirect ownership

Registrant owns 70% of Subsidiary. In a single transaction, Registrant and Subsidiary purchase 49% and 20% of Company A, respectively. Consolidated pretax income for Company A and Registrant is $35 and $100, respectively. Company A reports no NCI of its own.

The pretax income component of the income test is performed as follows.

Scenario	Outcome
Registrant's proportionate share of Company A's pretax income	
Direct ownership ($35 × 49%) = $17	
Indirect ownership (($35 × 20%) × 70%) = $5	22
Divided by Registrant's pretax income	100
Significance	**22%**

Registrant then determines significance under the revenue component. If significance under the revenue component is also greater than 20%, Company A's acquisition is significant to the Registrant because it is significant under the income test. Example 3.5.120 illustrates the revenue component of the income test for this scenario.

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Example 3.5.30
Pretax income component of income test – NCI

During the year ended December 31, 20X2, Registrant purchases 20% of Company A. Company A reports no NCI.

Registrant has an existing 25% interest in Company B (an equity method investment) and 70% ownership interest in Company C (a consolidated subsidiary).

Each entity's pretax income is shown in the following table.

Entity	Pretax income
Registrant	300
Company A	140
Company B	400
Company C	300

The table below lists certain income statement information for Registrant for the year ended December 31, 20X1.

Registrant	Year ended 12/31/X
Revenues	4,800
Income from continuing operations before taxes	300
Income taxes	(75)
Income from continuing operations net of taxes	225
Income from equity method investees (net of tax of $25)	75
Net income	300
Net income attributable to NCI (net of tax of $23)	(67)
Net income attributable to Registrant	**233**

The pretax income component of the income test is performed as follows.

Scenario	Outcome
Registrant's pretax income from continuing operations	300
Plus Registrant's share of Company B's pretax income ($400 × 25%)	100
Minus Company C's pretax income attributable to NCI ($300 × (1 – 70%))	(90)
Registrant's consolidated pretax income for the pretax income component	310
Registrant's proportionate share of Company A's pretax income ($140 × 20%)	28

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Scenario	Outcome
Divided by Registrant's total pretax income attributable to controlling interests for the pretax income component	310
Significance	**9.0%**

The acquisition of Company A is not significant under the pretax income component. Because significance under the income test is the lower of the results of the pretax income component and the revenue component (if applicable), the acquisition is not significant under the income test.

However, for illustrative purposes, Example 3.5.130 demonstrates the revenue component of the income test for this scenario.

Question 3.5.40

How is the pretax income component determined when there are losses?

Interpretive response: If the registrant, the acquired business, or both, have a pretax loss rather than income, the absolute value of the pretax loss is used to determine the pretax income component. [S-X Rule 1-02(w)(1)(iii)(A)(1)]

If either the registrant or acquired business does not have material revenue in each of the two most recently completed fiscal years (i.e. the revenue component does not apply), the registrant might have to use the average of the absolute values of its pretax income or losses, see Question 3.5.50.

When a registrant must perform an aggregate significance test – e.g. in connection with a registration statement – and some of the acquired businesses have pretax income and some have pretax losses, two aggregate significance tests are required (see Question 3.5.60).

Example 3.5.40

Acquired business incurred loss; registrant has income

Registrant acquires Company A. For their most recently completed fiscal years, Registrant has pretax income of $150 and Company A has a pretax loss of $50.

The pretax income component of the income test is performed as follows.

Scenario	Outcome
Absolute value of Company A's pretax loss	50
Divided by Registrant's pretax income	150
Significance	**33.3%**

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Registrant then determines significance under the revenue component (if applicable). If significance is also greater than 20% under the revenue component, the acquisition of Company A is significant under the income test.

Example 3.5.50

Acquired business incurred loss; registrant has loss

Registrant acquires Company A. For their most recently completed fiscal years, Registrant and Company A have pretax losses of $750 and $1,000, respectively.

The pretax income component of the income test is performed as follows.

Scenario	Outcome
Absolute value of Company A's pretax loss	1,000
Divided by absolute value of Registrant's pretax loss	750
Significance	**133.3%**

Registrant then determines significance under the revenue component (if applicable). If significance is also greater than 20% under the revenue component, the acquisition of Company A is significant under the income test.

Question 3.5.50

When does a registrant use an average of multiple years of pretax income or loss?

Interpretive response: A registrant uses the average of the absolute values of its income (or loss) from continuing operations for the last five years (the five-year averaging rule) as the denominator for the pretax income component if: [S-X Rule 1-02(w)(1)(iii)(B)(2)]

- the revenue component does not apply (i.e. registrant or the acquired businesses do not have material revenue in each of the two most recently completed fiscal years, see Question 3.5.90); and
- the absolute value of the registrant's consolidated pretax income or loss from continuing operations (after intercompany eliminations) attributable to the controlling interests for the most recent fiscal year is a least 10% lower than the average of the absolute values of the same amounts for the last five fiscal years.

This is known as the modified denominator.

The SEC staff does not permit using a five-year average income from continuing operations for the acquired business. Averaging applies only to the registrant's results. [FRM 2015.8]

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Example 3.5.60
Income in all five years

Registrant acquires Company A. Registrant does not have material revenue in its two most recently completed fiscal years (see Question 3.5.90); its pretax income in each of the five most recently completed fiscal years is as follows.

	Year 1	Year 2	Year 3	Year 4	Year 5
Registrant	100	250	175	125	50

The average pretax income for the last five fiscal years is $140 (($100 + $250 + $175 + $125 + $50) ÷ 5 years). Because pretax income from continuing operations in the most recent year ($50 in Year 5) is at least 10% lower than this five-year average pretax income of $140 (it is approximately 64% lower), Registrant uses the average pretax income of $140 when calculating the pretax income component. The revenue component does not apply because Registrant does not have material revenue in its two most recently completed fiscal years.

Company A's pretax income for the most recently completed fiscal year is $30. Company A's average pretax income is not relevant because it cannot be used in the significance tests.

The pretax income component of the income test is performed as follows.

Scenario	Outcome
Company A's pretax income	30
Divided by Registrant's average pretax income	140
Significance	**21.4%**

The acquisition of Company A is significant under the pretax income component (21.4%).

Example 3.5.70
Loss in two of five years

Registrant acquires Company A. Registrant does not have material revenue in its two most recently completed fiscal years (see Question 3.5.90); its pretax income (loss) in each of the five most recently completed fiscal years is as follows.

	Year 1	Year 2	Year 3	Year 4	Year 5
Registrant	(100)	250	(175)	125	50

The average of the absolute values of pretax income (loss) for the last five fiscal years is $140 (($100 + $250 + $175 + $125 + $50) ÷ 5 years). Because pretax income from continuing operations in the most recent year ($50 in Year 5) is at least 10% lower than this five-year average pretax income of $140 (it is

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approximately 64% lower), Registrant uses the average pretax income of $140 when calculating the pretax income component. The revenue component does not apply because the registrant does not have material revenue in its two most recently completed fiscal years.

Company A's pretax income for the most recently completed fiscal year is $30. Company A's average pretax income is not relevant because it cannot be used in the significance tests.

The pretax income component of the income test is performed as follows.

Scenario	Outcome
Company A's pretax income	30
Divided by the average of the absolute values of Registrant's pretax income	140
Significance	**21.4%**

The acquisition of Company A is significant under the pretax income component (21.4%).

Example 3.5.80
Loss in most recent year

Registrant acquires Company A. Registrant does not have material revenue in its two most recently completed fiscal years (see Question 3.5.90). Registrant's pretax income (loss) in each of the five most recently completed fiscal years is as follows.

	Year 1	Year 2	Year 3	Year 4	Year 5
Registrant	100	250	175	125	(150)

The average of the absolute values of pretax income (loss) for the last five fiscal years is $160 (($100 + $250 + $175 + $125 + $150) ÷ 5 years). Because the absolute value of Registrant's pretax loss of $150 in the most recent year (Year 5) is not at least 10% lower than the average of the absolute values of pretax income (loss) for the last five fiscal years of $160, Registrant uses the absolute value of the pretax loss in the most recent year of $150 when calculating the pretax income component. The revenue component does not apply because Registrant does not have material revenue in its two most recently completed fiscal years.

Company A's pretax income for the most recently completed fiscal year is $30. Company A's average pretax income is not relevant because it cannot be used in the significance tests.

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The pretax income component of the income test is performed as follows.

Scenario	Outcome
Company A's pretax income	30
Divided by the average of the absolute values of Registrant's pretax loss	150
Significance	**20%**

The acquisition of Company A is significant under the pretax income component (20%).

Question 3.5.60

Are pretax losses and income combined in the pretax income component when performing an aggregate significance test for individually insignificant acquisitions?

Interpretive response: No. When determining aggregate significance for individually insignificant acquired businesses, a registrant cannot: [S-X Rule 1-02(w)(1)(iii)(B)(3), FRM 2035.5]

- offset pretax losses of one or more individually insignificant acquired businesses with pretax income of other individually insignificant acquired businesses; or
- aggregate the absolute values of the pretax income and losses of the individually insignificant businesses.

A registrant must instead perform two separate significance tests – one for the group with pretax losses and one for the group with pretax income.

If the significance of either group exceeds 50%, the pretax income component is met for the entire pool of individually insignificant acquired businesses – not just for the entities in the single group (pretax income or pretax loss) that was greater than 50% significant. [S-X Rule 3-05(b)(2)(iv)]

Example 3.5.90

Individually insignificant acquired businesses with losses

Registrant's pretax income for the year ended December 31, 20X1 is $1,000. Registrant is filing a registration statement in December 20X2 and has made the following acquisitions during 20X2.

Acquired business	Date acquired	Pretax income (loss)	Individual significance
A	01/18/X2	150	15%
B	02/21/X2	133	13%

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Acquired business	Date acquired	Pretax income (loss)	Individual significance
C	03/28/X2	(114)	11%
D	04/02/X2	122	12%
E	05/01/X2	(117)	12%
F	07/21/X2	(110)	11%
G	08/14/X2	168	17%
H	09/22/X2	(153)	15%

Registrant determines aggregate significance under the pretax income component in two steps.

First, it determines significance for the acquired businesses with pretax income as follows.

Entities with pretax income			
Acquired business	**Date acquired**	**Pretax income**	**Individual significance**
A	01/18/X2	150	15%
B	02/21/X2	133	13%
D	04/02/X2	122	12%
G	08/14/X2	168	17%
Total		**573**	**57.3%**

The significance of acquired businesses with pretax income under the pretax income component is 57.3% ($573 ÷ $1,000).

Second, Registrant determines significance for the acquired businesses with pretax losses as follows.

Entities with pretax losses			
Acquired business	**Date acquired**	**Pretax loss**	**Individual significance**
C	03/28/X2	(114)	11%
E	05/01/X2	(117)	12%
F	07/21/X2	(110)	11%
H	09/22/X2	(153)	15%
Total		**(494)**	**49.4%**

The significance of the acquired businesses with pretax losses is 49.4% ($494 ÷ $1,000).

Registrant next determines significance under the revenue component of the income test for either or both groups (i.e. pretax income and loss groups).

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If the income test result (lesser of pretax income and revenue components) for *either* group is greater than 50%, the *entire* group is considered significant under the income test overall.

In this example, because the pretax income component significance for the loss group is less than 50%, the significance result of the revenue component for income group is the only component that could alter the overall income test result. If the revenue component for the income group is greater than 50%, the entire group (including those acquired businesses with pretax losses) would be considered significant.

See Example 3.5.140, which illustrates the revenue component of the income test for this scenario.

Question 3.5.70

How is the pretax income component determined in the acquisition of an equity method investment when the fair value option is elected?

Background: S-X Rule 3-05 applies to the acquisition of an equity method investment that is a business for SEC reporting purposes. The Rule applies regardless of whether the registrant applies the equity method of accounting or elects the fair value option in lieu of the equity method (see Question 2.2.130). [S-X Rule 3-05(a)(2)(ii)]

Interpretive response: S-X Rule 1-02(w)(1)(iii) does not specifically address how a registrant determines significance for an equity investment that will be accounted for using the fair value option instead of the equity method of accounting.

The SEC staff has indicated that a registrant should perform the pretax income component using the change in fair value of the relevant instrument (e.g. common stock) during the applicable historical period for which the test is being performed. This is usually the most recently completed pre-acquisition fiscal year. [2021 AICPA Conf, Regs Comm 03/2011]

A registrant also performs the revenue component of the income test if it and the acquired investee have material recurring annual revenue in each of the two most recently completed fiscal years (see Question 3.5.80). No adjustments are made to the calculation of the revenue component as a result of the investor electing the fair value option. [2021 AICPA Conf]

Example 3.5.100

Acquisition of equity investment accounted for using the fair value option

Registrant purchases 30 shares of Company A for $300. The acquisition results in Registrant owning a 30% common equity interest in Company A (a US registrant) and obtaining significant influence. Before the transaction, Registrant held no shares of Company A common stock.

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Registrant elects to apply the fair value option to its investment in Company A's common stock in lieu of applying the equity method of accounting.

Pretax income for Registrant and Company A for the year ended December 31, 20X3 is $125 and $100, respectively.

The fair value per share of Company A common stock is $8.00 on December 31, 20X2 and $8.50 on December 31, 20X3.

The pretax income component of the income test is performed as follows.

Period	Fair value of Company A common stock ($)
Beg. of 20X3	8.00
End of 20X3	8.50
Per share change in fair value	0.50

Scenario	Outcome
Registrant's pro forma share of change in fair value of its investment in Company A (30 shares × $0.50)	15
Divided by Registrant's pretax income	125
Significance	**12%**

Total revenue for Company A and Registrant is $500 and $1,000, respectively.

The revenue component of the income test is performed as follows.

Scenario	Outcome
Registrant's proportionate share of Company A's total revenue ($500 × 30%)	150
Divided by Registrant's total revenue	1,000
Significance	**15%**

The acquisition of Company A is not significant under the income test because both the pretax income and revenue components are less than 20%.

3.5.30 Revenue component

Question 3.5.80

How is the revenue component determined?

Interpretive response: The revenue component compares the acquirer's proportionate share of revenue of the tested subsidiary to its own consolidated total revenue for its most recently completed fiscal year.

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The revenue component is performed as follows.

The revenue component of the income test does not apply if either the registrant or the acquired business do not have material revenue in each of the two most recently completed fiscal years. In this situation, the registrant performs only the pretax income component of the income test.

Question 3.5.90

When does a business have 'material revenue'?

Interpretive response: No specific threshold exists for determining if the registrant and acquired business have 'material revenue', so judgment is necessary. We believe a registrant should consider both quantitative and qualitative factors.

The SEC staff has indicated that whether a registrant or acquired business has material revenue should be readily apparent and does not require an analysis under SAB Topic 1.M, Materiality (SAB 99). [2020 AICPA Conf]

The SEC staff encourages registrants to consult with it if uncertain of whether the revenue component applies to their circumstances.

Question 3.5.100

How is the registrant's share of revenue calculated when there is NCI?

Interpretive response: If a registrant acquires 100% of a business and that business has consolidated subsidiaries that are less than wholly owned (i.e. the acquired business presents NCI in its financial statements), the registrant uses the revenue as reported on the acquired business's financial statements. No adjustment is made to the numerator for the NCI holder's interest in the business's revenue.

Similarly, if a registrant's consolidated, but less than wholly-owned subsidiary acquires 100% of a business, the registrant uses the revenue as reported on the acquired business's financial statements, without adjustment for the NCI holder's interest in the business's revenue. [Regs Comm 03/2022]

However, if a registrant acquires less than 100% of a business, the numerator is the acquired business's revenue multiplied by the percentage of the business that the registrant has acquired.

This guidance is similar to the guidance on the asset test (see Question 3.6.20) and the pretax income component of the income test (see Question 3.5.30).

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Example 3.5.110
Revenue component of income test – Direct interest only

This example is a continuation of Example 3.5.10 to illustrate the revenue component.

Registrant purchases 51% of Company A. Total revenues for Company A and Registrant are $500 and $1,000, respectively. Company A reports no NCI.

The revenue component of the income test is performed as follows.

Scenario	Outcome
Registrant's proportionate share of Company A's total revenue ($500 × 51%)	255
Divided by Registrant's total revenue	1,000
Significance	**25.5%**

Because the pretax income component result of 17.9% (see Example 3.5.10) is less than the revenue component result of 25.5%, the result of the pretax income component is used for the income test.

The acquisition of Company A is not considered significant at 17.9% under the income test.

Example 3.5.120#
Revenue component of income test – Direct and indirect interest

This example is a continuation of Example 3.5.20 to illustrate the revenue component.

Registrant owns 70% of Subsidiary. In a single transaction, Registrant and Subsidiary purchase 49% and 20% of Company A, respectively. Revenue for Company A and Registrant is $500 and $1,000, respectively. Company A reports no NCI.

The revenue component of the income test is performed as follows.

Scenario	Outcome
Registrant's proportionate share of Company A's revenue	
Direct ownership ($500 × 49%) = $245	
Indirect ownership ($500 × 20%) = $100	345
Divided by Registrant's total revenue	1,000
Significance	**34.5%**

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Because the pretax income component result of 22% (see Example 3.5.20) is less than the revenue component result of 34.5%, the result of the pretax income component is used for the income test.

The acquisition of Company A is considered significant at 22% under the income test.

Example 3.5.130
Revenue component of income test – NCI

This example is a continuation of Example 3.5.30 to illustrate the revenue component.

Registrant purchases 20% of Company A. Registrant has an existing 25% interest in Company B (an equity method investment) and 70% ownership interest in Company C (a consolidated subsidiary).

Each entity's revenue is as follows.

Entity	Revenue
Registrant	4,800
Company A	6,400
Company B	5,400
Company C	4,800

The revenue component of the income test is performed as follows.

Scenario	Outcome
Registrant's total revenue	4,800
Plus Registrant's share of Company B's total revenue ($5,400 × 25%)	1,350
Minus Registrant's share of Company C's total revenue attributable to NCI ($4,800 × (1 – 70%))	(1,440)
Registrant's total revenue for the revenue component	4,710
Registrant's proportionate share of Company A's total revenue ($6,400 × 20%)	1,280
Divided by Registrant's total revenue for the revenue component	4,710
Significance	**27.2%**

Because the pretax income component result of 9.0% (see Example 3.5.30) is less than the revenue component result of 27.2%, the result of the pretax income component is used for the income test.

The acquisition of Company A is not considered significant at 9.0% under the income test.

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Question 3.5.110

How is the revenue component determined in an aggregate income test when not all of the acquired businesses have material revenue?

Interpretive response: It depends. The aggregate revenue component of the income test is performed differently for groups of individually insignificant acquisitions and related businesses.

Individually insignificant acquisitions

The first step is to separate the pool of individually insignificant acquirees (see Question 2.3.190) into two groups – the group of acquired businesses with pretax income and the group of businesses with pretax losses. If the group with pretax income had material combined revenue (and the registrant had material revenue) for the last two fiscal years, the revenue component for this group is performed based on the group's aggregate revenue.

Similarly, if the group with pretax losses had material combined revenue (and the registrant had material revenue) for the last two fiscal years, the revenue component for this group is performed based on the group's aggregate revenue.

As a result, it may be possible that the revenue component applies to one group of businesses (e.g. pretax income group), but not the other (e.g. pretax loss group).

As discussed in Question 3.5.60, if either group is significant at greater than 50% based on the lower of the results under the revenue component and the pretax income component (or just the pretax income component if a group does not have material combined revenue for the last two fiscal years), then the entire pool of individually insignificant acquired businesses is significant under the income test (not just the entities in the group that was greater than 50% significant).

Related businesses

When multiple acquired businesses are related under S-X Rule 3-05(a)(3), the revenue of the related businesses are combined as if all related businesses were a single business for purposes of the revenue component of the income test. See Question 2.2.210 for additional guidance on when businesses are related. Significance is not determined individually or by separating the businesses into pretax income and pretax loss groups. If the combined revenue for related businesses is not material for each of the last two years, the revenue component does not apply. See Question 3.3.200. [FRM 2020.10, 2020 AICPA Conf]

Example 3.5.140

Individually insignificant acquired businesses with losses

This example is a continuation of Example 3.5.90 to illustrate the revenue component.

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	Registrant 12/31/X1
Pretax income	1,000
Revenue	70,000

Scenario 1: Aggregate significance exceeds 50%

Registrant is filing a registration statement in December 20X2 and has made the following acquisitions during 20X2.

Acquired business	Date acquired	Pretax income (loss)	Revenue
A	01/18/X2	150	10,000
B	02/21/X2	133	2,000
C	03/28/X2	(114)	5,000
D	04/02/X2	122	8,000
E	05/01/X2	(117)	600
F	07/21/X2	(110)	1,100
G	08/14/X2	168	16,000
H	09/22/X2	(153)	800
Total		**$79**	**43,500**

Registrant determines significance under the revenue component in two steps.

First, it determines significance for the acquired businesses of the pretax income group. Because Registrant concludes the acquired businesses reporting pretax income, when evaluated together as if they were a single entity, had material revenue during the last two years, the revenue component applies. Registrant performs the revenue component of the income test for the pretax income group as shown in the following table.

Entities with pretax income			
Acquired business	**Individual significance from pretax income component**	**Revenue**	**Individual significance from revenue component**
A	15%	10,000	14%
B	13%	2,000	3%
D	12%	8,000	11%
G	17%	16,000	23%
Total	**57.3%**	**36,000**	**51.4%**

The significance of acquired businesses with pretax income under the revenue component is 51.4% ($36,000 ÷ $70,000).

Because the significance of the acquired businesses with pretax income is greater than 50% under the revenue component (51.4%, which is lower than the result of the pretax income component of 57.3%, see Example 3.5.90), the *entire* group of acquired businesses (i.e. all the acquired business regardless of

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whether they have pretax income or losses) is significant under the income test. As a result of the income test, Registrant must file pro forma financial information reflecting the acquisition of all the businesses in all material respects (see Question 2.3.140).

This is the case even though the pretax loss group is not significant under either the revenue component (10.7%, as shown in the following table) or the pretax income component (49.4%, see Example 3.5.90).

Entities with pretax losses

Acquired business	Individual significance from pretax income component	Revenue	Individual significance from revenue component
C	11%	5,000	7%
E	12%	600	1%
F	11%	1,100	2%
H	15%	800	1%
Total	**49.4%**	**7,500**	**10.7%**

Scenario 2: Aggregate significance does not exceed 50%

Assume the same facts outlined in Scenario 1, except that acquired business G's revenue is $10,000 instead of $16,000. This reduces the aggregate significance of acquired businesses in the revenue component reporting pretax income to 42.8% ($30,000 ÷ $70,000).

In this scenario, significance of acquired businesses reporting pretax income is 42.8% (the lower of the pretax income and revenue component results for the group). Because neither group (i.e. pretax income and loss groups) is significant using the lower of the revenue component and the pretax income component results (42.8% for the pretax income group under the revenue component and 10.7% for the pretax loss group under the revenue component), Registrant is not required to file pro forma financial information of the individually insignificant acquired businesses.

3.5.40 Business combinations achieved in stages (step acquisitions)

Question 3.5.120

In a business combination achieved in stages, is the income test performed only with respect to increase in its existing investment?

Interpretive response: Yes. As discussed in Question 3.4.100, when a registrant increases its existing investment in an entity, significance is measured relative to the additional interest acquired – e.g. if an additional 10%

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interest is acquired, a registrant performs the income test using 10% of the acquired business's pretax income and revenue.

An increase in an investment in a consolidated subsidiary does not ordinarily require the filing of separate financial statements because the consolidated financial statements already include the acquired business's financial information. However, the registrant must still perform significance tests when acquiring an NCI to determine if a Form 8-K and pro forma financial information are required. [FRM 2020.5]

See section 2.3.20 for information about Form 8-K requirements and section 2.4.20 for information on the financial statement requirements in a step acquisition.

Question 3.5.130

Is the gain or loss from remeasurement of a previously held equity interest of an acquired business included when calculating the pretax income component?

Interpretive response: No. Under Topic 805, when an investor obtains control over an entity in which it holds an existing interest, it remeasures its previously held equity interest to its acquisition-date fair value. The remeasurement is recognized as a gain or loss in earnings.

The remeasurement gain or loss does not factor into the calculation of the pretax income component because it is not included in the registrant's operating results for the most recently completed fiscal year.

See Question 3.4.100 for guidance about the investment test and Question 3.6.50 for guidance about the asset test in acquisitions achieved in stages. [FRM 2020.4]

Example 3.5.150

Pretax income component in step acquisition

Registrant currently owns 51% of the common stock of Company A and plans to acquire the remaining 49% in March 20X1.

In 20X0, Registrant had pretax income (after attribution to NCI) of $1,300. Company A's total pretax income of $530 for the year ended December 31, 20X0 included a $10 pretax profit from sales to Registrant.

To determine significance, intercompany profit is excluded from Company A's pretax income (i.e. $530 – $10). No adjustments to Registrant's pretax income are necessary because the intercompany transaction was eliminated in consolidation.

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The pretax income component of the income test is performed as follows.

Scenario	Outcome
Company A's pretax income (($530 – $10) × 49%)	255
Divided by Registrant's pretax income	1,300
Significance	**19.6%**

The acquisition of Company A is not significant under the pretax income component. It is also not significant under the income test because the lower of the results of the pretax income component and the revenue component (if applicable) equals the result under the income test.

Filing audited annual and unaudited interim financial statements on a Form 8-K is not required if the greatest level of significance for the acquired business (i.e. the remaining 49%) is less than or equal to 20%. However, pro forma financial information may still be required to be filed on a Form 8-K if the information giving effect to the step acquisition would be material to investors. [S-X Rule 11-01(a)(8)]

Example 3.5.160
Pretax income component in step acquisition obtaining control

Registrant acquires a 40% interest in Company A on February 1, 20X1. Registrant subsequently acquires an additional 20% interest in Company A on June 1, 20X2, resulting in control and consolidation of Company A with a total ownership interest of 60%. Registrant will recognize a gain at the acquisition date due to the remeasurement of its existing 40% interest to fair value.

Company A's pretax income for its most recently completed year, ended December 31, 20X1 is $700, and Registrant's pretax income for the same year is $1,200.

The pretax income component of the income test is performed as follows.

Scenario	Outcome
20% of Company A's pretax income for the year ended December 31, 20X1 ($700 × 20%)	140
Divided by Registrant's pretax income for the year ended December 31, 20X1	1,200
Significance	**11.7%**

The gain from remeasurement that Registrant recognizes at the acquisition date is not considered in the pretax income component because it is not included in Registrant's 20X1 operating results.

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Question 3.5.140

How is the income test performed when a registrant increases its ownership and must transition to the equity method or consolidation?

Interpretive response: Like other increases in ownership in an existing investee**,** if a registrant increases its investment in the investee to a level that requires use of the equity method or consolidation, the income test is based on the increase in the registrant's proportionate interest in pretax income during the year. However, step acquisitions that are part of a single plan to be completed within a 12-month period must be aggregated (see Question 3.4.100). [FRM 2020.3]

Example 3.5.170

Step acquisition from fair value method

Registrant owns 5% of the outstanding common stock of Company A and measures the investment at fair value under Topic 321. In 20X1, Registrant increases its investment in Company A to 25% by purchasing an additional 20% interest.

Registrant and Company A have calendar year-ends. The financial results for the year ended December 31, 20X0 for each company are as follows.

Year ended December 31, 20X0	Registrant	Company A
Revenues	9,000	6,000
Pretax income	1,000	750

The pretax income component of the income test is performed as follows.

Scenario	Outcome
Company A's pretax income ($750 × 20%)	150
Divided by Registrant's pretax income	1,000
Significance	**15%**

The revenue component of the income test is performed as follows.

Scenario	Outcome
Company A's revenue ($6,000 × 20%)	1,200
Divided by Registrant's revenue	9,000
Significance	**13.3%**

The acquisition of Company A is not significant under the income test because the results of the pretax income and revenue components do not exceed 20%. If significance under the asset and investment tests also does not exceed 20%, Registrant is not required to file S-X Rule 3-05 financial statements (i.e.

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Company A's audited annual and unaudited interim financial statements) on a Form 8-K.

However, Registrant may still need to file pro forma financial information on a Form 8-K if the pro forma financial information giving effect to the step acquisition of Company A would be material to investors. [S-X Rule 11-01(a)(8)]

3.5.50 Predecessor and successor financial statements

Question 3.5.150

What financial information is used for the income test when a registrant presents predecessor- and successor-basis financial statements in a single year?

Interpretive response: S-X Rules 1-02(w) and 11-01(b) require a registrant to use its historical financial statements for the most recently completed fiscal year filed or required to be filed to determine significance. However, it may be appropriate to use successor or pro forma information in certain circumstances.

Use of successor information: New basis of accounting

It is not uncommon for an entity to adopt a new basis of accounting when emerging from bankruptcy or experiencing a change in control event (and applying pushdown accounting). When these situations arise during the year, predecessor (pre-new basis) and successor (new basis) financial statements are generally presented with a black line separating the two periods. If a registrant's financial statements for the most recent fiscal year required to be filed include both predecessor- and successor-basis financial statements, the SEC staff has indicated that the pretax income and revenue of the registrant for the successor period should be used as the basis for calculating the income test. [FRM 2025.10]

The SEC staff has noted that when determining whether the revenue component applies in these scenarios, registrants should consider the entire relevant period (i.e. two most recently completed fiscal years), without regard to the separation of those years for predecessor and successor presentation. The revenue component applies only if both the registrant and acquired business have material revenue in each of the two most recently completed fiscal years. [Regs Comm 03/2022]

Use of pro forma: Other situations

The SEC has not specifically addressed other situations in which it may be acceptable to use financial information other than the historical financial statements of the registrant. However, it has acknowledged that under certain facts and circumstances with advance permission, it may be acceptable for a registrant to use pro forma financial information that gives effect to the acquisition of the predecessor entity (i.e. the change in control), calculated as if the transaction had occurred as of the beginning of the fiscal year. Registrants may request SEC staff permission to apply this approach in significance

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calculations by preclearance through a written request to the SEC staff (CF-OCA). [Regs Comm 09/2021, FRM 2025.10]

See Question 7.2.50 for similar consideration when successor/predecessor financial statements are presented in an IPO.

Example 3.5.180

Using successor period basis for pretax income and revenue components

On April 1, 20X2, a change in control of Registrant occurs and results in Registrant applying a new basis of accounting.

Registrant files a registration statement that becomes effective in June 20X3. Registrant's June 20X3 registration statement includes:

- predecessor-basis financial statements as of and for the years ended December 31, 20X1 and 20X0;
- predecessor-basis financial statements for the three months ended March 31, 20X2; and
- successor-basis financial statements as of and for the nine months ended December 31, 20X2.

Pretax income (loss) and revenue included in Registrant's registration statement are as follows.

	Successor Apr 1 – Dec 31, 20X2	Predecessor Jan 1 – Mar 31, 20X2	Predecessor 20X1	Predecessor 20X0
Pretax income (loss)	(500)	700	(1,000)	(1,000)
Revenue	10,000	1,000	5,000	1,000

The successor period pretax loss includes an increased amount of depreciation and amortization of $90 due to the new basis of accounting for certain assets.

Registrant's combined 20X2 actual and pro forma pretax income (loss) and revenue are as follows.

Pro forma	Pretax income (loss)	Revenue
Predecessor (3 months)	700	1,000
Successor (9 months)	(500)	10,000
Additional pro forma depreciation/amortization for three months ended March 31, 20X2 ($90 ÷ 3 quarters)	(30)	-
12 months pro forma financial information	**170**	**11,000**

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Acquisition

In October 20X3, Registrant acquires Company A. Company A has pretax income of $110 and revenue of $2,100 for the year ended December 31, 20X2.

Registrant uses successor period pretax income and revenue in performing the income test.

The pretax income component of the income test is performed as follows.

Scenario – successor period only	Outcome
Company A's pretax income	110
Divided by the absolute value of Registrant's successor period pretax loss	500
Significance	**22%**

The revenue component of the income test is performed as follows.

Scenario – successor period only	Outcome
Company A's revenue	2,100
Divided by Registrant's successor period revenue	10,000
Significance	**21%**

The acquisition of Company A is significant under the income test because the lower of the pretax income component and the revenue component is greater than 20%.

Registrant also could have requested permission from the SEC staff to use the pro forma amounts for the income test.

Example 3.5.190

Using pro forma basis for pretax income component / revenue component

Registrant is formed on May 1, 20X2 as a successor to several businesses. Registrant files the following financial statements:

- predecessor-basis financial statements as of and for the years ended December 31, 20X1 and 20X0;
- predecessor-basis financial statements for the four months ended April 30, 20X2; and
- successor-basis financial statements for the eight months ended December 31, 20X2.

Pretax income (loss) and revenue included in Registrant's registration statement are as follows.

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	Successor May 1 - Dec 31, 20X2	Predecessor Jan 1 - Apr 30, 20X2	Predecessor 20X1	Predecessor 20X0
Pretax income (loss)	(1,100)	(300)	1,000	1,000
Revenue	12,500	2,500	6,000	5,000

The successor period pretax loss includes an increased amount of depreciation and amortization of $480 due to the new basis of accounting for certain assets.

Registrant's combined 20X2 actual and pro forma pretax loss and revenue are as follows.

Pro forma	Pretax loss	Revenue
Predecessor (4 months)	(300)	2,500
Successor (8 months)	(1,100)	12,500
Additional pro forma depreciation/amortization for four months ended April 30, 20X2 ($480 ÷ 8 months × 4 months)	(240)	-
12 months pro forma financial information	**(1,640)**	**15,000**

Planned acquisition

Registrant is planning to acquire Company A in 20X3. Company A has pretax income of $300 and revenue of $2,500 for the year ended December 31, 20X2.

Registrant consults with the SEC staff and obtains preclearance to use the pro forma results of the successor period adjusted as if the transaction resulting in the change in basis occurred at the beginning of 20X2.

The pretax income component of the income test is performed as follows.

Scenario	Outcome
Company A's pretax income	300
Divided by the absolute value of Registrant's pro forma pretax loss	1,640
Significance	**18.3%**

The revenue component of the income test is performed as follows.

Scenario	Outcome
Company A's revenue	2,500
Divided by Registrant's pro forma revenue	15,000
Significance	**16.7%**

The acquisition of Company A is not significant under the income test because the lower of the pretax income and revenue components is less than 20%.

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Question 3.5.160

What information is used in the income test when an acquired business's most recent fiscal year includes successor and predecessor financial statements?

Background: Under S-X Rule 11-01(b), a registrant determines the significance of an acquisition using its own audited financial statements for the most recent fiscal year required to be filed and the financial statements of the acquired (or to be acquired) business for the same period. See Question 3.3.10.

However, when the financial statements of the acquired business include successor and predecessor periods (e.g. due to pushdown accounting resulting from a change in control event), the successor period may be less than a full year.

Interpretive response: When the most recent fiscal year of an acquired business consists of successor and predecessor financial statements, the numerator in the significance calculation under S-X Rule 3-05 will depend on the specific facts and circumstances, including the timing of the split between the successor and the predecessor periods.

If the successor period includes at least 12 months (i.e. a full annual period), this successor-only period is used to determine significance. The SEC staff has stated that equating a successor period of at least nine months to a 12-month period does not apply in this situation (i.e. S-X Rule 3-06 does not apply for this purpose).

However, if the successor period is less than 12 months, the SEC staff has stated that it will generally be necessary to use pro forma financial information of the successor for a 12-month period, prepared in accordance with Article 11. This pro forma financial information would be prepared using the basis of the acquired successor (i.e. as if the event giving rise to the predecessor-successor presentation had occurred at the beginning of the relevant fiscal year). The pro forma information would not be prepared using the registrant's new basis in the acquired business.

The SEC staff has indicated that the simple combination or addition of the predecessor and successor periods to equal 12 months of results, without pro forma adjustments, is not appropriate.

In situations where the most recent annual period of the acquired business includes only predecessor results (i.e. the change in basis occurred in the subsequent interim period prior to the registrant's acquisition), the predecessor-only information is used in the significance test, and pro forma adjustments are not made to those results.

Registrants may consult with the SEC staff when the successor period is less than a full 12-month period and the results of the significance tests are considered anomalous (e.g. acquired business is clearly not significant based on the consideration of all facts and circumstances). [FRM 2025.11, Regs Comm 10/2007]

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Example 3.5.200
Using successor period basis for the pretax income and revenue components

On April 1, 20X3, Registrant acquires Company A, which emerged from bankruptcy and adopted a new basis of accounting on July 1, 20X2.

Company A's financial statements include:

- predecessor-basis financial statements as of and for the years ended December 31, 20X0 and 20X1;
- predecessor-basis financial statements for the six months ended June 30, 20X2; and
- successor-basis financial statements as of and for the six months ended December 31, 20X2.

Pretax income (loss) and revenue for Company A are as follows.

	Successor July 1 - Dec 31, 20X2	Predecessor Jan 1 - June 30, 20X2	Predecessor 20X1	Predecessor 20X0
Pretax income (loss)	100	(700)	(1,200)	(900)
Revenue	10,000	5,000	8,000	6,000

The successor period pretax income includes an increased amount of depreciation and amortization of $70 due to the new basis of accounting for certain assets.

Registrant's combined 20X2 actual and pro forma pretax income (loss) and revenue are as follows; the pro forma information reflects all adjustments required to comply with Article 11 of Reg S-X.

Pro forma	Pretax income (loss)	Revenue
Predecessor (6 months)	(700)	5,000
Successor (6 months)	100	10,000
Additional pro forma depreciation/amortization for six months ended June 30, 20X2	(70)	-
12 months pro forma financial information	**(670)**	**15,000**

Registrant has pretax income of $1,900 and revenue of $35,000 for the year ended 20X2.

Registrant uses the pro forma financial information for Company A's successor basis pretax income and revenue in performing the income test.

The pretax income component of the income test is performed as follows.

Scenario	Outcome
Absolute value of Company A's pro forma 20X2 pretax loss	670
Divided by Registrant's 20X2 pretax income	1,900
Significance	**35.3%**

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The revenue component of the income test is performed as follows.

Scenario	Outcome
Company A's pro forma 20X2 revenue	15,000
Divided by Registrant's 20X2 revenue	35,000
Significance	**42.9%**

The acquisition of Company A is significant under the income test because the lower of the pretax income component and the revenue component is greater than 20%.

However, Registrant may consult with the SEC staff if it believes the result of the significance test is anomalous.

Example 3.5.210
Using predecessor period basis for the pretax income and revenue components

On May 1, 20X2, Registrant acquires Company A, which emerged from bankruptcy and adopted a new basis of accounting on January 1, 20X2.

Company A's financial statements include:

- predecessor-basis financial statements as of and for the years ended December 31, 20X0 and 20X1; and
- successor-basis financial statements as of and for the three months ended March 31, 20X2.

Pretax income (loss) and revenue for Company A are as follows.

	Successor Jan 1 – Mar 31, 20X2	Predecessor 20X1	Predecessor 20X0
Pretax income (loss)	(1,200)	(1,500)	120
Revenue	10,000	8,000	7,000

Registrant has pretax income of $2,500 and revenue of $15,000 for the year ended 20X1. It uses Company A's predecessor-only financial information in performing the income test.

The pretax income component of the income test is performed as follows.

Scenario	Outcome
Absolute value of Company A's predecessor-period (20X1) pretax loss	1,500
Divided by Registrant's 20X1 pretax income	2,500
Significance	**60%**

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The revenue component of the income test is performed as follows.

Scenario	Outcome
Company A's predecessor-period (20X1) revenue	8,000
Divided by Registrant's 20X1 revenue	15,000
Significance	**53.3%**

The acquisition of Company A is significant under the income test because the lower of the pretax income component and the revenue component is greater than 20%.

3.5.60 Using periods covering fewer than 12 months

Question 3.5.170

May a registrant or an acquired business use a period of fewer than 12 months for purpose of the income test?

Interpretive response: The most recently filed audited financial statements of the registrant or the acquired business covering a period of fewer than 12 months can be used in the following four situations.

Situation 1	Registrant or acquired business changed its year-end (Question 3.5.180)
Situation 2	Both registrant and acquired business changed their year-ends (Question 3.5.190)
Situation 3	Registrant or acquired business provided audited interim period financial statements in compliance with underwriter or SEC requests (see Question 3.5.200)
Situation 4	Registrant or acquired business started operations fewer than 12 months prior (see Question 3.5.210)

The Questions referenced in the above table explain whether it is acceptable to use the financial information from these financial statements that reflect a period of fewer than 12 months to perform the income test.

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Question 3.5.180

How is the income test performed if either the registrant or acquired business has changed its fiscal year?

This Question relates to Situation 1 in Question 3.5.170.

Background: When a registrant changes its fiscal year, it is generally required to file a report covering the transition period. A transition period is the period between the closing of the registrant's most recent fiscal year and the opening date of its newly selected fiscal year. [FRM 1360.1, Exchange Act Rule 13a-10, 15d-13]

When a transition period is one month or less, no separate transition report is required to be filed. However, the transition period financial statements must be included in the next periodic report filed by the registrant. [FRM 1360.2]

Interpretive response: In this instance, it depends on the length of the transition period.

Fewer than nine months

When the most recently filed financial statements of the registrant or the acquired business are for fewer than nine months due to a change in the registrant's or acquired business's year-end (e.g. the transition period is fewer than nine months), the registrant has a choice to use the following financial statements: [FRM 2025.6]

- the audited financial statements for the previous year-end before the change; or
- a 12-month period consisting of the audited transition period plus the months from the audited fiscal year before the transition period so that a total of 12 months of operations (ending on the last day of the transition period) is available to determine significance.

Nine months or more

If the transition period is nine months or more, the registrant must use the audited financial statements for the transition period. This is the case because financial statements for a period of nine to 12 months is considered the equivalent of one year under S-X Rule 3-06 (see section 4.5.20 for information about S-X Rule 3-06). [FRM 2025.6]

Question 3.5.190

How is the income test performed if both the registrant and the acquired business have changed their fiscal years?

This Question relates to Situation 2 in Question 3.5.170.

Interpretive response: Similar to Question 3.5.180, the approach depends on the length of the transition period.

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If both the registrant and the acquired business have changed their fiscal years, the same choices as described in Question 3.5.180 are available. However, the registrant must use a consistent approach to measure significance – i.e. either the registrant and the acquired business's audited financial statements for the previous year-end before the changes are used, or the audited 12-month period that includes (and ends with) the transition period of the registrant and the acquired business are used. If the audited transition period is nine months or more, the financial statements for that period must be used. [FRM 2025.6]

Example 3.5.220

Change in fiscal year-end – Six-month transition period

Registrant, with a calendar year-end, changes its fiscal year-end to June 30. It files audited financial statements for the six months ended June 30, 20X2 (the transition period) and the years ended December 31, 20X1 and 20X0.

Registrant may determine significance using either:

- its audited financial statements for the year ended December 31, 20X1; or
- audited financial statements for the continuous 12 months ended June 30, 20X2 (derived from the six-months ended December 31, 20X1 financial statements and the six-month transition period ending June 30, 20X2).

Example 3.5.230

Change in fiscal year-end – Nine-month transition period

Registrant, with a calendar year-end, changes its year-end to September 30. Registrant files audited financial statements for the nine months ended September 30, 20X2 (the transition period) and the years ended December 31, 20X1 and 20X0.

Registrant must determine significance using its audited financial statements for the nine months ended September 30, 20X2 (the transition period) because under S-X Rule 3-06 a period of nine to 12 months of audited financial statements satisfies the requirement for one year of audited financial statements.

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Question 3.5.200

How is the income test performed when the financial statements cover fewer than 12 months due to voluntary filing of an audited interim period?

This Question relates to Situation 3 in Question 3.5.170.

Interpretive response: The income test is performed using the audited financial statements for the registrant's most recently completed fiscal year on file. This is the case even if the registrant voluntarily filed audited financial statements for a more recent period covering fewer than 12 months.

A registrant may use audited 12-month periods that do not end on its fiscal year-end to determine significance only when it obtains pre-clearance through a written request to the SEC staff.

Question 3.5.210

How is the income test performed when either the registrant or the acquired business have been in existence fewer than 12 months?

This Question relates to Situation 4 in Question 3.5.170.

Interpretive response: In this instance, the registrant or acquired business's most recently filed financial statements may be for fewer than 12 months. The income test is performed based on the audited income statement available; it is inappropriate to annualize income from continuing operations.

If one of the entities has a full year of financial statements on file and the other does not (because it has been in existence for fewer than 12 months), the pretax income component is performed using financial information from the most recently completed fiscal year for one entity and the fewer-than-12-month period for the other. The audited pretax income of the entity with annual financial statements on file is not adjusted to equal the same number of months the other party has been in existence. [FRM 2025.5]

If the registrant or the acquired business has existed fewer than 12 months, the registrant should consider consulting with legal counsel and SEC staff as to whether the revenue component should be applied.

Example 3.5.240

Registrant has been in existence for fewer than 12 months

Registrant began operations on May 1, 20X1. In April 20X2, Registrant acquires Company A. Both have a calendar year-end.

Registrant's pretax income and revenue for the eight months ended December 31, 20X1 are $1,000 and $11,000, respectively. Company A's pretax income

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and revenue for the year ended December 31, 20X1 are $200 and $4,000, respectively.

The pretax income component is performed using Registrant's audited financial statements for the eight months ended December 31, 20X1 and the audited financial statements of Company A for the 12 months ended December 31, 20X1.

As a result, the pretax income component is calculated as 20% ($200 ÷ $1,000) significant.

3.6 Asset test

Excerpt from S-X Rule 1-02

Definitions of terms used in Regulation S-X (17 CFR part 210).

(w) *Significant subsidiary.*

(1)(ii) *Asset test.* This test is met when the registrant's and its other subsidiaries' proportionate share of the tested subsidiary's consolidated total assets (after intercompany eliminations) exceeds 10 percent of such total assets of the registrant and its subsidiaries consolidated as of the end of the most recently completed fiscal year.

3.6.10 Overview

The asset test is the last of the three significance tests. An acquisition is significant under the asset test if the registrant's proportionate share of the acquired business's total assets (after eliminating transactions between the registrant and the acquired business) exceeds 20% of the total consolidated assets of the registrant as of the end of the most recent fiscal year for which financial statements are required to be filed.

This section explains how to apply this test, including its many nuances.

Question 3.6.10

How is the asset test performed?

Interpretive response: The asset test is performed by taking a registrant's proportionate interest in the consolidated total assets of the acquired business (*before* purchase accounting adjustments and *after* eliminating transactions between the registrant and the acquired business, see Question 3.3.190) and dividing it by the registrant's consolidated total assets as of the end of the most recent fiscal year for which financial statements are required to be filed.

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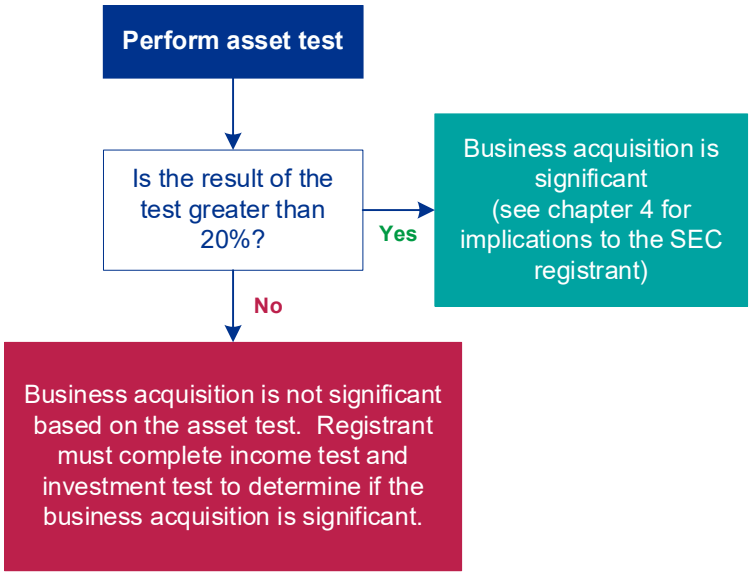
A registrant's proportionate interest in the acquired business's total assets includes its direct and indirect ownership interests.

A registrant's total assets used as the denominator is the amount reflected in its most recent annual financial statements required to be filed at or prior to the acquisition date. The total assets of a registrant exclude the assets of the acquired business.

The following decision tree summarizes the asset test.



Question 3.6.20

How is the registrant's share of total assets calculated when there is NCI?

Interpretive response: If a registrant acquires 100% of a business and that business has consolidated subsidiaries that are less than wholly owned (i.e. the acquired business presents NCI in its financial statements), the registrant uses the total assets as reported on the acquired business's financial statements. No adjustment is made to the numerator for the NCI holder's interest in the business's total assets.

Similarly, if a registrant's consolidated, but less than wholly-owned subsidiary acquires 100% of a business, the registrant uses the total assets as reported on the acquired business's financial statements, without adjustment for the NCI holder's interest in the business's total assets. [Regs Comm 03/2022]

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However, if a registrant acquires less than 100% of a business, the numerator is the acquired business's total assets multiplied by the percentage of the business that the registrant has acquired. No adjustment is made to the numerator for the NCI holder's interest in the business's total assets.

This guidance is similar to the guidance on the revenue component of the income test as discussed at Question 3.5.100.

Example 3.6.10
Asset test – Direct interest only

Registrant purchases 51% of Company A. Company A's and Registrant's consolidated total assets are $35 and $100, respectively. Company A reports no NCI.

The asset test is performed as follows.

Scenario	Outcome
Registrant's proportionate share of Company A's assets ($35 × 51%)	18
Divided by Registrant's consolidated total assets	100
Significance	**18%**

The acquisition of Company A is not significant under the asset test (18%).

Example 3.6.20
Asset test – Direct and indirect interest

Registrant owns 70% of Subsidiary. In a single transaction, Registrant and Subsidiary purchase 49% and 20% of Company A, respectively. Total assets for Company A and Registrant are $35 and $100, respectively. Company A reports no NCI.

The asset test is performed as follows.

Scenario	Outcome
Registrant's proportionate share of Company A's assets	
Direct ownership ($35 × 49%) = $17	
Indirect ownership (($35 × 20%) × 70%) = $5	22
Divided by Registrant's consolidated total assets	100
Significance	**22%**

The acquisition of Company A is significant under the asset test (22%).

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Question 3.6.30

Are working capital assets that are not acquired by the registrant included in the asset test?

Interpretive response: Yes. In some situations, a registrant may not acquire all the assets of an entity – e.g. other receivables and other working capital amounts. Working capital assets are included in the total assets of the acquired business for purposes of the asset test because they are expected to be required and funded after the acquisition. [FRM 2015.4]

If assets other than working capital assets are excluded from the acquisition, the registrant must determine if the assets it wishes to exclude are normal and necessary to the operations of the acquired business. If they are normal and necessary, they are likely included in the acquired business's total assets under the asset test. These determinations are dependent on the facts and circumstances in each situation and require judgment.

Example 3.6.30

Working capital assets

Registrant acquires Company A's operations exclusive of Company A's accounts receivable, which are retained by Company A's previous owner.

Company A's consolidated total assets at the end of its most recently completed fiscal year are $150, including $50 of accounts receivable. Registrant's consolidated total assets at the end of its most recently completed fiscal year are $500.

The asset test is performed as follows.

Asset test	Outcome
Company A's assets to be acquired	150
Divided by Registrant's total assets	500
Significance	**30%**

The acquisition of Company A is significant under the asset test (30%).

Example 3.6.40

Other than working capital assets

Registrant acquires Company A. Both entities are in the service industry with minimal tangible assets. Company A has two large assets that are not acquired by Registrant – a life insurance policy with a cash surrender value and a note receivable from the selling shareholder.

In this situation, the SEC staff has concluded that in determining the significance of the acquisition, Registrant may exclude the amount of the cash

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surrender value of the life insurance and the note receivable from the owner from Company A's consolidated total assets. The SEC staff's reasoning was that these assets are not working capital assets, nor are they necessary to operate the business after the acquisition.

3.6.20 Other scenarios and application matters

Question 3.6.40

How is the asset test performed for an acquisition of an interest in a general partnership?

Interpretive response: When purchasing a general partnership interest, the acquired ownership share is typically small but the acquired business may be consolidated with a significant NCI in the registrant's post-acquisition financial statements. As discussed in Question 3.6.20, the registrant uses the percentage ownership acquired to determine the proportionate share of the assets acquired when performing the asset test. This applies equally to the acquisition of a general partner interest, a limited partner interest, or both.

However, the SEC staff could invoke S-X Rule 3-13 and require financial statements of the acquired business if the asset test results in an extremely disproportionate answer relative to the overall effect of the acquisition on the acquirer's financial statements. This could occur for example when the significance threshold is not met but the acquisition will have a significant effect on the balance sheet. This is consistent with the SEC staff's view that registrants should consider whether the results of the significance tests, even when calculated appropriately, may result in the omission of information that would be material to an investor's understanding.

For example, if users are unable to understand the registrant's financial statements without seeing the financial statements of the acquired business, the SEC staff may require the registrant to file financial statements for the acquired business. This situation can occur when the registrant's financial statements will consist almost entirely of the assets and operations of the acquired business.

Results of significance tests can also be disproportionate relative to the effect of the acquisition when an event or transaction gives rise to the consolidation of another entity without any consideration being transferred. For example, contractual limits to a registrant's decision making authority over another entity may lapse, causing the registrant to consolidate an investment that was previously accounted for under the equity method. That situation would require the registrant to determine significance. See Questions 2.2.110 and 2.3.90.

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Question 3.6.50

How is the asset test performed for an acquisition achieved in stages (i.e. step acquisition)?

Interpretive response: If a registrant increases its existing investment in an entity, it performs the asset test based on the additional interest acquired. The significance is determined as the increase in the registrant's pro rata interest in the investee's consolidated total assets over the registrant's consolidated total assets. [FRM 2020.3]

Question 3.6.60

How are the acquirer's previously held equity interests in the acquiree valued when the registrant increases its existing investment in the entity?

Interpretive response: Under Topic 805, when an investor obtains control over an entity in which it holds an existing interest, it remeasures its previously held equity interest to its acquisition-date fair value. The gain or loss resulting from the remeasurement is recognized in earnings.

The remeasurement of the previously held equity interest is not included in the asset test because it is not included in the registrant's consolidated financial statements for its most recent fiscal year required to be filed before the acquisition. [FRM 2020.4]

See Question 3.4.100 for guidance about the investment test and Question 3.5.120 for guidance about the income test when an acquisition is achieved in stages.

Example 3.6.50

Asset test in step acquisition without obtaining control

Registrant has a calendar year-end and owns a 15% equity interest in Company A at the beginning of 20X2. In June of 20X2, Registrant acquires an additional 10% equity interest in Company A.

Company A's consolidated total assets are $1,000. Registrant's consolidated total assets as of December 31, 20X1 are $2,000.

The asset test is performed as follows.

Scenario	Outcome
Registrant's additional percentage of assets acquired in Company A ($1,000 × 10%)	100
Divided by Registrant's consolidated total assets	2,000
Significance	**5%**

The acquisition of Company A is not significant under the asset test (5%).

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Example 3.6.60
Asset test in step acquisition obtaining control

Registrant acquires a 40% interest in Company A on February 1, 20X1 for $800 and initially recognizes it as an equity method investment.

Company A's consolidated total assets at the end of its most recently completed year at the time of the initial acquisition (December 31, 20X0) were $1,900.

Registrant subsequently acquires an additional 20% interest in Company A on June 1, 20X2 for $800. The additional interest increases Registrant's ownership in Company A to 60% and results in obtaining control of (and consolidating) Company A.

At the end of Registrant's most recent fiscal year-end for which financial statements were required to be filed, December 31, 20X1, its total assets are $5,000 and Company A's total assets are $2,500.

The asset test for the subsequent acquisition of an additional 20% interest is performed as follows.

Scenario	Outcome
20% of Company A's assets at December 31, 20X1 ($2,500 × 20%)	500
Divided by Registrant's consolidated total assets at December 31, 20X1	5,000
Significance	**10%**

The asset test is not affected by the increase in the per share fair value of Company A's stock from February 1, 20X1 (Registrant's initial investment) to June 1, 20X2 (Registrant's subsequent investment) that results in an acquisition-date remeasurement gain on Registrant's existing 40% interest in Company A.

The acquisition of Company A is not significant under the asset test (10%).

3.7 Specific areas and topics – tests of significance

This section explains the application of the significance tests for reverse acquisitions, dispositions, and the acquisition or disposition of joint ventures.

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3.7.10 Reverse acquisitions

Question 3.7.10

How are the significance tests performed after a reverse acquisition?

Interpretive response: After a reverse acquisition, the accounting acquirer's historical financial statements are presented as the historical financial statements of the combined entity in post-acquisition filings. The accounting acquirer's historical financial statements and reporting history are used for testing significance under S-X Rule 3-05. [FRM 12210.1]

Example 3.7.10

Significance after a reverse acquisition

Acquisition of Company A (reverse acquisition)

Registrant issues its shares in an acquisition of Company A on March 1, 20X2. Both entities have calendar year-ends. Company A's former shareholders receive shares equal to 60% of Registrant's combined outstanding stock.

Company A is the accounting acquirer. In its Form 10-Q filed for the quarter ended March 31, 20X2, Registrant's historical financial statements are those of Company A for periods before March 1, 20X2 and shows the acquisition of the Registrant on March 1, 20X2.

Acquisition of Company B after reverse acquisition

Registrant acquires Company B on February 18, 20X3, before filing its 20X2 Form 10-K. Registrant applies the asset test by comparing Company B's total assets at December 31, 20X1 to Company A's total assets (not the assets of the original registrant) at December 31, 20X1. Because Company A was the accounting acquirer in the reverse acquisition of Registrant, the significance of the subsequent business acquisition is based on Company A's financial statements. The asset test indicates significance is at 22%.

As a result, Registrant files a Form 8-K that includes Company B's audited financial statements for the fiscal year ended December 31, 20X1, and unaudited financial statements for the nine months ended September 30, 20X2.

3.7.20 Dispositions

The significance tests are also applied to dispositions to determine whether a registrant must provide pro forma financial information. The significance tests for dispositions are generally aligned with acquisitions discussed in this chapter; however, this section explains certain differences.

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Question 3.7.20

How is the investment test performed for the disposition of a business?

Interpretive response: Similar to acquisitions (see section 3.4.10), the investment test is performed by dividing the registrant's *investments in and advances for* the disposed business by the registrant's AWMV, when available. For a disposition, the registrant's investments in and advances received for the disposed business is the consideration received, including contingent consideration. [S-X Rule 1-02(w)(1)(i)(A)(2)]

Registrant's investments in and advances received for the disposed business ÷ **Registrant's AWMV, if applicable**

AWMV is not available

If AWMV is not available for the registrant, the investment test is performed by dividing the carrying value of the disposed business by the registrant's consolidated total assets. [S-X Rule 1-02(w)(1)(i)(A)(2)]

Registrant's carrying value of the disposed business ÷ **Registrant's consolidated total assets**

Question 3.7.30

How is the investment test performed in a spin-off?

Interpretive response: In the case of a spin-off, the investment test is performed by dividing the carrying value of the disposed business (or the portion disposed) by the registrant's total assets as of the end of the most recent fiscal year prior to the disposal date. A registrant's AWMV is not used in a spin-off. [FRM 2130.2 (n 3), 2020 AICPA Conf]

Question 3.7.40

How is the numerator of the pretax income component of the income test determined for the disposition of a business?

Interpretive response: In the case of the disposition of a business, the numerator is based on the income statement effects that would be removed from the registrant's income statement during the tested period (similar to the requirements for presenting discontinued operations under Section 205-20-45).

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The numerator is not based on pretax income on a carve-out basis using the principles of SAB Topic 1.B.1. [Regs Comm 10/2020]

3.7.30 Joint ventures

The acquisition of an interest in a joint venture is considered the acquisition of a business, regardless of the consideration exchanged by the registrant to acquire the interest. As a result, these acquisitions are in the scope of S-X Rule 3-05 (see Question 2.2.150). Determining significance for these types of acquisitions (and the associated dispositions) presents some unique practical challenges.

Question 3.7.50

How are the significance tests performed in a joint venture formation if each joint venture partner contributes a business?

Interpretive response: As described in Question 2.2.150, if a registrant and its joint venture partner(s) each contribute a business to a joint venture, the registrant has both:

- acquired an interest in a business accounted for under the equity method; and
- disposed of the business it contributed.

The registrant must determine the significance of the acquisition and the disposition separately.

Acquisition of the equity method investment

The SEC staff has stated a registrant determines significance of the acquisition portion of the transaction by comparing the percentage of the business it acquires (i.e. the business contributed to the joint venture by the registrant's joint venture partner(s)) to its historical financial statements. The registrant's historical financial statements are not adjusted for the related disposition of the business the registrant contributed to the joint venture. [FRM 2025.4]

- As discussed in Question 3.4.10, the investment test is based on the purchase price divided by the registrant's AWMV, if available. The SEC staff has stated the numerator may be the fair value of the consideration transferred to the other joint venture partner(s) or the fair value of the consideration received, whichever is more readily determinable. [FRM 2025.4]
- The income test is determined based on the result of the pretax income component or the revenue component, whichever yields the lower percentage.
  - The pretax income component is based on the registrant's share of the acquired business's pretax income (i.e. the registrant's portion of pretax income of the business contributed by its joint venture partner(s)) divided by the registrant's consolidated pretax income.

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- The revenue component, if applicable, is based on the registrant's share of the acquired business's consolidated total revenue (i.e. the registrant's portion of revenue of the business contributed by its joint venture partner(s)) divided by the registrant's consolidated total revenue. If the registrant and the business contributed by the joint venture partner(s) do not both have material recurring annual revenue in each of the two most recently completed fiscal years, only the pretax income component applies (see Question 3.5.90).

— The asset test is based on the registrant's share of the acquired business's consolidated total assets (i.e. the registrant's portion of the assets contributed by its joint venture partner(s)) divided by the registrant's consolidated total assets.

Disposition of the business

The significance tests for the disposition portion of the transaction are performed in the same way as the acquisition portion, that is based on the percentage of the business disposed, not 100% of the business contributed to the joint venture. [Regs Comm 03/2011]

Example 3.7.20
Significance test – Contribution of businesses to joint venture

Registrant owns two businesses: a manufacturing business and a retail operation. In 20X2, Registrant contributes its manufacturing business in exchange for a 50% interest in Joint Venture. Company A (Registrant's joint venture partner) contributes its marketing and distribution business, also for a 50% interest.

Registrant's manufacturing business has a financial statement carrying amount of $750 and a fair value of $1,000. Company A's marketing and distribution business has a financial statement carrying amount of $500 and a fair value of $1,000.

Joint Venture recognizes the contributed assets at their combined fair value of $2,000.

Registrant's most recently completed fiscal year-end for which financial statements have been filed is December 31, 20X1.

Key information	Registrant	Company A	Joint venture
Fair value of consideration transferred/received	1,000	1,000	2,000
Average AWMV of Registrant	6,000		
Carrying value of assets contributed	500	750	
Consolidated total assets of Registrant (as of 12/31/X1)	5,000		
Pretax income of contributed business (20X1)	500	600	

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Key information	Registrant	Company A	Joint venture
Consolidated pretax income of Registrant (20X1)	1,000		
Revenue of contributed business (20X1)	1,500	1,100	
Consolidated total revenue of Registrant (20X1)	3,000		

Investment test

The investment test of the acquisition is performed as follows.

Scenario	Outcome
Fair value of business contributed by Company A	1,000
Registrant's share ($1,000 × 50%)	500
Registrant's AWMV	6,000
Significance ($500 ÷ $6,000)	**8.3%**

The investment test for the disposition is performed as follows.

Scenario	Outcome
Fair value of consideration received for business contributed by Registrant	1,000
Registrant's share disposed of ($1,000 × 50%)	500
Registrant's AWMV	6,000
Significance ($500 ÷ $6,000)	**8.3%**

Asset test

The asset test for the acquisition is performed as follows.

Scenario	Outcome
Carrying value of assets of business contributed by Company A	750
Registrant's share acquired ($750 × 50%)	375
Registrant's consolidated total assets	5,000
Significance ($375 ÷ $5,000)	**7.5%**

The asset test for the disposition is determined in the following table.

Scenario	Outcome
Carrying value of assets of business contributed by Registrant	500
Registrant's share disposed of ($500 × 50%)	250
Registrant's consolidated total assets	5,000
Significance ($250 ÷ $5,000)	**5%**

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Income test – acquisition portion

The pretax income component for the acquisition is performed as follows.

Scenario	Outcome
Pretax income of business contributed by Company A	600
Registrant's share ($600 × 50%)	300
Registrant's consolidated pretax income	1,000
Significance ($300 ÷ $1,000)	**30%**

The revenue component for the acquisition is performed as follows.

Scenario	Outcome
Revenue of business contributed by Company A	1,100
Registrant's share ($1,100 × 50%)	550
Registrant's consolidated total revenue	3,000
Significance ($550 ÷ $3,000)	**18.3%**

Because the revenue component result of 18.3% is less than the pretax income component result of 30%, the result of the revenue component is used. The acquisition of the business is not significant under the income test (18.3%).

Income test – disposition portion

The pretax income component for the disposition is performed as follows.

Scenario	Outcome
Pretax income of business contributed by Registrant	500
Registrant's share disposed of ($500 × 50%)	250
Registrant's consolidated pretax income	1,000
Significance ($250 ÷ $1,000)	**25%**

The revenue component for the disposition is performed as follows.

Scenario	Outcome
Revenue of business contributed by Registrant	1,500
Registrant's share disposed of ($1,500 × 50%)	750
Registrant's consolidated total revenue	3,000
Significance ($750 ÷ $3,000)	**25%**

The results of the significance tests for the acquisition and disposition are summarized below. The acquisition is not considered significant because none of the results of three significance tests exceed 20%.

However, the disposition is considered significant because the result of the income test (25%) exceeds 20%.

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	Investment test	Asset test	Income test[1]
Acquisition	8.3%	7.5%	18.3%
Disposition	8.3%	5%	25%

Note:
1. The lower of the pretax income component and revenue component used.

Question 3.7.60

How are the significance tests performed in a joint venture formation if a registrant does not contribute a business but the other venturer does?

Interpretive response: As discussed in Question 3.7.50, the registrant determines the significance of the acquisition and the disposition separately.

Acquisition of the equity method investment

The registrant determines significance of the acquisition portion of the transaction as discussed in Question 3.7.50.

Disposition of the assets that are not a business

If a registrant contributes assets that do not meet the definition of a business for SEC reporting purposes, the significance tests under S-X Rule 1-02(w) do not apply to the disposition. Instead, the significance of the disposition portion of the transaction is determined using an alternative significance test for purposes of determining whether a Form 8-K must be filed to report the disposition of a significant amount of assets.

Under this alternative test, a disposition of assets (which do not meet the definition of a business for SEC reporting purposes) is significant if: [Form 8-K Item 2.01 (Instruction 4(i)), FRM 2040.1]

- the registrant's share in the net book value of the assets disposed of exceeds 10% of the registrant's consolidated total assets; or
- the amount received for the assets disposed of exceeds 10% of the registrant's consolidated total assets.

Example 3.7.30

Significance test – Contribution of assets and a business to joint venture

In May 20X2, Registrant and Company B form Joint Venture. Registrant contributes assets that do not meet the definition of a business in exchange for a 50% interest in Joint Venture. Company B (Registrant's joint venture partner) contributes a business, also for a 50% interest.

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Registrant's most recently completed fiscal year-end is December 31, 20X1. Registrant must separately determine if the disposition and acquisition are significant.

Registrant determines significance of the acquisition portion of the transaction in the same manner as is illustrated in Example 3.7.20 (not reproduced here).

Key information	Registrant	Company B	Joint venture
Carrying value of assets contributed	500	600	
Amount received for the assets contributed	1,000	1,000	2,000
Consolidated total assets of Registrant (as of 12/31/X1)	4,000		

The significance tests for the disposition portion of the transaction is performed using the alternative significance test as shown in the following table.

Carrying value of assets contributed by Registrant ($500 × 50%)	$ 250
Divided by Registrant's consolidated total assets	$4,000
Significance	**6.3%**
Fair value of consideration received by Registrant for share of assets disposed of ($1,000 × 50%)	$ 500
Divided by Registrant A's consolidated total assets	$4,000
Significance	**12.5%**

Because the amount received for the assets disposed by Registrant exceeds 10% of its total assets, the disposition is considered significant and Registrant has to report it under Item 2.01 of Form 8-K.

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4. Required financial statements

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4.1 How the SEC Rules work

Significant business acquisitions can trigger requirements in SEC filings – e.g. the need to file a Form 8-K or in connection with a registration or proxy statement to be filed. These requirements may include the need for a registrant to provide the acquired business's historical financial statements and/or pro forma information. Determining which historical financial statements to provide depends on several factors – including the type of filing, the significance of the acquisition (see chapter 3), and the timing of the acquisition and the related filing.

For a single significant business acquisition, a registrant is typically required to provide historical financial statements of the acquired business and pro forma information. The number of periods and how current those periods must be depends on many factors including the level of significance and the date of the filing.

There may also be filing requirements for individually insignificant business acquisitions that are significant in the aggregate.

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4.2 Rule 3-05 financial statement general requirements

Excerpt from S-X Rule 3-05

Financial statements of businesses acquired or to be acquired.

(b) Periods to be presented.

(1) If registering an offering of securities to the security holders of the business to be acquired, then the financial statements specified in §§ 210.3-01 and 210.3-02 must be filed for the business to be acquired, except as provided otherwise for filings on Form N-14, S-4, or F-4 (§ 239.23, § 239.25, or § 239.34 of this chapter). The financial statements covering fiscal years must be audited except as provided in Item 14 of Schedule 14A (§ 240.14a-101 of this chapter) with respect to certain proxy statements or in registration statements filed on Forms N-14, S-4, or F-4 (§ 239.23, § 239.25, or § 239.34 of this chapter).

(2) In all cases not specified in paragraph (b)(1) of this section, financial statements of the business acquired or to be acquired must be filed for the periods specified in this paragraph (b)(2) or such shorter period as the business has been in existence. Determine the periods for which such financial statements are to be filed using the conditions specified in the definition of significant subsidiary in § 210.1-02(w), using the lower of the total revenue component or income or loss from continuing operations component for evaluating the income test condition, as follows:

(i) If none of the conditions exceeds 20 percent, financial statements are not required.

(ii) If any of the conditions exceeds 20 percent, but none exceed 40 percent, financial statements must be filed for at least the most recent fiscal year and the most recent interim period specified in §§ 210.3-01 and 210.3-02.

(iii) If any of the conditions exceeds 40 percent, financial statements must be filed for at least the two most recent fiscal years and any interim periods specified in §§ 210.3-01 and 210.3-02.

(iv) If the aggregate impact of 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 not required by paragraph (b)(2)(i) of this section or are not yet required based on paragraph (b)(4)(i) of this section, exceeds 50 percent for any condition, the registrant must provide the disclosure specified in paragraphs (b)(2)(iv)(A) and (B) of this section, however in determining the aggregate impact of the investment test condition also include the aggregate impact calculated in accordance with § 210.3-14(b)(2)(ii) of any acquired or to be acquired real estate operations specified in § 210.3-14(b)(2)(i)(C). In determining whether the income test condition (i.e. both the revenue

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component and the income or loss from continuing operations component) exceeds 50 percent, the businesses specified in this paragraph (b)(2)(iv) reporting losses must be aggregated separately from those reporting income. If either group exceeds 50 percent, paragraphs (b)(2)(iv)(A) and (B) of this section will apply to all of the businesses specified in this paragraph (b)(2)(iv) and will not be limited to either the businesses with losses or those with income.

(A) Pro forma financial information pursuant to §§ 210.11-01 through 210.11-02 that depicts the aggregate impact of these acquired or to be acquired businesses and real estate operations, in all material respects; and

(B) Financial statements covering at least the most recent fiscal year and the most recent interim period specified in §§ 210.3-01 and 210.3-02 for any acquired or to be acquired business or real estate operation for which financial statements are not yet required based on paragraph (b)(4)(i) of this section or § 210.3-14(b)(3)(i).

Excerpt from S-X Rule 3-01

Consolidated balance sheets.

(a) There must be filed, for the registrant and its subsidiaries consolidated and for its predecessors, audited balance sheets as of the end of each of the two most recent fiscal years. If the registrant has been in existence for less than one fiscal year, there must be filed an audited balance sheet as of a date within 135 days of the date of filing the registration statement.

(b) If the filing, other than a filing on Form 10-K or Form 10, is made within 45 days after the end of the registrant's fiscal year and audited financial statements for the most recent fiscal year are not available, the balance sheets may be as of the end of the two preceding fiscal years and the filing shall include an additional balance sheet as of an interim date at least as current as the end of the registrant's third fiscal quarter of the most recently completed fiscal year.

(c) The instruction in paragraph (b) of this section is also applicable to filings, other than on Form 10-K or Form 10, made after 45 days but within the number of days of the end of the registrant's fiscal year specified in paragraph (i) of this section: Provided, that the following conditions are met:

(1) The registrant files annual, quarterly and other reports pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 and all reports due have been filed;

(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, after taxes; and

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(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, after taxes.

(d) For filings made after 45 days but within the number of days of the end of the registrant's fiscal year specified in paragraph (i) of this section where the conditions set forth in paragraph (c) of this section are not met, the filing must include the audited balance sheets required by paragraph (a) of this section.

(e) For filings made after the number of days specified in paragraph (i)(2) of this section, the filing shall also include a balance sheet as of an interim date within the following number of days of the date of filing:

(1) 130 days for large accelerated filers and accelerated filers (as defined in § 240.12b-2 of this chapter); and

(2) 135 days for all other registrants.

(f) Any interim balance sheet provided in accordance with the requirements of this section may be unaudited and need not be presented in greater detail than is required by § 210.10-01. Notwithstanding the requirements of this section, the most recent interim balance sheet included in a filing shall be at least as current as the most recent balance sheet filed with the Commission on Form 10-Q.

(g) For filings by registered management investment companies, the requirements of § 210.3-18 shall apply in lieu of the requirements of this section.

(h) Any foreign private issuer, other than a registered management investment company or an employee plan, may file the financial statements required by Item 8.A of Form 20-F (§ 249.220 of this chapter) in lieu of the financial statements specified in this rule.

(i) (1) For purposes of paragraphs (c) and (d) of this section, the number of days shall be:

(i) 60 days (75 days for fiscal years ending before December 15, 2006) for large accelerated filers (as defined in § 240.12b-2 of this chapter);

(ii) 75 days for accelerated filers (as defined in § 240.12b-2 of this chapter); and

(iii) 90 days for all other registrants.

(2) For purposes of paragraph (e) of this section, the number of days shall be:

(i) 129 days subsequent to the end of the registrant's most recent fiscal year for large accelerated filers and accelerated filers (as defined in § 240.12b-2 of this chapter); and

(ii) 134 days subsequent to the end of the registrant's most recent fiscal year for all other registrants.

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Excerpt from S-X Rule 3-02

Consolidated statements of comprehensive income and cash flows.

(a) There shall be filed, for the registrant and its subsidiaries consolidated and for its predecessors, audited statements of comprehensive income and cash flows for each of the three fiscal years preceding the date of the most recent audited balance sheet being filed or such shorter period as the registrant (including predecessors) has been in existence. A registrant that is an emerging growth company, as defined in § 230.405 of this chapter (Rule 405 of the Securities Act) or § 240.12b-2 of this chapter (Rule 12b-2 of the Exchange Act), may, in a Securities Act registration statement for the initial public offering of the emerging growth company's equity securities, provide audited statements of comprehensive income and cash flows for each of the two fiscal years preceding the date of the most recent audited balance sheet (or such shorter period as the registrant has been in existence).

(b) In addition, for any interim period between the latest audited balance sheet and the date of the most recent interim balance sheet being filed, and for the corresponding period of the preceding fiscal year, statements of comprehensive income and cash flows shall be provided. Such interim financial statements may be unaudited and need not be presented in greater detail than is required by § 210.10-01.

(c) For filings by registered management investment companies, the requirements of § 210.3-18 shall apply in lieu of the requirements of this section.

(d) Any foreign private issuer, other than a registered management investment company or an employee plan, may file the financial statements required by Item 8.A of Form 20-F (§ 249.220 of this chapter) in lieu of the financial statements specified in this rule.

Excerpt from S-X Rule 3-04

Changes in stockholders' equity and noncontrolling interests.

An analysis of the changes in each caption of stockholders' equity and noncontrolling interests presented in the balance sheets shall be given in a note or separate statement. This analysis shall be presented in the form of a reconciliation of the beginning balance to the ending balance for each period for which a statement of comprehensive income is required to be filed with all significant reconciling items described by appropriate captions with contributions from and distributions to owners shown separately. Also, state separately the adjustments to the balance at the beginning of the earliest period presented for items which were retroactively applied to periods prior to that period. With respect to any dividends, state the amount per share and in the aggregate for each class of shares. Provide a separate schedule in the notes to the financial statements that shows the effects of any changes in the

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registrant's ownership interest in a subsidiary on the equity attributable to the registrant.

Excerpt from S-X Rule 8-02

Annual financial statements.

Smaller reporting companies must file an audited balance sheet for the registrant and its subsidiaries consolidated and for its predecessors as of the end of each of the most recent two fiscal years, or as of a date within 135 days if the issuer has existed for a period of less than one fiscal year, and audited statements of comprehensive income, cash flows and changes in stockholders' equity for each of the two fiscal years preceding the date of the most recent audited balance sheet (or such shorter period as the registrant has been in business).

Excerpt from S-X Rule 8-03

Interim financial statements.

Interim financial statements may be unaudited; however, before filing, interim financial statements included in quarterly reports on Form 10-Q (§ 249.308(a) of this chapter) must be reviewed by an independent public accountant using applicable professional standards and procedures for conducting such reviews, as may be modified or supplemented by the Commission. If, in any filing, the issuer states that interim financial statements have been reviewed by an independent public accountant, a report of the accountant on the review must be filed with the interim financial statements. Interim financial statements shall include a balance sheet as of the end of the issuer's most recent fiscal quarter, a balance sheet as of the end of the preceding fiscal year, and statements of comprehensive income and statements of cash flows for the interim period up to the date of such balance sheet and the comparable period of the preceding fiscal year.

(a) *Condensed format*. Interim financial statements may be condensed as follows:

(1) Balance sheets should include separate captions for each balance sheet component presented in the annual financial statements that represents 10% or more of total assets. Cash and retained earnings should be presented regardless of relative significance to total assets. Registrants that present a classified balance sheet in their annual financial statements should present totals for current assets and current liabilities.

(2) Statements of comprehensive income (or the statement of net income if comprehensive income is presented in two separate but consecutive financial statements) should include net sales or gross revenue, each cost and expense category presented in the annual financial

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statements that exceeds 20% of sales or gross revenues, provision for income taxes, and discontinued operations. (Financial institutions should substitute net interest income for sales for purposes of determining items to be disclosed.)

(3) Cash flow statements should include cash flows from operating, investing and financing activities as well as cash at the beginning and end of each period and the increase or decrease in such balance.

(4) Additional line items may be presented to facilitate the usefulness of the interim financial statements, including their comparability with annual financial statements.

(5) Provide the information required by § 210.3-04 for the current and comparative year-to-date periods, with subtotals for each interim period.

(b) *Disclosure required and additional instructions as to content* –

(1) *Footnotes.* Footnote and other disclosures should be provided as needed for fair presentation and to ensure that the financial statements are not misleading.

(2) [Reserved]

(3) *Significant equity investees.* Sales, gross profit, net income (loss) from continuing operations, net income, and net income attributable to the investee must be disclosed for equity investees that constitute 20 percent or more of a registrant's consolidated assets, equity or income from continuing operations attributable to the registrant.

(4) [Reserved]

(5) *Material accounting changes.* The registrant's independent accountant must provide a letter in the first Form 10-Q (§ 249.308a of this chapter) filed after the change indicating whether or not the change is to a preferable method. Disclosure must be provided of any retroactive change to prior period financial statements, including the effect of any such change on income and income per share.

(6) *Financial statements of and disclosures about guarantors and issuers of guaranteed securities.* The requirements of § 210.3-10 are applicable to financial statements for a subsidiary of a smaller reporting company that issues securities guaranteed by the smaller reporting company or guarantees securities issued by the smaller reporting company. Disclosures about guarantors and issuers of guaranteed securities registered or being registered must be presented as required by § 210.13-01.

(7) *Disclosures about affiliates whose securities collateralize an issuance.* Disclosures about a smaller reporting company's affiliates whose securities collateralize any class of securities registered or being registered and the related collateral arrangement must be presented as required by § 210.13-02.

Instruction 1 to § 210.8-03. Where §§ 210.8-01 through 210.8-08 (Article 8 of this part) are applicable to a Form 10-Q (§ 249.308a of this chapter) and the interim period is more than one quarter, statements of comprehensive income

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must also be provided for the most recent interim quarter and the comparable quarter of the preceding fiscal year.

4.2.10 Periods and age of Rule 3-05 financial statements

The financial statements of an acquired business must comply with the requirements of S-X Rule 3-05 if they are included in a Form 8-K, a registration statement or proxy material. Such financial statements are referred to as 'Rule 3-05 financial statements'.

To determine which Rule 3-05 financial statements must be included in a filing, a registrant assesses the period and age requirements in Rule 3-05. 'Periods' refers to the number of annual and interim financial statements that must be presented. 'Age' refers to how recent the financial statements presented must be.

Question 4.2.10

What do Rule 3-05 financial statements comprise?

Interpretive response: S-X Rule 3-05 requires:

- consolidated balance sheets (as specified in Rule 3-01);
- consolidated statements of comprehensive income and cash flows (as specified in Rule 3-02); and
- a statement of changes in stockholders' equity (presented in either a note to the consolidated financial statements or separate statement, as specified in Rule 3-04).

Question 4.2.20

How many periods of financial statements are required to comply with Rule 3-05?

Interpretive response: In some situations, only annual financial statements will be required in a filing. In other circumstances, a registrant will also need interim period financial statements.

A registrant also may need to file pro forma information (see Question 4.2.30).

Annual and interim period(s) required

The following table summarizes the basic requirements for audited annual financial statements of an acquired business, unless 'special circumstances' exist (see below). [S-X Rule 3-05(b)(2)(i-iv)]

A period of less than a year may be provided in the filing to satisfy the annual period requirements for Rule 3-05 financial statements. See section 4.5.20 for discussion of substituting a shorter period in satisfaction of a year. [S-X Rule 3-06]

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Acquisition's significance	Annual periods required	Interim periods required[1]
Does not exceed 20%	None	None
Exceeds 20% but not 40%	One fiscal year	Interim period subsequent to the required annual period (no comparative period required)
Exceeds 40%	Two fiscal years	Interim period subsequent to the latest required annual period **and** the comparative interim period of the prior year
Individually insignificant acquisitions with aggregate significance exceeding 50%	Audited financial statements for entities > 20% significant individually if not previously provided.	Most recent unaudited interim period for entities > 20% significant individually if not previously provided.
Note 1: Interim period financial statements of the acquired business may not be necessary based on the timing of the acquisition and type of filing (see Question 4.2.40).		

There are two special circumstances that can affect the above requirements.

Special circumstances affecting basic annual period requirements	Annual periods required
Securities being offered to acquired business shareholders in conjunction with a merger proxy or registration statement on Form S-4 or F-4	See chapter 5 for considerations.
Acquired business has been included in registrant's previously filed consolidated financial statements for a sufficient period of time	See Question 2.3.160 and Question 4.4.80.

Question 4.2.30

How many periods of pro forma information are required to comply with Reg S-X?

Background: S-X Article 11 requires registrants to provide pro forma information in certain filings. With respect to business acquisitions, pro forma information is required when a significant acquisition has occurred in the most recent fiscal year or subsequent interim period, or is probable. [S-X Rule 11-01(a)(1) - (2)]

Interpretive response: Unlike Rule 3-05 financial statements, the level of significance does not change the number of periods of pro forma information

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required. Typically, pro forma information includes the most recent (annual or interim) balance sheet and annual and interim income statements showing how the acquisition might have affected those financial statements if the transaction occurred at an earlier time. If the acquired entity is already included in such balance sheet, the filing of the most recent pro forma balance sheet is not required.

Pro forma financial information is not required for individually insignificant acquisitions unless they are greater than 50% significant in the aggregate. [S-X Rule 11-01(a)(1) - (2), FRM 3110.1]

See chapter 2, which discusses when pro forma information is required.

Question 4.2.40

What is meant by 'age of financial statements' in S-X Rule 3-05?

Interpretive response: The term 'age of financial statements' refers to which periods the Rule 3-05 financial statements to be filed must cover. The timing of the acquisition and the related filing date drive the 'age' determination. Annual financial statements for the most recent fiscal year are generally required to be filed, as well as financial statements for the prior annual period depending on significance. Interim financial statements requirements are based on the 'age' determination.

There are two rules that address age of financial statements: S-X Rules 3-01 and 3-12. Although the language in the two rules varies, the rules result in the same age determinations.

S-X Rule 3-01	generally addresses the requirements for the age of financial statements that must be included in a filing
S-X Rule 3-12	addresses updating financial statements required in a filing

The age requirements for an SRC are outlined in S-X Rule 8-08; however, those requirements generally result in the same age determination for non-SRCs as described in this question.

The age of pre-acquisition annual and interim financial statements that must be provided to satisfy Rule 3-05 varies based on the type of filing. The type of filing establishes a specific date that is important for determining the age of financial statements.

Form 8-K	earliest of date when initially filed with the SEC and date on which it must be initially filed
Registration statement	date declared effective
Proxy material	date mailed

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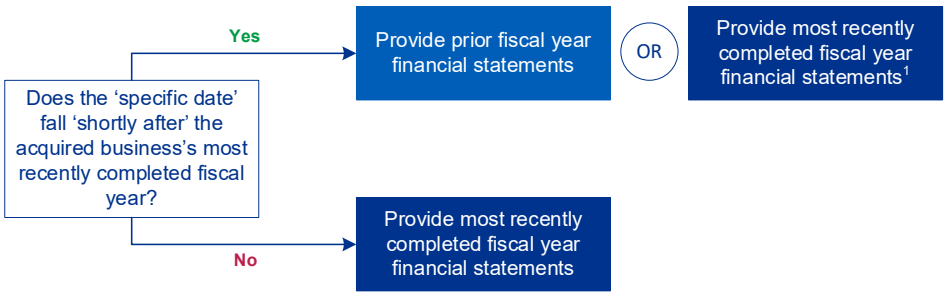
To determine the age of required annual financial statements, see Question 4.2.50. To determine the age of required interim financial statements, see Question 4.2.60.

Question 4.2.50

What annual financial statements are required?

Background: Before determining the age of financial statements, registrants identify how many periods are necessary, which is a function of the acquisition's significance (see Question 4.2.20). For example, if an acquisition is greater than 40% significant, the Rule 3-05 financial statements must include two years of audited annual financial statements.

Interpretive response: The requirement is to provide audited annual financial statements from the acquired business's most recent fiscal year(s) required by Rule 3-01. That is generally the most recently **completed** fiscal year; however, when the specific date identified in Question 4.2.40 falls 'shortly after' the acquired business's most recently completed fiscal year, the prior fiscal year may satisfy the requirement.



Note:

1. While the prior fiscal year financial statements would meet the age requirements, if audited financial statements for the most recently completed fiscal year are available, those statements must be included.

Two years of annual financial statements may be required depending on the acquisition's significance (see Question 4.2.20). For further detail regarding financial statements requirements, see section 4.3.10 (for Form 8-K filings) and section 4.4.20 (for registration statements and proxy material).

Question 4.2.60

What interim financial statements are required?

Background: Before determining the age of financial statements, registrants identify how many periods are necessary, which is a function of the acquisition's significance (see Question 4.2.20). For example, if the acquisition is greater than 40% significant, the Rule 3-05 financial statements must include

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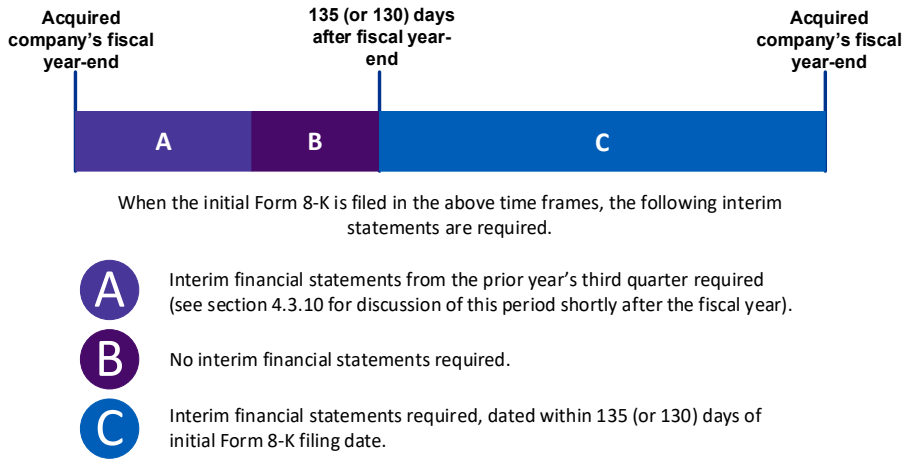
unaudited interim financial statements subsequent to the latest required annual period and the comparative interim period of the prior year.

Interpretive response: The period(s) for which interim financial statements are required depends on the timing of the acquisition and the required filing.

The registrant must provide interim period financials if the required annual period financial statements are dated 135 days (or 130 days) or more before the relevant filing date (see Question 4.3.10 for Form 8-K filing requirements and Question 4.4.30 for registration statements or proxy material). If interim period financials are provided, they must be dated fewer than 135 days (or 130 days) before the relevant filing date.

These concepts are illustrated for a Form 8-K filing in the following timeline.



For specific guidance on interim period financial statement requirements, see Question 4.3.10 for Form 8-K filings and Question 4.4.30 for registration statement or proxy material filings.

Example 4.2.10
Interim financial statement requirements

Registrant timely files a Form 8-K on September 17, 20X3 to report a significant business acquisition. This Form 8-K filing date is 135 days after May 4, 20X3. Therefore, the most recent balance sheet required to be filed can be as of a date no earlier than May 4, 20X3, meaning that the acquired business's financial statements must include the interim period ending June 30, 20X3 (assuming the acquired business has a calendar year-end). See Examples throughout this chapter that apply this requirement and its exceptions.

Although this example is based on filing a Form 8-K after a business acquisition, the same principles apply to a registration statement and proxy material. See section 4.4 for guidance on how to apply these principles in those situations.

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4.2.20 Form and content of Rule 3-05 financial statements

Question 4.2.70

Do Rule 3-05 financial statements need to comply with Reg S-X and US GAAP requirements for a PBE?

Interpretative response: Yes, Rule 3-05 financial statements need to comply with Reg S-X and US GAAP requirements for a PBE.

An entity whose financial statements or financial information is required to or is included in a filing with the SEC is considered a PBE under the FASB's definition and therefore its financial statements:

- may not use Private Company Council (PCC) accounting alternatives (e.g. amortization of goodwill); and
- must apply public company transition provisions for new standards except in certain circumstances (e.g. an entity is an EGC). For example, the SEC provided relief on the required timing of adoption of the revenue and leases accounting standards for companies that only met the definition of a PBE because their financial statements are included in a registrant's filing, such as Rule 3-05 financial statements.

The financial statements of a PBE are presented as if the company had always been public, unless the SEC staff has issued specific guidance to the contrary. If the acquired business's historical interim and annual financial statements were not prepared on that basis, they must be retrospectively revised for purposes of inclusion the filing.

Further, the financial information of an acquired business used to determine significance must also be based on the requirements of a PBE (see Question 3.3.80).

Disclosures not applicable to nonpublic entities

Notwithstanding the definition of a PBE, certain information and disclosures required by various accounting standards are not required for nonpublic acquired businesses or acquired businesses that do not have publicly held common stock or potential common stock (e.g. initial public offering). Each of these standards included its own definition of public entity before the FASB adopted the definition of *public business entity*, which applies to standards issued by the FASB after December 2013. Disclosures not required to be provided in a nonpublic acquired business's financial statements include, but are not limited to, disclosures that would otherwise be required by: [FRM 2005.1]

- Topic 260 (earnings per share) (paragraph 260-10-05-1);
- Topic 280 (segment reporting) (paragraph 280-10-15-3); and
- Topic 715 (retirement benefits) (paragraph 715-20-50-5).

Supplemental schedules and industry guide disclosures

The schedules otherwise required by S-X Articles 5 and 12 need not be furnished for significant acquired businesses, with the exception of those

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schedules required by S-X Rule 6-11 for acquired funds (see Question 9.4.20). However, the SEC staff has indicated that it may be necessary to include in a note to the financial statements, or elsewhere in a filing, certain information that ordinarily is furnished in the schedules when it would be considered material to an understanding of the financial statements of the acquired business. [FRM 2005.2, Form 8-K Item 9.01(a)(2)]

Further, the industry guide and other industry specific disclosures required by Reg S-K are not required by S-X Rule 3-05 even if the acquiree operates in a business for which there is an industry guide or specific Reg S-K item (e.g. Item 1300 for registrants engaged in mining operations, formerly Industry Guide 7).

Applicability of Staff Accounting Bulletins

The compliance of Rule 3-05 financial statements with Reg S-X also includes the consideration and application of the various Staff Accounting Bulletins (SABs). For example, entities consider the guidance in SAB Topic 1N relative to the evaluation of errors under the dual method. [FRM 2005.1]

Question 4.2.80

Under what circumstances are financial statements required to be audited under PCAOB standards?

Interpretive response: The Rule 3-05 financial statements of a non-issuer entity are not required to include an auditors' report under PCAOB standards. Further, auditors of non-issuers are not required to register with the PCAOB, and the non-issuers are not required to have an audit of the effectiveness of internal controls over financial reporting (as required under section 404 of the Sarbanes-Oxley Act). However, the Rule 3-05 financial statements of an issuer entity are required to be audited under PCAOB standards.

Rule 3-05 interim financial statements need not be reviewed by an independent public accountant, unless the acquired business is the accounting acquirer or the predecessor of the registrant acquirer.

The following is a list of certain scenarios and the SEC staff's views related to the auditor and audit standards to be applied. [FRM 4110.5]

Entities for which an audit report on the financial statements is included in the document filed with the SEC	Auditors' report must reference PCAOB standards?	Auditor must be a public accounting firm registered with the PCAOB?
Non-issuer entity whose financial statements are filed for the purposes of S-X Rule 3-05 or Rule 3-14	No	No
Non-issuer entity whose financial statements are included in proxy statement or Form S-4/F-4 as target (except for the target of a SPAC in a Form S4/F-4 – see below)	No	No
Issuer and its predecessor	Yes	Yes

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Entities for which an audit report on the financial statements is included in the document filed with the SEC	Auditors' report must reference PCAOB standards?	Auditor must be a public accounting firm registered with the PCAOB?
Entity that is filing an initial registration statement	Yes	Yes
Operating company (predecessor) whose financial statements are filed by a special purpose acquisition company (SPAC)	Yes[2]	Yes[2]
Operating company (predecessor) whose pre-acquisition financial statements are filed by an issuer that at the time the reverse merger is consummated is a public 'shell company' [FRM 12250.1]	Yes	Yes
Operating company (predecessor) whose pre-acquisition financial statements are filed by an issuer that at the time the reverse merger is consummated is not a public 'shell company'	No[1]	No[1]
Operating company (predecessor) whose post-acquisition audited financial statements are filed by the issuer after consummation of a reverse merger.	Yes	Yes

Notes:

1. The annual pre-acquisition financial statements of a nonpublic entity that is the accounting acquirer in a reverse acquisition that involves two operating companies need not be audited under PCAOB standards for purposes of pre-merger filings. However, once the acquisition is consummated and the nonpublic entity's financial statements become those of the registrant (i.e. the predecessor), a PCAOB registered firm must audit or review the post-acquisition financial statements (which now represent those of the issuer). These scenarios also present important considerations related to auditor independence. [FRM 12250.2]
2. See Question 10.2.80 for audit requirements in a de-SPAC transaction.

Auditors' reports

Auditors' reports on the financial statements of acquired businesses that contain qualifications due to audit scope limitations (or that disclaim an opinion) do not satisfy the requirement of S-X Rule 2-02(b) for the financial statements to be 'audited', because the auditor was unable to perform all necessary procedures to support the opinion. [SAB Topic 1E(2), FRM 4220]

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Question 4.2.90

Is pushdown accounting required to be applied in the acquired business financial statements?

Interpretive response: No. There is no requirement or prohibition to applying pushdown accounting in financial statements filed with the SEC if it is permitted by US GAAP.

Pushdown accounting refers to the method of establishing a new basis of accounting in the separate stand-alone financial statements of an acquired business arising from a change in its control (e.g. purchase of the business by an unrelated party). When pushdown accounting is applied in a business combination, the recorded acquisition adjustments of the acquirer are pushed down to the separate stand-alone financial statements of the acquired business.

The application of pushdown accounting under Topic 805 and related examples are discussed in detail in section 27 of KPMG Handbook, Business combinations.

Question 4.2.100

If pushdown accounting is elected for an acquired business, how are the financial statements presented?

Background: Registrant acquires Company A from Seller on March 31, 20X2. Seller obtained control of Company A on July 1, 20X1. Separate financial statements of Company A had not yet been prepared by Seller when requested by Registrant in 20X2 to satisfy its S-X Rule 3-05 reporting obligation. Seller elects pushdown accounting for Company A.

Interpretive response: Because Seller has elected pushdown accounting for Company A's financial statements, the statements of income, comprehensive income, cash flows, and changes in stockholders' equity for the year ended December 31, 20X1 include a six-month predecessor period and a six-month successor period separated by a vertical line (i.e. 'black line'). The columns related to the two accounting entities generally are labeled Predecessor and Successor or a similar designation to clearly indicate the change in accounting basis at that date. The notes to the financial statements must include relevant information separated for the predecessor and successor periods.

When pushdown accounting not elected

If Seller had not elected to apply pushdown accounting in Company A's financial statements, Company A's financial statements for the year ended December 31, 20X1 would not reflect a change in basis and there would be no split between predecessor and successor periods.

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Question 4.2.110

Can Rule 3-05 financial statements be abbreviated?

Interpretive response: Yes, if certain criteria are met.

Abbreviated financial statements may be provided to satisfy the Rule 3-05 financial statement requirements when net assets that constitute a business are acquired (e.g. when a component of an entity is acquired) and certain qualifying conditions are met. See further discussion of the requirements for abbreviated financial statements in chapter 10. [S-X Rule 3-05(e)]

4.3 Financial statement considerations – Form 8-K

Excerpt from Form 8-K

Item 2.01, Instruction 4

An acquisition or disposition will be deemed to involve a significant amount of assets:

(i) if the registrant's and its other subsidiaries' equity in the net book value of such assets or the amount paid or received for the assets upon such acquisition or disposition exceeded 10 percent of the total assets of the registrant and its consolidated subsidiaries;

(ii) if it involved a business (see 17 CFR 210.11-01(d)) that is significant (see 17 CFR 210.11-01(b)). 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; or

(iii) in the case of a business development company, if the amount paid for such assets exceeded 10 percent of the value of the total investments of the registrant and its consolidated subsidiaries.

The aggregate impact of acquired businesses are not required to be reported pursuant to this Item 2.01 unless they are related businesses (see 17 CFR 210.3-05(a)(3)), related real estate operations (see 17 CFR 210.3-14(a)(3)), or related funds (see 17 CFR 210.6-11(a)(3)), and are significant in the aggregate.

Item 9.01(a)

(a) Financial statements of businesses or funds acquired.

(1) For any business acquisition or fund acquisition required to be described in answer to Item 2.01 of this form, file financial statements and any applicable supplemental information, of the business acquired specified in Rules 3-05 or 3-14 of Regulation S-X (17 CFR 210.3-05 and 210.3-14), or Rules 8-04 or 8-06 of Regulation S-X (17 CFR 210.8-04

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and 210.8-06) for smaller reporting companies, or of the fund acquired specified in Rule 6-11 of Regulation S-X (17 CFR 210.6-11).

(2) The financial statements must be prepared pursuant to Regulation S-X except that supporting schedules need not be filed unless required by Rule 6-11 of Regulation S-X (17 CFR 210.6-11). A manually signed accountant's report should be provided pursuant to Rule 2-02 of Regulation S-X (17 CFR 210.2-02).

(3) Financial statements required by this item may be filed with the initial report, or by amendment not later than 71 calendar days after the date that the initial report on Form 8-K must be filed. If the financial statements are not included in the initial report, the registrant should so indicate in the Form 8-K report and state when the required financial statements will be filed. The registrant may, at its option, include unaudited financial statements in the initial report on Form 8-K.

General instruction B.3

If the registrant previously has reported substantially the same information as required by this form, the registrant need not make an additional report of the information on this form. To the extent that an item calls for disclosure of developments concerning a previously reported event or transaction, any information required in the new report or amendment about the previously reported event or transaction may be provided by incorporation by reference to the previously filed report. The term *previously reported* is defined in Rule 12b-2.

A registrant is required to provide financial statements of a significant acquired business under Item 9.01 of Form 8-K. These financial statements may be filed on the Form 8-K filed to report the acquisition, or through an amendment to the original Form 8-K within 71 days of the due date of the original Form 8-K.

Item 9.01 requires that these financial statements comply with Reg S-X. The following Rules in Reg S-X contain the financial statement requirements.

Registrant is an SRC	Rule 8-02 (annual financial statements) Rule 8-03 (interim financial statements)
All other registrants	Rule 3-01 (balance sheet) Rule 3-02 (income statement and cash flows) Rule 3-04 (statement of changes in stockholders' equity)

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4.3.10 Periods and age

Question 4.3.10

What periods of financial statements of an acquired business must be filed on Form 8-K?

Interpretive response: The age of the financial statements of an acquired business to be included in a Form 8-K is determined by reference to the earlier of the: [FRM 2045.13]

- date the Form 8-K is initially filed; or
- the due date of the Form 8-K reporting the acquisition.

The Form 8-K reporting the acquisition must be filed on or before the fourth business day following the date of the acquisition's consummation. Registrants may file the required financial statements of the acquired business with this initial Form 8-K. However, the registrant may also use a 71-day extension period to file these Rule 3-05 financial statements by later amending the Form 8-K.

The filing date of the initial Form 8-K reporting the acquisition is used to determine the required age of Rule 3-05 financial statements with the latest possible date being the original due date of the initial Form 8-K. If the initial form is filed after its due date, the due date is used to determine the required age of financial statements. As such, the use of the 71-day extension to file does not impact the required age of the financial statements (see Question 4.3.20), except when a registration statement becomes effective during the 71-day extension period (see Question 4.3.30). [FRM 2045.13, FRM 2045.17]

Financial statements

Form 8-K must include the acquired business's annual audited financial statements for the most recent fiscal year required by Rule 3-01 (See Question 4.2.50). Unaudited financial statements for the interim period(s) subsequent to this annual period may also be required based on the timing of the initial Form 8-K filing.

		Age of financial statements	
Acquired business is:	**Initial Form 8-K filing date**	**Annual financial statements**	**Interim financial statements**
Large accelerated filer	60 days or more after fiscal year-end of acquired business	As of and for most recently completed fiscal year	As of and for the interim period ending fewer than 130 days before the initial Form 8-K filing date
	Not more than 59 days after fiscal year-end of acquired business	As of and for previous fiscal year[1]	As of and for the interim period ending fewer than 130 days before the initial Form 8-K filing date; Third quarter is considered timely through 60th day after fiscal year-end

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		Age of financial statements	
Acquired business is:	**Initial Form 8-K filing date**	**Annual financial statements**	**Interim financial statements**
Accelerated filer	75 days or more after fiscal year-end of acquired business	As of and for most recently completed fiscal year	As of and for the interim period ending fewer than 130 days before the initial Form 8-K filing date
	Not more than 74 days after fiscal year-end of acquired business	As of and for previous fiscal year[1]	As of and for the interim period ending fewer than 130 before the initial Form 8-K filing date; Third quarter is considered timely through 75th day after fiscal year-end
Non-accelerated filer (including nonpublic entity)	90 days or more after fiscal year-end of acquired business	As of and for most recently completed fiscal year	As of and for the interim period ending fewer than 135 days before the initial Form 8-K filing date
	Not more than 89 days after fiscal year-end of acquired business	As of and for previous fiscal year[1]	As of and for the interim period ending fewer than 135 days before the initial Form 8-K filing date; Third quarter is considered timely through 90th day after fiscal year-end

Note:

1. When a registration statement is filed and expected to become effective shortly after fiscal year end, the most recently completed fiscal year financial statements may be required. See scenario 2 of Example 4.3.40.

[FRM 2045.14, FRM 2045.15]

Number of periods required

A registrant may also have to file up to two years of audited financial statements. The number of periods is determined based on the significance of the acquired business.

Significance	Financial statement requirements
20% or less	None
Exceeds 20% but not 40%	Most recent fiscal year required by Rule 3-01 (as indicated in the table above), and the unaudited subsequent interim financial statements. No comparative interim period needed.
Greater than 40%	If the acquired business is a real estate operation subject to S-X Rule 3-14, the most recent fiscal year required by Rule 3-01 (as indicated in the table above), and the unaudited subsequent interim financial statements. No comparative interim financial statements needed.

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Significance	Financial statement requirements
	For all other acquired businesses, audited financial statements for the most recent fiscal year required by Rule 3-01 (as indicated in the table above) and the year prior, as well as the unaudited subsequent interim financial statements and the comparative interim financial statements of the prior year.

Example 4.3.10

Interim financial statement filing requirements based on filing date of Form 8-K

Registrant acquires Company A on August 11, 20X1. Company A has a December 31 year-end and is not an accelerated filer (see Example 4.3.30 when the acquired business is an accelerated filer). The acquisition is significant (25%) and Registrant is required to file a Form 8-K on or before August 15, 20X1 (four business days after the transaction) to report the acquisition. Registrant may include Company A's financial statements in this initial filing, but it chooses to include them later in a Form 8-K/A (see Question 2.3.40 for the due date of the Form 8-K/A).

The Rule 3-05 interim financial statements required depends on when Registrant files the initial Form 8-K. August 13, 20X1 is a significant date because it is 135 days after the end of the first quarter.

Initial Form 8-K filed:	Amended Form 8-K must include:
Before Aug 13, 20X1	Company A's interim period financial statements as of and for the three months ended March 31, 20X1
On or after Aug 13, 20X1	Company A's interim period financial statements as of and for the six months ended June 30, 20X1

See also Question 4.4.70 for possible updating required when filing a registration statement.

Example 4.3.20

Acquisition of a non-accelerated filer

Registrant, a December 31 year-end accelerated filer, acquires Company A, a nonpublic entity, on August 7, 20X2. Company A also has a December 31 year-end. The acquisition is significant (45%) and Registrant files a Form 8-K to report the acquisition on August 11, 20X2 (four business days after the transaction). Registrant plans to include Company A's financial statements later in a Form 8-K/A (see Question 2.3.40 for the due date of the Form 8-K/A).

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Registrant filed its Form 10-Q on August 3, 20X2 for the six months ended June 30, 20X2. The Company A financial statements that will be filed on Form 8-K/A are as follows.

Financial statements required	Periods required
Audited annual financial statements	As of and for the years ended December 31, 20X1 and 20X0 (two annual periods because significance is greater than 40%)
Unaudited interim financial statements	As of March 31, 20X2 and for the three months ended March 31, 20X2 and 20X1

Interim period financial statements are not required for Company A's six months ended June 30, 20X2 because Registrant filed the initial Form 8-K fewer than 135 days after March 31, 20X2.

See Question 4.4.70 for circumstances that might require updating of the financial statements when filing a registration statement.

Example 4.3.30
Acquisition of an accelerated filer

Assume the same facts as in Example 4.3.20, except that Company A is a registrant and an accelerated filer.

Registrant must include in its Form 8-K unaudited interim period financial statements for Company A as of June 30, 20X2 and for the six months ended June 30, 20X2 and 20X1. This is because Registrant's initial Form 8-K was filed 130 days or more after the end of Company A's first quarter-end (March 31, 20X2).

Example 4.3.40
Form 8-K filed not more than 89 days after year-end of acquired business

On February 10, 20X3, Registrant purchases Company A, a nonpublic entity, in an acquisition that is significant in excess of 40%. Company A has a December 31 year-end. Registrant files a Form 8-K on February 10, 20X3 reporting this acquisition.

The periods required to be filed on Form 8-K/A depend on whether a registration statement is expected to be declared effective between the initial filing of the Form 8-K and the filing of the Form 8-K/A.

Scenario 1: No registration statement declared effective before Form 8-K/A filed

The Company A financial statements that will be filed later in a Form 8-K/A are as follows.

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Financial statements required	Periods required
Audited annual financial statements	As of and for the years ended December 31, 20X1 and 20X0
Unaudited interim financial statements	As of September 30, 20X2 and for the nine months ended September 30, 20X2 and 20X1

Because the acquisition is consummated shortly after year-end (i.e. not more than 89 days), the Registrant may file the financial statements of Company A for the year ended December 31, 20X1. In this case, interim financial statements of Company A are also required as of September 30, 20X2 because the third quarter financial statements are considered timely through March 31, 20X3 (90 days after the acquired business's fiscal year-end).

Scenario 2: Registration statement declared effective before Form 8-K/A filed

The facts in scenario 1 apply except Registrant also has a registration statement that is expected to be declared effective on March 20, 20X3 (before its Form 8-K/A is due). Because the registration statement is expected to be declared effective more than 45 days after, but fewer than 90 days after Company A's most recent fiscal year-end, Registrant must file Company A financial statements as of and for each of the years ended December 31, 20X2 and 20X1 before the registration statement is declared effective unless the conditions in S-X Rule 3-01(c) are met (see Questions 4.4.120 and 4.4.130). The effectiveness of a registration statement in this case accelerates the due date to file Company A financial statements. See Question 4.3.30.

Example 4.3.50

Form 8-K filed more than 89 days but fewer than 135 days after year-end of acquired business

On January 21, 20X3, Registrant purchases Company A, a nonpublic entity, in an acquisition that is significant in excess of 40%. Company A has a September 30 year-end.

Registrant must file a Form 8-K no later than January 25, 20X3 (four business days after the transaction). The Form 8-K or the subsequently filed amendment must include the following financial statements of Company A.

Financial statements required	Periods required
Audited annual financial statements	As of and for the years ended September 30, 20X2 and 20X1

Because the initial Form 8-K was filed fewer than 135 days after the balance sheet date of the annual financial statements, no interim financial statements are required. Additionally, because the acquisition is significant in excess of 40%, Company A audited financial statements for two annual periods must be filed.

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Compare this result with a situation in which the Form 8-K is filed more than 134 days after the acquired business's year-end. In this alternative situation, assume Registrant consummates the acquisition on February 13, 20X3, and files the Form 8-K on February 17, 20X3. Registrant would have to file the following Company A financial statements in Form 8-K.

Financial statements required	Periods required
Audited annual financial statements	As of and for the years ended September 30, 20X2 and 20X1
Unaudited interim financial statements	As of December 31, 20X2 and for the three months ended December 31, 20X2 and 20X1 (i.e. Company A's first fiscal quarter)

Interim periods are required in this situation because the initial Form 8-K filing (February 17, 20X3) is more than 134 days after the most recently completed fiscal year (September 30, 20X2).

Example 4.3.60

Form 8-K filed more than 134 days after the year-end of acquired business

On May 16, 20X3, Registrant purchases Company A, which is significant in excess of 40%. Company A, a nonpublic entity, has a June 30 fiscal year-end. Registrant must file a Form 8-K reporting the acquisition no later than May 20, 20X3.

The Form 8-K or the subsequently filed amendment must include the following financial statements of Company A.

Financial statements required	Periods required
Audited annual financial statements	As of and for years ended June 30, 20X2 and 20X1
Unaudited interim financial statements	As of March 31, 20X2 and for the nine months ended March 31, 20X3 and 20X2

Registrant must file two annual periods for Company A because the acquisition is greater than 40% significant.

Because the annual financial statements are as of a date that is more than 134 days before the Form 8-K filing, subsequent interim period financial statements are required. Using May 20, 20X3 as the due date of the Form 8-K filing, Registrant must include the March 31, 20X3 interim financial statements.

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Question 4.3.20

Does the 71-day extension period affect the age of financial statements required to be included in the Form 8-K?

Background: Financial statements required by Item 9.01 of Form 8-K may be filed with the initial report, or by amendment not later than 71 calendar days after the date that the initial report on Form 8-K must be filed (the original due date, or four business days after the transaction). If the financial statements are not included in the initial Form 8-K, the registrant indicates this in the Form 8-K and states when the required financial statements will be filed. The registrant may, at its option, include unaudited financial statements in the initial report on Form 8-K. [Form 8-K Item 9.01(a)(3)]

Interpretive response: No.

The age of financial statements that must be included in the Form 8-K is not affected by the 71-day automatic extension of time (or *grace period*) to file the financial statements. That is, the use of the grace period does not result in a requirement to file more current financial statements on Form 8-K. However, if the registrant has a registration statement declared effective during the grace period, it may need to provide more current financial statements (see Question 4.3.30). [FRM 2045.17]

Question 4.3.30

Is the age of financial statements affected if a registration statement goes effective during the 71-day extension period?

Interpretive response: Yes.

S-X Rule 3-05(b)(4) allows a registrant to omit financial statements of an acquired business from a registration statement with an effective date during the 71-day extension period (i.e. not more than 74 days after consummation of an acquisition) unless the acquisition is 50% or more significant. The same applies for proxy materials as of the mailing date.

Even though the financial statements meeting these criteria may be omitted from a registration or proxy statement, they still must be included in a Form 8-K, filed within the timeframe for filing that form. The age of Rule 3-05 financial statements filed on Form 8-K/A is based on the effective date of the registration statement (or the mailing date of the proxy statement) not the initial Form 8-K filing date, if:

- the effective date of a registration statement occurs within the Form 8-K's 71-day extension period; and
- the acquisition is less than 50% significant.

A registrant that has recently acquired a business (or individually insignificant businesses that are in aggregate 50% or more significant) and is planning to file a registration statement should consider how the effective date of the

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registration statement will affect the age of the acquired business(es) financial statements to be included in its Form 8-K/A if it chooses to take advantage of the 71-day extension period. [FRM 2045.17]

Example 4.3.70

Filing date of Form 8-K when registration statement is filed

Registrant acquires Company A on April 4, 20X2. The acquisition of Company A is significant at 21% and its most recent year-end financial statements are as of December 31, 20X1.

Registrant files the following.

Form	Filing date
Initial Form 8-K to report the acquisition	April 10, 20X2 (four business days after the acquisition)
Form S-4 registration statement to register shares it will exchange for shares of Company A.	May 16, 20X2 (effective date of the registration statement)
Amended Form 8-K to file Rule 3-05 financial statements	June 20, 20X2

If the age of financial statements is based solely on the date the Form 8-K reporting the transaction was filed, April 10, 20X2, the following Company A financial statements would be required.

Financial statements required	Periods required
Audited annual financial statements	As of and for the year ended December 31, 20X1
Unaudited interim financial statements	None (because the annual financial statements period ended fewer than 135 days before the initial Form 8-K filing)

However, the age of financial statements is based on the effective date of the registration statement, May 16, 20X2. As a result, the following Company A financial statements are required.

Financial statements required	Periods required
Audited annual financial statements	As of and for the year ended December 31, 20X1
Unaudited interim financial statements	As of March 31, 20X2 and for the three months ended March 31, 20X2

The date used to determine the age of Company A's financial statements is May 16, 20X2 because the registration statement became effective during the 71-day extension period for filing Rule 3-05 financial statements on Form 8-K. Registrant is required to file unaudited interim financial statements as of March

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31, 20X2 because the year-end 20X1 financial statements are dated 135 or more days from May 16, 20X2. Note that a comparative period is not required for the interim financial statements because the acquisition is significant at 21% (less than 40%). [FRM 2045.17]

4.3.20 Other considerations

Question 4.3.40

Must financial statements of an acquired business be filed on Form 8-K if they were included in a previously filed registration statement?

Interpretive response: No, as long as the financial statements included in the registration statement are substantially the same as those required in the Form 8-K. This is true regardless of whether the acquired business was the target in an exchange offer or was a probable acquisition in a registration statement filed for purposes other than the acquisition.

If a registrant has previously reported substantially the same information as required by the Form 8-K, the instructions to Form 8-K state that the registrant does not need to make an additional report of the information. To the extent that any item required to be reported on Form 8-K calls for disclosure of developments concerning a previously reported event or transaction, those disclosures can be made on the Form 8-K through incorporation by reference to the previously filed report. The term 'previously reported' is defined in Rule 12b-2. [Form 8-K (gen instruction B.3)]

Evaluating 'substantially the same'

The SEC staff believes that audited annual financial statements are not substantially the same as unaudited interim financial statements. As a result, previously filed unaudited interim financial statements will not satisfy a registrant's requirement to file annual audited financial statements on Form 8-K. [FRM 2045.16]

The SEC staff also believes that interim financial statements are not substantially the same if those that were previously filed are prepared as of a date (or for a period ending) that is more than one quarter different from the 'as of' date (or period) that is required to be filed on Form 8-K. If there is more than a one quarter difference, a registrant has to update the financial statements to comply with Form 8-K requirements. [FRM 2045.16]

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Example 4.3.80
Form 8-K – Determining when to update interim periods

Registrant has an effective registration statement that includes the following financial statements of Company A, a nonpublic calendar year-end entity. The probable acquisition of Company A would be significant at 25%.

Financial statements required	Periods required
Audited annual financial statements	As of and for the year ended December 31, 20X1
Unaudited interim financial statements	As of and for the three months ended March 31, 20X2

On October 31, 20X2, Registrant consummates the acquisition of Company A and files a Form 8-K.

The financial statements required in the Form 8-K would be as of and for the interim period ended June 30, 20X2. September 30, 20X2 interim financial statements are not required because June 30 is fewer than 135 days before the October 31 Form 8-K filing date. Registrant may omit filing financial statements of Company A in the Form 8-K because the March 31, 20X2 financial statements included in the registration statement are considered substantially the same as the June 30, 20X2 financial statements that are required in the Form 8-K – i.e. the period-end dates are one quarter apart.

However, if the acquisition had occurred later in the year and the Form 8-K was filed on or after the 135th day following June 30, 20X2 (i.e. November 12, 20X2 or later), unaudited financial statements as of and for the nine months ended September 30, 20X2 would be required in the Form 8-K. This is the case because the March 31, 20X2 financial statements included in the registration statement are not considered substantially the same as the September 30, 20X2 financial statements required on Form 8-K – i.e. the period-end dates are more than one quarter apart.

Example 4.3.90
Form 8-K – Determining when to update annual periods

Registrant previously filed a registration statement that included unaudited financial statements as of and for the nine months ended September 30, 20X2 and 20X1, and audited financial statements as of and for the years ended December 31, 20X1 and 20X0 for Company A, a nonpublic entity. The acquisition of Company A was considered probable and significant (greater than 50%) at the effective date of the registration statement.

Once the acquisition of Company A is consummated, Registrant determines whether updated financial statements are required based on when the Form 8-K is filed.

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Form 8-K filed:	Updated financial statements required?
Not more than 89 days after December 31, 20X2 (i.e. shortly after year-end)	No
90 days or more after December 31, 20X2	Yes

If the Form-8-K is filed not more than 89 days after Company A's fiscal year-end, the September 30, 20X2 interim financial statements for Company A are considered timely and updating is not required.

However, if the Form 8-K is filed 90 days or more after the Company A's year-end, more recent financial statements would be required. Registrant is required to provide the audited financial statements as of and for the years ended December 31, 20X2 and 20X1 in the Form 8-K filing.

Evaluating 'substantially the same'

Although the December 31, 20X2 financial statements required for the Form 8-K are within one quarter of the September 30, 20X2 that are already on file, they are not 'substantially the same'. This is because the Form 8-K would require audited financial statements, which are not considered substantially the same as unaudited interim financial statements. See Question 4.3.40.

4.4 Financial statement considerations – Registration and proxy statements

4.4.10 Overview

Excerpt from S-X Rule 3-12

Age of Financial Statements at Effective Date of Registration Statement or at Mailing Date of Proxy Statement.

(a) If the financial statements in a filing are as of a date the number of days specified in paragraph (g) of this section or more before the date the filing is expected to become effective, or proposed mailing date in the case of a proxy statement, the financial statements shall be updated, except as specified in the following paragraphs, with a balance sheet as of an interim date within the number of days specified in paragraph (g) of this section and with statements of comprehensive income and cash flows for the interim period between the end of the most recent fiscal year and the date of the interim balance sheet provided and for the corresponding period of the preceding fiscal year. Such interim financial statements may be unaudited and need not be presented in greater detail than is required by [S-X Rule] 10-01. Notwithstanding the above requirements, the most recent interim financial statements shall be at least as current as the most recent financial statements filed with the Commission on Form 10-Q.

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(b) Where the anticipated effective date of a filing, or in the case of a proxy statement the proposed mailing date, falls within the number of days subsequent to the end of the fiscal year specified in paragraph (g) of this section, the filing need not include financial statements more current than as of the end of the third fiscal quarter of the most recently completed fiscal year unless the audited financial statements for such fiscal year are available or unless the anticipated effective date or proposed mailing date falls after 45 days subsequent to the end of the fiscal year and the registrant does not meet the conditions prescribed under paragraph (c) of [S-X Rule] 3-01. If the anticipated effective date or proposed mailing date falls after 45 days subsequent to the end of the fiscal year and the registrant does not meet the conditions prescribed under Paragraph (c) of [S-X Rule] 3-01, the filing must include audited financial statements for the most recently completed fiscal year.

(c) Where a filing is made near the end of a fiscal year and audited financial statements for that fiscal year are not included in the filing, the filing shall be updated with such audited financial statements if they become available prior to the anticipated effective date, or proposed mailing date in the case of a proxy statement.

(d) The age of the registrant's most recent audited financial statements included in a registration statement filed under the Securities Act of 1933 or filed on Form 10 under the Securities Exchange Act of 1934 shall not be more than one year and 45 days old at the date the registration statement becomes effective if the registration statement relates to the security of an issuer that was not subject, immediately before the time of filing the registration statement, to the reporting requirements of section 13 or 15(d) of the Securities Exchange Act of 1934.

(e) For filings by registered management investment companies, the requirements of [S-X Rule] 3-18 shall apply in lieu of the requirements of this section.

(f) Any foreign private issuer may file financial statements whose age is specified in Item 8.A of Form 20-F. Financial statements of a foreign business which are furnished pursuant to [S-X Rule] 3-05 or [S-X Rule] 3-09 because it is an acquired business or a 50 percent or less owned person may be of the age specified in Item 8.A of Form 20-F.

(g) (1) For purposes of paragraph (a) of this section, the number of days shall be:

(i) 130 days for large accelerated filers and accelerated filers (as defined in §240.12b-2 of this chapter); and

(ii) 135 days for all other registrants.

(2) For purposes of paragraph (b) of this section, the number of days shall be:

(i) 60 days (75 days for fiscal years ending before December 15, 2006) for large accelerated filers (as defined in §240.12b-2 of this chapter);

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(ii) 75 days for accelerated filers (as defined in §240.12b-2 of this chapter); and

(iii) 90 days for all other registrants.

Excerpt from S-X Rule 8-08

Age of Financial Statements.

At the date of filing, financial statements included in filings other than filings on Form 10-K must be not less current than the financial statements that would be required in Forms 10-K and 10-Q if such reports were required to be filed. If required financial statements are as of a date 135 days or more before the date a registration statement becomes effective or proxy material is expected to be mailed, the financial statements shall be updated to include financial statements for an interim period ending within 135 days of the effective or expected mailing date. Interim financial statements must be prepared and presented in accordance with paragraph (b) of this section.

(a) When the anticipated effective or mailing date falls within 45 days after the end of the fiscal year, the filing may include financial statements only as current as of the end of the third fiscal quarter; Provided, however, that if the audited financial statements for the recently completed fiscal year are available or become available before effectiveness or mailing, they must be included in the filing; and

(b) If the effective date or anticipated mailing date falls after 45 days but within 90 days of the end of the smaller reporting company's fiscal year, the smaller reporting company is not required to provide the audited financial statements for such year end provided that the following conditions are met:

(1) If the smaller reporting company is a reporting company, all reports due must have been filed;

(2) For the most recent fiscal year for which audited financial statements are not yet available, the smaller reporting company reasonably and in good faith expects to report income from continuing operations attributable to the registrant before taxes; and

(3) For at least one of the two fiscal years immediately preceding the most recent fiscal year the smaller reporting company reported income from continuing operations attributable to the registrant before taxes.

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Excerpt from S-X Rule 3-05

Financial statements of businesses acquired or to be acquired.

(b) *Periods to be presented.*

(4) Financial statements required for the periods specified in paragraph (b)(2) of this section may be omitted to the extent specified as follows:

(i) Registration statements not subject to the provisions of § 230.419 of this chapter and proxy statements need not include separate financial statements of an acquired or to be acquired business if neither the business nor the aggregate impact specified in paragraph (b)(2)(iv) of this section exceeds any of the conditions of significance in the definition of significant subsidiary in § 210.1-02 at the 50 percent level computed in accordance with paragraph (b)(3) of this section, and either:

(A) The consummation of the acquisition has not yet occurred; or

(B) The date of the final prospectus or prospectus supplement relating to an offering as filed with the Commission pursuant to [Rule 424(b) of Regulation C], or mailing date in the case of a proxy statement, is no more than 74 days after consummation of the business combination, and the financial statements have not previously been filed by the registrant.

(ii) A registrant, other than a foreign private issuer required to file reports on Form 6-K (§ 249.306 of this chapter) or a shell company (other than a business combination related shell company), that omits from its initial registration statement financial statements of a recently consummated business acquisition pursuant to paragraph (b)(4)(i) of this section must file those financial statements and any pro forma information specified by §§ 210.11-01 through 210.11-03 (Article 11) under cover of Form 8-K (§ 249.308 of this chapter) no later than 75 days after consummation of the acquisition. When a predecessor to a shell company (other than a business combination related shell company) acquires a business and the financial statements of that recently consummated business are omitted from a registration statement or proxy statement pursuant to paragraph (b)(4)(i) of this section, refer to § 210.15-01(d)(2).

(iii) Separate financial statements of the acquired business specified in paragraph (b)(2)(ii) of this section need not be presented once the operating results of the acquired business have been reflected in the audited consolidated financial statements of the registrant for at least nine months. Separate financial statements of the acquired business specified in paragraph (b)(2)(iii) of this section need not be presented once the operating results of the acquired business have been reflected in the audited consolidated financial statements of the registrant for a complete fiscal year.

(iv) A separate audited balance sheet of the acquired business is not required when the registrant's most recent audited balance sheet

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required by § 210.3-01 is for a date after the date the acquisition was consummated.

With limited exceptions, when a registrant files a registration or proxy statement it must include, or incorporate by reference, the Rule 3-05 financial statements, pro forma information, or both, about recent significant business acquisitions or significant probable acquisitions.

Question 4.4.10

Do S-X Rule 3-05 requirements apply directly to an acquired business subject to a registration statement or a merger proxy on Form S-4 or F-4?

Interpretive response: No. There are provisions related to the financial statement requirements for a business that has been identified as a target for a proposed business acquisition in a transaction that either: [S-X Rule 3-05(b)(1)]

- requires shareholder approval; or
- involves the exchange of registered securities.

These requirements are separate from the requirements discussed in this chapter for consummated and probable business acquisitions in S-X Rule 3-05. These provisions are discussed in chapter 5.

Question 4.4.20

Are Rule 3-05 financial statements required when an entity files an initial registration statement?

Interpretive response: Generally, yes. An entity preparing its initial registration statement must assess the need for financial statements of significant acquired businesses. This requires considering all business acquisitions that have occurred in the most recent fiscal year and any subsequent interim periods for which financial statements are required to be presented for the registrant in the initial registration statement. Financial statements are also required for probable acquisitions that exceed 50% significance (see Question 2.3.140). For special considerations for initial registration statements, see chapter 7.

Question 4.4.30

What are the age requirements for Rule 3-05 financial statements in a registration statement or proxy material?

Interpretive response: The age of Rule 3-05 financial statements required to be included in a registration statement is determined by reference to the effective date of the registration statement if no proxy materials are to be

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mailed to shareholders. In situations where a proxy statement is to be filed and proxy materials mailed to shareholders, then the date that the materials are mailed is used to determine the age of Rule 3-05 financial statements.

When a registrant files a registration statement that also includes the required proxy materials that will be mailed to shareholders (e.g. Form S-4), it generally determines the age of financial statements based on the effective date of the registration statement. However, if the mailing date of the proxy materials is delayed and is not within a few days of the effective date of the registration statement, the age of the Rule 3-05 financial statements required in the proxy materials would need to be based on the mailing date. [FRM 1220.8]

Financial statements

A registration statement and/or proxy materials must contain the acquired business's audited annual financial statements for the most recent fiscal year required by Rule 3-01, unless the registration statement becomes effective (or proxy materials are to be mailed) shortly after the acquired business's fiscal-year end (see section 4.4.20).

As of the effective/mailing date, the registrant must have on file for the acquired business:

— a balance sheet as of an interim date ending fewer than 135 days of initial Form 8-K (130 days if the acquired business is an accelerated filer or a large accelerated filer); and

— the income statement and statement of cash flows through the interim balance sheet date (and for the corresponding period of the preceding fiscal year in certain circumstances, see Question 4.3.10). [S-X Rule 3-12, S-X Rule 8-08]

Question 4.4.40

When do Rule 3-05 financial statements require updating in a registration statement or proxy materials?

Interpretive response: If a registration statement becomes effective (or the proxy materials are mailed) 135 or more days after the acquisition date, a registrant provides updated financial statements for the significant acquired business as of the end of the last pre-acquisition fiscal year or the last pre-acquisition interim period, whichever is later, and the comparative prior fiscal year and interim period depending on significance. This is because the effective date or proposed mailing date is ordinarily weeks or months after the date the registration statement or proxy material is initially filed with the SEC, and the financial statements that were included in that initial filing may require updating because they have gone stale.

See Question 4.4.200 for further discussion on updated interim financial statements.

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Question 4.4.50

Is the filing date relevant to determining the age of financial statements to be included in a registration statement or proxy material?

Interpretive response: Yes. The age of financial statements must comply with S-X Rule 3-12 or Rule 8-08 at the date the registration statement or proxy material is filed with the SEC *and* the date registration statement becomes effective or the proxy material is mailed to shareholders.

When a registrant files the registration statement or proxy material with the SEC, the SEC staff may choose to review the document and provide comments on the content of the filing. If the financial statements included in a filing do not comply with the age of financial statement requirements at the time of the filing, the SEC staff may decline to review and process the document or request that the document be withdrawn from filing until it can be filed with financial statements that fully comply with the age of financial statement requirements.

If the period of delay between filing and effectiveness (or mailing) crosses over any of the dates that require more recent financial statements (see Question 4.4.200), it may be necessary for the registrant to update the financial statements.

Question 4.4.60

Is the age of Rule 3-05 financial statements affected by the registrant's filing status?

Interpretive response: No. Rule 3-05 financial statement age requirements are the same whether the registrant is an accelerated or non-accelerated filer.

However, the filing status of the **acquired business** is relevant when determining the age of Rule 3-05 financial statements (see Question 4.3.10). This can result in a mismatch of financial statement periods in the filing. For example, if the registrant is an accelerated filer and the acquired business is not, the registrant's financial statements included in the registration statement may be more current than those required by Rule 3-05 for the acquired business. [FRM 2045.5]

Example 4.4.10

Age of financial statements, accelerated filer registrant and acquired business

On July 10, 20X2, Registrant, an accelerated filer, acquires Company A, a nonpublic entity. Both have a calendar year-end. The acquisition is 60% significant and therefore Registrant is required to file a Form 8-K.

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Form	Filing date
Initial Form 8-K reporting the acquisition	July 14, 20X2 (four business days after the acquisition)
Amended Form 8-K	July 23, 20X2 Contains Company A's audited annual ffinancial statements as of and for the years ended December 31, 20X1 and 20X0 and unaudited interim financial statements as of March 31, 20X2 and for the three months ended March 31, 20X2 and 20X1

On July 23, 20X2, Registrant files a registration statement. Registrant expects the registration statement to become effective by August 12, 20X2 and incorporates by reference the following financial statements.

Financial statements required	Periods required for Registrant	Periods required for Company A
Audited annual financial statements	As of December 31, 20X1 and 20X0 and for the three years ended December 31, 20X1	As of and the years ended December 31, 20X1 and 20X0
Unaudited interim financial statements	As of March 31, 20X2 and for the three months ended March 31, 20X2 and 20X1	As of March 31, 20X2 and for the three months ended March 31, 20X2 and 20X1

On August 9, 20X2, Registrant files an amendment to the registration statement to include its updated unaudited interim period financial statements. The amended registration statement and incorporates by reference the following financial statements.

Financial statements required	Periods required for Registrant	Periods required for Company A
Audited annual financial statements	As of December 31, 20X1 and 20X0 and for the three years ended December 31, 20X1	As of and the years ended December 31, 20X1 and 20X0
Unaudited interim financial statements	As of June 30, 20X2 and for the six months ended June 30, 20X2 and 20X1	As of March 31, 20X2 and for the three months ended March 31, 20X2 and 20X1

Registrant does not need to update Company A's interim financial statements. This is the case because Company A is not an accelerated filer and Registrant expects the registration statement to become effective before 135 days from the end of Company A's quarter ended March 31, 20X2.

However, if Company A were an accelerated filer (or if the registration statement is declared effective after August 12, 20X2), Registrant would need to update the Company A's interim period financial statements for the period ended June 30, 20X2 (see Question 4.3.10).

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Question 4.4.70

Does a previous filing on Form 8-K change the requirements for the age of financial statements in a registration statement or proxy material?

Interpretive response: No. The financial statements of an acquired business included in a registration statement or proxy material must comply with S-X Rule 3-12 (or 8-08) updating requirements regardless of what financial statements were filed previously in a Form 8-K. A registrant may need to provide updated financial statements for a previous acquisition, even though the appropriate financial statements were filed timely in a Form 8-K when the acquisition occurred. Updated financial statements may be provided in the registration statement or proxy material or filed on Form 8-K/A incorporated by reference into the registration statement. [FRM 2045.2]

Although in most cases the SEC staff will not waive the requirements to update the acquired business's financial statements when a registration statement becomes effective, the SEC staff may consider a waiver request based on the relevant facts and circumstances (e.g. updating involves unreasonable expense and effort and one complete quarter of the registrant's post-acquisition operating results is included in the filing).

Example 4.4.20

Updating required for interim period

On July 29, 20X2, Registrant acquires Company A. Both entities have a calendar year-end. The acquisition is significant at 43% and Registrant files a Form 8-K on August 1, 20X2 (within four business days) to report the acquisition and includes the following financial statements of Company A.

Financial statements required	Periods required
Audited annual financial statements	As of and for the years ended December 31, 20X1 and 20X0
Unaudited interim financial statements	As of March 31, 20X2 and for the three months ended March 31, 20X2 and March 31, 20X1

If a registration statement is declared effective after August 12, 20X2 (i.e. 135 days after March 31, 20X2), Company A's financial statements must be updated through June 30, 20X2.

Example 4.4.30

Updating required for audited annual period

On January 2, 20X2, Registrant acquires Company A, a private company. Both entities have a calendar year-end. The acquisition is significant at 25%, and

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Registrant files a Form 8-K on January 4 (within four business days) to report the acquisition and includes the following financial statements of Company A.

Financial statements required	Periods required
Audited annual financial statements	As of and for the year ended December 31, 20X0
Unaudited interim financial statements	As of and for the nine months ended September 30, 20X1

On April 1, 20X2, Registrant files a registration statement that incorporates by reference its 20X1 Form 10-K.

Registrant will need to file Company A's 20X1 audited annual financial statements because the registration statement will become effective more than 90 days after Company A's fiscal year-ended December 31, 20X1. This is the case even though the Registrant did not (and was not required to) file those financial statements on Form 8-K.

See section 4.4.20 for special considerations for acquisitions shortly after fiscal year-end.

Example 4.4.40
Updating not required

On December 28, 20X2, Registrant acquires Company A. Both entities have a calendar year-end. The acquisition is significant at 38% and Registrant files a Form 8-K on December 30, 20X2 (within four business days) and includes the following financial statements of Company A.

Financial statements required	Periods required
Audited annual financial statements	As of and for the year ended December 31, 20X1
Unaudited interim financial statements	As of September 30, 20X2 and for the nine months ended September 30, 20X2

On April 1, 20X3, Registrant files a registration statement that incorporates by reference its 20X2 Form 10-K and the Form 8-K filed for the Company A acquisition.

Registrant will not need to update the financial information filed for Company A. Company A's 20X2 audited annual financial statements are not required because Company A was acquired before its 20X2 year-end and the Form 8-K includes the latest pre-acquisition fiscal period ended before the acquisition (see Question 4.4.30).

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Question 4.4.80

When can Rule 3-05 financial statements be omitted from a registration statement or proxy material?

Interpretive response: Rule 3-05 financial statements may be omitted in a registration statement or proxy material under certain circumstances within the Rule.

Sufficient time included in registrant financial statements

Rule 3-05 (pre-acquisition) financial statements of an acquired business may be omitted from a registration statement or proxy material if the acquired business's operations have been included in the registrant's audited financial statements for nine months or a complete fiscal year, depending on the acquisition's level of significance. [S-X Rule 3-05(b)(4)(iii)]

Significance	Period included in registrant's consolidated audited financial statements
Greater than 20% but not 40%	9 months
Greater than 40%	A complete fiscal year

If the acquired business's operations have not been included for the relevant time periods, the registrant must provide the audited pre-acquisition financial statements for the number of years required based on the significance thresholds. However, the acquired business's balance sheet may be omitted if the acquisition is reflected in the registrant's latest balance sheet included in the registration statement or proxy material. [S-X Rule 3-05(b)(4)(iii) – (b)(4)(iv)]

Business acquired within 74 days

Registration and proxy statements may omit the financial statements of businesses acquired within 74 days before the effective date of a registration statement or mailing date of proxy material, if the acquisition is less than 50% significant. Although financial statements may be omitted from the registration statement, when they are omitted, the registrant must subsequently file the financial statements on a Form 8-K/A. The age of the financial statements included in the Form 8-K/A must be determined based on the effective date of the registration statement (see Question 4.3.30). [FRM 2045.17]

This exception also applies to: [S-X Rule 3-05(b)(4)(i), FRM 2045.17]

- individual business acquisitions that are probable at the date of the registration statement or mailing date of proxy material that are 50% or less significant, and
- completed acquisitions that are tested for significance in the aggregate.

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Question 4.4.90

Can post-acquisition audited financial statements reduce the periods that audited pre-acquisition financial statements must cover?

Interpretive response: No. The registrant's post-acquisition financial statements (which include the results of the acquired business's results) cannot be used in lieu of the acquired business's pre-acquisition financial statements. [SEC Rel 33-10786]

However, if an acquired business has been included in a registrant's post-acquisition consolidated financial statements for a sufficient period of time (based on significance), separate Rule 3-05 financial statements may not be required (see Question 4.4.80 for time periods that determine whether pre-acquisition financial statements can be omitted). [SEC Rel 33-10786]

If a registrant wants to combine pre- and post-acquisition periods to satisfy the financial statement requirements, it must seek a waiver from the SEC staff.

Example 4.4.50

Registration statement effective date shortly after acquisition

Registrant acquires Company A, a nonpublic entity, on October 5, 20X2. Company A has a December 31 year-end and the acquisition is significant at 45%. Registrant files the following forms after the acquisition.

Form	Filing date
Initial Form 8-K reporting the acquisition	October 9, 20X2 (four business days after acquisition)
Registration statement (initial filing)	November 15, 20X2
Amended Form 8-K	December 1, 20X2 Contains Company A's audited annual financial statements as of and for the years ended December 31, 20X1 and 20X0 and unaudited interim financial statements as of June 30, 20X2 and for the six months ended June 30, 20X2 and 20X1

What Rule 3-05 financial statements are required in the registration statement?

Following staff review and comments of its registration statement, Registrant files an amended registration statement that it expects to be declared effective on December 22, 20X2. Because the expected effective date is more than 74 days after the October 5th acquisition, the S-X Rule 3-05(b)(4)(i) exception (which would permit Registrant to omit the Rule 3-05 financial statements, see Question 4.4.80) does not apply. Therefore, Registrant must include (or

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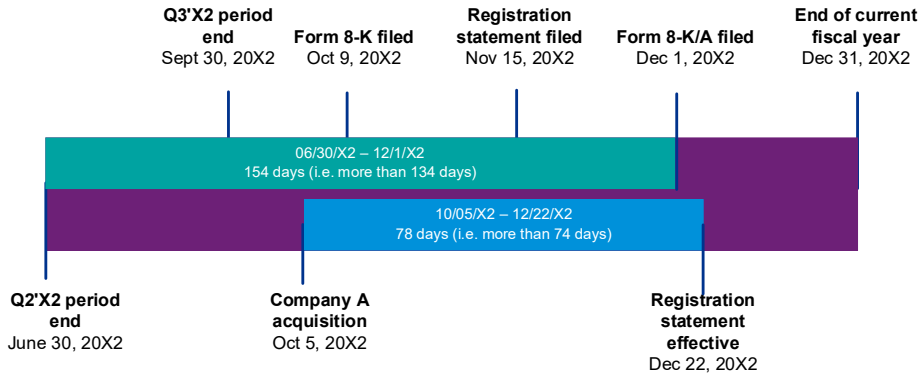
incorporate by reference) Company A's annual and nine months ended interim financial statements in the amended registration statement.

The interim period financial statements must include the nine months ended September 30, 20X2 and 20X1 because June 30, 20X2 is more than 134 days before the effective date (see Question 4.4.30 for a discussion of the requirements to update the financial statements).



What Rule 3-05 financial statements are required in the registration statement if it becomes effective automatically?

Had the registration statement filed on November 15, 20X2 become effective automatically (i.e. it was filed by a well-known seasoned issuer (WKSI), as discussed in Question 4.4.190), Registrant could have relied on S-X Rule 3-05(b)(4)(i) and would not have needed to amend the registration statement to provide Company A's financial statements (see Question 4.3.30). It could have filed the financial statements in a Form 8-K amendment within four business days plus 71 calendar days of consummation of the acquisition but the interim period financial statements would include the nine months ended September 30, 20X2 and 20X1. This is because the age must be determined based on the effective date of the registration statement, not the initial Form 8-K filing date (see Question 4.3.30).

Example 4.4.60

Acquisition significant at 30% and acquired business included in consolidated financial statements for more than nine months

Registrant acquires Company A, a nonpublic entity, on February 23, 20X2. Company A has a December 31 year-end and the acquisition is significant at 30%. See timeline below for forms filed after the acquisition.

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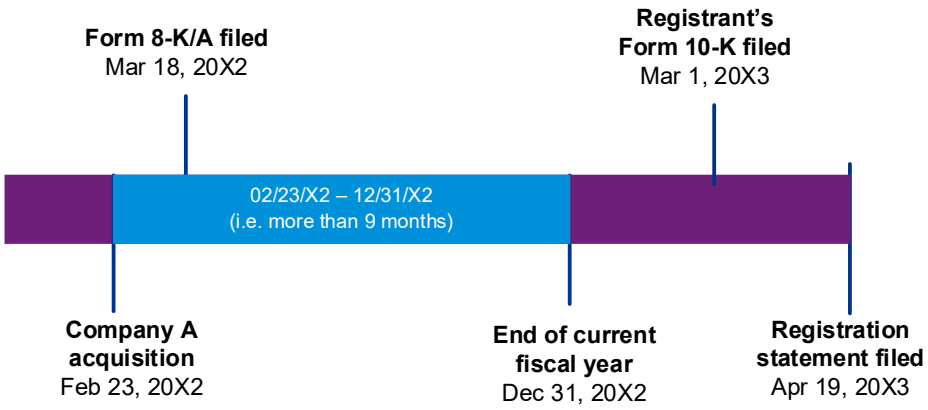

The Form 8-K/A filing includes the Rule 3-05 financial statements of Company A. However, because Company A's operations are included in Registrant's consolidated operations for more than nine months as of December 31, 20X2, Company A's separate financial statements are not required in filings following the 20X2 Form 10-K filing (e.g. the April 20X3 registration statement).

Example 4.4.70

Acquisition more than 40% significant and acquired business included in consolidated financial statements for less than one year

Registrant acquires Company A on October 1, 20X3. Both Registrant and Company A have a December 31 year-end. The acquisition is significant at 45%.

A Form 8-K with the required financial statements of Company A was filed including:

- audited financial statements of Company A as of and for the years ended December 31, 20X2 and 20X1; and
- unaudited interim financial statements as of June 30, 20X3 and for the six months ended June 30, 20X3 and 20X2.

In April 20X4, Registrant files a registration statement that includes its audited financial statements for the year ended December 31, 20X3.

Rule 3-05 financial statements for Company A must be included in the registration statement because a complete fiscal year of Company A's operating results have not been included in Registrant's audited financial statements for the year ended December 31, 20X3. Therefore, the following Company A financial statements are required for the registration statement.

Financial statements required	Periods required
Audited annual financial statements	As of and for the years ended December 31, 20X2 and 20X1
Unaudited interim financial statements	As of September 30, 20X3 and for the nine months ended September 30, 20X3 and 20X2

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The June 30 financial statements that were included in the Form 8-K must be updated to September 30 for inclusion in the registration statement.

Registrant will continue to include Company A's financial statements in any registration statements filed until early 20X5 when the 20X4 Form 10-K is filed, at which point Registrant's audited financial statements will include at least 12 months of operating results of Company A.

4.4.20 Considerations shortly after fiscal year-end

The required age of Rule 3-05 financial statements is affected when the effective date of a registration statement or mailing of proxy material falls shortly after the acquired business's fiscal year-end.

Question 4.4.100

How are Rule 3-05 financial statements affected when the effective date of a registration statement or mailing date of proxy material occurs shortly after the fiscal year-end of the acquired business?

Interpretive response: If the anticipated effective date of a registration statement or the proposed mailing date of proxy material falls within 45 days after the end of the acquired business's fiscal year-end, the following Rule 3-05 financial statements can be provided with the registration statement.

Financial statements required	Latest period required
Audited annual financial statements	For the preceding fiscal year (not the most recently completed fiscal year)
Unaudited interim financial statements	For the third quarter of the most recently completed fiscal year

However, if audited financial statements for the most recently completed fiscal year are available, those statements must be included. [S-X Rule 3-12(b), S-X Rule 8-08]

If audited financial statements for the most recently completed fiscal year are not included in the filing because they are not available, the registrant must update the filing with the audited financial statements if they become available before the effective date of the registration statement or the mailing date for proxy material. [FRM 1220.3]

Question 4.4.120 discusses additional relief beyond 45 days that may be available for certain entities.

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Question 4.4.110

When are the financial statements of an acquired business considered to be available?

Interpretive response: Determining what constitutes 'available' financial statements depends on the particular facts and circumstances of a registrant or an acquired business. As outlined in Topic 855 (subsequent events), financial statements are considered available no later than when they are issued.

The SEC staff considers a registrant's financial statements issued as of the earlier of the date the annual or quarterly financial statements are: [855-10-S99-2]

- widely distributed to all shareholders and other financial statement users for general use and reliance in a format that complies with GAAP and, in the case of annual financial statements, that contain an audit report indicating that the auditors have complied with generally accepted auditing standards (GAAS) (i.e. auditing standards of the PCAOB (US)); or
- filed with the SEC.

Posting of financial statements to a registrant's website is considered to be wide distribution to all shareholders and other financial statement users if the registrant uses its website to disclose information to the public.

For nonpublic entities financial statements are considered available if they are available to be issued, as outlined in Topic 855. This also applies to Rule 3-05 financial statements of nonpublic entities.

In addition to the completion of the audit, financial statements are considered available to be issued when they are complete in a form and format that complies with GAAP and all approvals necessary for issuance have been obtained, e.g. from management, the board of directors or audit committee, and/or significant shareholders. [855-10, FRM 1220.3]

Question 4.4.120

Is relief available if the effective date of a registration statement or mailing date of proxy material falls more than 45 days after the fiscal year-end of the acquired business?

Interpretive response: It depends.

S-X Rule 3-01(c) provides relief to certain registrants from the requirement for the age of financial statements when the effective date of the registration statement (or the date the proxy material is mailed) is later than 45 days after but still in close proximity to the acquired business's fiscal year-end.

This relief is available when the *registrant's* financial statements meet certain eligibility conditions (see Question 4.4.130). The characteristics of the Rule 3-05 financial statements for the acquired business are not relevant for determining eligibility for the relief.

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When the relief applies, the third-quarter interim financial statements of the acquired business's previous year are the most recent financial statements required to be included in a registration statement if the effective date of the registration statement (or the date the proxy material is mailed) is before a certain date as indicated in the following table. [S-X Rule 3-12(b), 3-12(g)(2)]

Acquired business filing status	Registration statement effective date or proxy material mailing date
Large accelerated filer	60th day after the acquired business's fiscal year-end
Accelerated filer	75th day after the acquired business's fiscal year-end
Non-accelerated filer (including nonpublic entity)	90th day after the acquired business's fiscal year-end

Similarly, if the *registrant* (not the acquired business) is an SRC that meets the conditions in S-X Rule 8-08(b), third-quarter interim financial statements of the acquired business are considered timely if the effective date of the registration statement (or the date the proxy material is mailed) is before the 90th day after the acquired business's fiscal year-end.

Audited financial statements of the acquired business for the most recent fiscal year required by Rule 3-01 must be included in the registration statement or proxy material if: [S-X Rule 3-01(d), FRM 2045.5]

- the effective/mailing date is after the days indicated above; or
- the *registrant* does not satisfy the conditions of S-X Rule 3-01(c) (see Question 4.4.130) or S-X Rule 8-08(b), as applicable, after the 45th day after the acquired business's most recently completed fiscal year-end.

Question 4.4.130

What are the conditions in S-X Rule 3-01(c) that impact the required period(s) of acquired business financial statements?

Interpretive response: S-X Rule 3-01(c) provides relief from including the most recently completed fiscal year financial statements for the acquired business in certain filings for acquisitions occurring shortly after the fiscal year-end (as explained in Question 4.4.120).

The following conditions must be met *by the registrant* (not the acquired business) to qualify for this accommodation under Rule 3-01(c). [S-X Rule 3-01(c), Rule 8-08(b)]

Condition 1	The registrant files annual, quarterly and other reports pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 and all reports due have been filed.
Condition 2	The registrant reasonably and in good faith expects to report income attributable to the registrant, after taxes, for the most recently

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	completed fiscal year prior to the acquisition date, regardless of whether the financial statements for that year are available.*
Condition 3	The registrant reported income attributable to the registrant for at least one of the two fiscal years immediately preceding the most recent fiscal year.

*S-X Rule 3-01(c)(2) states that Condition 2 is based on the most recent fiscal year for which financial statements are not yet available. However, the SEC staff has indicated that when determining the required age of Rule 3-05 financial statements, a registrant applies the condition based on its most recently completed fiscal year prior to the acquisition date even if financial statements are available. See Example 4.4.100. [FRM 2045.5 (note)]

The conditions above are consistent with the requirements of S-X Rule 8-08(b), which provides similar relief to SRCs.

Example 4.4.80

Registrant expects to report income; acquired business expects to report loss

On October 16, 20X2, Registrant, with a calendar year-end, acquires Company A, a nonpublic entity with a September 30 year-end. The acquisition is significant at 42%. Registrant meets all the requirements of S-X Rule 3-01(c); however, Company A expects to report a loss for fiscal 20X2. Registrant files a registration statement to issue shares and expects the registration statement to be declared effective on November 17, 20X2.

Registrant is not required to include Company A's audited financial statements as of and for the year ended September 30, 20X2 in the registration statement. While Company A is expected to report a loss, the Rule 3-01(c) conditions are required to be met only by the registrant. Registrant provides the following Company A financial statements.

Financial statements required	Periods required
Audited annual financial statements	As of and for the years ended September 30, 20X1 (the preceding fiscal year) and 20X0
Unaudited interim financial statements	As of June 30, 20X2 and for the nine months ended June 30, 20X2 and 20X1

Example 4.4.90

Registrant expects to report loss; acquired business expects to report income

Registrant acquires Company A, a nonpublic entity, on July 9, 20X2. The acquisition is significant in excess of 40%. Company A has a June 30 fiscal

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year-end and expects to report net income for fiscal 20X2. Registrant also has a June 30 fiscal year-end but expects to report a loss for fiscal 20X2.

On August 10, 20X2 (less than 45 days after Company A's year-end), Registrant files a registration statement that is expected to be declared effective on or after August 17, 20X2 (more than 45 days after Company A's year-end). The initial and subsequent registration statements include the following Company A financial statements.

Financial statements required	Periods required in initial filing of registration statement	Periods required in amended filing of registration statement prior to effective date
Audited annual financial statements	As of and for the years ended June 30, 20X1 and 20X0[1]	As of and for the years ended June 30, 20X2 and 20X1
Unaudited interim financial statements	As of March 31, 20X2 and for the nine months ended March 31, 20X2 and 20X1	None (because the filing is fewer than 135 days after year-end)

Note:

1. Registrant may include audited financial statements of Company A as of for the years ended June 30, 20X2 and 20X1, if available. No amended filing would be necessary for the purposes of updating financial statements of Company A.

Registrant does not meet Condition 2 in S-X Rule 3-01(c) due to its expected loss in the current year. Therefore, the audited 20X2 fiscal year financial statements of both the Registrant and Company A must be included in the registration statement before effectiveness.

Question 4.4.140

Which entity's reporting history is used to evaluate the S-X Rules 3-01(c) conditions in a reverse acquisition?

Interpretive response: For a reverse acquisition, because the accounting acquirer is considered the 'registrant' (see Question 4.4.130), the historical financial statements and reporting history of the accounting acquirer are used to assess the registrant's ability to meet the requirements of S-X Rule 3-01(c) (or Rule 8-08(b)) in determining whether financial statements of the accounting acquirer must be updated. [FRM 12220.2]

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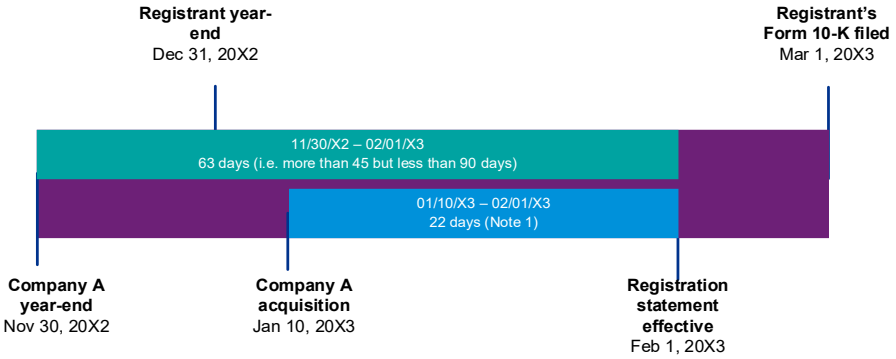
Example 4.4.100
Registrant's and acquired business's fiscal year-ends differ – Rule 3-01(c) considerations

Registrant has a calendar year-end and is current on all required filings.

Registrant acquires Company A, a nonpublic entity with a November 30 year-end, on January 10, 20X3. Registrant determines that the acquisition is significant at 60%.

Registrant intends to file a new registration statement on Form S-3 and anticipates it will become effective on February 1, 20X3, prior to the planned filing of its Form 10-K on March 1, 20X3.



S-X Rule 3-01(c) potentially impacts the required age of the Rule 3-05 financial statements in this scenario, because the registration statement becomes effective more than 45 days but fewer than 90 days after Company A's most recently completed fiscal year-end.

The exception that would permit Registrant to omit Company A's Rule 3-05 financial statements does not apply in this scenario (even though Company A was acquired within 74 days of the registration statement effective date), because the significance of Company A's acquisition exceeds 50% (see Question 4.4.80).

Step 1: Determine information used to evaluate conditions under 3-01(c)

Registrant measures its eligibility under S-X Rule 3-01(c) by reference to its own most recently completed fiscal year (without regard to whether the audited financial statements for that year have been issued) and the two preceding years. The financial statements of the acquired business are not relevant to the evaluation of the Rule 3-01(c) conditions. Condition #1 is met because Registrant is current on all required filings. The following table illustrates the information required to be used to evaluate Conditions #2 and #3 (see Question 4.4.130).

Condition	Information required to be used
#2: Determined based on registrant's most recently completed fiscal year	Registrant's net income or loss for the year ended December 31, 20X2.[1]

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Condition	Information required to be used
#3: Determined based on registrant's two preceding fiscal years	Registrant's net income or loss for the years ended December 31, 20X1 and 20X0.

Note:

1. S-X Rule 3-01(c)(2) states that Condition 2 is based on the most recent fiscal year for which financial statements are not yet available. However, the SEC staff has indicated that when determining the required age of Rule 3-05 financial statements, a registrant applies the condition based on the registrant's most recently completed fiscal year prior to the acquisition date even if financial statements are available for that year (see Question 4.4.130).

Step 2: Determine required age of Rule 3-05 financial statements based on whether the conditions are met

Scenario 1: Conditions #2 and #3 are met

Registrant has reported (and expects to report) *income* in the relevant periods to be evaluated in the table above.

As a result, the following financial statements for Company A and Registrant are required to be included (or incorporated by reference) in the registration statement.

Financial statements required	Company A – Rule 3-05 financial statements	Registrant
Audited annual financial statements	As of and for the years ended November 30, 20X1 and 20X0	As of December 31, 20X1 and 20X0 and for the years ended December 31, 20X1, 20X0 and 20Y9
Unaudited interim financial statements	As of August 31, 20X2 and for the nine months ended August 31, 20X2 and 20X1	As of September 30, 20X2 and for the three- and nine-months ended September 30, 20X2 and 20X1

Company A's unaudited interim financials as of and for the nine months ended August 31, 20X2 are considered the most recent financial statements required to be included in the registration statement because the effective date is not more than 90 days after Company A's fiscal year-end.

Scenario 2: Conditions #2 or #3 are not met

Registrant has reported (and expects to report) *losses* in each the relevant periods to be evaluated in the table above (i.e. as a loss corporation).

As a result, the following financial statements for Company A and Registrant are required to be included (or incorporated by reference) in the registration statement.

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Financial statements required	Company A – Rule 3-05 financial statements	Registrant
Audited annual financial statements	As of and for the years ended November 30, 20X2 and 20X1	As of December 31, 20X1 and 20X0 and for the years ended December 31, 20X1, 20X0 and 20Y9
Unaudited interim financial statements	None (because the filing is fewer than 135 days after year-end)	As of September 30, 20X2 and for the three- and nine-months ended September 30, 20X2 and 20X1

The Rule 3-05 financial statements as of and for the most recently completed fiscal year end of Company A are required to be included (or incorporated) in the registration statement because the effective date is more than 45 days after Company A's fiscal year-end and Registrant does not meet the conditions of Rule 3-01(c). This is the case even though it results in Rule 3-05 financial statements that are for a more recent period compared to those required for Registrant.

In this scenario, as a loss corporation, Registrant must update its audited financial statements if the registration statement becomes effective after February 14, 20X3 (i.e. 45 days after fiscal year-end), even though the Form 10-K is not yet required.

Question 4.4.150

Is relief available if S-X Rule 3-05 requires more recent financial statements than those required for the registrant?

Interpretive response: Yes.

In limited circumstances, applying S-X Rule 3-12 or Rule 8-08 may result in a requirement to file audited financial statements of the acquiree as of a date more recent than is required for the registrant. If the registrant believes that providing more recent audited financial statements of the acquiree imposes an unreasonable burden under the circumstances, it may request relief from the Office of the Chief Accountant of the Division of Corporation Finance before filing. In requesting relief, the registrant should be prepared to provide the acquiree's financial statements updated on an unaudited basis through either the registrant's latest balance sheet date or the acquiree's year-end. See chapter 10 for requesting relief. [FRM 2045.6]

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Question 4.4.160

How are the Rule 3-05 financial statements affected if the effective date or proposed mailing date falls beyond the S-X Rule 3-01(c) relief dates?

Interpretive response: Rule 3-01(c) relief is not available if a registration statement becomes effective or proxy material containing financial statements of an acquired business are mailed more than 89 days (74 days and 59 days if the acquired business is an accelerated filer or a large accelerated filer, respectively) following the fiscal year-end of the acquired business. In this instance, audited financial statements for the most recently completed fiscal year of the acquired business must be included in the filing. [S-X Rule 3-01(d)]

Example 4.4.110

Age of financial statements based on effective date of registration statement

Registrant acquires Company A, a nonpublic entity, on October 5, 20X2. Company A has a September 30 year-end. The acquisition is significant at 45%.

Form	Filing date
Initial Form 8-K reporting the acquisition	October 9, 20X2 (four business days after the acquisition)
Amended Form 8-K	November 1, 20X2 (contains audited annual financial statements for September 30, 20X1 and 20X0 and unaudited interim financial statements for the nine months ended June 30, 20X2)

On November 20, 20X2 (more than 45 days after the end of Company A's most recent fiscal year-end), Registrant files a registration statement. Registrant includes Company A's financial statements as of and for the same periods as were included in the Form 8-K because it satisfies the conditions in S-X Rule 3-01(c).

After SEC staff review, the registration statement is expected to be declared effective on January 7, 20X3.

Relief under Rule 3-01(c) is not available (see Question 4.4.120) because the effective date is expected to be more than 89 days after Company A's most recent fiscal year-end. The registration statement will require an additional amendment to update Company A's financial statements to include the audited financial statements for the September 30, 20X2 fiscal year.

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Question 4.4.170

How are Rule 3-05 financial statements affected if the effective date or mailing date falls later than 134 days after the fiscal year-end of the acquired business?

Interpretive response: If the registration statement's effective date is 135 or more days (or 130 days if the acquired business is an accelerated filer or a large accelerated filer) after the acquired business's year-end, it must also include unaudited interim financial statements. These unaudited interim financial statements must be as of a date and for a period ending fewer than 135 days (or 130 days if the acquired business is an accelerated filer or a large accelerated filer) before the expected effective date. [S-X Rule 3-12(a), Rule 8-08]

Similarly, if the proxy statement mailing date is more than 134 days (or 129 days if the acquired business is an accelerated filer or a large accelerated filer) after the acquired business's year-end, it must also include unaudited interim financial statements.

4.4.30 Other scenarios and considerations

Question 4.4.180

Can an acquiring registrant obtain an accelerated effective date for its registration statement?

Background: In certain circumstances, the time between the initial filing and effectiveness of a registration statement may result in significant effort for an acquiring registrant. For example, if the effective date of the registration extends beyond a given date, a registrant may be required to file audited financial statements of an acquired business for a period that would otherwise not be required. In these cases, registrants may seek to accelerate the timing of the review and effectiveness of the registration statement.

Interpretive response: Yes. The SEC staff may accelerate the effective date of the registrant's registration statement if:

— an acquiring registrant has timely filed all of its Exchange Act reports in the last 12 months; and

— interim financial statements in the filing are at least as recent as the quarterly information that has been filed as required by the Exchange Act at the time of effectiveness.

However, the SEC staff may ask the registrant to confirm that:

— the next quarterly report will be timely filed after effectiveness; and

— there have been no material trends, events or transactions that arose after the date of the latest balance sheet included in the filing that would

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materially affect an investor's understanding of the registrant's financial condition and results of operations.

A description of these items in the next quarter ordinarily will not suffice. [FRM 1220.5]

Question 4.4.190

Are well-known seasoned issuers exempt from the age requirements for Rule 3-05 financial statements?

Interpretive response: No.

While a shelf registration statement filed by a well-known seasoned issuer (WKSI) becomes effective when filed (without any review by the SEC staff), the immediate effectiveness does not exempt the WKSI from complying with the age of financial statement requirements with respect to itself and all completed and probable acquirees at the time of effectiveness. [FRM 2045.4]

A WKSI is defined as an entity that, within 60 days of the determination date: [Reg C Rule 405]

- meets the registrant requirements of Form S-3 or F-3, including having been current and timely in filing its Exchange Act reports for the preceding 12 calendar months; and
- either
  - has a worldwide market value* of its voting and nonvoting common equity held by nonaffiliates (public float) of at least $700 million; or
  - meets both of the following conditions:
    - has issued, in the preceding three years, at least $1 billion aggregate principal amount of registered nonconvertible securities, other than common equity, in primary offerings for cash; and
    - will register only nonconvertible securities, other than common equity (unless the issuer also meets the $75 million public float requirement of Form S-3 and F-3).

*The worldwide market value used for WKSI and filer status is different than the definition of aggregate worldwide market value used in the investment significance test, which is discussed in section 3.4.30.

To qualify as a WKSI, the issuer may not fall into the category *of ineligible issuers* as defined in Regulation C, Rule 405.

A WKSI may register an unspecified amount of securities on its automatically effective Form S-3 or F-3 registration statement. [Reg C Rule 405]

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Question 4.4.200

Do Rule 3-05 financial statements need to be updated beyond the most recently completed quarter before the acquisition?

Interpretive response: No.

While S-X Rule 3-12 and Rule 8-08 may require a registrant to present unaudited interim financial statements for both itself and its acquired business in a registration statement, the SEC staff has stated that pre-acquisition interim period financial statements of the acquired business are not required beyond the most recently *completed* quarter before the acquisition if the omitted period is less than a complete quarter. However, disclosure of significant events occurring during the omitted interim period may be necessary.

A registrant must file financial statements audited through the date of acquisition for any business deemed a predecessor. [FRM 2045.9]

Example 4.4.120

Latest pre-acquisition interim period financial statements required

On October 1, 20X1, Registrant, with a December 31 year-end, acquired Company A, a nonpublic entity with a September 30 year-end. The acquisition was significant at 25%.

Registrant files a registration statement that becomes effective on January 2, 20X2. It must include Company A's audited financial statements as of and for the year ended September 30, 20X1. No interim financial statements are required in this filing because the balance sheet date of the annual financial statements provided is fewer than 135 days from the effective date of the registration statement.

If Registrant had acquired Company A on September 29, 20X1, it would not have had to include financial statements for the period ended September 30, 20X1, because that period would not have ended before the acquisition. In this instance, Registrant would have included Company A's audited annual financial statements for the fiscal year ended September 30, 20X0 and unaudited interim financial statements for the nine months ended June 30, 20X1.

Question 4.4.210

If the last day of the period after which Rule 3-05 financial statements must be updated is a non-working day, do they have to be updated on the next working day?

Interpretive response: No. If the last day of the period after which financial statements go stale (e.g. the 134th day after a quarter-end) falls on a Saturday,

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Sunday or holiday, the filing may be made on the next business day without updating the financial statements. [FRM 1220.12, Reg C Rule 417]

See discussion of updating requirements at Question 4.4.40.

Question 4.4.220

What is the maximum age of Rule 3-05 financial statements to be included in an IPO registration statement?

Interpretive response: If the registration statement relates to an IPO, the most recent audited financial statements required by Rule 3-05 must not be more than one year and 45 days old at the date the registration statement becomes effective. See chapter 7 for additional information about acquired business financial statements in initial registration statements. [S-X Rule 3-12(d)]

S-X Rule 8-08 has no similar requirement. The financial statements for a business acquired by an SRC may be filed up to 90 days after year-end if the SRC expects to report income in the current year and has reported income in at least one of the two previous years. See Question 4.4.120.

Question 4.4.230

Are there additional disclosure requirements for multiple acquisitions that otherwise do not require audited financial statements?

Interpretive response: Yes.

A registrant may make multiple acquisitions for which audited financial statements are:

- not required based on the significance of each individual acquisition of unrelated businesses; or
- not *yet* required based on the 75-day grace period (i.e. criteria in S-X Rule 3-05(b)(4)(i)) (see Question 4.4.80).

However, if the aggregate impact of such acquired or to be acquired businesses exceeds 50% under any of the significance tests (see section 3.2.40), the registrant must provide the following: [S-X Rule 3-05(b)(2)(iv)]

- pro forma financial information under S-X Rules 11-01 and 11-02 that depicts the aggregate impact of the acquired or to be acquired businesses, in all material respects; and
- financial statements covering at least the most recent fiscal year and the most recent interim period for any acquired or to be acquired business for which financial statements are not *yet* required solely based on the 75-day grace period (i.e. exception provided in S-X Rule 3-05(b)(4)(i)).

The requirement to provide these disclosures is based on the aggregate significance of acquisitions and probable acquisitions since the date of the

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registrant's latest audited fiscal year-end balance sheet. *Therefore, filing the Form 10-K for a fiscal year results in a fresh start on aggregate measurement.* However, in the early months of each fiscal year before the time the Form 10-K is filed, the period to which the aggregate significance tests apply may be up to 15 months, depending on filer status. See Question 3.2.40.

Example 4.4.130
Acquisitions significant in the aggregate

Scenario 1: Individual acquisitions less than 20% significant

Registrant's year-end is December 31. During the period from April 15 to December 31, 20X1, Registrant acquires several unrelated businesses that have a December 31 year-end. Each acquisition is under the 20% significance threshold individually but the aggregate significance of the 20X1 acquisitions exceeds the 50% significance threshold.

In the first quarter of 20X2 (before the 20X1 Form 10-K is filed), Registrant expects to offer securities through a registration statement. Registrant's most recent audited financial statements included in the registration statement will be for the year ended December 31, 20X0.

Registrant includes in its registration statement pro forma information that depicts the aggregate impact of the acquired businesses, in all material respects.

Because each of the acquired businesses are below the 20% significance threshold, separate audited Rule 3-05 financial statements are not required for any of the acquired businesses.

Scenario 2: Acquisition greater than 20% significant

Registrant, a non-accelerated filer, files a registration statement in August 20X2. Registrant (who's last filed audited annual financial statements were as of December 31, 20X1) made the following acquisitions during 20X2.

Acquired business	Date acquired	Fiscal year-end	% significance
Company A	1/18/X2	12/31/X1	19%
Company B	3/28/X2	9/30/X1	18%
Company C	7/21/X2	11/30/X1	22%

Acquiring Company C resulted in the aggregate significance of the acquisitions exceeding 50%. Therefore, Registrant includes in its registration statement pro forma financial statements depicting the aggregate impact of all three acquisitions.

In addition, because the aggregate significance of the acquisitions exceeds 50%, the 75-day grace period does not apply (see Question 4.4.80) and Registrant must include financial statements covering the most recently completed fiscal year-end and the subsequent interim period for Company C. This is required even if the effective date of the registration statement is not more than 74 days after consummation of the acquisition of Company C.

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The registration statement must include the following Company C financial statements.

Financial statements required	Periods required
Audited annual financial statements	As of and for the year ended November 30, 20X1
Unaudited interim financial statements	As of for the six months ended May 31, 20X2

4.4.40 Shelf registration statements

This section covers issues related to how shelf registration statements are affected by business acquisitions.

Shelf registration statements may be filed by eligible public companies to register securities that will be offered from time to time as needed. Offerings made using a shelf registration statement are termed *delayed* or *continuous* offerings because they may occur weeks or months after the effectiveness of the registration statement. These are sometimes referred to as a takedown offering or as taking securities 'off the shelf'.

Most shelf registration statements are filed on Form S-3, which permits updating information to be filed on a Form 8-K that can be incorporated by reference into the Form S-3.

Question 4.4.240

How do the age requirements of financial statements apply to shelf registration statements?

Interpretive response: The instructions for determining the age of financial statements are described in S-X Rules 3-01, 3-02, and 3-12. These requirements are discussed in Question 4.2.40. Those rules dictate the specific annual and interim periods for which financial statements must be included in an effective shelf registration statement.

Because the offering will be delayed or continuous, financial statements that meet the age of financial statement requirements at the time of effectiveness may not meet those requirements when securities are sold off the shelf. After nine months have passed from the date of effectiveness, the audited balance sheet can be no more than 16 months old. [Securities Act §10(a)(3)]

Significant business acquisitions may occur or become probable prior to a takedown offering, but subsequent to the date that would have required the Rule 3-05 financial statements of the acquired (or to be acquired) business to be included or incorporated by reference in the original shelf registration statement.

Most shelf registration statements are filed on Form S-3. Registrants are permitted to automatically incorporate by reference financial information that is

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subsequently filed on periodic reports (e.g. Form 8-K and Forms 10-K and 10-Q) into an existing, effective Form S-3. As a result, registration statements for delayed and continuous offerings usually are updated automatically as periodic reports are filed.

Question 4.4.250

When is a registrant required to amend a shelf registration statement?

Interpretive response: After effectiveness, a domestic registrant has no specific obligation to update the prospectus in the registration statement except for certain 'undertakings'. [S-K Item 512]

One such undertaking states that the registrant must amend the registration statement if there is a *fundamental change* in its business. When preparing to take securities 'off the shelf', a registrant must consider whether any facts or events arising after the effective date of the registration statement (or most recent post-effective amendment), individually or in the aggregate, represent a fundamental change in the information included in the effective registration statement. When a fundamental change has occurred, the registrant updates the shelf registration statement by filing a post-effective amendment. [FRM 2045.3]

If a fundamental change has occurred as a result of a business acquisition, the requirements for filing and/or updating financial statements may be met, in most situations, by filing financial statements of the acquired or to be acquired businesses on a Form 8-K, instead of by filing an amended registration statement (see Question 4.4.270).

Question 4.4.260

Is a significant business acquisition a fundamental change?

Interpretive response: The SEC has not defined the term fundamental change. Whether facts or events, individually or in the aggregate, constitute a fundamental change is a legal determination, and registrants should consult with their legal counsel in making that determination.

Registrants often question whether a business acquisition (or probable acquisition) is a fundamental change. If it is, the registrant is required to update a shelf registration statement to provide financial statements for the probable or consummated significant business acquisition(s) that results in the fundamental change.

This may occur even when a Form 8-K that includes the Rule 3-05 financial statements is not yet required (within the 71-day extension period), but those financial statements would be required if the takedown offering were a new registration statement that had not yet become effective (e.g. acquisition is greater than 50% significant).

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A registrant should also consider whether individually insignificant acquisitions occurring after effectiveness, when combined with individually insignificant acquisitions that occurred after the most recent audited balance sheet in the registration statement but before effectiveness, may be of such significance in the aggregate that an amendment is necessary. [FRM 2045.3]

Although there is no specific guidance in the rules on evaluating whether a business acquisition is a fundamental change, the SEC staff recommends that management consider its significance (and probability of consummation, if applicable) when making the determination. A business acquisition may be a fundamental change as a result of its quantitative or qualitative significance. It is management's responsibility to determine what constitutes a fundamental change in the information included in the registration statement (i.e. whether additional information is necessary for an investor to make an informed investment decision. [Reg S-K Item 512(a)]

Typically, an acquisition, or group of acquisitions, that is less than 50% significant does not represent a fundamental change. The SEC staff has not indicated that an acquisition that exceeds that threshold is, itself, a fundamental change – that determination is based on all facts and circumstances. However, the SEC staff expects shelf registration statements to be updated for completed acquisitions that are individually at or above 50% significant, regardless of whether they represent a fundamental change (see Question 4.4.280). [FRM 2045.3]

Question 4.4.270

What are the updating requirements for an offering under a shelf registration statement due to a fundamental change?

Background: Generally, a shelf registration statement is automatically updated by Forms 10-K, 10-Q, and 8-K. When updated in this manner, there is no need to directly amend the shelf registration statement itself.

Interpretive response: If a registrant concludes that a significant business acquisition is a fundamental change, it must update the shelf registration statement before a takedown can occur. A registrant can satisfy the requirements for filing and/or updating the financial statements of an acquired (or to be acquired) business by filing them on a Form 8-K (instead of filing an amended registration statement).

If a business acquisition does not represent a fundamental change to the registrant's business (and is less than 50% significant – see Question 4.4.280), no updating is needed even if a takedown from a shelf registration statement subsequently occurs.

As a reminder, Form 8-K does not require filing financial statements for probable acquisitions or individually insignificant acquisitions. However, if these types of transactions represent a fundamental change, the registrant can effectively update a shelf registration statement by filing a Form 8-K with the target's historical financial statements.

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Question 4.4.280

Must a shelf registration statement be updated for a business acquisition that exceeds 50% significance if the acquisition does not represent a fundamental change?

Interpretive response: Yes, prior to any takedown offerings from the shelf registration statement.

If the significance of a completed acquisition exceeds 50%, offerings under an effective registration statement cannot proceed until the registration statement has been updated for the Rule 3-05 financial statements, even if the acquisition does not represent a fundamental change. There is an exception for offerings and sales that are not for the purpose of capital raising; such offerings and sales may proceed without providing the Rule 3-05 financial statements when the acquisition does not represent a fundamental change. [FRM 2045.3, FRM 2050.3]

If a greater than 50% significant acquisition is probable but not yet completed at the time of a takedown from a shelf registration statement, the takedown may proceed without providing Rule 3-05 financial statements unless management determines that the probable business acquisition constitutes a fundamental change. [Regs Comm 10/2015]

See Question 2.3.140 for additional information about offerings and sales that may proceed in this situation and section 2.2.30 for additional information about the assessment of probability.

Example 4.4.140

Shelf takedowns and greater than 50% completed and probable business acquisitions

Registrant has an effective shelf registration statement and expects to conduct a primary offering of securities under that registration statement (i.e. a shelf takedown) on May 20, 20X1.

Registrant enters into a letter of intent on May 1, 20X1 to acquire Company A and expects to close the acquisition on July 1, 20X1. It considers the acquisition probable and its significance exceeds 50%. Under Form 8-K requirements, Registrant is required to file Company A's financial statements within 75 days of consummation of the transaction.

Registrant may proceed with its shelf takedown without filing the financial statements of Company A before May 20, 20X1 as long as it concludes that the probable acquisition does not constitute a fundamental change as discussed in S-K Item 512(a).

However, if Registrant's acquisition of Company A is completed before May 20, 20X1, Registrant must file Company A's financial statements before the shelf takedown even if Registrant does not believe the acquisition constitutes a fundamental change.

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Example 4.4.150

Financial statement updating before a shelf takedown

Registrant acquires Company A on January 2, 20X5. Company A is a nonpublic entity and its acquisition is over 50% significant. Registrant filed the following Company A financial statements on a Form 8-K to be incorporated by reference into a new shelf registration statement that is effective on January 15, 20X5.

Financial statements required	Periods required
Audited annual financial statements	As of and for the years ended December 31, 20X3 and 20X2
Unaudited interim financial statements	As of September 30, 20X4 and for the nine months ended September 30, 20X4 and 20X3

Registrant will take down from the shelf in April 20X5. In connection with the takedown from the shelf registration statement, Registrant is not required to update Company A's audited financial statements for the year ended December 31, 20X4, unless it is determined that there was a fundamental change in the information associated with the acquisition that was previously included in the registration statement.

However, if Registrant files a *new* registration statement after March 30, 20X5, Company A's audited annual financial statements for December 31, 20X4 are required to be filed before the new registration statement is declared effective because the new registration statement will be effective more than 89 days after Company A's year-end.

Question 4.4.290

When is a prospectus supplement required to be filed?

Interpretive response: A prospectus supplement may be required when a registrant uses a shelf registration statement to offer securities on a delayed or continuous basis. A prospectus supplement filed under Rule 424(c), sometimes called a post-effective amendment or sticker supplement, is provided when there have been no substantive changes to the prospectus previously filed in the effective registration statement. A registrant must update a prospectus by post-effective amendment or, if eligible, incorporation by reference if: [FRM 1220.6]

- it is in use beyond nine months after its effective date (i.e. the registration statement's effective date filed with the prospectus supplement); and
- the audited balance sheet is more than 16 months old.

Post-effective amendments to continuous or delayed offering registration statements are generally considered new filings and, as a result, require compliance with S-X Rule 3-12 or 8-08 on the effective date. Amendment of a

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registration statement to provide an exhibit does not amend the prospectus. [FRM 1220.10]

Question 4.4.300

Is an amendment to the prospectus supplement considered to be a new filing?

Interpretive response: An amendment to a prospectus supplement that consolidates supplements is not considered a new filing for purposes of updating the financial statements if the amendment is filed by an entity under Item 20.D of Industry Guide 5 solely to provide the financial statements of acquired businesses. See Question 8.5.110. [FRM 1220.11]

4.5 Specific application matters

4.5.10 Acquisition of related businesses

Question 4.5.10

What are the financial statement requirements for an acquisition of related businesses?

Interpretive response: As discussed in Question 3.3.200, the significance of acquisitions of related businesses is determined based on their combined financial information. See Question 2.2.210 for the definition of related businesses.

If the cumulative significance of the acquisition of a group of related businesses requires that a Form 8-K be filed, the required Rule 3-05 financial statements are those of the individual (or combined) businesses included in the tested group, but only to the extent those financial statements have not been filed previously.

The group of related businesses tested for significance includes both probable and consummated acquisitions that are determined to be related. When the results of the aggregate test are significant, a registrant must include in the relevant filing the financial statements of the following individual (or combined) businesses included in the tested group of related businesses (even if they are individually insignificant).

- Form 8-K: each related business for which the acquisition has been consummated (if those financial statements have not been previously filed).
- Registration statement: each related business for which the acquisition has been consummated or is probable.

The financial statements must be provided for all members of the related group for the periods indicated by the cumulative significance tests.

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Individual vs. combined financial statements

Even though the significance tests are performed based on the combined financial statements of the related businesses, it is not appropriate to present combined financial statements of the acquired businesses in any filing unless some (or all) of the entities are under common control or common management.

Combined financial statements for the related businesses that are under common control or management may be provided for any annual or interim period for which the businesses are under common control or management for the entire period. However, combined financial statements are not required. See section 9.3 of KPMG Handbook, Business combinations, regarding combined financial statements. [810-10-55-1B, FRM 2020.8 - .9]

If a registrant decides not to file combined financial statements or combined financial statements are not appropriate, then separate financial statements must be provided for each related business for the periods required based on the combined significance of the group. [FRM 2020.9]

Example 4.5.10
Combined financial statements not permitted

Registrant will acquire Companies A, B and C with the proceeds from its offering of securities. Companies A, B and C have no previous relationship or business dealings with one another. However, because the acquisition of these companies is contingent on the occurrence of a single event (i.e. the offering of securities), Companies A, B and C are considered related businesses under Reg S-X (see Question 2.2.210).

Registrant determines the acquisitions' significance using the as-if combined financial information of Companies A, B and C. However, combined financial statements cannot be presented to satisfy the Rule 3-05 financial statement requirement because US GAAP does not permit presenting combined financial statements unless the entities are under common control or common management.

If the facts were changed so that each of the companies is acquired after the offering but not contingent on the success of the offering, then the acquisitions would not be considered related businesses. For example, other sources of funds such as borrowings under an existing bank facility could be used to finance the acquisitions.

Example 4.5.20
Individually insignificant related businesses

Registrant acquires four related businesses during 20X2. Information related to the acquisitions is as follows.

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Acquired entity	Date of acquisition	Significance of individual acquisition	Cumulative significance of acquisitions	Form 8-K required	Audited financial statement period required
AAA	2/28/X2	11%	11%	No	None
BBB	4/30/X2	11%	22%	Yes	Individual AAA and BBB audited financial statements for one year
CCC	6/30/X2	11%	33%	Yes	CCC audited financial statements for one year
DDD	8/31/X2	11%	44%	Yes	DDD audited financial statements for two years, plus one **additiona**l year of individual audited financial statements for AAA, BBB, and CCC

In addition to requirements for audited financial statements, unaudited interim period financial statements must be provided that comply with S-X Rule 3-12. If the cumulative significance tests for the entire group are ultimately met at a higher level than the significance levels computed as the individual acquisitions were added to the group, the registrant must consider the need to provide updated interim period financial statements for all the individual related business (similar to the dynamic illustrated with the acquisition of DDD above) unless those interim periods are included in the registrant's recent interim financial statements.

4.5.20 S-X Rule 3-06: Substituting a period of 9 to 12 months for 1 year

Excerpt from S-X Rule 3-06

Financial statements covering a period of nine to twelve months.

(a) Except with respect to registered investment companies, the filing of 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 where:

(1) The issuer has changed its fiscal year;

(2) The issuer has made a significant business acquisition for which financial statements are required under § 210.3-05, § 210.3-14, § 210.8-04, or § 210.8-06 and the financial statements covering the interim period pertain to the business being acquired; or

(3) The Commission so permits pursuant to § 210.3-13 or § 210.8-01(e).

(b) Where there is a requirement for filing financial statements for a time period exceeding one year but not exceeding three consecutive years (with not more than 12 months included in any period reported upon), the filing of financial statements covering a period of 9 to 12 months will satisfy a filing requirement of financial statements for one year of that time period only if the conditions described in paragraph (a)(1), (2), or (3) of this section

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exist and financial statements are filed that cover the full fiscal year or years for all other years in the time period.

Question 4.5.20

Are financial statements for a period of 9 to 12 months permitted to satisfy the one-year requirement?

Interpretive response: Yes.

S-X Rule 3-06 permits a period of nine to 12 months of operations of an acquired business to be used to satisfy the requirements to provide financial statements for any one-year period for which financial statements are required. By extension, 21 months of financial statements would satisfy requirement to provide two years of financial statements as long as no audited period is longer than 12 months. This exception in Rule 3-06 is available to all registrants, including SRCs. [S-X Rule 3-06(a)]

The use of S-X Rule 3-06 is limited to satisfying financial statement requirements in the following two situations: [S-X Rule 3-06(a)(1) – (a)(2)]

- the registrant changes it fiscal year-end; or
- the registrant makes a significant business acquisition for which Rule 3-05, Rule 3-14, Rule 8-06 or Rule 8-04 financial statements are required.

This exception may not be applied to other situations without written permission from the SEC staff. [S-X Rule 3-06(a)(3)]

S-X Rule 3-06 does not specify whether the period for which audited financial statements are required must correspond to any particular fiscal period. As a result, it is often used when a registrant acquires a business for which audited financial statements have not been obtained previously and/or an audit of a recent period is more easily obtained or is more meaningful than earlier periods. See Examples 4.5.30 through 4.5.50.

S-X Rule 3-06 may not be used to satisfy the financial statement requirements for a target company that must be provided in a proxy statement or Form S-4. This is because a target company's financial statements are not being provided pursuant to S-X Rule 3-05. See chapter 5 for further discussion of Form S-4 requirements. [FRM 1140.8]

Example 4.5.30

Applying S-X Rule 3-06 – Financial statements for a period of one year required

Registrant acquires Company A on March 31, 20X3. Company A is a nonpublic entity with a calendar year-end. The acquisition of Company A is significant in excess of 20% and Registrant must provide audited financial statements of

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Company A under S-X Rule 3-05 for at least the most recent fiscal year required by Rule 3-01. Company A does not have audited financial statements available.

Registrant may use S-X Rule 3-06 and provide audited financial statements of Company A for a period between 9 and 12 months to satisfy the requirements for a full year of audited financial statements. Because S-X Rule 3-06 does not specify that the period for which audited financial statements are required must correspond to any particular fiscal period, audited financial statements of Company A may be provided as of and for the 9-month to 12-month period ended September 30, 20X2, December 31, 20X2, or March 31, 20X3.

However, the choice of a period may result in a need to provide unaudited interim financial information. For example, if Registrant provided audited September 30, 20X2 financial statements, it may also need to provide unaudited interim financial information for the subsequent period.

Selection of interim period to be audited

Question 4.5.30

How is S-X Rule 3-06 applied when Rule 3-05 financial statements for two years are required.?

Interpretive response: As described in Question 4.5.20, S-X Rule 3-06 permits financial statements for a period of 9 to 12 months to satisfy the requirements for a full fiscal year. However, in situations in which more than one fiscal year is required, registrants may rely on S-X Rule 3-06 for only one of the required fiscal years.

For example, when the acquisition of a business is greater than 40%, registrants may provide audited financial statements for a period of 9 to 12 months for one of the two required years, but not both. The audited financial statements for the second period must cover a full fiscal year. [S-X Rule 3-06(b)]

Registrants have the option to determine which fiscal year period will be satisfied by providing 9 to 12 months of audited financial statements. However, the period selected needs to be audited and should immediately follow or precede the other (full) fiscal year for which the audited financial statements are provided (i.e. there should not be a gap between audited periods).

Example 4.5.40

Applying S-X Rule 3-06 – Financial statements for more than one year required

Registrant acquires Company A on March 1, 20X3. Company A is a nonpublic entity with a calendar year-end. The acquisition of Company A is significant in excess of 50%. Registrant intends to file a registration statement (unrelated to the acquisition) on March 10, 20X3. Registrant must provide two years of audited financial statements of Company A under S-X Rule 3-05.

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To satisfy the requirements of S-X Rule 3-05, Registrant has the option of providing the following sets of audited financial statements of Company A.

Financial statements required	Audited periods required
Alternative 1	— As of and for the year ended December 31, 20X1; and — As of and for the nine months ended September 30, 20X2
Alternative 2	— As of and for the nine months ended December 31, 20X1; and — As of and for the year ended December 31, 20X2

Example 4.5.50
Selection of interim period to be audited

Registrant is filing a registration statement in June 20X3. It acquired Company A on October 1, 20X2, so that only three months of Company A's operations are included in Registrant's December 31, 20X2 audited financial statements. The acquisition of Company A is significant at 40%. Due to the acquisition's significance, two years of Company A's audited financial statements must be included in the 20X3 registration statement.

Registrant has the option of providing the following sets of audited financial statements of Company A to satisfy the requirements of S-X Rule 3-05.

Financial statements required	Periods required
Alternative 1	— Audited financial statements as of and for the years ended December 31, 20X1 and 20X0: and — Unaudited interim financial statements for the nine months ended September 30, 20X2 and 20X1.
Alternative 2	— Audited financial statements as of and for the year ended December 31, 20X1 and as of and for the nine months ended December 31, 20X0; and — Unaudited interim financial statements for the nine months ended September 30, 20X2 and 20X1.
Alternative 3	— Audited financial statements as of and for the nine months ended September 30, 20X2 and as of and for the year ended December 31, 20X1.

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Financial statement updating

Question 4.5.40

When must pre-acquisition financial statements prepared under S-X Rule 3-06 be updated?

Interpretive response: If a registrant must file Rule 3-05 financial statements and provides audited financial statements for a 9- to 12-month period (in lieu of audited financial statements for the acquired business's most recent fiscal year as permitted under S-X Rule 3-06), it may need to update those financial statements. This may occur if those financial statements are included in a subsequently filed registration statement, proxy statement, or Form 8-K reporting the consummation of a business acquisition previously reported as a probable acquisition.

For example, this situation could occur if the first nine months of the year are used as the nine-month audited period to satisfy a registrant's Form 8-K requirement to report the acquisition. If the registrant later filed a registration statement for which updated financial statements are required for the acquired business, the audited financial statements for the full fiscal year (i.e. 12 months) would be required to comply with the updating requirements in S-X Rule 3-12 or 8-08 (see Question 4.4.70). It is not acceptable to provide unaudited interim financial statement for the three-month period ended subsequent to the nine-month period (i.e. the fourth quarter) to satisfy the updating requirement. [Regs Comm 03/2013]

Example 4.5.60

Updating financial statements after applying S-X Rule 3-06

Registrant acquires Company A on January 10, 20X3. Registrant, an accelerated filer, and Company A have December 31 year-ends. The acquisition is greater than 40% significant; therefore, audited financial statements for two years are required to satisfy S-X Rule 3-05.

Scenario 1: Rule 3-06 is applied

Registrant relies on S-X Rule 3-06 and files the following Company A financial statements in the Form 8-K.

Financial statements required	Periods required
Audited annual financial statements	As of and for the year ended December 31, 20X1 and as of and for the nine months ended September 30, 20X2

Registrant files a registration statement on April 1, 20X3. Company A's financial statements must be updated by providing the audited financial statements for the full 12 months ended December 31, 20X2 (in addition to the audited 20X1

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financial statements) to meet the two-year requirement because the effective date of the registration will be more than 89 days after Company A's year-end.

Scenario 2: Rule 3-06 not applied

If S-X Rule 3-06 is not applied initially, Registrant must file the following Company A financial statements in the Form 8-K.

Financial statements required	Periods required
Audited annual financial statements	For the years ended December 31, 20X1 and 20X0
Unaudited interim financial statements	For the nine months ended September 30, 20X2 and 20X1

Similar to Scenario 1 above, when the registration statement is filed on April 1, 20X3, Registrant must update the Company A financial statements by filing the audited annual financial statements for 20X2. No additional unaudited interim financial statements would be required.

Pro forma financial information

Question 4.5.50

Can S-X Rule 3-06 be applied to unaudited pro forma financial information?

Interpretive response: Yes, but only in limited and specific circumstances. S-X Rule 3-06 is an accommodation that applies to audits of historical financial statements. The use of a period of nine to 12 months for unaudited pro forma financial information is only permitted when a registrant's financial statements for its most recent fiscal year are for a period of nine to 12 months (i.e. the registrant applies the S-X Rule 3-06 accommodation). If a registrant's most recent fiscal year is a period of 12 months, a full 12-month period of operations for the acquired or to be acquired entity (that is within 93 days of the registrant's year-end) must be included in the pro forma financial information.

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5. Merger proxy statements and registration statements on Form S-4/F-4

Detailed contents

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5.2 Mechanics of mergers and tender offers: A brief overview

5.3 Registration statements on Forms S-4, F-4 and N-14

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5.3.20 Financial statement requirements – Form S-4

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Questions

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5.3.170 Does a bank reorganizing under a newly formed holding entity include target entity financial statements in the initial registration statement on Form S-4?

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5.3.190 Are there unique reporting considerations if the target is a foreign business but not an SEC reporting entity?

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5.3.220 Are there differences in the requirements of Form F-4 vs Form S-4?

Examples

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5.3.20 Target annual financial statement requirements – Form S-4 will be used for resale

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5.3.50 Previously acquired business of target entity

5.3.60 Target entity audit requirements – Form S-4 will not be used for resale

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5.4 Merger proxy statements

5.4.10 Overview

5.4.20 Requirements for financial statements in a merger proxy statement

5.4.30 Audit considerations

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Questions

5.4.10 When is a merger proxy statement used in connection with a business combination?

5.4.20 What information is included in a merger proxy statement?

5.4.30 Are there unique age considerations for merger proxy statements?

5.4.40 Does Schedule 14A provide any exceptions for certain types of transactions?

5.4.50 How is the 'target' identified in a merger?

5.4.60 What are the financial statement requirements in a merger proxy statement?

5.4.70 When are financial statements of the acquirer considered 'material' to an informed voting decision?

5.4.80 When is pro forma financial information considered 'material' to an informed voting decision?

5.4.90 Does a merger proxy statement require separate financial statements of separate acquisitions made by the acquiring entity?

5.4.100 Are the target's required financial statements affected when either the acquirer or target is an EGC?

5.4.110 What are the audit requirements in a merger proxy statement?

Examples

5.4.10 Previously acquired business of target

5.4.20 Previously acquired business of acquiring entity

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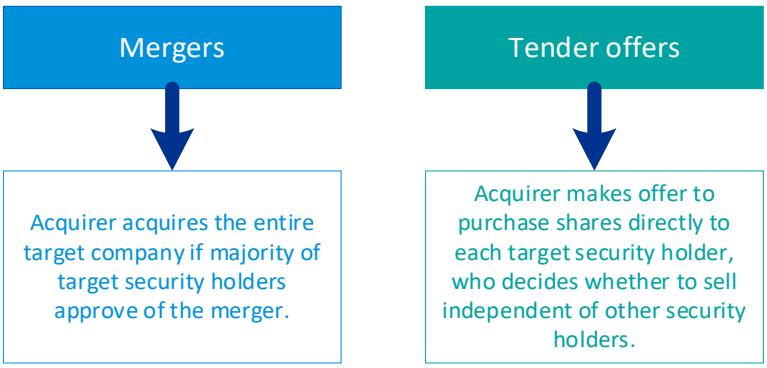
5.1 How the SEC rules work

The SEC rules contemplate two primary business combination methods.



In either a tender offer or a merger, the offeror may offer cash, securities, or a combination of each. The following table summarizes the typical filing requirements based on the type of business combination and type of consideration.

Type of business combination	Registration statement (Form S-4/ F-4/N-14)	Proxy statement	Schedule TO
Cash merger		✔	
Stock merger	✔	✔	
Cash tender offer			✔
Exchange (stock tender offer)	✔		✔

Forms S-4, F-4, and N-14 are registration statements used when the legal acquirer registers securities that will be consideration in a merger or acquisition of a target. Although the objectives of the forms are similar, Form F-4 applies to foreign private issuers (FPIs) and Form N-14 applies to registered investment companies and business development companies (Question 5.3.10). This chapter focuses primarily on the requirements of Form S-4, which is used by other, and most, SEC registrants (i.e. commercial and industrial companies). See Questions 5.3.20 and 5.3.30 for discussion of specific differences between Form S-4 and Form F-4 requirements and chapter 9 for discussion related to acquisitions by funds that may require filing of Form N-14.

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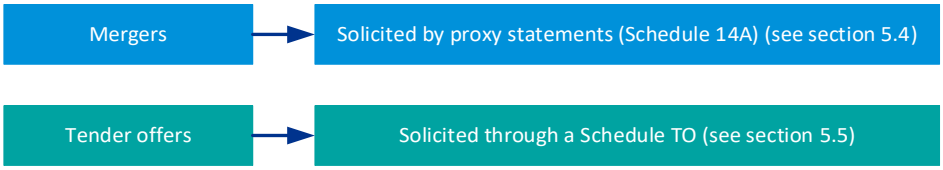
5.2 Mechanics of mergers and tender offers: A brief overview

In either a merger or tender offer, the acquirer (offeror) may offer cash, securities, or a combination of each. If the consideration includes securities, the acquirer generally will need to register them under the Securities Act. Because the investment decision is more complex than if it were offering cash, the acquirer will need to give more information to security holders of the target company. That generally includes information about the issuer whose securities they will receive if the transaction is consummated and information about the surviving, combined entity (i.e. pro forma financial information).

Soliciting target's shareholders

A primary difference between a merger and tender offer is how the target shareholder vote is solicited.



In a merger, the target security holders almost always vote on the merger while sometimes the acquirer's security holders also vote. Whether a vote is required is determined by state law, each company's governing instruments, and requirements of applicable self-regulatory organizations (e.g. national security exchanges such as NYSE).

Unlike a merger, a tender offer may not be supported by the target company's board of directors and management. Further, the acquirer is unlikely to receive 100% of the target shares even if the tender offer is successful.

Registering securities

If the consideration offered to the target security holders is in the form of the acquirer's stock, the acquirer also must file a registration statement on Form S-4, F-4 or N-14 (see section 5.3).

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5.3 Registration statements on Forms S-4, F-4 and N-14

5.3.10 Overview

Excerpt from S-X Rule 3-05

Financial statements of businesses acquired or to be acquired.

(b) Periods to be presented.

(1) If registering an offering of securities to the security holders of the business to be acquired, then the financial statements specified in §§ 210.3-01 and 210.3-02 must be filed for the business to be acquired, except as provided otherwise for filings on Form N-14, S-4, or F-4 (§ 239.23, § 239.25, or § 239.34 of this chapter). The financial statements covering fiscal years must be audited except as provided in Item 14 of Schedule 14A (§ 240.14a-101 of this chapter) with respect to certain proxy statements or in registration statements filed on Forms N-14, S-4, or F-4 (§ 239.23, § 239.25, or § 239.34 of this chapter).

Excerpt from 17 CFR, part 239

§239.23 Form N-14, for the registration of securities issued in business combination transactions by investment companies and business development companies.

This form shall be used by a registered investment company or a business development company as defined by section 2(a)(48) of the Investment Company Act of 1940 for registration under the Securities Act of 1933 of securities to be issued:

(a) In a transaction of the type specified in paragraph (a) of Rule 145 (§230.145 of this chapter);

(b) In a merger in which the applicable state law would not require the solicitation of the votes or consents of all the security holders of the company being acquired;

(c) In an exchange offer for securities of the issuer or another entity;

(d) In a public reoffering or resale of any such securities acquired pursuant to this registration statement;

(e) In more than one of the kinds of transactions listed in paragraphs (a) through (d) registered on one registration statement.

§239.25 Form S-4, for the registration of securities issued in business combination transactions.

This form may be used for registration under the Securities Act of 1933 of securities to be issued (a) in a transaction of the type specified in paragraph (a)

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of Rule 145 (§230.145 of this chapter); (b) in a merger in which the applicable state law would not require the solicitation of the votes or consents of all of the security holders of the company being acquired; (c) in an exchange offer for securities of the issuer or another entity; (d) in a public reoffering or resale of any such securities acquired pursuant to this registration statement; or (e) in more than one of the kinds of transactions listed in paragraphs (a) through (d) registered on one registration statement.

§239.34 Form F-4, for registration of securities of foreign private issuers issued in certain business combination transactions.

This form may be used by any foreign private issuer, as defined in rule 405 (§230.405 of this chapter), for registration under the Securities Act of 1933 ("Securities Act") of securities to be issued:

(a) In a transaction of the type specified in paragraph (a) of rule 145 (§230.145 of this chapter);

(b) In a merger in which the applicable law would not require the solicitation of the votes or consents of all of the securityholders of the company being acquired;

(c) In an exchange offer for securities of the issuer or another entity;

(d) In a public reoffering or resale of any such securities acquired pursuant to this registration statement; or

(e) In more than one of the kinds of transactions listed in paragraphs (a) through (d) registered on one registration statement.

Generally, registration statements under the 1933 and 1934 Acts include all the financial statements required by Reg S-X. When a form requires all financial statements under Reg S-X, the registrant includes:

— the financial statements of acquired businesses required by S-X Rule 3-05 (the 'Rule 3-05 financial statements'); and
— pro forma financial information required by S-X Article 11.

Chapter 4 discusses the requirements for registration statements in general. However, registration statements on Form S-4, F-4 and N-14 include different requirements for financial statements than other registration forms. These requirements are covered in this section. [S-X Rule 3-05(b)(1)]

Question 5.3.10

When are Forms S-4, F-4 and N-14 used?

Interpretive response: These registration statements are used when the legal acquirer registers securities that will be used as consideration in the merger or acquisition of a target. Form S-4 is used unless the requirements to use Form F-4 or N-14 are met (see below).

The registration statement often incorporates proxy solicitations being sent to shareholders because the information required in each document is similar. This

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combined document is sometimes referred to as a wraparound Form S-4 because it consists of a registration statement cover wrapped around the proxy materials.

The wraparound Form S-4 is used when the acquirer needs shareholder approval and intends to transfer registered securities as consideration. When shareholder approval is not required, there is no merger proxy statement and just the Form S-4 is required.

Form F-4

Form F-4 is used to register securities of FPIs (that use foreign forms) issued in certain business combination transactions. The requirements of Form F-4 are similar to Form S-4. See Question 5.3.220 for considerations specific to Form F-4.

Form N-14

Form N-14 is used to register securities issued in business combination transactions by investment companies and business development companies. See chapter 9 for further discussion about requirements for related to acquisitions by funds that may require filing of Form N-14.

Question 5.3.20

What information is included in Forms S-4 and F-4?

Interpretive response: Form S-4 and F-4 must include information about the:

- transaction;
- registrant; and
- business being acquired (the target entity).

The financial information required in each Form complies with Reg S-X, including requirements for audited annual and unaudited interim historical financial statements of significant acquired or probable-to-be-acquired businesses and pro forma financial information reflecting the acquisition. The Forms specify how to comply with these requirements.

Question 5.3.30

Are there specific age considerations for Form S-4 and Form F-4?

Interpretive response: Generally, no for the Form S-4. The age requirements of Form S-4 are the same as the age requirements for other registration statements. Those requirements are discussed in detail in sections 4.4.10 and 4.4.20.

In a wraparound Form S-4, the required age of financial statements is determined by the effective date of the Form S-4 because the Form S-4 becomes effective before the proxy statement is mailed. If mailing the proxy

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statement is delayed for more than a few days after the effectiveness of the Form S-4, updating the financial statements in the proxy statement may be required based on the mailing date. [FRM 1220.8]

See Question 4.3.40 regarding Form 8-K considerations when the financial statements were previously filed on a Form S-4 registration statement.

Form F-4 – specific age considerations

The age requirements for financial statements filed on a Form F-4 differ. The SEC staff has stated the financial statements on a Form F-4 must remain current in a merger or acquisition transaction until shareholder approval has occurred. Therefore, registrants filing a Form F-4 may have to update the financial statements after the filing to comply with the age requirements. See section 6.3.50 for guidance about the age of financial statements for acquired foreign businesses. [FRM 1220.8, FRM 6230.1]

Question 5.3.40

Are there additional requirements for roll-up transactions?

Background: A roll-up transaction involves the combination or reorganization of one or more partnerships, directly or indirectly, in which some or all of the investors in any of those partnerships will receive new securities or securities in another entity. [S-K Item 901]

Interpretive response: Yes. A roll-up transaction requires special attention in a Form S-4 registration statement.

General Instruction I of Form S-4 and G of Form F-4 require compliance with Subpart 229.900 of Reg S-K in addition to the disclosure requirements of Form S-4. See Reg S-K Item 914, *Pro forma financial statements: selected financial data*, for additional requirements.

5.3.20 Financial statement requirements – Form S-4

Excerpt from Form S-4

B. INFORMATION ABOUT THE REGISTRANT

Item 14. Information with Respect to Registrants Other Than S-3 Registrants.

If the registrant does not meet the requirements for use of Form or S-3, or otherwise elects to comply with this Item in lieu of Item 10 or 12, furnish the information required by:

(a) Item 101 of Regulation S-K, description of business;

(b) Item 102 of Regulation S-K, description of property;

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(c) Item 103 of Regulation S-K, legal proceedings;

(d) Where common equity securities are being issued, Item 201 of Regulation S-K, market price of and dividends on the registrant's common equity and related stockholder matters;

(e) Financial statements meeting the requirements of Regulation S-X, (schedules required by Regulation S-X shall be filed as "Financial Statement Schedules" pursuant to Item 21 of this Form), as well as financial information required by Rule 3-05 and Article 11 of Regulation S-X with respect to transactions other than that pursuant to which the securities being registered are to be issued.

(f) [Reserved]

(g) Item 302 of Regulation S-K, supplementary financial information;

(h) Item 303 of Regulation S-K, management's discussion and analysis of financial condition and results of operations;

(i) Item 304 of Regulation S-K, changes in and disagreements with accountants on accounting and financial disclosure; and

(j) Item 305 of Regulation S-K (§ 229.305 of this chapter), quantitative and qualitative disclosures about market risk.

C. INFORMATION ABOUT THE COMPANY BEING ACQUIRED

Item 17. Information with Respect to Companies Other Than S-3 Companies.

If the company being acquired does not meet the requirements for use of Form S-3, or compliance with this Item is otherwise elected in lieu of Item 15 or 16, furnish the information required by paragraph (a) or (b) of this Item, whichever is applicable.

(a) If the company being acquired is subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act, or compliance with this subparagraph in lieu of subparagraph (b) of this Item is selected, furnish the information that would be required by Item 14 of this Form if the securities of such company were being registered; however, only those schedules required by Rules 12-15, 28 and 29 of Regulation S-X (§210.12-15, 28, 29 of this chapter) need be provided with respect to the company being acquired.

(b) If the company being acquired is not subject to the reporting requirements of either Section 13(a) or 15(d) of the Exchange Act; or, because of Section 12(i) of the Exchange Act, has not furnished an annual report to security holders pursuant to Rule 14a-3 (§240.14a-3 of this chapter) or Rule 14c-3 (§240.14c-3 of this chapter) for its latest fiscal year; furnish the information that would be required by the following if securities of such company were being registered:

(1) a brief description of the business done by the company which indicates the general nature and scope of the business;

(2) Item 201 of Regulation S-K, market price of and dividends on the registrant's common equity and related stockholder matters;

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(3) [Reserved]

(4) [Reserved]

(5) Item 303 of Regulation S-K, management's discussion and analysis of financial condition and results of operations;

(6) Item 304(b) of Regulation S-K (§229.304 of this chapter), changes in and disagreements with accountants on accounting and financial disclosure;

(7) Financial statements that would be required in an annual report sent to security holders under Rules 14a-3(b)(1) and (b)(2) (§240.14b-3 of this chapter), if an annual report was required. In a de-SPAC transaction, see § 240.15-01 (Rule 15-01 of Regulation S-X). If the registrant's security holders are not voting, the transaction is not a roll-up transaction (as described by Item 901 of Regulation S-K (§229.901 of this chapter)), and:

(i) the company being acquired is significant to the registrant in excess of the 20% level as determined under §210.3-05(b)(2), provide financial statements of the company being acquired for the latest fiscal year in conformity with GAAP. In addition, if the company being acquired has 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, provide the financial statements for those years; or

(ii) the company being acquired is significant to the registrant at or below the 20% level, no financial information (including pro forma and comparative per share information) for the company being acquired need be provided.

Instructions.

1. The financial statements required by this paragraph 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. For a company combining with a registrant that is a shell company, see § 210.15-01(a).

2. If the financial statements required by this paragraph are prepared on the basis of a comprehensive body of accounting principles other than U.S. GAAP, provide a reconciliation to U.S. GAAP in accordance with Item 17 of Form 20-F (§249.220f of this chapter) unless a reconciliation is unavailable or not obtainable without unreasonable cost or expense. At a minimum, provide a narrative description of all material variations in accounting principles, practices and methods used in preparing the non-U.S. GAAP financial statements from those accepted in the U.S. when the financial statements are prepared on a basis other than U.S. GAAP.

3. If this Form is used to register resales to the public by any person who is deemed an underwriter within the meaning of Rule 145(c) (§230.145(c) of this chapter) with respect to the securities being reoffered, the financial statements must be audited for the fiscal

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years required to be presented under paragraph (b)(2) of Rule 3-05 of Regulation S-X (17 CFR 210.3-05(b)(2)).

4. In determining the significance of an acquisition for purposes of this paragraph, apply the tests prescribed in Rule 1-02(w) (§210.1-02(w) of this chapter).

(8) the quarterly financial and other information as would have been required had the company being acquired been required to file Part I of Form 10-Q (§249.308a) for the most recent quarter for which such a report would have been on file at the time the registration statement becomes effective or for a period ending as of a more recent date.

(9) schedules required by Rules 12-15, 28 and 29 of Regulation S-X.

Item 305 of Regulation S-K (§ 229.305 of this chapter), quantitative and qualitative disclosures about market risk.

Question 5.3.50

How is the target entity determined?

Interpretive response: The SEC staff has stated that the determination of the entity being acquired (the target entity) is based on the legal form of the transaction. For example, in a reverse acquisition between two operating entities, the target entity's financial statements for the purposes of Form S-4 are those of the legal target, which may be the accounting acquirer. [FRM 2200.1]

Question 5.3.60

What are the financial statement requirements of the acquirer?

Interpretive response: The financial statement requirements for an acquirer follow the same requirements of a registrant for any other 1933 Act registration statement (see section 4.2).

For acquirers that are S-3 eligible, the financial statement requirements are outlined in Items 10 to 13 of Form S-4. These registrants are permitted to incorporate required information in the registration statement and prospectus by reference to other reports, instead of by physical inclusion. This may save registrants considerable effort in preparing the registration statement.

For acquirers that are not S-3 eligible, the financial statement requirements are outlined in Item 14 of Form S-4 and information is required to be furnished with the Form S-4 (versus being incorporated by reference). See section 4.2 for the financial statement requirements.

If the acquirer is a registrant and has other consummated or probable acquisitions for which S-X Rule 3-05 financial statements would normally be required (i.e. unrelated to the acquisition of the target entity), those financial

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statements are included in Form S-4 to the extent they have not been previously filed.

The remainder of this section describes the target financial statement requirements.

Question 5.3.70

What are the financial statement requirements of a target entity?

Interpretive response: The financial statement requirements of a target entity on a Form S-4 depend on several factors, including: [FRM 2200.1]

- the reporting status of the target (i.e. whether it is a registrant);
- whether the registrant's shareholders are voting;
- the size of the target relative to the registrant (i.e. the acquisition's significance)
- whether the Form will be used for resale by a deemed underwriter under Rule 145(c) of the 1933 Act); and
- whether the registrant is an EGC (see Question 5.3.110)d

The following table outlines the requirements for the financial statements of a target on a Form S-4 by incorporating the above factors. See Question 5.3.120 for the audit requirements for the target's financial statements. [FRM 2200] See financial statement requirements for transactions with shell companies, including SPAC and de-SPAC transactions in section 10.2.

Target's reporting status	Voting status	Significance	Target's financial statement requirements
Target is a registrant	N/A	N/A	— balance sheets as of the two most recent fiscal years — statements of operations, comprehensive income, cash flows, and changes in stockholder's equity for the three most recent years (two if the target is an SRC or EGC) — interim information (if applicable) - see Question 5.3.90 — financial statements of the **target's** significant acquired or to be acquired businesses under S-X Rule 3-05 - see Question 5.3.100
Target is NOT a registrant	Registrant's shareholders are voting	N/A	— balance sheets as of the two most recent fiscal years — statements of operations, comprehensive income, cash flows, and changes in stockholder's equity for the three

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Target's reporting status	Voting status	Significance	Target's financial statement requirements
			most recent years (two if the target would qualify as an SRC) — interim information (if applicable) – see Question 5.3.90 — financial statements of the **target's** significant acquired or to be acquired businesses under S-X Rule 3-05 **if** the omission of those financial statements renders the target's financial statements substantially incomplete or misleading – see Question 5.3.100 — see Question 5.3.110 regarding when the registrant is an EGC.
	Registrant's shareholders are NOT voting	Less than 20%	— none, subject to aggregation of individually insignificant acquisitions to comply with S-X Rule 3-05(b)(2)(iv) – see section 3.2.40
		20% or greater and used for resale	— 20 – 40% significant = latest fiscal year OR — greater than 40% significant = 2 most recent fiscal years — if additional years were previously distributed to target shareholders, also required to be included - see Example 5.3.20 — interim information (if applicable) - see Question 5.3.90 — financial statements of the **target's** significant acquired or to be acquired businesses under S-X Rule 3-05 - see Question 5.3.100
		20% or greater and NOT used for resale	— latest fiscal year — if prior two years were previously distributed to target shareholders, also required to be included - see Example 5.3.10 — interim information (if applicable) - see Question 5.3.90 — financial statements of the **target's** significant acquired or to be acquired businesses under S-X Rule 3-05 **if** the omission of those financial statements renders the target's financial statements substantially incomplete or misleading - see Question 5.3.100

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Example 5.3.10

Target annual financial statement requirements – Form S-4 will not be used for resale

On August 20, 20X9, Registrant files a Form S-4 to register shares to be exchanged for shares of Target, a December 31 year-end entity. Registrant's shareholders are not voting on the transaction and Target is not an SEC registrant. The Form S-4 will not be used for resale by a deemed underwriter.

Scenario 1: Financial statements previously distributed to target shareholders

The acquisition of Target is 35% significant to the Registrant. Target has previously provided its December 31, 20X8, 20X7, and 20X6 financial statements to its shareholders.

Target's financial statements as of December 31, 20X8 and 20X7 and for the three years ended December 31, 20X8 are required on the Form S-4.

Scenario 2: Financial statements not previously distributed to target shareholders

The acquisition of Target is 45% significant to the Registrant. Target has not previously provided financial statements to its shareholders.

Target's financial statements for only the most recent fiscal year are required on the Form S-4 because the prior financial statements were not previously provided to Target's shareholders. Further, because the Form S-4 will not be used for resale by underwriters, any significance level at 20% or greater will not impact the periods required in this scenario.

See Question 5.3.90 for interim considerations and see section 5.3.30 for audit considerations.

Example 5.3.20

Target annual financial statement requirements – Form S-4 will be used for resale

Assume the same facts as in Example 5.3.10, except the Form S-4 will be used for resale by underwriters.

Scenario 1: Acquisition of Target is 20% or greater but less than 40% significant to Registrant

The acquisition of Target is 35% significant to the Registrant.

Target's financial statements for the year ended December 31, 20X8 are required on the Form S-4, determined based on S-X Rule 3-05 (see chapter 3).

Consistent with Example 5.3.10, if target has previously provided its financial statements for the years ended December 31, 20X7 and 20X6 to its shareholders, those are required on the Form S-4 as well, regardless of whether the Form S-4 is used for resale.

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Scenario 2: Acquisition of Target is 40% or greater significant to Registrant

Target's acquisition is 45% significant.

Target's financial statements for the two years ended December 31, 20X8 are required on the Form S-4, determined based on S-X Rule 3-05 (see chapter 3).

Consistent with Example 5.3.10, if target has previously provided its financial statements for the year ended December 31, 20X6 to its shareholders, those are required to be included on the Form S-4.

See Question 5.3.90 for interim considerations and see section 5.3.30 for audit considerations.

Question 5.3.80

Are financial statements for a period of nine to 12 months permitted to satisfy the one-year requirement of target companies?

Background: S-X Rule 3-06 permits the filing of financial statements covering a period of nine to 12 months to satisfy the one-year financial statement requirement for an acquired business.

Interpretive response: No, the SEC staff's position is S-X Rule 3-06 does not apply to financial statements of target companies filed on Form S-4 or in proxy solicitation materials (required under Schedule 14A Item 14(c)(2)). [FRM 1140.8]

> "Target company financial statements required to be provided in a proxy statement or Form S-4 are not provided pursuant to S-X Rule 3-05. This is true even though the proxy statement and Form S-4 reference S-X Rule 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 Rule 3-05, the exception permitted in S-X Rule 3-06(b) [for business acquisitions] is not available for purposes of providing target company financial statements in a proxy statement on Form S-4." [FRM 1140.8 (note)]

However, the exception in S-X Rule 3-06(a) is available if the target entity changed its fiscal year. An entity may request permission from the Office of the Chief Accountant of the Division of Corporation Finance to apply S-X Rule 3-06 in other circumstances. [FRM 1140.8]

Question 5.3.90

How are interim financial statement requirements determined?

Interpretive response: Interim financial statement requirements depend on whether the target is an SEC registrant.

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Target is an SEC registrant

If the target is an SEC registrant, the acquiring registrant is required to furnish financial statements of the target meeting the requirements of Reg S-X. The age of those financial statements is determined by S-X Rule 3-12 (or Rule 8-08 if the target is an SRC).

Under these age requirements, the financial statements (including unaudited interim financial information) in a registration or proxy statement are as of a date within 135 days (or 130 days when the target is an accelerated filer or large accelerated filer) of the date the filing is expected to become effective, or proposed mailing date for a wraparound Form S-4.

Interim financial information that is filed on the registration or proxy statement must be as recent as the most recent financial statements filed on Form 10-Q. [S-X Rule 3-12(a) and (g), Form S-4 Item 17(a)]

Target is not an SEC registrant

If the target is not an SEC registrant, the acquiring registrant is required to furnish interim financial information of the target for the most recent period as would have been filed on Form 10-Q had the target been an SEC registrant. [Form S-4 Item 17(b)(8)]

Example 5.3.30

Target interim financial statement requirements – Same conclusion for nonpublic entity

Registrant files a Form S-4 registration statement on July 20, 20X9 to register shares it will exchange for shares of Target, a December 31 year-end entity.

Following SEC staff review and comments, it expects the registration statement to be declared effective on September 9, 20X9.

Scenario 1: Target is a large accelerated or accelerated SEC registrant

Target's March 31, 20X9 financial statements go stale at the close of business on August 7, 20X9 (129 days); therefore, the registration statement cannot be declared effective after August 7 without updated interim financial information.

The effective Form S-4 would need to include interim financial information for the six months ended June 30, 20X9.

Scenario 2: Target is a non-accelerated filer or not an SEC registrant

Target's March 31, 20X9 financial statements go stale at the close of business on August 12, 20X9 (134 days); therefore, the registration statement cannot be declared effective after August 12 without updated interim financial information.

The effective Form S-4 would need to include interim financial information for the six months ended June 30, 20X9.

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Example 5.3.40

Target interim financial statement requirements – Different conclusion for nonpublic entity

Assume the same facts as Example 5.3.30, except Registrant files the Form S-4 registration statement on July 22, 20X9 and expects it to become effective by August 11, 20X9.

Scenario 1: Target is a large accelerated or accelerated SEC registrant

Target's March 31, 20X9 financial statements will go stale prior to the Form S-4 effective date, August 11, 20X9; therefore, the interim financial information for the six months ended June 30, 20X9 is required in the Form S-4.

Scenario 2: Target is a non-accelerated filer or not an SEC registrant

Target's March 31, 20X9 financial statements do not go stale until after the expected effective date, August 11, 20X9; therefore, the interim financial information for the three months ended March 31, 20X9 is required in the Form S-4.

Question 5.3.100

Does Form S-4 require financial statements for businesses acquired by a target entity?

Interpretive response: In addition to the financial statement requirements for the target itself, financial statements may be required to be filed on Form S-4 for a business recently acquired, or probable of being acquired by the target (e.g. the target's 'previously acquired businesses'). The requirement depends on whether the target is an SEC registrant.

If the target is an SEC registrant with probable or consummated business acquisitions, the financial statements that would be required to be filed by target under S-X Rule 3-05 are filed on the Form S-4 (unless they have already been filed and are incorporated by reference in the registration statement).

If the target is not an SEC registrant, Rule 3-05 financial statements for any probable or consummated business acquisitions of target are filed only if the omission of those financial statements would render the target entity's financial statements substantially incomplete or misleading. We believe determining whether it is acceptable to omit the Rule 3-05 financial statements should be based on the specific facts and circumstances, such as the level of significance of the acquisition to the target and the timing of the acquisition. [FRM 2200.4, SEC T-Inter §H.Q 3 – 4 (7/01)]

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Example 5.3.50
Previously acquired business of target entity

On August 1, 20X9, Registrant enters into an agreement to purchase all the outstanding stock of Target. Target acquired Entity Z on June 28, 20X9. The Entity Z acquisition was greater than 80% significant to Target. Registrant expects to file a Form S-4 on September 1, 20X9 in connection with its acquisition of Target.

Scenario 1: Target is an SEC registrant

On July 2, 20X9, Target, a public entity, reported the acquisition of Entity Z on Form 8-K, which did not include Entity Z's financial statements required under S-X Rule 3-05.

Because an 8-K/A has not yet been filed, Target must file Entity Z's financial statements before Registrant's Form S-4 can be filed with the SEC.

Scenario 2: Target is not an SEC registrant

Entity Z's financial statements likely need to be filed on Registrant's Form S-4 due to the level of significance of Entity Z's acquisition to Target and the short period of time the results of Entity Z have been included in Target's post-acquisition financial statements.

Question 5.3.110
Are a target entity's financial statement requirements affected if the acquirer is an EGC?

Interpretive response: Yes.

If a registrant is an EGC, the SEC staff has stated it will not object to the registrant filing two years of the target's annual and interim financial statements on a Form S-4 if the registration statement:

- constitutes its IPO of common equity securities; or
- is filed after the EGC's IPO but before the EGC files its next Form 10-K.

This accommodation applies when the target is not an SEC registrant and the registrant's shareholders are voting. [FRM 10220.6]

5.3.30 Audit considerations

Question 5.3.120
What are the audit requirements for a target entity's financial statements?

Interpretive response: The following table indicates the audit requirements for the target financial statements on a Form S-4. [FRM 2200.6, FRM 2200.7]

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Target filing status	Resale status	Target audit requirements
Target is an SEC registrant	N/A	All years presented
Target is not an SEC registrant	Used for resale	Required for each year presented in accordance with S-X Rule 3-05(b)(2). See Question 5.3.140.
	Not used for resale	Latest fiscal year, if practicable. See Question 5.3.150.

Whether or not the registrant's shareholders are voting does not affect the audit requirements.

See Question 5.3.70 for discussion of the financial statement requirements of a target entity.

Question 5.3.130

When are a target entity's financial statements required to be audited under PCAOB standards?

Interpretive response: The auditors' report for a nonpublic entity whose financial statements are included in a proxy statement or Form S-4 (as either a target or an acquirer) need not be issued by a public accounting firm registered with the PCAOB. In addition, the auditors' report is not required to reference PCAOB standards. [FRM 4110.5, FRM 4110.6]

However, if after consummation of the merger transaction, the financial statements for the target become the financial statements of the registrant (a reverse acquisition), the audited financial statements filed on Form 8-K reporting the transaction will require an auditors' report issued by a PCAOB-registered auditor that refers to PCAOB standards. See Question 4.2.80. [FRM 12250.2]

Question 5.3.140

How are target entity audit requirements impacted if the Form S-4 is used for resale by a deemed underwriter?

Interpretive response: If the Form S-4 will be used for resale by a deemed underwriter, the target entity's annual financial statements must be audited for those periods that would need to be audited under S-X Rule 3-05. [Form S-4 Item 17 (Instr 3)]

If the Form S-4 will not be used for resale by a deemed underwriter, target financial statements for only the latest year must be audited if the two years preceding the latest fiscal year have not previously been audited. Financial statements for the most recent fiscal year do not have to be audited if impracticable (see Question 5.3.150). [FRM 2200.7]

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Example 5.3.60

Target entity audit requirements – Form S-4 will not be used for resale

This example addresses the audit considerations of the scenarios in Example 5.3.10, in which the Form S-4 will not be used for resale. In each scenario, Registrant may request relief from the SEC staff for the audit requirement if an audit is impracticable (see Question 5.3.150).

Scenario 1: Three years of financial statements included (previously provided to shareholders)

Target's acquisition is 35% significant. Target's financial statements for the three years ended December 31, 20X8 are included in the Form S-4 because Target has previously provided those financial statements to its shareholders.

Target's financial statements for the fiscal year ended December 31, 20X8 must be audited.

If the 20X7 and 20X6 annual financial statements were not previously audited, they are included, but are not required to be audited.

Scenario 2: One year of financial statements included (not previously provided to shareholders)

Target's acquisition is 45% significant. Target's financial statements for only 20X8 are included in the Form S-4 because Target has not provided its shareholders with financial statements for previous periods.

Target's financial statements for the fiscal year ended December 31, 20X8 must be audited.

Example 5.3.70

Target entity audit requirements – Form S-4 will be used for resale

This example addresses the audit considerations of the scenarios in Example 5.3.20, in which the Form S-4 will be used for resale. In each scenario, Registrant may request relief from the SEC staff for the audit requirement if an audit is impracticable (see Question 5.3.150).

Scenario 1: Significance is greater than 20% but less than 40%

Target's acquisition is 35% significant. Target's financial statements for the three years ended December 31, 20X8 are included in the Form S-4 because Target has previously provided those financial statements to its shareholders.

Target's financial statements for the fiscal year ended December 31, 20X8 must be audited.

If the 20X7 and 20X6 annual financial statements were not previously audited, they are included, but are not required to be audited.

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Scenario 2: Significance is greater than 40%

Target's acquisition is 45% significant. Target's financial statements for the two years ended 20X8 are included in the Form S-4 based on the acquisition's significance. Target's 20X6 financial statements are not included because Target had not previously provided them to its shareholders.

Target's financial statements for the two years ended December 31, 20X8 must be audited.

Question 5.3.150

How does an entity determine if an audit is impracticable?

Interpretive response: Determining whether an audit is impracticable involves weighing the feasibility and expense of the audit against the usefulness to the target entity's security holders of having audited financial statements.

The SEC staff will assess the merits of a registrant's assertion that an audit for the latest fiscal year is impracticable based on the particular facts and circumstances, including the specific actions taken by the registrant (i.e. legal acquirer) to obtain a timely audit of the target. The circumstances under which the SEC staff would concur it is impracticable to provide audited financial statements of at least the most recent fiscal year are limited. [FRM 1140.5, FRM 2200.7]

We have observed the SEC staff consider the following factors in the practicability analysis:

- size, sophistication, and relationships of target's owner group (e.g. all owners are also directors and officers or limited groups of venture capitalists with board representation);
- limitations on ability to obtain an audit (e.g. target was a closely held family business, see Question 5.3.160, and audits were not performed and inventory is significant); and
- financial and resource cost of obtaining an audit (e.g. audit fee estimated at $75,000 in relation to transactions with fair value of $750,000 would cost target's shareholders 10% of their investment).

The SEC staff may ask a registrant applying the practicability exception to significant acquisitions to explain why audited financial statements cannot be completed in time for the Form S-4 but can be completed in time to meet the Form 8-K requirements. This is because the registrant will file the target's audited financial statements for a significant acquisition on Form 8-K and those audited financial statements are due within 71 calendar days after the 4th business day following consummation of the acquisition.

If relief from audit is obtained, the registrant is still required to furnish all financial statements specified by Item 17 of Form S-4 on an unaudited basis. [FRM 2200.7 (note)]

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Question 5.3.160

What is considered a closely held business?

Interpretive response: Determining whether a business is considered closely held depends on the specific facts and circumstances, including the number and relationships of the shareholders, trading activity, and whether shareholders also are employees, officers or directors. Consultation with legal counsel may be necessary as part of this determination.

Example 5.3.80

Target entity is closely held

Registrant, a major regional bank holding entity, files a Form S-4 (not to be used for resales) to register shares in connection with acquiring ABC Savings Corp. Registrant's shareholders are voting on the transaction and the acquisition is greater than 20% significant.

ABC is owned by 16 individuals consisting of the two founders, their spouses, their six children (four of whom are minors), four individuals who are senior management of ABC (CEO, CFO, Director of Lending Activities, and Director of Corporate Reporting) and two significant investors (each of whom owns 5% of the bank and are members of the board of directors).

The SEC staff may waive the requirement for audited financial statements. This is because there are only 16 investors, all of whom have a close association to ABC and have access to information concerning its performance.

5.3.40 Other scenarios and considerations

Bank reorganizing under newly formed holding entity

Question 5.3.170

Does a bank reorganizing under a newly formed holding entity include target entity financial statements in the initial registration statement on Form S-4?

Background: A bank holding entity, with no operations, is formed to purchase and own an operating bank. To execute the combination, 100% of the operating bank's common stock is exchanged for 100% of the bank holding entity's common stock. After the exchange, the financial statements of the bank holding entity are the same as the financial statements of the operating bank.

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Interpretive response: No.

The operating bank's financial statements may be omitted from the registration statement if the operating bank separately furnishes to its shareholders financial statements prepared under US GAAP (that need not be audited) for at least the most recently completed fiscal year if the following conditions are met.

- The Form S-4 is being filed to register the common stock of a newly formed holding entity to acquire 100% of the common stock of the operating bank.
- The transaction satisfies all the criteria stipulated in General Instruction G of Form S-4. Generally, those criteria require that the transaction is a reorganization with no changes in relative interests, involves no leverage, and results in no new classes of stock.

Similarly, statistical disclosures for bank and savings and loan registrants as outlined in Item 1400 of Reg S-K (formerly Industry Guide 3) may be omitted from the registration statement. However, when the registrant files its first Annual Report on Form 10-K, audited financial statements and other required statistical disclosures must be furnished for at least the two most recent fiscal years. [FRM 1150, SAB Topic 1.F]

Question 5.3.180

How does compliance with General Instruction G of Form S-4 impact when the registration statement becomes effective?

Interpretive response: Form S-4 registration statements automatically become effective 20 days after initial filing if registrants mark the box on the cover that they are in compliance with the form's General Instruction G. Failure to check the box (or meet all the conditions of General Instruction G) means that the registration statement will not be declared effective automatically.

For a registrant to be compliant with General Instruction G, the transaction being registered must involve the organization of a bank or savings and loan holding company and the sole purpose of registering shares on Form S-4 must be to acquire the stock of the company that is organizing the holding company. If the transaction involves other actions by shareholders, the registrant may not be in compliance with the conditions of Instruction G. Noncompliance with Instruction G does not allow for the registration statement to be declared effective automatically. However, even though the registration statement may not be declared effective automatically, financial statements may not be required if all the conditions of SAB Topic 1F are met. [FRM 1150, SAB Topic 1F]

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Foreign target on Form S-4 (domestic registrant)

Question 5.3.190

Are there unique reporting considerations if the target is a foreign business but not an SEC reporting entity?

Interpretive response: Yes.

If a foreign target prepares its financial statements using a comprehensive body of accounting principles other than US GAAP or IFRS Accounting Standards-IASB, the registrant must provide a reconciliation to US GAAP in accordance with Item 17 of Form 20-F. See chapter 6 for guidance about the reconciliation. [Form S-4 Item 17 (Instr 2)]

If the reconciliation is not available or obtainable without unreasonable cost or expense, the filing must include, at a minimum, a narrative description of all material variations in accounting principles, practices, and methods used in preparing the non-US GAAP financial statements from those accepted in the US.

Registrants should consider all relevant facts and circumstances in determining whether the US GAAP reconciliation is unavailable or not obtainable without unreasonable cost or expense. For example, the SEC staff has objected to the omission of the US GAAP reconciliation in circumstances where the nonreporting target entity was a subsidiary (or investee) of a larger reporting entity, and considerable reconciling information for the subsidiary would have already been necessary to prepare the parent entity's US GAAP reconciliation. A registrant is encouraged to consult with the SEC staff (CF-OCA) before filing if it intends to omit the US GAAP reconciliation because it is unavailable or available but only at unreasonable cost. [FRM 2200.9]

This exception to providing a US GAAP reconciliation does not apply to pro forma financial information prepared under S-X Article 11. See additional guidance on acquisitions of foreign businesses in chapter 6.

Question 5.3.200

Are there unique considerations for preparing the Form S-4 if the target is an FPI?

Excerpts from Regulation S-X

§210.3-01 Consolidated balance sheets.

(h) Any foreign private issuer, other than a registered management investment company or an employee plan, may file the financial

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statements required by Item 8.A of Form 20-F (§249.220 of this chapter) in lieu of the financial statements specified in this rule.

§210.3-02 Consolidated statements of comprehensive income and cash flows.

(d) Any foreign private issuer, other than a registered management investment company or an employee plan, may file the financial statements required by Item 8.A of Form 20-F (§249.220 of this chapter) in lieu of the financial statements specified in this rule.

§210.3-12 Age of financial statements at effective date of registration statement or at mailing date of proxy statement.

Any foreign private issuer may file financial statements whose age is specified in Item 8.A of Form 20-F (§249.220f of this chapter). Financial statements of a foreign business which are furnished pursuant to §210.3-05 or §210.3-09 because it is an acquired business or a 50 percent or less owned person may be of the age specified in Item 8.A of Form 20-F.

Interpretive response: Yes.

Although the acquirer is required to furnish financial statements of an FPI target that meet the requirements of Reg S-X, the financial statements may differ from a domestic target. This is the case because Reg S-X permits financial statements required by Item 8.A of Form 20-F (see section 6.3 for discussion about financial statement requirements of an acquired foreign business). [S-X Rules 3-01, 3-02, 3-12]

Question 5.3.210

Are there additional audit considerations if the target is a foreign business but not an SEC registrant?

Interpretive response: No.

The financial statements must be audited under US GAAS. For discussion of other matters specific to foreign registrants, see chapter 6. [FRM 4210.3]

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Acquirer is an FPI (Form F-4)

Question 5.3.220

Are there differences in the requirements of Form F-4 vs Form S-4?

Excerpt from Form F-4

B. INFORMATION ABOUT THE REGISTRANT

Item 14. Information With Respect to Foreign Registrants Other Than F-3 Registrants.

If the foreign registrant does not meet the requirements for use of Form F-3, or otherwise elects to comply with this Item in lieu of Items 10 and 11 or Items 12 and 13, furnish the following information:

(a) Item 4.A, 4.B, and 4.C of Form 20-F, description of business;

(b) Item 4.D of Form 20-F, description of property;

(c) Item 8.A.7 of Form 20-F, legal proceedings;

(d) Item 10.D of Form 20-F, exchange controls and other limitations affecting security holders;

(e) Item 10.E of Form 20-F, taxation;

(f) Item 3.A of Form 20-F, selected financial data;

(g) (1) Item 5 of Form 20-F, operational and financial review;

(2) Item 11 of Form 20-F, quantitative and qualitative disclosures of market risk.

(h) Financial statements required by Item 18 of Form 20-F. In addition, financial information required by Rule 3-05 and Article 11 of Regulation S-X with respect to transactions other than that pursuant to which the securities being registered are to be issued. (Schedules required by Regulation S-X shall be filed as "Financial Statement Schedules" pursuant to Item 21 of this Form.);

(i) Where common equity securities are being issued, the information required by Item 9.A.4 of Form 20-F, nature of trading markets, should be updated to cover any subsequent interim periods for which interim financial statements are required to be included to comply with Item 8.A of Form 20-F; and

(j) Item 16F of Form 20-F, change in registrant's certifying accountant.

Instructions

The financial statements required herein shall comply with Item 8.A of Form 20-F. See also Rules 4-01(a)(2) and 10-01 of Regulation S-X.

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C. INFORMATION ABOUT THE COMPANY BEING ACQUIRED

Item 17. Information with Respect to Foreign Companies Other Than F-3 Companies.

If the company being acquired does not meet the requirements for use of Form F-3, or compliance with this Item is otherwise elected in lieu of Item 15 or 16, furnish the information required by paragraph (a) or (b) of this Item, whichever is applicable.

(a) If the company being acquired is subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act, and compliance with this subparagraph in lieu of subparagraph (b) of this Item is elected, furnish the information that would be required by Item 14 of this Form if the securities of such company were being registered; however, only financial statements complying with the reconciliation requirements of Item 17 of Form 20-F, and those schedules required by Rules 12-15, 28, and 29 of Regulation S-X (§210.12-15, 28, 29 of this chapter) need be provided with respect to the company being acquired.

(b) If the company being acquired is not subject to the reporting requirements of either Section 13(a) or 15(d) of the Exchange Act, furnish the information that would be required by the following if securities of such company were being registered.

(1) A brief description of the business done by the company which indicates the general nature and scope of the business;

(2) Where common equity securities are being issued, the information required by Item 9.A.4 of Form 20-F, nature of trading markets, updated to cover any subsequent interim periods for which interim financial statements are required to be included to comply with Item 8.A of Form 20-F. Such updating may be made in the prospectus, in an amended Form 20-F, Form 10-K or, in the case of registrants described in General Instruction A.(2) of Form 40-F, Form 40-F, or in a Form 6-K, Form 10-Q or Form 8-K;

(3) [Reserved]

(4) (i) Item 5 of Form 20-F, management's discussion and analysis of financial condition and results of operations;

(ii) Item 11of Form 20-F, quantitative and qualitative disclosures of market risk.

(5) Financial statements that would have been required to be included in an annual report on Form 20-F (§249.220f of this chapter) had the company being acquired been required to prepare such a report. If the registrant's security holders are not voting, the transaction is not a roll-up transaction (as described by Item 901 of Regulation S-K (§229.901 of this chapter), and:

(i) the company being acquired is significant to the registrant in excess of the 20% level as determined under §210.3-05(b)(2), provide financial statements of the company being acquired for the latest fiscal year in conformity with GAAP. In addition, if the company being acquired has provided its security holders with

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financial statements prepared in conformity with GAAP for either or both of the two fiscal years before the latest fiscal year, provide the financial statements for those years; or

(ii) the company being acquired is significant to the registrant at or below the 20% level, no financial information (including pro forma and comparative per share information) for the company being acquired need be provided; and

(6) For the registrant's fiscal years ending on or after December 15, 2009, Item 16F of Form 20–F, change in registrant's certifying accountant.

Instructions:

1. The financial statements required by this paragraph 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. For a company combining with a registrant that is a shell company, see § 210.15-01(a).

2. If this Form is used to register resales to the public by any person who is deemed an underwriter within the meaning of Rule 145(c) (§230.145(c) of this chapter) with respect to the securities being reoffered, the financial statements must be audited for the fiscal years required to be presented under paragraph (b)(2) of Rule 3-05 of Regulation S-X (17 CFR 210.3-05(b)(2)).

3. In determining the significance of an acquisition for purposes of this paragraph, apply the tests prescribed in Rule 1-02(w) (§210.1-02(w) of this chapter).

(6) any interim financial statements that would be required to be included in order to comply with Item 8.A of Form 20-F; and

(7) Schedules required by Rules 12-15, 28 and 29 of Regulation S-X.

Instructions to paragraph (b)(5) and (b)(6):

If the financial statements required by paragraphs (b)(5) and (b)(6) are prepared on the basis of a comprehensive body of accounting principles other than U.S. GAAP, provide a reconciliation to U.S. GAAP in accordance with Item 18 of Form 20-F (§ 249.220f of this chapter) if the foreign business being acquired will be a predecessor to the issuer that is a shell company or, in all other circumstances, with Item 17 of Form 20-F (§ 249.220f of this chapter) unless a reconciliation is unavailable or not obtainable without unreasonable cost or expense. At a minimum, provide a narrative description of all material variations in accounting principles, practices and methods used in preparing the non-U.S. GAAP financial statements from those accepted in the U.S. when the financial statements are prepared on a basis other than U.S. GAAP.

Background: Registration statements on Forms S-4 and F-4 are used when registered securities are being exchanged in a business combination. The information requirements of Forms S-4 and F-4 are set out in three parts: (1) information about the transaction, (2) information about the registrant, and (3)

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information about the business being acquired (target). Both of these forms require financial information that complies with Reg S-X, including requirements for audited annual and unaudited interim historical financial statements and pro forma financial information giving effect to significant acquired or to be acquired businesses.

Interpretive response: Yes. Although the requirements for Form F-4 are similar to those of Form S-4, Form F-4 permits financial statements required by Item 8.A of Form 20-F (see section 6.3.50). [FRM 2200.1]

5.4 Merger proxy statements

5.4.10 Overview

A registrant could be required to obtain shareholder approval of a potential business combination for many reasons, but it is frequently because of state law or the registrant's articles of incorporation. Solicitation of shareholder vote is achieved by filing a merger proxy statement on Schedule 14A.

S-X Rule 3-05(b)(1) indicates merger proxy statements are subject to special requirements for financial statements, which are governed by Regulation 14A, Solicitation of Proxies. However, if the consideration transferred in the merger includes registered securities, the registrant must also comply with the financial statement requirements of Form S-4 (see section 5.3). This section addresses the requirements when soliciting shareholder vote that do **not** involve registered securities (i.e. cash and/or exempt securities).

Excerpt from S-X Rule 3-05

Financial statements of businesses acquired or to be acquired.

(b) *Periods to be presented.*

(1) If registering an offering of securities to the security holders of the business to be acquired, then the financial statements specified in §§ 210.3-01 and 210.3-02 must be filed for the business to be acquired, except as provided otherwise for filings on Form N-14, S-4, or F-4 (§ 239.23, § 239.25, or § 239.34 of this chapter). The financial statements covering fiscal years must be audited except as provided in Item 14 of Schedule 14A (§ 240.14a-101 of this chapter) with respect to certain proxy statements or in registration statements filed on Forms N-14, S-4, or F-4 (§ 239.23, § 239.25, or § 239.34 of this chapter).

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Excerpt from Regulation 14A: Solicitation of Proxies

Information to be furnished to security holders.

(a) No solicitation subject to this regulation shall be made unless each person solicited is concurrently furnished or has previously been furnished with:

(1) A publicly-filed preliminary or definitive proxy statement, in the form and manner described in §240.14a-16, containing the information specified in Schedule 14A (§240.14a-101);

(2) A preliminary or definitive written proxy statement included in a registration statement filed under the Securities Act of 1933 on Form S-4 or F-4 (§239.25 or §239.34 of this chapter) or Form N-14 (§239.23 of this chapter) and containing the information specified in such Form; or

(3) A publicly-filed preliminary or definitive proxy statement, not in the form and manner described in §240.14a-16, containing the information specified in Schedule 14A (§240.14a-101), if:

(i) The solicitation relates to a business combination transaction as defined in §230.165 of this chapter, as well as transactions for cash consideration requiring disclosure under Item 14 of §240.14a-101; or

(ii) The solicitation may not follow the form and manner described in §240.14a-16 pursuant to the laws of the state of incorporation of the registrant;

(b) If the solicitation is made on behalf of the registrant, other than an investment company registered under the Investment Company Act of 1940, and relates to an annual (or special meeting in lieu of the annual) meeting of security holders, or written consent in lieu of such meeting, at which directors are to be elected, each proxy statement furnished pursuant to paragraph (a) of this section shall be accompanied or preceded by an annual report to security holders as follows:

(1) The report shall include, for the registrant and its subsidiaries, consolidated and audited balance sheets as of the end of the two most recent fiscal years and audited statements of income and cash flows for each of the three most recent fiscal years prepared in accordance with Regulation S-X (part 210 of this chapter), except that the provisions of Article 3 (other than §§210.3-03(e), 210.3-04 and 210.3-20) and Article 11 shall not apply. Any financial statement schedules or exhibits or separate financial statements which may otherwise be required in filings with the Commission may be omitted. If the financial statements of the registrant and its subsidiaries consolidated in the annual report filed or to be filed with the Commission are not required to be audited, the financial statements required by this paragraph may be unaudited. A smaller reporting company may provide the information in Article 8 of Regulation S-X (§210.8 of this chapter) in lieu of the financial information required by this paragraph 9(b)(1).

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Question 5.4.10

When is a merger proxy statement used in connection with a business combination?

Interpretive response: A merger proxy statement filed on Schedule 14A is used to solicit approval of the business combination by the acquiring entity's shareholders, the target entity's shareholders, or both. If the consideration transferred in the merger includes registered securities, the registrant must also comply with the financial statement requirements of Form S-4/F-4 (see section 5.3).

If a merger requires a vote by the target's shareholders, it typically must be approved by the holders of a majority of the target's outstanding shares. The acquiring company's shareholders may also need to approve – e.g. as a result of the listing standards of the exchange.

The voting requirements for the target or acquiring entity can apply regardless of whether it is an SEC registrant. Determining which parties are required to vote is based on state law, corporate bylaws, or articles of incorporation. An entity should consult with legal counsel if it is unsure of the voting parties.

Unique considerations for FPIs

FPIs do not file Schedule 14A because they are exempt from section 14 of the 1934 Act and the related rules under Regulation 14A (Solicitation of Proxies). However, certain transactions of FPIs may still require shareholder vote due to local laws (see Question 6.4.10). [§240.3a12-3]

Question 5.4.20

What information is included in a merger proxy statement?

Interpretive response: Schedule 14A under the 1934 Act specifies the information registrants provide in proxy solicitation materials. Rule 14a-3(b)(1) indicates if an annual meeting of shareholders at which directors will be elected uses proxy solicitation materials, an annual report to shareholders must be furnished before, or together with, the proxy materials.

That annual report does not need to include financial information required by S-X Article 3 and Article 11. However, if proxy solicitation materials are used for a meeting of shareholders for which votes are solicited with respect to Item 11, *Authorization or Issuance of Securities Otherwise Than for Exchange,* Item 12, *Modification or Exchange of Securities*, or Item 14, *Mergers, Consolidations, Acquisitions and Similar Matters,* then Schedule 14A generally requires financial statements that fully comply with Reg S-X in proxy materials.

The following table summarizes potential scenarios where Schedule 14A might require financial information associated with a business combination.

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If proxy solicitation materials are used for a meeting of shareholders for which votes are solicited with respect to…	Then…
Item 11 or Item 12 **unrelated to potential acquisition** (i.e. not Item 14)	Financial statements requirements determined per Item 13, *Financial and other information*[1].
Item 11 or Item 12 involving **registered** securities to be used as consideration for potential acquisition (i.e. Item 14 also applies)	Financial statements requirements determined per Form S-4. See section 5.3
Item 11 or Item 12 involving **exempt** securities to be used as consideration for potential acquisition (i.e. Item 14 also applies)	Financial statements requirements determined per Item 13[1] and Item 14. See section 5.4.20
Item 11 and Item 12 do not apply because cash is to be used as consideration for potential acquisition (i.e. only Item 14 applies)	Financial statements requirements determined per Item 14. See section 5.4.20

Note:

1. This can also include financial information meeting the requirements of S-X Rule 3-05 and Article 11 with respect to transactions that are not the subject of proxy solicitation action. See chapter 4.

In addition to typical information provided in an entity's annual proxy statement to shareholders, the information required in a merger proxy statement under Item 14 is similar to the requirements of Form S-4. The merger proxy statement must include information about the transaction, acquiring entity, and/or target and pro forma financial information.

Section 5.4.20 addresses the financial statement requirements of the acquiring entity and target under Item 13 and Item 14. [§240-14a-101 (Note A)]

Question 5.4.30

Are there unique age considerations for merger proxy statements?

Interpretive response: No, the requirement to update target entity financial statements is based on the registrant's obligation to update under S-X Rule 3-12 (or Rule 8-08 for an SRC). See section 4.4.

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Question 5.4.40

Does Schedule 14A provide any exceptions for certain types of transactions?

Interpretive response: Yes.

The following transactions require special attention in merger proxy statements.

Going-private transaction

A going-private transaction involves an offer by an issuer (or an affiliate of the issuer) to purchase enough of its own securities so that it is held by fewer than 300 persons or so that it is no longer listed on any national securities exchange (e.g. NYSE) or quoted on a national interdealer quotation system (e.g. NASDAQ). [§ 240.13e-3]

Even though a going-private transaction might only consist of consideration in the form of cash and/or exempt securities, Schedule 14A requires specific information be provided to the shareholders of the target (the issuer) to allow an informed voting decision. See Rule 13e-3 for full requirements. [Sch 14A (Instr 2 – 3)]

Roll-up transaction

A roll-up transaction involves the combination or reorganization of one or more partnerships, directly or indirectly, in which some, or all, of the investors in those partnerships will receive new securities, or securities in another entity. [S-K Item 901]

Even though a roll-up transaction might only consist of consideration in the form of exempt securities, Schedule 14A requires more information be provided to the shareholders of the target company to allow an informed voting decision. See Reg S-K Item 914, *Pro forma financial statements: selected financial data*, for additional requirements. [Sch 14A (Instr 3)]

Registered investment companies and business development companies

If the parties to the transaction involve registered investment companies and business development companies, the entity must provide the information regarding the target or acquiring entity outlined in Schedule 14A, Item 14(d).

5.4.20 Requirements for financial statements in a merger proxy statement

Excerpt from Schedule 14A

Schedule 14A. Information required in proxy statement.

Notes:

A. Where any item calls for information with respect to any matter to be acted upon and such matter involves other matters with respect to which

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information is called for by other items of this schedule, the information called for by such other items also shall be given. For example, where a solicitation of security holders is for the purpose of approving the authorization of additional securities which are to be used to acquire another specified company, and the registrants' security holders will not have a separate opportunity to vote upon the transaction, the solicitation to authorize the securities is also a solicitation with respect to the acquisition. Under those facts, information required by Items 11, 13 and 14 shall be furnished.

Item 11. Authorization or issuance of securities otherwise than for exchange.

If action is to be taken with respect to the authorization or issuance of any securities otherwise than for exchange for outstanding securities of the registrant, furnish the following information:

(a) State the title and amount of securities to be authorized or issued.

(b) Furnish the information required by Item 202 of Regulation S-K (§229.202 of this chapter). If the terms of the securities cannot be stated or estimated with respect to any or all of the securities to be authorized, because no offering thereof is contemplated in the proximate future, and if no further authorization by security holders for the issuance thereof is to be obtained, it should be stated that the terms of the securities to be authorized, including dividend or interest rates, conversion prices, voting rights, redemption prices, maturity dates, and similar matters will be determined by the board of directors. If the securities are additional shares of common stock of a class outstanding, the description may be omitted except for a statement of the preemptive rights, if any. Where the statutory provisions with respect to preemptive rights are so indefinite or complex that they cannot be stated in summarized form, it will suffice to make a statement in the form of an opinion of counsel as to the existence and extent of such rights.

(c) Describe briefly the transaction in which the securities are to be issued including a statement as to (1) the nature and approximate amount of consideration received or to be received by the registrant and (2) the approximate amount devoted to each purpose so far as determinable for which the net proceeds have been or are to be used. If it is impracticable to describe the transaction in which the securities are to be issued, state the reason, indicate the purpose of the authorization of the securities, and state whether further authorization for the issuance of the securities by a vote of security holders will be solicited prior to such issuance.

(d) If the securities are to be issued otherwise than in a public offering for cash, state the reasons for the proposed authorization or issuance and the general effect thereof upon the rights of existing security holders.

(e) Furnish the information required by Item 13(a) of this schedule.

Item 12. Modification or exchange of securities.

If action is to be taken with respect to the modification of any class of securities of the registrant, or the issuance or authorization for issuance of securities of the registrant in exchange for outstanding securities of the registrant furnish the following information:

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(a) If outstanding securities are to be modified, state the title and amount thereof. If securities are to be issued in exchange for outstanding securities, state the title and amount of securities to be so issued, the title and amount of outstanding securities to be exchanged therefor and the basis of the exchange.

(b) Describe any material differences between the outstanding securities and the modified or new securities in respect of any of the matters concerning which information would be required in the description of the securities in Item 202 of Regulation S-K (§229.202 of this chapter).

(c) State the reasons for the proposed modification or exchange and the general effect thereof upon the rights of existing security holders.

(d) Furnish a brief statement as to arrears in dividends or as to defaults in principal or interest in respect to the outstanding securities which are to be modified or exchanged and such other information as may be appropriate in the particular case to disclose adequately the nature and effect of the proposed action.

(e) Outline briefly any other material features of the proposed modification or exchange. If the plan of proposed action is set forth in a written document, file copies thereof with the Commission in accordance with §240.14a-6.

(f) Furnish the information required by Item 13(a) of this Schedule.

Instruction. If the existing security is presently listed and registered on a national securities exchange, state whether the registrant intends to apply for listing and registration of the new or reclassified security on such exchange or any other exchange. If the registrant does not intend to make such application, state the effect of the termination of such listing and registration.

Item 13. Financial and other information. (See Notes D and E at the beginning of this Schedule).

(a) *Information required.* If action is to be taken with respect to any matter specified in Item 11 or 12, furnish the following information:

(1) Financial statements meeting the requirements of Regulation S-X, including financial information required by Rule 3-05 and Article 11 of Regulation S-X with respect to transactions other than pursuant to which action is to be taken as described in this proxy statement (A smaller reporting company may provide the information in Rules 8-04 and 8-05 of Regulation S-X (§§210.8-04 and 210.8-05 of this chapter) in lieu of the financial information required by Rule 3-05 and Article 11 of Regulation S-X);

(2) Item 302 of Regulation S-K, supplementary financial information;

(3) Item 303 of Regulation S-K, management's discussion and analysis of financial condition and results of operations;

(4) Item 304 of Regulation S-K, changes in and disagreements with accountants on accounting and financial disclosure;

(5) Item 305 of Regulation S-K, quantitative and qualitative disclosures about market risk; and

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(6) A statement as to whether or not representatives of the principal accountants for the current year and for the most recently completed fiscal year:

(i) Are expected to be present at the security holders' meeting;

(ii) Will have the opportunity to make a statement if they desire to do so; and

(iii) Are expected to be available to respond to appropriate questions.

(b) *Incorporation by reference.* The information required pursuant to paragraph (a) of this Item may be incorporated by reference into the proxy statement as follows:

(1) *S-3 registrants and certain N-2 registrants.* If the registrant meets the requirements of Form S-3 or General Instruction A.2 of Form N-2 (see Note E to this Schedule), it may incorporate by reference to previously-filed documents any of the information required by paragraph (a) of this Item, provided that the requirements of paragraph (c) are met. Where the registrant meets the requirements of Form S-3 or General Instruction A.2 of Form N-2 and has elected to furnish the required information by incorporation by reference, the registrant may elect to update the information so incorporated by reference to information in subsequently-filed documents.

(2) *All registrants.* The registrant may incorporate by reference any of the information required by paragraph (a) of this Item, provided that the information is contained in an annual report to security holders or a previously-filed statement or report, such report or statement is delivered to security holders with the proxy statement and the requirements of paragraph (c) are met.

(c) *Certain conditions applicable to incorporation by reference.* Registrants eligible to incorporate by reference into the proxy statement the information required by paragraph (a) of this Item in the manner specified by paragraphs (b)(1) and (b)(2) may do so only if:

(1) The information is not required to be included in the proxy statement pursuant to the requirement of another Item;

(2) The proxy statement identifies on the last page(s) the information incorporated by reference; and

(3) The material incorporated by reference substantially meets the requirements of this Item or the appropriate portions of this Item.

Instructions to Item 13.

1. Notwithstanding the provisions of this Item, any or all of the information required by paragraph (a) of this Item not material for the exercise of prudent judgment in regard to the matter to be acted upon may be omitted. In the usual case the information is deemed material to the exercise of prudent judgment where the matter to be acted upon is the authorization or issuance of a material amount of senior securities, but the information is not deemed material where the matter to be acted upon is the authorization or issuance of common stock, otherwise than in an exchange, merger, consolidation, acquisition or similar transaction, the authorization of

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preferred stock without present intent to issue or the authorization of preferred stock for issuance for cash in an amount constituting fair value.

2. In order to facilitate compliance with Rule 2-02(a) of Regulation S-X, one copy of the definitive proxy statement filed with the Commission shall include a manually signed copy of the accountant's report. If the financial statements are incorporated by reference, a manually signed copy of the accountant's report shall be filed with the definitive proxy statement.

3. Notwithstanding the provisions of Regulation S-X, no schedules other than those prepared in accordance with Rules 12-15, 12-28 and 12-29 (or, for management investment companies, Rules 12-12 through 12-14) of that regulation need be furnished in the proxy statement.

4. Unless registered on a national securities exchange or otherwise required to furnish such information, registered investment companies need not furnish the information required by paragraph (a)(2) or (3) of this Item.

5. If the registrant submits preliminary proxy material incorporating by reference financial statements required by this Item, the registrant should furnish a draft of the financial statements if the document from which they are incorporated has not been filed with or furnished to the Commission.

6. A registered investment company need not comply with items (a)(2), (a)(3), and (a)(5) of this Item 13.

Item 14. Mergers, consolidations, acquisitions and similar matters. (See Notes A and D at the beginning of this Schedule).

Instructions to Item 14:

1. In transactions in which the consideration offered to security holders consists wholly or in part of securities registered under the Securities Act of 1933, furnish the information required by Form S-4 (§239.25 of this chapter), Form F-4 (§239.34 of this chapter), or Form N-14 (§239.23 of this chapter), as applicable, instead of this Item. Only a Form S-4, Form F-4, or Form N-14 must be filed in accordance with §240.14a-6(j).

2. (a) In transactions in which the consideration offered to security holders consists wholly of cash, the information required by paragraph (c)(1) of this Item for the acquiring company need not be provided unless the information is material to an informed voting decision (e.g., the security holders of the target company are voting and financing is not assured).

   (b) Additionally, if only the security holders of the target company are voting:

      i. The financial information in paragraphs (b)(8)-(11) of this Item for the acquiring company and the target need not be provided; and

      ii. The information in paragraph (c)(2) of this Item for the target company need not be provided.

      If, however, the transaction is a going-private transaction (as defined by §240.13e-3), then the information required by paragraph (c)(2) of this Item must be provided and to the extent that the going-private rules require the information specified in

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paragraph (b)(8)-(b)(11) of this Item, that information must be provided as well.

3. In transactions in which the consideration offered to security holders consists wholly of securities exempt from registration under the Securities Act of 1933 or a combination of exempt securities and cash, information about the acquiring company required by paragraph (c)(1) of this Item need not be provided if only the security holders of the acquiring company are voting, unless the information is material to an informed voting decision. If only the security holders of the target company are voting, information about the target company in paragraph (c)(2) of this Item need not be provided. However, the information required by paragraph (c)(2) of this Item must be provided if the transaction is a going-private (as defined by §240.13e-3) or roll-up (as described by Item 901 of Regulation S-K (§229.901 of this chapter)) transaction.
4. The information required by paragraphs (b)(8)-(11) and (c) need not be provided if the plan being voted on involves only the acquiring company and one or more of its totally held subsidiaries and does not involve a liquidation or a spin off.
5. To facilitate compliance with Rule 2-02(a) of Regulation S-X (§210.2-02(a) of this chapter) (technical requirements relating to accountants' reports), one copy of the definitive proxy statement filed with the Commission must include a signed copy of the accountant's report. If the financial statements are incorporated by reference, a signed copy of the accountant's report must be filed with the definitive proxy statement. Signatures may be typed if the document is filed electronically on EDGAR. See Rule 302 of Regulation S-T (§232.302 of this chapter).
6. Notwithstanding the provisions of Regulation S-X, no schedules other than those prepared in accordance with §210.12-15, §210.12-28 and §210.12-29 of this chapter (or, for management investment companies, §§210.12-12 through 210.12-14 of this chapter) of that regulation need be furnished in the proxy statement.
7. If the preliminary proxy material incorporates by reference financial statements required by this Item, a draft of the financial statements must be furnished to the Commission staff upon request if the document from which they are incorporated has not been filed with or furnished to the Commission.

(a) *Applicability*. If action is to be taken with respect to any of the following transactions, provide the information required by this Item:

(1) A merger or consolidation;

(2) An acquisition of securities of another person;

(3) An acquisition of any other going business or the assets of a going business;

(4) A sale or other transfer of all or any substantial part of assets; or

(5) A liquidation or dissolution.

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(b) *Transaction information.* Provide the following information for each of the parties to the transaction unless otherwise specified:

(1) *Summary term sheet.* The information required by Item 1001 of Regulation M-A (§229.1001 of this chapter).

(2) *Contact information.* The name, complete mailing address and telephone number of the principal executive offices.

(3) *Business conducted.* A brief description of the general nature of the business conducted.

(4) *Terms of the transaction.* The information required by Item 1004(a)(2) of Regulation M-A (§229.1004 of this chapter).

(5) *Regulatory approvals.* A statement as to whether any federal or state regulatory requirements must be complied with or approval must be obtained in connection with the transaction and, if so, the status of the compliance or approval.

(6) *Reports, opinions, appraisals.* If a report, opinion or appraisal materially relating to the transaction has been received from an outside party, and is referred to in the proxy statement, furnish the information required by Item 1015(b) of Regulation M-A (§229.1015 of this chapter).

(7) *Past contacts, transactions or negotiations.* The information required by Items 1005(b) and 1011(a)(1) of Regulation M-A (§229.1005 of this chapter and §229.1011 of this chapter), for the parties to the transaction and their affiliates during the periods for which financial statements are presented or incorporated by reference under this Item.

(8)—(10) [Reserved]

(11) *Financial information.* If material, financial information required by Article 11 of Regulation S-X (§§210.10-01 through 229.11-03 of this chapter) with respect to this transaction.

Instructions to paragraph (b)(11):

1. Present any Article 11 information required with respect to transactions other than those being voted upon (where not incorporated by reference) together with the pro forma information relating to the transaction being voted upon. In presenting this information, you must clearly distinguish between the transaction being voted upon and any other transaction.
2. If current pro forma financial information with respect to all other transactions is incorporated by reference, you need only present the pro forma effect of this transaction.

(c) *Information about the parties to the transaction—*

(1) *Acquiring company.* Furnish the information required by Part B (Registrant Information) of Form S-4 (§239.25 of this chapter) or Form F-4 (§239.34 of this chapter), as applicable, for the acquiring company. However, financial statements need only be presented for the latest two fiscal years and interim periods.

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(2) *Acquired company.* Furnish the information required by Part C (Information with Respect to the Company Being Acquired) of Form S-4 (§239.25 of this chapter) or Form F-4 (§239.34 of this chapter), as applicable.

(d) *Information about parties to the transaction: registered investment companies and business development companies.* If the acquiring company or the acquired company is an investment company registered under the Investment Company Act of 1940 or a business development company as defined by Section 2(a)(48) of the Investment Company Act of 1940, provide the following information for that company instead of the information specified by paragraph (c) of this Item:

(1) Information required by Item 101 of Regulation S-K (§229.101 of this chapter), description of business;

(2) Information required by Item 102 of Regulation S-K (§229.102 of this chapter), description of property;

(3) Information required by Item 103 of Regulation S-K (§229.103 of this chapter), legal proceedings;

(4) Information required by Item 201(a), (b) and (c) of Regulation S-K (§229.201(a), (b) and (c) of this chapter), market price of and dividends on the registrant's common equity and related stockholder matters;

(5) Financial statements meeting the requirements of Regulation S-X, including financial information required by Rule 3-05 and Article 11 of Regulation S-X (§210.3-05 and §210.11-01 through §210.11-03 of this chapter) with respect to transactions other than that as to which action is to be taken as described in this proxy statement;

(6) [Reserved]

(7) Information required by Item 302 of Regulation S-K (§229.302 of this chapter), supplementary financial information;

(8) Information required by Item 303 of Regulation S-K (§229.303 of this chapter), management's discussion and analysis of financial condition and results of operations; and

(9) Information required by Item 304 of Regulation S-K (§229.304 of this chapter), changes in and disagreements with accountants on accounting and financial disclosure.

Instruction to paragraph (d) of Item 14:

Unless registered on a national securities exchange or otherwise required to furnish such information, registered investment companies need not furnish the information required by paragraphs (d)(6), (d)(7) and (d)(8) of this Item.

(e) *Incorporation by reference.*

(1) The information required by paragraph (c) of this section may be incorporated by reference into the proxy statement to the same

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extent as would be permitted by Form S-4 (§239.25 of this chapter) or Form F-4 (§239.34 of this chapter), as applicable.

(2) Alternatively, the registrant may incorporate by reference into the proxy statement the information required by paragraph (c) of this Item if it is contained in an annual report sent to security holders in accordance with §240.14a-3 of this chapter with respect to the same meeting or solicitation of consents or authorizations that the proxy statement relates to and the information substantially meets the disclosure requirements of Item 14 or Item 17 of Form S-4 (§239.25 of this chapter) or Form F-4 (§239.34 of this chapter), as applicable.

(f) *De-SPAC transactions.*

(1) If the transaction is a de-SPAC transaction, as defined in § 229.1601(a) (Item 1601(a) of Regulation S-K), then the disclosure provisions of §§ 229.1603, 229.1604(b)(1) through (6) and (c), 229.1605 through 229.1607, and 229.1609 (Items 1603, 1604(b)(1) through (6) and (c), 1605 through 1607, and 1609 of Regulation S-K) apply in addition to the provisions of this schedule and disclosure thereunder must be provided in the proxy statement, and the structured data provisions of § 229.1610 (Item 1610 of Regulation S-K) apply to those disclosures. The information required by § 229.1604(b)(1) through (6) must be briefly described in the front of the disclosure document. To the extent that the applicable disclosure requirements of subpart 229.1600 of Regulation S-K are inconsistent with the disclosure requirements of this schedule, the requirements of subpart 229.1600 are controlling.

(2) Provide the following additional information for the target company:

(i) Information required by § 229.101 (Item 101 of Regulation S-K, description of business);

(ii) Information required by § 229.102 (Item 102 of Regulation S-K, description of property);

(iii) Information required by § 229.103 (Item 103 of Regulation S-K, legal proceedings);

(iv) Information required by § 229.304 (Item 304 of Regulation S-K, changes in and disagreements with accountants on accounting and financial disclosure);

(v) Information required by § 229.403 (Item 403 of Regulation S-K, security ownership of certain beneficial owners and management), assuming the completion of the de-SPAC transaction and any related financing transaction; and

(vi) Information required by § 229.701 (Item 701 of Regulation S-K, recent sales of unregistered securities).

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Question 5.4.50

How is the 'target' identified in a merger?

Interpretive response: The determination of the target entity is based on the legal form of the transaction. For example, in a reverse acquisition between two operating entities, the target entity's financial statements for the purposes of the merger proxy statement are those of the legal target, which may be the accounting acquirer. [FRM 1140.7]

Question 5.4.60

What are the financial statement requirements in a merger proxy statement?

Interpretive response: The required financial statements to be included in a merger proxy statement depend on a number of factors, including: [FRM 1140.3]

- the parties voting on the transaction (i.e. shareholders of the acquiring entity, target, or both);
- the form of consideration (i.e. cash, exempt securities, combination of cash and exempt securities);
- whether the target is an SEC registrant and
- the size of the target relative to the acquiring entity.

The following table outlines the requirements for the financial statements to be included in a merger proxy statement. The required financial statements of the acquirer and target apply to SEC registrants and non-SEC registrants. [FRM 1140.3]

Voting shareholders	Consideration	Financial statement of acquirer required?	Financial statements of target required?	Pro forma financial information required?
Acquirer only	Cash only, exempt securities only, or a combination. *See section 5.3 for registered securities.*	No (unless material to the voting decision, see Question 5.4.70)	Yes	Yes (if material to the voting decision)
Target only	Cash only	No (unless material to the voting decision, see Question 5.4.70)	No (unless it is a going-private transaction, see Question 5.4.40)	No

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Voting shareholders	Consideration	Financial statement of acquirer required?	Financial statements of target required?	Pro forma financial information required?
Target only	Exempt securities only or combination of exempt securities and cash	Yes	No (unless it is a going-private or roll-up transaction, see Question 5.4.40)	Yes (if material)
Acquirer and target	Cash only	No (unless material to the voting decision, see Question 5.4.70)	Yes	Yes (if material to the voting decision)
Acquirer and target	Exempt securities only or a combination of exempt securities and cash	Yes	Yes	Yes (if material)

If financial statements are required based on the table above, Item 14(c) of Schedule 14A indicates the information required is the same as the information required by Form S-4, except an acquirer need only provide two years of its own financial statements.

The following table summarizes the requirements, which are discussed in greater detail in section 5.3.

Required target financial statements	— three years (two for SRCs) — interim information (if applicable) – see Question 5.3.90 — financial statements of the target's significant acquired or to be acquired business under S-X Rule 3-05 may be required (see Question 5.3.100)
Required acquirer financial statements	— two years — interim information (if applicable) – see Question 5.3.90 — financial statements of the acquirer's significant acquired or to be acquired business under S-X Rule 3-05 are required unless previously filed (see Question 5.4.90)

See section 5.4.30 for audit considerations.

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Question 5.4.70

When are financial statements of the acquirer considered 'material' to an informed voting decision?

Interpretive response: The instructions to Item 13 and 14 of Schedule 14A indicate information not material for the exercise of prudent judgment about the matter to be acted upon may be omitted. The following are examples of when acquirer financial statements may be required because they are considered material to the voting decision.

Financing is not assured

If the acquiring entity plans to finance the acquisition, the SEC staff expects it to have an unconditional firm commitment for the financing in place to support omission of its financial statements (i.e. the financing is assured). If not, financial statements of the acquiring entity must be included for the two latest fiscal years and current interim period since the last audited balance sheet.

Only acquirer shareholders voting

If the acquiring entity's shareholders are the only parties voting, the presumption is that they have access to information about the acquiring entity. Therefore, generally no financial statements of the acquiring entity are required if the acquiring entity's financing (if any) is assured.

The SEC staff expects it to be rare for the acquiring entity to conclude that its financial statements are required in the merger proxy. [FRM 1140.2, FRM 1140.3]

Question 5.4.80

When is pro forma financial information considered 'material' to an informed voting decision?

Interpretive response: We believe pro forma information usually is provided unless the acquisition is clearly de minimis.

For a cash-only transaction in which only the target shareholders are voting, pro forma information giving effect to the acquisition of the target is not required. Pro forma information would not be relevant to the target shareholders because they will not receive an interest in the to-be-combined entities.

Question 5.4.90

Does a merger proxy statement require separate financial statements of separate acquisitions made by the acquiring entity?

Interpretive response: In addition to the financial statement requirements for the acquiring entity and target that are being merged, additional financial statements may be required in a merger proxy statement for a separate

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business recently acquired or that is probable of being acquired by the acquiring entity and/or target. See Question 5.3.100 for considerations of separate acquisitions completed by the target.

If the merger requires the target's shareholders to vote, the inclusion of the S-X Rule 3-05 financial statements for the acquiring entity's acquisitions depends on the type of consideration involved in the merger.

Cash only

If the merger consideration is cash only, the acquiring entity's financial statements generally are not required and therefore S-X Rule 3-05 financial statements of the acquiring entity's acquisitions would also not be required.

If the financial statements of the acquiring entity are required (because the entity cannot demonstrate that financing is assured, see Question 5.4.70), then S-X Rule 3-05 financial statements are also required.

However, if only the target's security holders are voting, the SEC staff would consider granting relief from providing the S-X Rule 3-05 financial statements on a case-by-case basis if those financial statements are not material to assessing whether the acquiring entity's financing is assured. In its evaluation, the SEC staff considers the timing of the acquisition, its relative size, and its effect on the acquiring entity's existing cash resources. [SEC T-Int §H.Q5 (7/01), 2000 AICPA Conf]

Exempt securities or combination of exempt securities and cash

If only the target's shareholders are voting, Item 14(c)(1) of Schedule 14A requires the acquiring entity to provide the same financial information as would be required if the entity was offering registered securities (i.e. comply with Part B of Form S-4). As a result, S-X Rule 3-05 financial statements for the acquiring entity must be included in the merger proxy if not previously filed.

Example 5.4.10
Previously acquired business of target

On August 1, 20X9, Registrant entered into an agreement to purchase all the outstanding stock of Target for cash, subject to approval by Registrant's shareholders. Target acquired Entity Z on June 28, 20X9. The acquisition of Entity Z was 80% significant to Target.

Registrant expects to file a merger proxy statement on September 1, 20X9 in connection with the acquisition of Target.

Scenario 1: Target is an SEC registrant

On July 2, 20X9, Target initially reported the acquisition on Form 8-K. The July 2 Form 8-K did not include Entity Z's financial statements required under S-X Rule 3-05.

Target must file Entity Z's financial statements before the merger proxy statement can be filed with the SEC.

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Scenario 2: Target is not an SEC registrant

The financial statements of Entity Z would likely need to be included in the merger proxy statement due to the level of significance of Entity Z's acquisition to Target and the short period of time the results of Entity Z have been included in Target's post-acquisition financial statements.

Example 5.4.20

Previously acquired business of acquiring entity

Registrant enters into an agreement to purchase 100% of the outstanding stock of Target for cash. Target is an SEC registrant and must file a merger proxy statement to obtain shareholder approval for the merger.

Registrant is not required to obtain shareholder approval for the merger. It expects to finance the acquisition through bank debt. Registrant recently consummated a significant acquisition of Entity Z. As of the date of filing of Target's merger proxy, Registrant:

— does not have an unconditional firm commitment in place to obtain the financing for the transaction (i.e. has not demonstrated that financing is assured); and

— has not filed on Form 8-K the required Rule 3-05 financial statements of Entity Z (Registrant is within the 71-day extension period).

Registrant's financial statements for the two most recent fiscal years required to be filed and the current interim period since the last audited balance sheet must be included in Target's merger proxy. This is because Registrant has not demonstrated its financial ability to satisfy the terms of the merger with Target (i.e. Registrant has not demonstrated that financing is assured).

In addition, because Registrant has not previously filed the required Rule 3-05 financial statements of Entity Z, those financial statements may need to be included in Target's merger proxy. This is because the information generally would be considered material to the Target shareholders' voting decision. However, because only Target's shareholders are voting on the merger, the SEC staff may grant relief from this requirement.

Question 5.4.100

Are the target's required financial statements affected when either the acquirer or target is an EGC?

Interpretive response: Yes.

If the target's financial statements are required in a merger proxy statement, the SEC staff has stated it will not object to inclusion of two years of annual financial statements (and interim financial statements) if: [FRM 10220.7]

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— the merger proxy statement is filed after the legal acquirer's IPO but before the filing (or the filing deadline) of the legal acquirer's first Form 10-K; and

— the legal acquirer is an EGC that is not a shell company, or is a shell company EGC (such as a SPAC EGC) and the target would be an EGC if it were conducting an IPO.

5.4.30 Audit considerations

Question 5.4.110

What are the audit requirements in a merger proxy statement?

Interpretive response: All annual financial statements included in a merger proxy statement (both for the acquiring entity and the target) must be audited. The only exception is for a target that is not subject to the reporting requirements under sections 13(a) or 15(d) of the 1934 Act. In that case, only the financial statements for the latest fiscal year must be audited if practicable (see Question 5.3.150). Financial statements for previous years do not need to be audited unless they were previously audited. [FRM 1140.5]

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6. Acquisitions of and by foreign entities

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6.4.10 Are there special considerations for FPIs when shareholders are required to vote on a proposed acquisition?

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6.1 How the SEC Rules work

This chapter explains the SEC reporting requirements for:

— acquisitions of foreign entities by domestic registrants; and
— acquisitions of domestic (US) or foreign entities by foreign private issuers (FPIs).

Just as Rule 3-05 financial statements may be required when a domestic registrant acquires a domestic business, they may be required in the above scenarios. The significance levels that trigger the need to file these statements are the same as they are in the 'domestic acquires domestic' scenario.

However, an FPI that files its periodic reports on Form 20-F (or Form 40-F for Canadian registrants) does not have a Form 8-K filing requirement when it makes a significant acquisition. Nevertheless, certain other filing requirements may result in the need for Rule 3-05 financial statements. This would be the case for example if this issuer is filing a registration statement or it is otherwise required to furnish a Form 6-K (e.g. because local regulations require the information to be disclosed).

The following table summarizes the similarities and differences in the requirements for Rule 3-05 financial statements in the above scenarios versus when a domestic registrant acquires a domestic business.

Significance tests	The significance tests and the significance thresholds that trigger Rule 3-05 financial statements are the same (see chapter 3). However, when the acquiree's and registrant's financial statements are based on different GAAP, the relevant amounts from acquiree's financial statements are converted to amounts that conform to the GAAP used by the registrant. See section 6.3.20.
Basis for preparation	Unlike Rule 3-05 financial statements of domestic acquirees, the financial statements of foreign acquirees do not need to be prepared under US GAAP. See section 6.3.40.
Number of periods	The number of periods required are the same for all significant acquisitions. See section 4.2.10.
Age of financial statements	The age requirements for all significant acquisitions are in S-X Rule 3-01 and Rule 3-02 (see section 4.2.10), except when the acquiree is a foreign entity that meets the definition of a foreign business. In this latter scenario, the age requirements are in Item 8 of Form 20-F, regardless of whether the acquiring registrant is a domestic registrant or an FPI. See section 6.3.50.

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6.2 General framework for reporting acquisitions of and by foreign entities

6.2.10 Acquisitions by domestic registrants

When a domestic registrant acquires a foreign entity (or assets), it has to comply with Reg S-X if:

— the entity or assets acquired constitute a business as defined in S-X Rule 11-01(d) (see section 2.2); and

— the acquisition meets the applicable significance thresholds (e.g. greater than 20% significance triggers the filing of a Form 8-K for many domestic registrants) (see section 2.3.20).

If these conditions are met, a domestic registrant files Rule 3-05 financial statements on a Form 8-K, registration statements and proxy materials (see section 2.3 for an overview of the filing and reporting requirements).

This chapter explains how to apply the Reg S-X requirements to the acquisition of a foreign entity (or assets) – e.g. how the significance tests are performed, the required basis of accounting for the Rule 3-05 financial statements and the age and period requirements for those financial statements.

6.2.20 Acquisitions by FPIs

Excerpt from Reg C Rule 405

Definitions of terms.

Foreign issuer. The term foreign issuer means any issuer which is a foreign government, a national of any foreign country or a corporation or other organization incorporated or organized under the laws of any foreign country.

Foreign private issuer.

(1) The term foreign private issuer means any foreign issuer other than a foreign government except an issuer meeting the following conditions as of the last business day of its most recently completed second fiscal quarter:

(i) More than 50 percent of the outstanding voting securities of such issuer are directly or indirectly owned of record by residents of the United States; and

(ii) Any of the following:

(A) The majority of the executive officers or directors are United States citizens or residents;

(B) More than 50 percent of the assets of the issuer are located in the United States; or

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(C) The business of the issuer is administered principally in the United States.

****

Note to paragraph (1) of the definition of Foreign private issuer: To determine the percentage of outstanding voting securities held by U.S. residents:

A. Use the method of calculating record ownership in §240.12g3-2(a) of this chapter, except that:

(1) The inquiry as to the amount of shares represented by accounts of customers resident in the United States may be limited to brokers, dealers, banks and other nominees located in:

(i) The United States,

(ii) The issuer's jurisdiction of incorporation, and

(iii) The jurisdiction that is the primary trading market for the issuer's voting securities, if different than the issuer's jurisdiction of incorporation; and

(2) Notwithstanding §240.12g5-1(a)(8) of this chapter, the issuer shall not exclude securities held by persons who received the securities pursuant to an employee compensation plan.

B. If, after reasonable inquiry, the issuer is unable to obtain information about the amount of shares represented by accounts of customers resident in the United States, the issuer may assume, for purposes of this definition, that the customers are residents of the jurisdiction in which the nominee has its principal place of business.

C. Count shares of voting securities beneficially owned by residents of the United States as reported on reports of beneficial ownership provided to the issuer or filed publicly and based on information otherwise provided to the issuer.

****

(2) In the case of a new registrant with the Commission, the determination of whether an issuer is a foreign private issuer shall be made as of a date within 30 days prior to the issuer's filing of an initial registration statement under either the Act or the Securities Exchange Act of 1934.

(3) Once an issuer qualifies as a foreign private issuer, it will immediately be able to use the forms and rules designated for foreign private issuers until it fails to qualify for this status at the end of its most recently completed second fiscal quarter. An issuer's determination that it fails to qualify as a foreign private issuer governs its eligibility to use the forms and rules designated for foreign private issuers beginning on the first day of the fiscal year following the determination date. Once an issuer fails to qualify for foreign private issuer status, it will remain unqualified unless it meets the requirements for foreign private issuer status as of the last business day of its second fiscal quarter …

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Excerpt from Rule 3b-4 of the 1934 Act

Definitions of "foreign government", "foreign issuer" and "foreign private issuer".

(a) The term *foreign government* means the government of any foreign country or of any political subdivision of a foreign country.

(b) The term *foreign issuer* means any issuer which is a foreign government, a national of any foreign country or a corporation or other organization incorporated or organized under the laws of any foreign country.

(c) The term *foreign private issuer* means any foreign issuer other than a foreign government except for an issuer meeting the following conditions as of the last business day of its most recently completed second fiscal quarter:

(1) More than 50 percent of the issuer's outstanding voting securities are directly or indirectly held of record by residents of the United States; and

(2) Any of the following:

(i) The majority of the executive officers or directors are United States citizens or residents;

(ii) More than 50 percent of the assets of the issuer are located in the United States; or

(iii) The business of the issuer is administered principally in the United States.

When an FPI acquires a domestic or foreign entity (or assets), it has to comply with Reg S-X if:

— the entity or assets acquired constitute a business as defined in S-X Rule 11-01(d) (see section 2.2); and

— the acquisition meets the applicable significance thresholds (see section 2.3.20).

If these conditions are met, an FPI files Rule 3-05 financial statements on registration statements and potentially on a Form 8-K (see section 2.3 for an overview of the filing and reporting requirements).

This chapter explains how to apply the Reg S-X requirements to an acquisition by an FPI – e.g. how the significance tests are performed, the required basis of accounting for the Rule 3-05 financial statements and the age and period requirements for those financial statements.

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Question 6.2.10

What is an FPI?

Interpretive response: An FPI means any issuer (other than a foreign government) incorporated or organized under the laws of a jurisdiction outside of the US unless:

- more than 50% of the outstanding voting securities of the issuer are directly or indirectly owned of record by residents of the US; and
- any one of one the following:
  - the majority of the executive officers or directors are US citizens or residents;
  - more than 50% of the assets of the issuer are located in the US; or
  - the business of the issuer is administered principally in the US. [FRM 6110.2, Reg C Rule 405, Rule 3b-4 of 1934 Act]

Question 6.2.20

What are the main filing requirement differences between an FPI and a domestic registrant?

Interpretive response: FPIs use different forms (e.g. Form 20-F as an annual report instead of Form 10-K) and have different filing deadlines for those forms. However, FPIs may elect to follow US domestic reporting requirements, which means filing periodic reports on Forms 10-K and 10-Q and filing Forms 8-K when required.

An FPI may file its financial statements based on accounting standards other than US GAAP regardless of which forms it uses. Specifically, an FPI's financial statements may be based on US GAAP, IFRS Accounting Standards, or home-country GAAP. If it uses the English-language version of IFRS Accounting Standards as issued by the International Accounting Standards Board (referred to in this Handbook as IFRS Accounting Standards-IASB), no reconciliation to US GAAP is needed. Otherwise, it reconciles its financial statements to US GAAP.

Question 6.2.30

When is an FPI required to provide Rule 3-05 financial statements for significant acquisitions?

Interpretive response: An FPI's requirement to provide Rule 3-05 financial statements depends on whether it files periodic reports on Form 20-F or elects to file under US domestic reporting requirements.

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FPIs that file Form 20-F

An FPI is not required to file a Form 8-K for its business acquisitions if it files periodic reports on Form 20-F and furnishes current reports on Form 6-K. Therefore, such an FPI is required to provide Rule 3-05 financial statements only when it files a registration statement (e.g. Form F-1 or Form F-3), including a Form 20-F used to register shares under the 1934 Act. When an FPI files a registration statement, it determines its Rule 3-05 financial statement requirements based on Item 8 of Form 20-F for age of financial statements (see section 6.3.50) and Item 17 of Form 20-F for the content of the financial statements (see section 6.3.40).

FPIs that file under US domestic reporting requirements

An FPI reports business acquisitions on Form 8-K if it files under the US domestic reporting requirements. When such an FPI acquires an US acquiree, the Rule 3-05 financial statements have to be based on US GAAP and comply with the requirements in Reg S-X (see chapter 4). Therefore, the rest of this chapter is not relevant in this situation.

In contrast, when an FPI acquires a foreign acquiree, the Rule 3-05 financial statement requirements are determined under Item 8 of Form 20-F for age of financial statements (see section 6.3.50) and Item 17 of Form 20-F for the content of the financial statements (see section 6.3.40). This is the case regardless of whether it files Form 20-F or has elected to follow the US domestic reporting requirements.

Canadian issuers that file under MJDS (Multi-Jurisdictional Disclosure System)

Canadian issuers that file under the MJDS include financial statements and pro forma financial information of acquired businesses in a MJDS registration statement only if Canadian securities regulators require those financial statements and information. This chapter focuses on the requirements related to Form 20-F. See Form 40-F for specific requirements for Canadian issuers that file under the MJDS.

Question 6.2.40

What requirements apply to continuous offerings and shelf registrations by FPIs?

Interpretive response: It depends.

Applicability to continuous offerings

For a continuous offering, an FPI files updated financial statements, as required by S-X Rule 3-05, on a post-effective amendment to the registration statement during the term of the offering period.

Applicability to a shelf registration

For delayed offerings on a shelf registration statement, previously filed S-X Rule 3-05 financial statements have to comply with the age requirements at the time

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of each offering or *takedown*. See section 6.3.50 regarding the age requirements. [FRM 6230]

6.3 Rule 3-05 financial statements

6.3.10 Overview

A registrant (either domestic or an FPI) provides Rule 3-05 financial statements for significant acquisitions of foreign acquirees in instances outlined in section 6.2. For example, a domestic registrant files a Form 8-K for significant acquisitions of foreign acquirees, but an FPI files a Form 8-K for such significant acquisitions only if it files its periodic reports on a Form 10-K. Further, an FPI provides Rule 3-05 financial statements for significant acquisitions of US acquirees in instances outlined in section 6.2.20.

Section 6.3.20 explains how to perform the significance tests when the acquiree and acquiring registrant prepare their financial statements based on different GAAP. That section applies to acquisitions of both foreign and US acquirees. The remaining sections of this chapter apply to acquisitions of foreign acquirees, either by domestic registrants or FPIs.

A registrant first determines if an acquired entity or assets meets the definition of a business under Rule 11-01(d). If so, and if the significance tests trigger a filing requirement (see section 6.3.20), the registrant next determines if the foreign acquiree meets the definition of a 'foreign business'. This is a specific definition in S-X Rule 1-02(l) and is different than the threshold determination of whether the entity or assets acquired meet the definition of a business under S-X Rule 11-01(d) (there are no Rule 3-05 filing requirements if the acquiree does not meet this definition of a business; see section 2.2.10). This is important because Reg S-X makes certain accommodations for the Rule 3-05 financial statements when the foreign acquiree meets this definition.

The remaining sections of the larger section 6.3 walk through the process of determining whether a foreign acquiree's financial statements comply with the requirements for Rule 3-05 financial statements.

Foreign business defined	Section 6.3.30	Defines a foreign business and illustrates application of the definition
Basis for preparation	Section 6.3.40	Discusses the acceptable bases for preparation of a foreign acquiree's Rule 3-05 financial statements (i.e. US GAAP, IFRS Accounting Standards-IASB, home-country GAAP reconciled to either US GAAP or IFRS Accounting Standards-IASB).
Periods and age requirements	Section 6.3.50	Discusses the number of periods required and the age of a foreign acquiree's Rule 3-05 financial statements.
Audit requirements	Section 6.3.60	Discusses the audit requirements for a foreign acquiree's Rule 3-05 financial statements

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6.3.20 Determining significance

S-X Rule 3-05's requirement to provide historical financial statements of the acquiree in a significant acquisition applies to acquisitions of both domestic and foreign acquirees. Therefore, the significance tests are applied when a registrant acquires a foreign acquiree.

Question 6.3.10

What are the significance thresholds that trigger reporting requirements for acquisitions by or of foreign acquirees?

Interpretive response: The significance thresholds that trigger filing requirements when either or both the acquirer and acquiree are foreign are the same as the thresholds when both acquirer and acquiree are domestic entities. However, an FPI acquirer that does not elect to use the forms that a US domestic registrant uses does not have a Form 8-K filing requirement for significant acquisitions or dispositions (see Question 6.2.30).

The following diagram (see section 2.1) summarizes those thresholds.

	Acquisition of business (transaction consummated)	Disposition of business (transaction consummated)	Probable acquisition of business	Acquisition of individually insignificant businesses
Form 8-K filing	Acquired business is > 20% significant.	Disposed of business is > 20% significant.	N/A	N/A
Registrant is filing a registration or proxy statement	Up to 74 days & > 50% significant 75 or more days & > 20% significant	N/A	To be acquired business is > 50% significant.	Acquisitions and probable acquisitions meeting certain criteria in the aggregate are > 50% significant.

Question 6.3.20

How are the significance tests applied to the acquisition of a foreign acquiree?

Interpretive response: The significance tests for a foreign acquiree under S-X Rule 3-05 are the same as the significance tests for a domestic acquiree (see chapter 3). To perform the required calculations, the foreign acquiree's financial information must conform to the basis of accounting used by the registrant (i.e.

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the acquirer). Therefore, a domestic registrant bases the amounts used in the significance tests for a foreign acquiree (the numerator) on US GAAP.

Similarly, an FPI bases the amounts used in the significance tests for a foreign or domestic acquiree on the same basis of accounting as it uses in its financial statements.

- If an FPI presents its financial statements in US GAAP (or home-country GAAP with reconciliation to US GAAP), it bases the amounts used for a foreign or domestic acquiree in the numerator of the significance tests on US GAAP.
- If an FPI prepares its financial statements based on IFRS Accounting Standards-IASB, it bases the amounts used for a foreign or domestic acquiree on IFRS Accounting Standards-IASB.

Therefore, a registrant may have to convert amounts from the acquiree's historical financial statements to the registrant's basis of accounting to perform the significance tests. [FRM 6350.2]

Question 6.3.30

May an FPI determine significance of an acquisition using pro forma information reflecting prior acquisitions?

Background: FPIs are not required to file a Form 8-K for significant acquisitions but may voluntarily submit a Form 6-K or be required to submit a Form 6-K (due to local regulations requiring public disclosure of information). That Form 6-K of the FPI may include audited financial statements and pro forma financial information of a significant acquired business.

Interpretive response: Yes. A foreign registrant that voluntarily *files* (versus furnishes) audited financial statements of a significant acquired business on a Form 6-K would be able to use pro forma financial information reflecting the previous significant acquisition(s) as the basis for determining the significance of subsequent acquisitions if:

- the registrant has filed Rule 3-05 financial statements (or Rule 3-14 financial statements for real estate operations) for any such previous significant acquired business; and
- the registrant has filed the pro forma financial information required by Article 11 for any such previously acquired or disposed business.

A foreign registrant may also be able to use pro forma financial information when the required information has been included or incorporated by reference in a previous registration statement to satisfy the requirements of S-X Rule 3-05. See Question 3.3.110 for a discussion of these conditions and the ability to use pro forma information to determine significance.

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6.3.30 Foreign business defined

Excerpt from S-X Rule 1-02(l)

Definitions of terms used in Regulation S-X.

(l) *Foreign business*. A business that is majority owned by persons who are not citizens or residents of the United States and is not organized under the laws of the United States or any state thereof, and either:

(1) More than 50 percent of its assets are located outside the United States; or

(2) The majority of its executive officers and directors are not United States citizens or residents.

When Rule 3-05 financial statements are required for a foreign acquiree that does not prepare its financial statements using US GAAP, they must be reconciled to US GAAP in certain instances. When and whether a reconciliation is required depends in part on whether the acquiree meets the definition of a foreign business. This section defines the term 'foreign business' and illustrates the application of the term; section 6.3.40 explains the reconciliation requirements.

Question 6.3.40

What is a foreign business?

Interpretive response: The SEC's definition of a foreign business has three elements. It is a business that: [S-X Rule 1.02(l), FRM 6110.4]

- is majority owned by persons who are not citizens or residents of the US;
- is not organized under the laws of the US or any US state; and
- has at least one of the following characteristics:
  - more than 50% of its assets are located outside the US; or
  - the majority of its executive officers and directors are not US citizens or residents.

In determining majority ownership, the SEC staff will consider the ultimate parent entity that would consolidate the business under US GAAP (IFRS Accounting Standards for IFRS Accounting Standards-IASB issuers) and the parent's controlling shareholders.

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Example 6.3.10

Entity comprises a US parent and subsidiaries organized in a non-US jurisdiction

A reporting entity comprises a US parent and three subsidiaries organized outside of the US. The three subsidiaries prepare US GAAP information for purposes of preparing the US parent's consolidated financial statements.

Because the parent is not organized outside the US, the reporting entity is not considered a foreign business.

Example 6.3.20

Entity comprises components organized in and outside the laws of the US

A reporting entity is a holding company that consists of two subsidiaries that are distinct legal entities (one incorporated in the US and the other incorporated in the UK), with 30% of the assets in the US and 70% in the UK. The UK entity is not a subsidiary of the US entity.

Despite the fact that a portion of the business is organized in the US, the reporting entity is presumed not to be organized in the US, due to the relative significance of the UK part of the business (more than 50% of its assets are located outside the US).

If this fact pattern is changed and the UK entity is a subsidiary of the US entity, then the reporting entity would be considered organized in the US.

Likewise, if the UK entity is not a subsidiary of the US entity, but the majority of the assets are in the US, then the reporting entity is presumed to be organized in the US.

Question 6.3.50

How does the foreign business definition apply to a carve-out of a larger entity?

Interpretive response: The Center for Audit Quality's International Practices Task Force discussed with the SEC staff how to apply the foreign business definition when the acquiree is a carve-out of a larger entity.

The Task Force concluded that a carved-out reporting entity is presumed to be a US-organized entity (and not a foreign business) if:

- the entity is a carve-out entirely from an entity incorporated in the US; or
- the entity comprises components of subsidiaries, or is carved out from businesses that are subsidiaries of a US company, regardless of the tier and regardless of the country in which the components are organized.

If neither of these conditions are present and the carved-out reporting entity comprises entities organized both in the US and abroad, all of the elements of

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the definition of a foreign business (see Question 6.3.40) are applied to the facts and circumstances of the case. This analysis includes as assessment of: [FRM 6110.4, IPTF 7/15/03]

- the relative significance of the parts of the carved-out reporting entity's business organized in and outside the US. If the majority of the business is in the US, it is presumed that the carved-out reporting entity is organized in the US;
- the majority ownership of the carved-out reporting entity. In determining majority ownership of the carved-out reporting entity, the SEC staff will consider the ultimate parent entity that would consolidate the business under the applicable GAAP and that parent's controlling shareholders.

If any of these presumptions apply but the registrant believes it has overcome them, it is encouraged to consult with legal counsel and discuss the specific fact pattern with the SEC staff.

Example 6.3.30

Entity is a carve-out from an entity organized in the US

A UK company sells a portion of its business in the US that is entirely owned and operated by a subsidiary incorporated in the US. Because the reporting entity is entirely part of the US subsidiary, it is considered organized in the US.

Question 6.3.60

When does a registrant determine whether an acquiree meets the definition of a foreign business?

Interpretive response: The SEC staff has indicated that there is no specified date in the SEC rules and regulations on which to determine whether a foreign acquiree meets the definition of a foreign business. Instead, registrants should use the date that makes the most sense based on their individual facts and circumstances. [Regs Comm 06/2015]

There are several dates a registrant might look to when assessing whether a foreign acquiree meets the definition of a foreign business, including:

- as of the end of the foreign acquiree's most recently completed fiscal year;
- as of the filing date of a pre-consummation registration statement/proxy (potentially with the need to perform the calculation as of the effective/mailing date);
- immediately before reporting the consummation of the acquisition on Form 8-K (as required by Item 2.01); and
- as of the last business day of the most recently completed second fiscal quarter of the foreign acquiree (similar to when FPI status is determined).

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6.3.40 Rule 3-05 financial statements: basis for preparation

Excerpt from Reg S-X Rule 3-05

Financial statements of businesses acquired or to be acquired.

(c) *Financial statements of a foreign business.* Financial statements of an acquired or to be acquired foreign business (as defined in § 210.1-02(l)) meeting the requirements of Item 17 of Form 20-F (§ 249.220f of this chapter) will satisfy this section. Such financial statements may be reconciled to U.S. Generally Accepted Accounting Principles (U.S. GAAP) or International Financial Reporting Standards as issued by the International Accounting Standards Board (IFRS-IASB) if the registrant is a foreign private issuer that prepares its financial statements in accordance with IFRS-IASB. This reconciliation must generally follow the form and content requirements in Item 17(c) of Form 20-F; however, accommodations in Item 17(c)(2) of Form 20-F that would be inconsistent with IFRS-IASB may not be applied, and IFRS 1, First-time Adoption of International Financial Reporting Standards, may be applied.

(d) *Financial statements of an acquired or to be acquired business that would be a foreign private issuer if it were a registrant.* Financial statements of an acquired or to be acquired business that is not a foreign business (as defined in § 210.1-02(l)), but would qualify as a foreign private issuer (as defined in §§ 230.405 and 240.3b-4 of this chapter) if it were a registrant may be prepared in accordance with IFRS-IASB without reconciliation to U.S. GAAP or, if the registrant is a foreign private issuer that prepares its financial statements in accordance with IFRS-IASB, may be prepared according to a comprehensive basis of accounting principles other than U.S. GAAP or IFRS-IASB and must be reconciled to IFRS-IASB or to U.S. GAAP. This reconciliation must generally follow the form and content requirements in Item 17(c) of Form 20-F; however, accommodations in Item 17(c)(2) of Form 20-F that would be inconsistent with IFRS-IASB may not be applied, and IFRS 1, First-time Adoption of International Financial Reporting Standards, may be applied.

Excerpt from Form 20-F

Item 17. Financial Statements.

(c) The financial statements and schedules required by paragraph (a) above may be prepared according to U.S. generally accepted accounting principles or IFRS as issued by the IASB. If the financial statements comply with IFRS as issued by the IASB, such compliance must be unreservedly and explicitly stated in the notes to the financial statements and the auditor's report must include an opinion on whether the financial statements comply with IFRS as issued by the IASB. If the notes and auditor's report of an issuer do not contain the information in the preceding sentence, then the U.S. GAAP reconciliation information described in paragraphs (c)(1) and (c)(2) must be provided. Alternatively, such financial statements and schedules may be prepared according to a comprehensive body of accounting principles other than those

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generally accepted in the United States or IFRS as issued by the IASB if the following are disclosed:

(1) An indication, in the accountant's report or in a reasonably prominent headnote before the financial statements, of the comprehensive body of accounting principles used to prepare the financial statements.

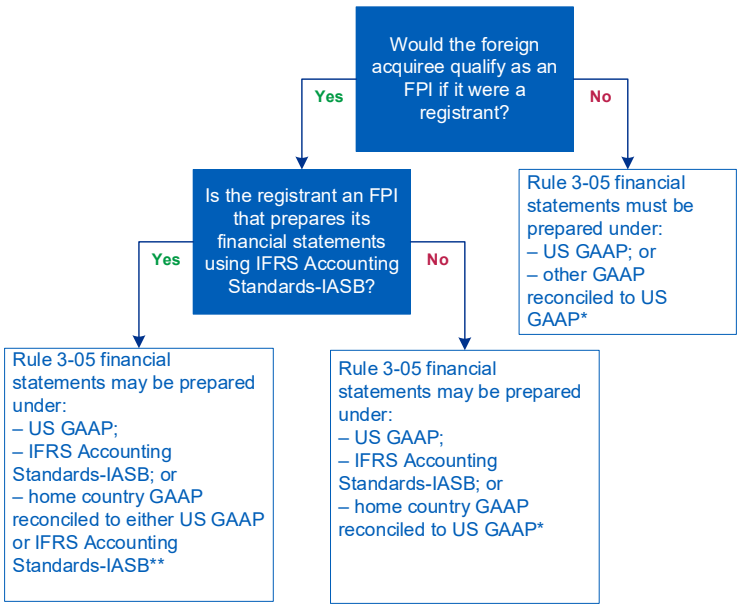
(2) A discussion of the material variations in the accounting principles, practices, and methods used in preparing the financial statements from the principles, practices, and methods generally accepted in the United States and in Regulation S-X.

The Rule 3-05 financial statements of a foreign acquiree may (but are not required to) be based on US GAAP. If they are based on other GAAP, whether they must be reconciled to US GAAP depends on several factors discussed in this section. To determine the permissible bases for preparation, a registrant first determines if the foreign acquiree meets the definition of a foreign business (see section 6.3.30).

Question 6.3.70

On what basis may Rule 3-05 financial statements be prepared if the acquiree does not meet the definition of a foreign business?

Interpretive response: The following decision tree summarizes the acceptable bases for preparation of Rule 3-05 financial statements when the acquiree is not a foreign business. [S-X Rule 3-05(c) – (d)]



*The reconciliation must comply with Item 18 of Form 20-F. See Question 6.3.90 for the reconciliation requirements.

**The reconciliation must comply with Item 17 of Form 20-F. See Question 6.3.90 for the reconciliation requirements.

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In summary, a foreign acquiree that does not meet the definition of a foreign business but would qualify as an FPI if it were a registrant may:

— prepare its financial statements based on home-country GAAP with reconciliation to IFRS Accounting Standards-IASB instead of to US GAAP when the registrant FPI uses IFRS Accounting Standards-IASB; or

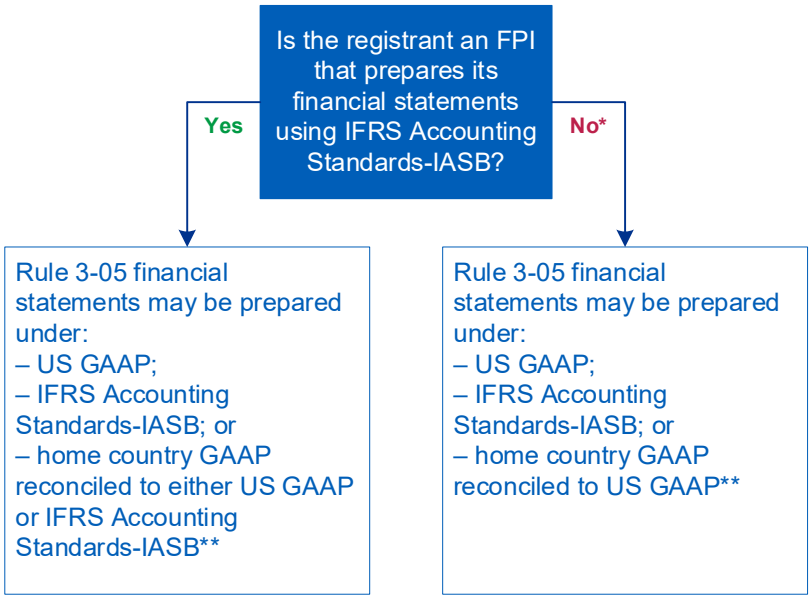
— prepare its financial statements based on IFRS Accounting Standards-IASB without reconciliation to US GAAP even if the registrant prepares its financial statements based on US GAAP.

These options do not apply if the acquiree would not qualify as an FPI if it were a registrant; in that case, its financial statements have to be based on US GAAP or reconciled to US GAAP.

Question 6.3.80

On what basis may Rule 3-05 financial statements be prepared if the acquiree meets the definition of a foreign business?

Interpretive response: The following decision tree summarizes the acceptable bases for preparation of Rule 3-05 financial statements when the acquiree is a foreign business.



*Answer no if the registrant is either a domestic registrant or a foreign registrant that does not prepare its financial statements based on IFRS Accounting Standards-IASB.

**The reconciliation must comply with Item 17 of Form 20-F (see Question 6.3.90).

In summary, a domestic registrant or FPI may file Rule 3-05 financial statements based on IFRS Accounting Standards-IASB without reconciliation to US GAAP, regardless of the acquisition's significance. Further, an FPI that prepares its financial statements based on IFRS Accounting Standards-IASB

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may reconcile the Rule 3-05 financial statements based on home-country GAAP to IFRS Accounting Standards-IASB instead of to US GAAP. [SEC Rel 33-10786]

Question 6.3.90

What are the reconciliation requirements under Items 17 and 18 of Form 20-F?

Interpretive response: Form 20-F provides two levels of reconciliation to US GAAP – Item 17 and Item 18. Item 17 is not a full reconciliation but requires:

- a qualitative discussion of material variations between the accounting principles, practices and methods used in the financial statements and those required under US GAAP; and
- a quantitative reconciliation of such material variations.

When Item 17 applies but the acquisition is not greater than 30% significant, the quantitative reconciliation is not required; only the qualitative disclosures are required. This 30% accommodation does not apply when the Rule 3-05 financial statements are filed on Form S-4, Form F-4 or proxy statement for a nonreporting foreign target company. In these instances, a quantitative reconciliation is still required. [FRM 6410.6(c)]

Item 18 requires the same information as Item 17 plus the disclosures required by US GAAP and Reg S-X. In addition to the detailed requirements outlined in Items 17 and 18, the SEC's FRM sections 6510 and 6520 provide additional explanation and interpretation of those requirements.

When it is required, the US GAAP reconciliation must be included unless a reconciliation is unavailable or not obtainable without unreasonable cost or expense. If a reconciliation is unavailable, the filing must (at a minimum) describe in narrative form all material variations in accounting principles, practices, and methods used in preparing the non-US GAAP financial statements from those accepted in the US. The SEC staff considers the unavailability hurdle to be very high and recommends pre-clearance. This exception to providing a US GAAP reconciliation does not apply to pro forma financial information prepared under S-X Article 11. [FRM 6410.2]

Example 6.3.40

Financial statements based on IFRS Accounting Standards-IASB

Scenario 1: Company A is a foreign business

Registrant, a US company, acquires Company A on August 12, 20X9. Company A is a private Australian company that prepares its financial statements based on IFRS Accounting Standards-IASB and meets the definition of a foreign business. Its acquisition is 55% significant, and Registrant files a Form 8-K to report the acquisition.

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Because Company A meets the definition of a foreign business and its financial statements are based on IFRS Accounting Standards-IASB, its financial statements need not be reconciled to US GAAP (see Question 6.3.80).

Scenario 2: Company A is not a foreign business

The above result would have been the same even if Company A had not met the definition of a foreign business but would have qualified as an FPI if it were a registrant.

In contrast, if it had not met the definition of a foreign business and would not have qualified as an FPI, then a reconciliation to US GAAP would have been required. The reconciliation in this instance would have to comply with Item 18 of Form 20-F. See Question 6.3.70.

Example 6.3.50
Significance below 30%

Scenario 1: Registrant is a US issuer

Registrant, a US issuer, acquires Company A on May 5, 20X1. Company A is a private UK company that prepares it financial statements under UK GAAP and meets the definition of a foreign business. The acquisition is 25% significant, and Registrant files a Form 8-K to report the acquisition.

Because Company A meets the definition of a foreign business, its financial statements must comply with Item 17 of Form 20-F. However, because the acquisition is not greater than 30% significant, a quantitative reconciliation to US GAAP under Item 17 of Form 20-F is not required. However, qualitative discussions of material variances from US GAAP are required (see Questions 6.3.90 and 6.3.80).

Scenario 2: Registrant is an FPI that prepares its financial statements under IFRS Accounting Standards-IASB

Same facts as Scenario 1, except Registrant is an FPI that prepares its financial statements based on IFRS Accounting Standards-IASB and must include Rule 3-05 financial statements on a registration statement (that is not a Form S-4 or Form F-4).

Because the acquisition is not greater than 30% significant, a quantitative reconciliation to IFRS Accounting Standards-IASB is not required, but qualitative discussions of material variances from IFRS Accounting Standards-IASB are required (see Question 6.3.80 and Question 6.3.90).

Observation
Foreign business definition provides an accommodation

When the SEC established the definition of a foreign business, its intent was to provide an accommodation to registrants that acquire (or have significant equity

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affiliates of) non-US companies because such non-US companies would have the same difficulty in obtaining information on a US GAAP basis as an FPI. Under this accommodation, Rule 3-05 financial statements of an acquired foreign business may be based on IFRS Accounting Standards-IASB without reconciliation to US GAAP or in some instances based on home-country GAAP with reconciliation to IFRS Accounting Standards-IASB.

As indicated in the SEC staff's paper on International Financial Reporting and Disclosure Issues "[T]he definition of a foreign business is designed to provide the accommodations where the acquiree or investee would not reasonably be expected to have US GAAP information or be subject to US reporting requirements." It was assumed that entities that do not meet this definition would have a reason to be preparing US GAAP data and therefore are not entitled to the accommodation. [IPTF 7/15/03]

Question 6.3.100

Can a foreign acquiree's financial statements be based on US GAAP under any circumstances?

Interpretive response: Yes. Item 8 of Form 20-F allows financial statements of foreign entities that are filed in the US to be based on US GAAP regardless of whether the foreign acquiree meets the definition of a foreign business.

Further, US GAAP financial statements are acceptable for foreign acquirees even if the registrant prepares its financial statements on a non-US GAAP basis. However, to perform the significance tests, the acquiree's financial information must be converted to the registrant's basis for preparing financial statements (see section 6.3.10).

Question 6.3.110

Is IFRS 1 applicable to Rule 3-05 financial statements when reconciling to IFRS Accounting Standards-IASB for the first time?

Interpretive response: Yes. If the acquired business's financial statements are being reconciled to IFRS Accounting Standards-IASB for the first time, IFRS 1 is applicable.

IFRS 1 is applied in this instance because a business that is reconciling to IFRS Accounting Standards-IASB for the first time faces many of the same challenges in determining the relevant financial statement amounts as it would if it were directly presenting its financial statements under IFRS Accounting Standards-IASB for the first time.

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Example 6.3.60

Financial statements for an acquired foreign business implementing IFRS Accounting Standards-IASB

On June 1, 20X2, Registrant offers securities to shareholders of Company A. The acquisition of Company A is greater than 40% significant and Registrant includes two years of audited Company A financial statements in the Form F-4 registration statement.

Registrant is an FPI that prepares its financial statements based on IFRS Accounting Standards-IASB. Company A is a foreign business that prepares its financial statements based on home-country GAAP.

Registrant applies IFRS 1 when reconciling Company A's financial statements to IFRS Accounting Standards-IASB because Company A is applying IFRS Accounting Standards-IASB for the first time.

Therefore, the Form F-4 includes Company A's audited financial statements for the two years ended December 31, 20X1 with reconciliation from home-country GAAP to IFRS Accounting Standards-IASB applying IFRS 1.

Question 6.3.120

Is it acceptable to use the *IFRS for SMEs*® Accounting Standard in Rule 3-05 financial statements?

Interpretive response: It depends. If an acquired business meets the definition of a foreign business, its financial statements may be based on the SMEs Accounting Standard (published by the IASB in July 2009 as amended in 2015) but must be reconciled to US GAAP.

However, the SEC staff will not accept financial statements based on the SMEs Accounting Standard for issuers, predecessors of issuers, domestic acquired businesses or domestic equity method investees. [FRM 6410.6(d)]

Question 6.3.130

What SABs apply to Rule 3-05 financial statements that are not based on US GAAP?

Interpretive response: SABs related to filing and audit requirements apply to all Rule 3-05 financial statements even if they are not based on US GAAP. Financial statements that are not based on US GAAP need not reflect application of SABs that relate specifically to accounting matters under US GAAP (e.g. SAB 119). However, unless the SAB is US GAAP specific, generally it is the SEC staff's expectation that all IFRS Accounting Standards-IASB financial statements filed with the SEC have considered and applied other

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relevant SAB Topics (e.g. those related to IFRS Accounting Standards, filing requirements, materiality, etc.). [FRM 6320.5, SEC Rel 33-8879]

In some situations, entities that do not prepare US GAAP financial statements may elect to apply SABs when their GAAP does not provide guidance on certain transactions or industry-specific issues. For example, IFRS Accounting Standards-IASB do not provide guidance on extractive activities, common control mergers, reorganizations and recapitalizations. In these instances, the entity may choose to apply the SABs to these transactions if the other IAS 8 (accounting policies, changes in accounting estimates and errors) requirements are met. Entities provide full and transparent disclosures about the accounting policies selected and the effects of those policies on its IFRS financial statements, consistent with IAS 1 (presentation of financial statements) and IAS 8. [FRM 6320.4 – .5]

Question 6.3.140

What currency is used in Rule 3-05 financial statements?

Interpretive response: While S-X Rule 3-20 allows FPIs to prepare financial statements in the currency they believe is appropriate, it does not address financial statements of acquirees. The SEC staff permits Rule 3-05 financial statements to be prepared either in the same currency as the registrant or in the currency that normally is used to prepare the acquiree's or registrant's financial statements. For example, a domestic issuer can prepare financial statements of a foreign acquiree in US dollars. [FRM 6620.7]

However, when calculating the significance tests, the acquiree's financial information should be converted to the currency of the registrant.

6.3.50 Rule 3-05 financial statements: periods and age requirements

Excerpt from Reg S-X Rule 3-12

Age of financial statements at effective date of registration statement or at mailing date of proxy statement.

(f) Any foreign private issuer may file financial statements whose age is specified in Item 8.A of Form 20-F (§ 249.220f of this chapter). Financial statements of a foreign business which are furnished pursuant to § 210.3-05 or § 210.3-09 because it is an acquired business or a 50 percent or less owned person may be of the age specified in Item 8.A of Form 20-F.

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Excerpt from Form 20-F

Item 8. Financial Information

The purpose of this standard is to specify which financial statements must be included in the document, as well as the periods to be covered, the age of the financial statements and other information of a financial nature.

A. Consolidated Statements and Other Financial Information.

…

4. The last year of audited financial statements may not be older than 15 months at the time of the offering or listing; provided, however, that in the case of the company's initial public offering, the audited financial statements also shall be as of a date not older than 12 months at the time the document is filed. In such cases, the audited financial statements may cover a period of less than a full year.

5. If the document is dated more than nine months after the end of the last audited financial year, it should contain consolidated interim financial statements, which may be unaudited (in which case that fact should be stated), covering at least the first six months of the financial year. The interim financial statements should include a balance sheet, 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), cash flow statement, and a statement showing either (i) changes in equity other than those arising from capital transactions with owners and distributions to owners, or (ii) all changes in equity (including a subtotal of all non-owner items recognized directly in equity). Each of these statements may be in condensed form as long as it contains the major line items from the latest audited financial statements and includes the major components of assets, liabilities and equity (in the case of the balance sheet); income and expenses (in the case of the statement of comprehensive income) and the major subtotals of cash flows (in the case of the cash flow statement). The interim financial statements should include comparative statements for the same period in the prior financial year, except that the requirement for comparative balance sheet information may be satisfied by presenting the year end balance sheet. 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. The interim financial statements should include selected note disclosures that will 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. If, at the date of the document, the company has published interim financial information that covers a more current period than those otherwise required by this standard, the more current interim financial information must be included in the document. Companies are encouraged, but not required, to have any interim financial statements in the document reviewed by an independent auditor. If such a review has been performed and is referred to in the document, a copy of the auditor's interim review report must be provided in the document.

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Question 6.3.150

How many periods of Rule 3-05 financial statements are required for a foreign acquiree?

Interpretive response: S-X Rule 3-05(b) dictates how many financial periods are required for Rule 3-05 financial statements. The period requirements are the same for both domestic and foreign acquirees.

The requirements for annual periods are as follows.

- Acquisition 20% of less significant: no periods required (no filing requirement).
- Acquisition greater than 20% but not exceeding 40% significant: one annual period required.
- Acquisition greater than 40% significant: two annual periods required.

See Question 4.2.20 for the number of interim periods required.

Question 6.3.160

What are the age requirements for an acquired domestic entity or a foreign entity that does not meet the definition of a foreign business?

Interpretive response: The age requirements of Rule 3-05 financial statements of a domestic entity acquired by an FPI are the same as they are for a domestic entity acquired by a domestic registrant. These same age requirements also apply to an acquisition of a foreign entity by any type of registrant if that foreign entity does not meet the definition of a foreign business. The age requirements are in S-X Rule 3-01 and Rule 3-02 (see section 4.2.10).

The age requirements differ when the foreign acquiree meets the definition of a foreign business. The next several Questions and Examples address the age requirements relating to acquisitions of these entities.

Question 6.3.170

What are the age requirements for an acquired foreign business's financial statements?

Interpretive response: If the acquiree meets the definition of a foreign business, the age of the financial statements filed is determined under Item 8 of Form 20-F (not under S-X Rule 3-01 and Rule 3-02, see Question 6.3.160).

Specifically, Item 8.A of Form 20-F provides age requirements for: [FRM 6220.4]

- financial statements of foreign businesses acquired by both FPIs and domestic registrants provided under S-X Rule 3-05, including filings by domestic registrants under Items 2.01 and 9.01 of Form 8-K;

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— financial statements of foreign target businesses required on Form S-4 or Form F-4;

— financial statements of foreign equity investees of both foreign and domestic registrants provided under S-X Rule 3-09; and

— financial statements of foreign businesses that are acquired real estate operations under S-X Rule 3-14 or Rule 8-06.

Annual financial statement considerations

Rule 3-05 financial statements include the acquiree's audited financial statements for the most recently completed fiscal year, unless the Form 8-K is filed or the registration statement becomes effective within three months of the end of that year (see Question 6.3.190). If the financial statements of the most recently completed fiscal year are not required, then the financial statements of the prior fiscal year are required. This requirement is referred to as the '15-month requirement' because its application results in the acquiree's annual financial statements being no more than 15-months old. [Form 20-F Item 8.A.4]

For example, if a registration statement becomes effective on March 21, 20X3 (i.e. within three months of the acquired business's December 31, 20X2 year-end), then the acquiree's financial statements for the fiscal year-end December 31, 20X1 are required. The result is that those financial statements are 15 months old at the registration statement's effective date.

This 15-month requirement for annual financial statements applies when an acquired foreign business's financial statements must be filed (or incorporated by reference) on a domestic or foreign registrant's registration statement under S-X Rule 3-05 or on a Form 8-K when required by Item 2.01. These requirements may cause an acquired FPI to file its audited financial statements earlier than it would be required to file them on Form 20-F. [FRM 2045.14]

Interim financial statement considerations

Rule 3-05 financial statements must include financial statements that are as of a date within nine months of the filing of a Form 8-K or a registration statement's effective date (instead of within 134 days for domestic acquirees, or 129 days in the case of accelerated filers and large accelerated filers). Therefore, if the filing date (Form 8-K) or effective date (registration statement) is more than nine months after the balance sheet date of the audited annual financial statements required, then interim statements that fall within this nine-month period are required. No interim financial statements are required if the audited annual financial statements are within this nine-month period. Interim financial statements may be unaudited. [Form 20-F Item 8.A.5]

Specific exceptions to the annual and interim financial statements age

The 15-month period for audited financial statements is extended to 18 months, and the nine-month period for interim financial statements is extended to 12 months for registration statements for the following offerings: [Form 20-F Item 8 (Instr 2)]

— exercise of outstanding rights granted pro rata to all existing security holders;

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— dividend or interest reinvestment plan; or
— conversion of outstanding convertible securities or exercise of outstanding transferable warrants.

Question 6.3.180

What periods are required to be included in interim financial statements of an acquired foreign business?

Interpretive response: If interim financial statements are required, they must cover a period of at least six months. An acquired foreign business that has been in existence for less than a year must include an audited balance sheet not more than nine months old and audited statements of income, stockholders' equity, and cash flows for the period from the date of inception to the date of the audited balance sheet. [FRM 6220.5]

Question 6.3.190

What periods are required for filings within three months after the year-end of an acquired foreign business?

Interpretive response: As discussed in Question 6.3.170, financial statements for the most recently completed fiscal year of an acquired foreign business are not required if the filing date of a Form 8-K, effective date of a registration statement, or mailing date of a proxy statement is within three months after the foreign business's year-end. Instead, the audited financial statements of the previous year are required.

However, the date of unaudited interim financial statements of a foreign business must be within nine months of the filing, effective date or mailing date (see Question 6.3.170). This may result in a requirement to include interim financial statements for periods ended before the most recently completed fiscal year. [FRM 6220.7]

Example 6.3.70

Age of audited annual financial statements exceeds nine months

On September 15, 20X9, Registrant, a US company, acquires Company A, a foreign business with a calendar year-end. The acquisition is significant at 80%.

Registrant files a registration statement expected to be effective January 10, 20Y0. Because the registration statement is effective within three months of Company A's most recently completed fiscal year (December 31, 20X9),

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financial statements from that year need not be filed on the registration statement.

Registrant files the following Company A's financial statements on the registration statement.

Financial statements required	Periods required
Audited annual financial statements	As of and for years ended December 31, 20X8 and 20X7
Unaudited interim financial statements	As of June 30, 20X9 and for the six months ended June 30, 20X9 and 20X8

Two years of annual financial statements are required because the acquisition is greater than 40% significant.

The interim financial statements for June 30, 20X9 are required because the audited annual financial statements are more than nine months old when the registration statement becomes effective.

Example 6.3.80

Form 8-K due within three months after acquired business's year-end

On March 20, 20X9, Registrant acquires Company A, a foreign business whose financial statements are based on non-US GAAP. The acquisition is significant at 60%, and Registrant has a Form 8-K filing requirement (i.e. it is either a domestic registrant or an FPI that elects to file under US domestic reporting requirements).

On June 3, 20X9, Registrant files an amendment to the Form 8-K (originally filed March 24, 20X9) to provide Company A's financial statements. The amendment includes the following Company A financial statements.

Financial statements required	Periods required
Audited annual financial statements	As of and for years ended December 31, 20X7 and 20X6
Unaudited interim financial statements	As of June 30, 20X8 and for the six months ended June 30, 20X8 and 20X7

The age of the Rule 3-05 financial statements filed on Form 8-K generally is determined as of the filing date (or due date) of the initial Form 8-K reporting the acquisition. Because the acquisition in this instance occurred on March 20, 20X9, and Registrant timely filed the Form 8-K on March 24, 20X9, the age of financial statements is based on March 24, 20X9.

The Form 8-K filing date in this case is within three months of the end of Company A's most recently completed fiscal year (December 31, 20X8). Therefore, the audited annual financial statements for that year are not required but the December 31, 20X7 and 20X6 are. Because December 31, 20X7 is

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more than nine months before March 24, 20X9, the June 30, 20X8 interim financial statements are required.

Question 6.3.200

What periods are required for filings beyond three months after the year-end of an acquired foreign business?

Interpretive response: Form 8-K filings made, proxy material mailed or registration statements declared effective three months or more after an acquired foreign business's year-end must include audited financial statements for the most recently completed fiscal year. This requirement exists so that the annual financial statements filed do not exceed 15 months (see Question 6.3.170).

Interim financial statements are required if the Form 8-K is filed, the proxy material mailed, or the registration statement is declared effective more than nine months after the acquired business's fiscal year-end. The interim financial statements need not be audited (see Question 6.3.180).

Interim financial statements for foreign businesses must cover a period of at least six months. Accordingly, the financial statements of an acquired foreign business generally do not need to be updated if the omitted period is less than six months (i.e. the time between the effective date of the acquisition and the acquired foreign business's annual financial statements) and the acquired business does not prepare quarterly financial statements under its home-country reporting requirements. [FRM 6220.7]

Example 6.3.90

Form 8-K due more than three months after acquired business's year-end

On March 29, 20X9, Registrant acquires Company A, a foreign business whose financial statements are based on non-US GAAP. The acquisition is significant at 60%, and Registrant has a Form 8-K filing requirement (i.e. it is either a domestic registrant or an FPI that elects to file under US domestic reporting requirements).

The Form 8-K reporting the acquisition is due on and filed on April 2, 20X9. Because Company A's audited annual financial statements filed on the Form 8-K cannot be older than 15 months, Registrant files the following Rule 3-05 financial statements.

Financial statements required	Periods required
Audited annual financial statements	As of and for years ended December 31, 20X8 and 20X7
Unaudited interim financial statements	None

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Interim financial statements are not required because the December 31, 20X8 annual financial statements are as of a date that is within nine months of the filing date of the Form 8-K. Had Registrant filed the Form 8-K on or before March 31, 20X9, the annual financial statements required would have been as of and for years ended December 31, 20X7 and 20X6 (i.e. because the filing would be within three months of the 20X8 year-end).

If Company A is an FPI, Registrant would have filed financial statements of Company A at an earlier date than Company A would have been required to file its Form 20-F for the same fiscal year.

Example 6.3.100

Registration statement becomes effective more than six months after acquired business's year-end

On July 12, 20X9, Registrant, a US company, acquires Company A, a foreign business with a calendar year-end. The acquisition is significant at 60%.

Registrant files a registration statement expected to be declared effective September 30, 20X9. Because the registration statement will be effective more than three months after Company A's fiscal year-end, Registrant files Company A's audited annual financial statements for the most recently completed fiscal year.

The registration statement includes the following Company A financial statements.

Financial statements required	Periods required
Audited annual financial statements	As of and for years ended December 31, 20X8 and 20X7
Unaudited interim financial statements	None

No interim financial statements are required because Company A's audited annual financial statements are not more than nine months old at the time the registration statement becomes effective.

Example 6.3.110

Registration statement becomes effective more than nine months after acquired business's year-end

Scenario 1: Acquisition occurs within six months of acquired foreign business's year-end

On June 1, 20X9, Registrant, a US company, acquires Company A, a foreign business with a calendar year-end. Company A's financial statements are based on home-country GAAP, which does not require Company A to prepare interim financial statements. The acquisition is significant at 25%.

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Registrant files a registration statement expected to be declared effective October 1, 20X9. The registration statement includes the following Company A financial statements.

Financial statements required	Periods required
Audited annual financial statements	As of and for year ended December 31, 20X8
Unaudited interim financial statements	None

An acquired foreign business's financial statements filed on a registration statement generally includes financial statements as of a date within nine months of the effective date of the registration statement. However, no interim financial statements are required in this instance because (see Question 6.3.200):

— the omitted period is less than six months (i.e. the acquisition took place before the end of the interim period ended June 30, 20X9); and
— Company A is not required to prepare more current (e.g. quarterly) interim financial statements under its home-country reporting requirements.

Had Company A been required to prepare interim financial statements for the period ended March 31, 20X9 under its home-country GAAP, Registrant would provide in the registration statement those interim financial statements as of and for the three months ended March 31, 20X9 (see Question 6.3.220).

Scenario 2: Acquisition occurs more than six months after acquired foreign business's year-end

Assume the same facts as Scenario 1, except:

— Registrant acquires Company A on July 14, 20X9, more than six months after Company A's most recently completed year-end; and
— Registrant's registration statement is expected to be declared effective on October 1, 20X9.

The registration statement includes the following Company A financial statements.

Financial statements required	Periods required
Audited annual financial statements	As of and for year ended December 31, 20X8
Unaudited interim financial statements	As of June 30, 20X9 and for the six months ended June 30, 20X9

Registrant is required to provide interim financial statements of Company A because:

— the omitted period is more than six months (i.e. the acquisition took place after the end of the interim period ended June 30, 20X9); and

— the audited annual financial statements are more than nine months old when the registration statement becomes effective.

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Question 6.3.210

Are Rule 3-05 financial statements of an acquired FPI due earlier than an acquired foreign business that is not an FPI?

Interpretive response: It depends. When a domestic registrant or FPI acquires an FPI, the SEC staff expects the acquirer to file the Rule 3-05 financial statements (e.g. to comply with the requirements of Form 8-K) no later than the date the acquired FPI is required to file its own Form 20-F.

Form 20-F, when used as an annual report, is due within four months after an FPI's fiscal year-end. Therefore, if the acquirer is required to file a Form 8-K shortly after this four-month due date, the Rule 3-05 financial statements would be required to be filed earlier than otherwise would be due.

However, the acquired FPI's Form 20-F due date remains four months even if the audited financial statements for the most recently completed fiscal year have been filed on a registration statement or domestic acquirer's Form 8-K before the four-month due date. Therefore, while many entities in this situation file the Form 20-F early, there is no requirement to do so.

Question 6.3.220

Must a registrant also file the more current information about a foreign business in a registration statement?

Interpretive response: It depends. Item 8.A.5 of Form 20-F requires that if a foreign business has made financial information available to shareholders, exchanges or others in any jurisdiction, that information must also be included in the registration statement. As a result, the financial information filed may be more recent than the financial information that is required to be included under S-X Rule 3-05.

Specifically, Item 8.A.5 of Form 20-F states the following.

> If, at the date of the document, the company has published interim financial information that covers a more current period than those otherwise required by this standard, the more current interim financial information must be included in the document.

Further, Instruction 3 to Item 8.A.5 of Form 20-F states the following.

> The requirement covers any publication of financial information that includes, at a minimum, revenue and income information, even if that information is not published as part of a complete set of financial statements.

While this information is a separate requirement than S-X Rule 3-05, in some cases the information may fully satisfy those requirements and additional information would not be required. For example, if the only difference is that the financial information is more recent (through the second quarter) than

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required by S-X Rule 3-05 (through the first quarter), it would not be necessary to provide the financial information from the earlier period.

Question 6.3.230

Does financial information that is more current than the required Rule 3-05 financial statements also need to be reconciled with US GAAP?

Interpretive response: No. A registrant need not reconcile the more current information provided under Item 8.A.5 of Form 20-F (see Question 6.3.220). However, it must explain in narrative form differences in accounting principles. Differences between foreign and US GAAP can be identified by cross reference to US GAAP reconciliation footnotes elsewhere in the filing and material new reconciling items must be quantified. [FRM 6220.6]

Instruction 3 to Item 8.A.5 of Form 20-F states:

> Whenever you provide more current interim financial information in response to this requirement:
>
> (a) Describe any ways in which the accounting principles, practices and methods used in preparing that interim financial information vary materially from the principles, practices and methods accepted in the US; and
>
> (b) Quantify any material variations, unless they already are quantified because they occur in other financial statements included in the document.

If a new US accounting standard must be applied in the period for which the updated information is provided, that fact is disclosed, but no quantification of the effect is necessary if unreasonable cost or delay would be required.

An FPI filing financial information that complies with IFRS Accounting Standards-IASB is not required to provide the information described in paragraphs (a) and (b) above. [FRM 6220.6]

Example 6.3.120

Quarterly information available

Registrant acquires Company A, a foreign business, in April 20X9 and files a registration statement on August 6, 20X9. Company A's audited annual financial statements for years ended December 31, 20X8 and December 31, 2007 are filed on the registration statement.

Company A publishes summarized quarterly earnings under an exchange listing requirement in a foreign country. The summarized quarterly earnings must be filed on the registration statement. The summarized earnings data does not need to be reconciled to US GAAP; however, Registrant must explain in narrative form differences in accounting principles. Additionally, Registrant needs to evaluate whether this more current information meets the

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requirements of S-X Rule 3-05. If not, such financial information for the periods required must also be provided.

Question 6.3.240

What is the effect of choosing to reconcile 'more current information' to US GAAP?

Interpretive response: If more current information is included due to the requirements of Item 8.A.5 and a US GAAP reconciliation is included with that information, the SEC staff believes that interim financial statements have effectively been presented, which necessitates including comparative prior-year financial information and updating pro forma information. [FRM 6220.6]

6.3.60 Audit requirements

Question 6.3.250

What auditing standards are used in the audit of a foreign acquiree's Rule 3-05 financial statements?

Interpretive response: Item 8.A.2 of Form 20-F requires SEC filings to include financial statements audited under US GAAS. Therefore, Rule 3-05 financial statements of a foreign acquiree must be audited under US GAAS, whether those financial statements are based on US GAAP, IFRS Accounting Standards-IASB or home-country GAAP. If the audited financial statements include reconciliations prepared under Items 17 or 18 of Form 20-F (see Question 6.3.90), those reconciliations also must be audited under US GAAS. [FRM 6410.6(b)]

The SEC staff will continue to accept wording variations in audit reports to comply with local reporting formats; however, it encourages the use of US GAAS report wording. In all other respects, the report must say that the auditor performed the audit under US GAAS.

A registrant that acquires a Canadian entity that reports in the US under the MJDS (and therefore files an audit report issued under Canadian GAAS with its financial statements) must provide a US GAAS report to satisfy S-X Rule 3-05. Similarly, an MJDS company whose financial statements are filed on an S-4 or F-4 as a target must be audited under US GAAS. [FRM 6820.3]

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6.4 Other considerations for foreign businesses

Excerpt from General Rules and Regulation, Securities Exchange Act of 1934

§ 240.3a12-3 Exemption from sections 14(a), 14(b), 14(c), 14(f) and 16 for securities of certain foreign issuers.

(a) Securities for which the filing of registration statements on Form 18 [17 CFR 249.218] are authorized shall be exempt from the operation of sections 14 and 16 of the Act.

(b) Securities registered by a foreign private issuer, as defined in Rule 3b-4 (§ 240.3b-4 of this chapter), shall be exempt from sections 14(a), 14(b), 14(c), 14(f) and 16 of the Act.

[44 FR 70137, Dec. 6, 1979, as amended at 47 FR 54780, Dec. 6, 1982; 56 FR 30067, July 1, 1991]

Question 6.4.10

Are there special considerations for FPIs when shareholders are required to vote on a proposed acquisition?

Interpretive response: Yes.

An FPI must file a Form F-4 to register securities to be used in a business combination. However, an FPI is exempt from the proxy solicitation rules under Reg 14A (§ 240.3a12-3). Therefore, it need not file a Schedule 14A when there is a request of a shareholder vote. Further, while proxy rules do not apply, information could be voluntarily disclosed on Form 6-K. Question 5.3.220 describes the financial statement requirements when registration statements on Form S-4 or F-4 are used to register securities being exchanged in a business combination.

The financial statement requirements of Form S-4 or F-4 apply not only to the registrant but also to the target entity. The financial statement requirements for a target entity depend on several factors, including whether the target is a reporting company (i.e. SEC registrant) and the parties that are voting on the transaction.

If the acquiring entity's shareholders are not voting, and the acquisition will be greater than 20% significant, target financial statements for the most recently completed fiscal year (audited) and interim period (unaudited) are required. Prior-year target financial statements also are required for the second and third years back if they were previously furnished to the target's security holders for either (or both) of the two earlier periods. Audited financial statements are required for the second and third year back if those financial statements were previously audited.

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Reconciliation requirements

If a foreign target's financial statements are prepared on the basis of a comprehensive body of accounting principles other than US GAAP or IFRS Accounting Standards-IASB, a reconciliation to US GAAP under Item 17 of Form 20-F is required for all financial statements presented (unless a reconciliation is unavailable or not obtainable without unreasonable cost or expense, see Question 6.3.90). If the target's financial statements have not previously been filed with the SEC, reconciliation is required only for the two most recent fiscal years and any interim periods required in the filing. [FRM 6410.2(a)]

Audit requirements

If a nonreporting foreign target's financial statements for the years preceding the latest fiscal year were audited based on non-US GAAS, financial statements for those periods must be audited based on US GAAS and filed on the registration statement if those financial statements have been published for general distribution in the target's home jurisdiction or elsewhere (see Question 4.2.80). The SEC staff would consider granting relief on a case-by-case basis in unusual circumstances. [FRM 4110.5]

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7. Initial registration statements

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7.1 How the SEC Rules work

An entity may become a public registrant by filing a registration statement on the following forms (not exhaustive).

1933 Act	1934 Act
Form S-1 Form S-4 Form F-1 Form F-4	Form 10 Form 20-F

Generally, financial statements of an acquired business are included in an initial registration statement to comply with S-X Rule 3-05. However, certain portions of S-X Rule 3-05 cannot be applied because the registrant filing an initial registration statement has not been a registrant in the past.

This chapter addresses issues unique to initial registration statements, including:

- determining significance of acquisitions for potential inclusion in an initial registration statement;
- determining time periods over which to evaluate acquisitions for the purposes of inclusion in the initial registration statements;
- reporting put-together transactions;
- reporting combinations of entities under common control; and
- evaluating the SAB 80 criteria for relief from the requirements of S-X Rule 3-05.

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7.2 Identifying significant acquired businesses

7.2.10 Overview

A registrant preparing an initial registration statement applies S-X Rule 3-05 to determine whether to include the pre-acquisition financial statements of previously acquired businesses, or probable acquisitions. To do so, it needs to look back over a specified historical period to determine the population of acquisitions that need to be evaluated for significance. An acquiree's pre-acquisition financial statements are included in the initial registration statement when the acquisition meets an applicable significance threshold(s). Those financial statements must comply in form and content with the requirements in S-X Rule 3-05.

7.2.20 Identifying acquisitions to test for significance

Question 7.2.10

Which acquisitions are tested for significance for an initial registration statement?

Interpretive response: A registrant performs the significance tests for all its acquisitions since the earliest year for which its audited financial statements are required in the initial registration statement (i.e. within the last two or three years depending on anticipated filer status).

However, pre-acquisition financial statements for an acquiree can be omitted if the acquiree's operations have been included in the registrant's post-acquisition results for a sufficient period of time based on the significance of the acquisition. Audited pre-acquisition financial statements can be omitted if the acquiree's operations have been included in the registrant's audited consolidated financial statements for:

— one full year (12 months); or
— nine months (if significance of the acquisition exceeds 20% but not 40%).

After considering these permissible omissions, the registrant practically only needs to consider acquisitions made in the most recent fiscal year and any subsequent interim periods. For example, an entity filing an initial registration statement that includes audited financial statements for the three years ended December 31, 20X9 practically only needs to evaluate business acquisitions since December 31, 20X8. This is because all business acquisitions before December 31, 20X8 are included in the entity's audited post-acquisition results for the entire 12 months of the December 31, 20X9 financial statements. Therefore, regardless of significance, separate financial statements of businesses acquired before December 31, 20X8 can be omitted.

In addition to historical consummated acquisitions, the registrant also assesses whether financial statements are required for probable acquisitions that exceed 50%.

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Example 7.2.10
Period of post-acquisition results

Registrant files an initial registration statement containing its audited financial statements for each of the three years in the period ended December 31, 20X9.

Scenario 1: Sufficient period of post-acquisition results

Registrant acquired Company A in November 20X8. The acquisition was significant at 55%.

Registrant is not required to include separate pre-acquisition financial statements for Company A. This is because Company A's results have been included in Registrant's audited financial statements for one full fiscal year (i.e. December 31, 20X9). Although the significance level was provided in the facts, it is not relevant in determining whether financial statements need to be included in the registration statement in this scenario.

Scenario 2: Insufficient period of post-acquisition results

Registrant acquired Company A on July 1, 20X9. The acquisition was significant at 55%.

Registrant is required to include two years of Company A pre-acquisition audited financial statements ending December 31, 20X8 and unaudited interim financial statements for the period through June 30, 20X9. This is because only six months of Company A's results have been included in Registrant's audited financial statements.

Example 7.2.20
Multiple acquisitions

Registrant files a registration statement in April 20X9, which includes its audited financial statements as of December 31, 20X8 and 20X7, and for each of the three years in the period ended December 31, 20X8.

Registrant made the following acquisitions during the three-year period.

Acquired business	Date acquired	Fiscal year-end	% significance
Company A	Jan 18, 20X8	Dec 31, 20X7	29%
Company B	Apr 30, 20X8	Sept 30, 20X7	42%
Company C	July 21,20X8	Sept 30, 20X7	25%

No separate financial statements are required for Company A. Despite its significance being between 20% and 40%, its operations have been included in Registrant's December 31, 20X8 audited financial statements for more than nine months and those financial statements are filed with the initial registration statement.

Registrant must include two years of Company B's pre-acquisition financial statements. This is because only eight months of Company B's operations are

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included in Registrant's December 31, 20X8 audited financial statements. Company B's operations would need to be included in Registrant's audited financial statements for one year to omit the pre-acquisition financial statements because the acquisition was greater than 40% significant.

Registrant satisfies its S-X Rule 3-05 requirements by including the following financial statements of Company B in the registration statement.

Financial statements required	Periods required
Audited annual financial statements	As of September 30, 20X7 and for the two years ended September 30, 20X7
Unaudited interim financial statements	As of March 31, 20X8 and for the six months ended March 31, 20X8 and 20X7

Registrant must include one year of Company C's pre-acquisition financial statements. This is because only five months and ten days of Company C's operations are included in Registrant's December 31, 20X8 audited financial statements. Company C's operations would need to be included in Registrant's audited financial statements for at least nine months to omit the pre-acquisition financial statements because the acquisition was between 20% and 40% significant.

Registrant satisfies the S-X Rule 3-05 requirements by including the following Company C financial statements in the registration statement.

Financial statements required	Periods required
Audited annual financial statements	As of and for the year ended September 30, 20X7
Unaudited interim financial statements	As of and for the nine months ended June 30, 20X8

7.2.30 Determining significance

Significance is determined using the significance tests in chapter 3.

Question 7.2.20

Is there a choice of what financial statement period to use to determine significance of acquisitions to be included in an initial registration statement?

Background: Question 3.3.30 explains that existing registrants may have a choice when identifying the financial statement period to be used to determine significance for an acquisition that is consummated shortly after the registrant's most recent fiscal year-end.

Interpretive response: No. The SEC staff has stated a registrant is required to perform the significance tests using the most recent pre-acquisition audited

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financial statements required to be filed on the initial registration statement. [Regs Comm 03/2021]

Example 7.2.30

Identifying fiscal year for use in determining significance

Company A, with a calendar year-end, files an initial registration statement in 20X3 and includes its financial statements as of December 31, 20X2 and 20X1 and for the three years ended December 31, 20X2.

On February 10, 20X2, Company A acquires Company B.

Company A determines the significance of its Company B acquisition based on its financial statements for the year ended December 31, 20X1. This is because the 20X1 financial statements are the most recent pre-acquisition financial statements.

Question 7.2.30

Can a registrant determine significance based on financial information for a period not yet required to be included?

Interpretive response: It depends.

A company may confidentially submit draft registration statements for review prior to the first public filing. In these cases, the SEC staff has stated the company may determine the significance of an acquisition that is consummated after year-end using the most recent year-end financial statements, even if those financial statements are not included in the draft registration statement, as long as those most recent year-end audited financial statements will be included in the first public filing.

The SEC staff encourages companies determining significance in this manner to make the Division of Corporation Finance aware of the circumstances prior to confidentially submitting the draft registration statement. [Regs Comm 03/2018]

Question 7.2.40

Can a registrant use pro forma financial information to determine significance in an initial registration statement?

Interpretive response: Yes, if certain conditions are met.

As described in Question 3.3.110, a registrant can determine significance using filed pro forma financial information that only depicts significant business

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acquisitions and dispositions consummated after the latest fiscal year-end if it has previously filed:

— audited Rule 3-05 (or Rule 3-14) financial statements for any such acquired business (or acquired real estate operations); and
— the pro forma financial information required by S-X Article 11 for any such acquired or disposed business.

A registrant filing an initial registration statement will be considered to have met the condition in the first bullet if that information is included in the final filed initial registration statement, not solely in a draft registration statement. [SEC Rel 33-10786 FN 196]

If a registrant is filing an initial registration statement and has multiple acquisitions after year-end, it can use pro forma financial information reflecting acquisitions made early in the year to determine the significance for acquisitions made later in the year when submitting its draft registration statement. However, using that pro forma information is appropriate only if the pro forma information used in the significance tests will be included in the final filed initial registration statement. [Regs Comm 09/2021]

See Question 7.2.50 for discussion of using pro forma information for determining significance when a change in control has occurred.

Example 7.2.40

Use of pro forma in a draft initial registration statement

Registrant submits a draft initial registration statement on July 1, 20X2. It also made the following acquisitions during 20X2.

Acquired business	Date acquired	% significance based on 20X1 financial statements
Company A	March 1, 20X2	30%
Company B	May 15, 20X2	25%

The Form S-1 includes Registrant's financial statements for two years ended December 31, 20X1 and unaudited interim financial statements for the period ended March 31, 20X2.

Registrant includes in the initial filing (and ultimately the final filing) the S-X Rule 3-05 financial statements for Company A because its acquisition is significant at 30%.

If Company A has a calendar year-end, Registrant includes the following S-X Rule 3-05 financial statements for Company A in the draft registration statement.

Financial statements required	Periods required
Audited annual financial statements	As of December 31, 20X1 and for the year ended December 31, 20X1

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Financial statements required	Periods required
Unaudited interim financial statements	As of March 31, 20X2 and for the three months ended March 31, 20X2

Registrant also includes in the draft initial registration statement the pro forma information for the acquisition of Company A.

Registrant is not precluded from using the pro forma financial information that includes the impacts of the acquisition of Company A in determining the significance of the Company B acquisition as long as the pro forma information is included in the final effective registration statement.

Question 7.2.50

Can a registrant use pro forma financial information to determine significance in an initial registration when there has been a change in control?

Interpretive response: It depends.

When a registrant is a successor to a predecessor company, it uses only the results of operations of the successor company in the denominator of the income test if it does not have available a full year statement of comprehensive income. [FRM 2025.10]

If a registrant believes the use of just the successor period yields anomalous results, it may seek permission from the SEC staff to use pro forma amounts to determine significance as if the predecessor had been acquired or a change in control had occurred at the beginning of the fiscal year. [Regs Comm 09/2021]

Example 7.2.50

Use of pro forma in a draft initial registration statement when a change in control occurred

Registrant files a draft initial registration statement on July 1, 20X2 and had a change of control in 20X1. It also made the following acquisitions.

Acquired business	Date acquired	% significance based on 20X1 financial statements
Company A	March 1, 20X2	30%
Company B	May 15, 20X2	25%

In the historical financial statements for 20X1, Registrant presents two periods – a predecessor period and a successor period – separated by a black line. In the pro forma information, it reflects the change-in-control transaction as if it occurred as of the beginning of 20X1.

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Registrant must use 20X1 results of the successor period to determine significance. In this scenario, if Registrant wants to use pro forma information it may make a written a request to the SEC staff.

Question 7.2.60

Can a registrant omit certain financial information from an initial registration statement?

Interpretive response: It depends.

Under the FAST Act, an EGC filing (or submitting for confidential review) an IPO registration statement can omit historical financial information that would normally be required, provided that it reasonably believes the information will not be required at the time of the contemplated offering. This can include any Rule 3-05 financial statements that an EGC would be required to provide. [§71003 FAST Act]

For non-EGCs, the SEC staff has published a view that it will accept draft registration statements for confidential review. This view also provides non-EGCs with the ability to omit certain financial information. The SEC will process a draft registration statement that is substantially complete (except for the financial information the registrant reasonably believes will not be required at the time the registration statement is publicly filed). However, the relief provided by the FAST Act to omit information that is not expected to be required at the time of the contemplated offering is not available to registrants other than EGCs. Therefore, for non-EGCs, the registration statement must conform to the applicable rules and forms in effect on the initial filing date. [SEC Corp Fin Announcement]

7.3 Put-together transactions

Put-together transactions are unique because they combine previously unrelated businesses concurrently with an IPO. A shell company is formed to purchase two or more unrelated businesses or one of the operating entities acquires several other entities at one time. The acquisitions are normally contingent on receipt of the proceeds of the IPO, and the proceeds are used to fund the acquisitions.

It is important to identify the accounting acquirer and test the significance of all businesses acquired against that acquirer in these circumstances because it may be an entity different from the registrant. This is the case regardless of whether the accounting acquirer is a Newco (which would likely result in all acquired businesses being significant). Even though each acquired business may be purchased from a different owner, the SEC staff has indicated that all of the acquired businesses are considered related businesses and therefore are grouped and assessed for significance against the accounting acquirer as a single acquisition (section 2.2.20 addresses related businesses). The SEC staff may grant relief from the literal application of S-X Rule 3-05 on written request. [FRM 2025.12]

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Example 7.3.10
Put-together transaction

In April 20X9, Registrant, a shell company, files an IPO registration statement, the proceeds of which it will use to acquire Companies, A, B, C and D (unrelated businesses) in a put-together transaction. Company B is deemed the accounting acquirer in the transaction. Because the acquisition of each business is contingent on the closing of the offering, Companies A, C, D and Registrant are considered related businesses and are grouped together in assessing their significance relative to Company B.

Question 7.3.10
What financial statements are used to determine the significance of acquisitions after a put-together transaction?

Interpretive response: If a new acquisition takes place after an IPO that involved a put-together transaction, but before the filing of the new registrant's first Form 10-K, significance is measured against the audited financial statements of the accounting acquirer for the most recent fiscal year that was included in the IPO registration statement.

If a new acquisition takes place after the filing of the registrant's first Form 10-K, significance is measured against the audited financial statements of the registrant for the most recent fiscal year in the Form 10-K. In some cases, such as when the IPO occurs close to the registrant's year-end, the registrant's financial statements presented in Form 10-K may only include operations for a very short period of time. Upon written request and depending on the proximity of the transaction to the balance sheet date, the SEC staff will consider whether relief from the literal application of S-X Rule 3-05 is appropriate. [FRM 2025.13]

Example 7.3.20
Significance in a put-together transaction

Registrant files an IPO registration statement that becomes effective in April 20X9. The proceeds of the offering will be used to acquire Companies A and B in a put-together transaction. Registrant is deemed the accounting acquirer and has a calendar year-end. The acquisition of Companies A and B occur in June 20X9 when Registrant has not yet filed its first Form 10-K. Significance of the aggregate of Companies A and B is measured against Registrant's audited financial statements for the most recent fiscal year included in the registration statement, or December 31, 20X8.

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7.4 Combination of entities under common control

Combinations between entities or businesses under common control involve exchanges or movements of net assets or equity interests between entities controlled, directly or indirectly, by the same parent, investor or ownership group that has agreed to vote in concert. See chapter 28 of KPMG Handbook, Business combinations, for more on combinations of entities under common control.

Depending on the timing of the merger of entities under common control, a registrant may need to combine the historical financial statements in the initial registration statement, or separately present the financial statements of the registrant and the reorganized entities. Further, a merger of this nature can impact:

— the way the significance tests are performed;
— the determination of the parent or predecessor entity; and
— the form and content in which the financial statements are presented.

Each of these items is discussed in this section.

Question 7.4.10

How do the financial statements in an initial registration statement reflect a combination of entities under common control?

Interpretive response: If the combination occurred during the historical periods presented in a registration statement, the combination is reflected in those historical financial statements.

If the combination (or other change in reporting entity) will occur when or after the registration statement becomes effective but no later than the closing of the IPO, the historical financial statements of the entities are presented separately. However, in these circumstances, the SEC staff will consider requests to present consolidated or combined financial statements as the registrant's primary financial statements. If the request is granted, then the separate financial statements of the registrant and of the entities to be reorganized are not required. [FRM 13410.3]

If the merger occurs after the closing of the IPO, the merger is reflected in the pro forma financial information included in the registration statement. Pro forma financial information is presented for the same periods as required for the historical financial statements.

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Question 7.4.20

How is significance determined when historical financial statements have been updated for combinations of entities under common control?

Background: Two or more entities under common control may merge into one legal entity for purposes of an IPO. Transfers of net assets or exchanges of equity interests between entities under common control do not constitute a business combination and are generally accounted for at historical cost similar to the pooling-of-interests method (as-if pooling-of-interests). Under the as-if pooling-of-interests method, the separate financial statements of the combining entities before the combination are retrospectively adjusted on a combined basis for all periods presented in which they were under common control.

Interpretive response: An acquisition accounted for as a business combination may have occurred during the period in which the previously separate entities were under common control, but before the combination of entities under common control was legally consummated. For purposes of determining the significance of such a prior acquisition, the registrant's financial statements for the most recently completed fiscal year before the acquisition may be different now than what they were at the time of the acquisition. This is because the registrant's prior-period financial statements have been retrospectively adjusted to reflect the combination of the registrant with another entity (or entities) that were under common control.

In this situation, the significance of the business acquisition (which occurred prior to the combination of the entities under common control) is determined based on the registrant's as-if pooled financial statements – i.e. the financial statements that have already been retrospectively adjusted to reflect the combination of entities under common control. If the combination (or other change in reporting entity) will occur when or after the registration statement becomes effective but no later than the closing of the IPO, the SEC staff will consider requests for relief to use the combined financial statement amounts for purposes of determining the acquisition's significance. [FRM 2015.2]

See Question 3.3.210 for guidance related to effects of combinations of entities under common control on the determination of significance.

Example 7.4.10

Determining significance, combination of entities under common control

In October 20X8, Company A, a private company, acquires Company B in a transaction accounted for as a business combination. Both companies have a calendar year-end.

The acquisition of Company B is considered significant at 55% at the acquisition date. The asset test yielded the greatest significance, determined as Company B's total assets of $55 at December 31, 20X7 divided by Company A's total assets of $100 as of the same date.

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In May 20X9, Company A merges with Company C in a combination of entities under common control. Company A will file an initial registration statement in July 20X9. The initial registration statement will contain the audited financial statements of the combined company for the three years ended December 31, 20X8 – i.e. the historical financial statements of Company A will be retrospectively adjusted to reflect the application of the as-if pooling-of-interests method with Company C. Company A's assets on an adjusted as-if pooled basis as of December 31, 20X7 are $250.

The significance of the Company B acquisition is determined using Company A's adjusted as-if pooled financial statements as of December 31, 20X7. Significance is determined using Company B's total assets of $55 as of December 31, 20X7 divided by Company A's restated total assets of $250 as of the same date. This calculation results in the acquisition of Company B being 22% significant under the asset test.

Question 7.4.30

Which financial statements are required in an initial registration statement for a combination of entities under common control?

Interpretive response: To determine the financial statements required in a registration statement for a combination of entities under common control, the registrant must first determine the 'parent entity' in the transaction. The parent entity is the party that controls the entities being combined. Although no parent financial statements are required in the registration statement, determining the parent entity affects the accounting in the combined financial statements.

After the parent entity is identified, a predecessor is determined (see Question 10.2.20 for considerations related to designation of a predecessor). The predecessor entity will normally be the entity within the entities under common control that was first controlled by the parent entity. The predecessor provides the same financial statements as a registrant would – i.e. full financial statements for all periods as required under S-X Rules 3-01 and 3-02, or 8-02 and 8-03. The predecessor is not eligible for any relief that might be available under S-X Rule 3-05 for an acquired business. [FRM 1170]

7.5 SAB 80 relief

Excerpt from SAB Topic 1.J (SAB 80)

Application Of Rule 3-05 In Initial Public Offerings

Facts: Rule 3-05 of Regulation S-X establishes the financial statement requirements for businesses acquired or to be acquired. If required, financial statements must be provided for one, two or three years depending upon the relative significance of the acquired entity as determined by the application of

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Rule 1-02(w) of Regulation S-X. The calculations required for these tests are applied by comparison of the financial data of the registrant and acquiree(s) for the fiscal years most recently completed prior to the acquisition. The staff has recognized that these tests literally applied in some initial public offerings may require financial statements for an acquired entity which may not be significant to investors because the registrant has had substantial growth in assets and earnings in recent years

Question: How should Rules 3-05 and 1-02(w) of Regulation S-X be applied in determining the periods for which financial statements of acquirees are required to be included in registration statements for initial public offerings?

Interpretive Response: It is the staff's view that initial public offerings involving businesses that have been built by the aggregation of discrete businesses that remain substantially intact after acquisition were not contemplated during the drafting of Rule 3-05 and that the significance of an acquired entity in such situations may be better measured in relation to the size of the registrant at the time the registration statement is filed, rather than its size at the time the acquisition was made. Therefore, for a first time registrant, the staff has indicated that in applying the significance tests in Rule 3-05, the three tests in Rule 1-02(w) generally can be measured against the combined entities, including those to be acquired, which comprise the registrant at the time the registration statement is filed. The staff's policy is intended to ensure that the registration statement will include not less than three, two and one year(s) of audited financial statements for not less than 60%, 80% and 90%, respectively, of the constituent businesses that will comprise the registrant on an ongoing basis. In all circumstances, the audited financial statements of the registrant are required for three years, or since its inception if less than three years. The requirement to provide the audited financial statements of a constituent business in the registration statement is satisfied for the post-acquisition period by including the entity's results in the audited consolidated financial statements of the registrant. If additional periods are required, the entity's separate audited financial statements for the immediate pre-acquisition period(s) should be presented.

In order for the pre-acquisition audited financial statements of an acquiree to be omitted from the registration statement, the following conditions must be met:

a. the combined significance of businesses acquired or to be acquired for which audited financial statements cover a period of less than 9 months may not exceed 10%;
b. the combined significance of businesses acquired or to be acquired for which audited financial statements cover a period of less than 21 months may not exceed 20%; and
c. the combined significance of businesses acquired or to be acquired for which audited financial statements cover a period of less than 33 months may not exceed 40%.

Combined significance is the total, for all included companies, of each individual company's highest level of significance computed under the three tests of significance. The significance tests should be applied to pro forma financial statements of the registrant, prepared in a manner consistent with Article 11 of Regulation S-X. The pro forma balance sheet should be as of the

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date of the registrant's latest balance sheet included in the registration statement, and should give effect to businesses acquired subsequent to the end of the latest year or to be acquired as if they had been acquired on that date. The pro forma statement of operations should be for the registrant's most recent fiscal year included in the registration statement and should give effect to all acquisitions consummated during and subsequent to the end of the year and probable acquisitions as if they had been consummated at the beginning of that fiscal year.

The three tests specified in Rule 1-02(w) should be made in comparison to the registrant's pro forma consolidated assets and pretax income from continuing operations. The assets and pretax income of the acquired businesses which are being evaluated for significance should reflect any new cost basis arising from purchase accounting.

SAB 80 provides elective relief for companies filing an initial registration statement that would be subject to the requirements of S-X Rule 3-05. However, SAB 80 ultimately may not result in reduced financial statement requirements as compared to application of S-X Rule 3-05. SAB 80 was issued before the 2021 amendments to S-X Rule 3-05, which changed the significance tests and has generally resulted in a decrease in the number of periods of financial statements required in a registration statement. As a result, the application of SAB 80 is expected to be rare because it no longer provides significant relief.

SAB 80 should be considered carefully against the requirements of S-X Rule 3-05 to determine if the election is advantageous for the registrant, including consultation with its auditors and legal counsel.

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8. Real estate acquisitions

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8.1 How the SEC Rules work

A real estate operation under SEC reporting requirements is an acquired set of assets and activities (set) that meets the SEC's definition of a business but generates substantially all revenues through leasing of real property.

When a registrant acquires a real estate operation, it determines the significance of the acquisition and provides certain information about the acquired operation if the acquisition is significant. These requirements differ from the requirements concerning acquired businesses that do not constitute real estate operations (discussed in all prior chapters of this Handbook).

Acquired business	Apply S-X Rule 3-05	— Determine significance using all three significance tests (asset, income and investment tests). — If acquisition is significant, provide acquired business's full financial statements.
Acquired real estate operation	Apply S-X Rule 3-14	— Determine significance using only investment test. — If acquisition is significant, provide abbreviated financial statements of the acquired real estate operation.

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8.2 Scope and definitions

Excerpt from S-X Rule 3-14

Special instructions for financial statements of real estate operations acquired or to be acquired.

(a) *Financial statements required.*

(1) Financial statements (except the related schedules specified in § 210.12) prepared and audited in accordance with Regulation S-X (including the independence standards in § 210.2-01 or, alternatively if the real estate operation is not a registrant, the applicable independence standards) for the periods specified in paragraph (b) of this section and the supplemental information specified in paragraph (f) of this section must be filed if any of the following conditions exist:

(i) During the most recent fiscal year or subsequent interim period for which a balance sheet is required by § 210.3-01, an acquisition of a real estate operation has occurred; or

(ii) After the date of the most recent balance sheet filed pursuant to § 210.3-01, consummation of an acquisition of a real estate operation has occurred or is probable.

(2) For purposes of determining whether the provisions of this section apply:

(i) The term *real estate operation* means a business (as set forth in § 210.11-01(d)) that generates substantially all of its revenues through the leasing of real property.

(ii) The acquisition of a real estate operation encompasses the acquisition of an interest in a real estate operation accounted for by the registrant under the equity method or, in lieu of the equity method, the fair value option.

(3) 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 will be treated under this section as if they are a single acquisition. The required financial statements may be presented on a combined basis for any periods they are under common control or management. For purposes of this section, acquisitions will be deemed to be related if:

(i) They are under common control or management;

(ii) The acquisition of one real estate operation is conditional on the acquisition of each other real estate operation; or

(iii) Each acquisition is conditioned on a single common event.

(4) This section does not apply to a real estate operation that is totally held by the registrant prior to consummation of the transaction.

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(b) *Periods to be presented.*

(1) If registering an offering of securities to the security holders of the real estate operation to be acquired, then the financial statements specified in paragraph (c) of this section and the supplemental information specified in paragraph (f) of this section must be filed for the real estate operation to be acquired for the periods specified in §§ 210.3-01 and 210.3-02, except as provided otherwise for filings on Form S-4 or F-4 (§ 239.25 or § 239.34 of this chapter). The financial statements covering fiscal years must be audited except as provided in Item 14 of Schedule 14A (§ 240.14a-101 of this chapter) with respect to certain proxy statements or in registration statements filed on Form S-4 or F-4 (§ 239.25 or § 239.34 of this chapter).

(2) In all cases not specified in paragraph (b)(1) of this section, financial statements of the real estate operation acquired or to be acquired must be filed for the periods specified in this paragraph (b)(2) or such shorter period as the real estate operation has been in existence. The periods for which such financial statements are to be filed must be determined using the investment test condition specified in the definition of significant subsidiary in § 210.1-02(w)(1)(i) modified as follows:

(i)

(A) If the condition does not exceed 20 percent, financial statements are not required.

(B) If the condition exceeds 20 percent, financial statements of the real estate operation for at least the most recent fiscal year and the most recent interim period specified in §§ 210.3-01 and 210.3-02 must be filed.

(C) If the aggregate impact of acquired or to be acquired real estate operations since the date of the most recent audited balance sheet filed for the registrant, for which financial statements are either not required by paragraph (b)(2)(i)(A) of this section or are not yet required based on paragraph (b)(3)(i) of this section, exceeds 50 percent, the registrant must provide the disclosures specified in paragraphs (b)(2)(i)(C)(1) and (b)(2)(i)(C)(2) of this section. If there are also businesses acquired or to be acquired as described in § 210.3-05(b)(2)(iv), the requirements in § 210.3-05(b)(2)(iv) will apply instead.

(1) Pro forma financial information pursuant to §§ 210.11-01 through 210.11-02 that depicts the aggregate impact of these acquired or to be acquired real estate operations in all material respects; and

(2) Financial statements covering at least the most recent fiscal year and the most recent interim period specified in §§ 210.3-01 and 210.3-02 for any acquired or to be acquired real estate operation for which financial statements are not yet required based on paragraph (b)(3)(i) of this section.

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(ii) When the investment test is based on the total assets of the registrant and its subsidiaries consolidated, include any assumed debt secured by the real properties in the "investments in" the tested real estate operation.

(iii) The determination must be made using § 210.11-01(b)(3) and (4).

(3) Financial statements required for the periods specified in paragraph (b)(2) of this section may be omitted to the extent specified as follows:

(i) Registration statements not subject to the provisions of § 230.419 of this chapter and proxy statements need not include separate financial statements of the acquired or to be acquired real estate operation if neither the real estate operation nor the aggregate impact specified in paragraph (b)(2)(i)(C) of this section exceeds the condition of significance in the definition of significant subsidiary in § 210.1-02(w)(1)(i), as modified by paragraphs (b)(2)(ii) and (iii) of this section, at the 50 percent level computed in accordance with paragraph (b)(2) of this section, and either:

(A) The consummation of the acquisition has not yet occurred; or

(B) The date of the final prospectus or prospectus supplement relating to an offering as filed with the Commission pursuant to § 230.424(b) of this chapter, or mailing date in the case of a proxy statement, is no more than 74 days after consummation of the acquisition of the real estate operation, and the financial statements have not previously been filed by the registrant.

(ii) A registrant, other than a foreign private issuer required to file reports on Form 6-K (§ 249.306 of this chapter) or shell company (other than a business combination related shell company), that omits from its initial registration statement financial statements of a recently consummated acquisition of a real estate operation pursuant to paragraph (b)(3)(i) of this section must file those financial statements and any pro forma information specified by §§ 210.11-01 through 210.11-03 (Article 11) under cover of Form 8-K (§ 249.308 of this chapter) no later than 75 days after consummation of the acquisition. When a predecessor to a shell company (other than a business combination related shell company) acquires a real estate operation and the financial statements of that recently consummated acquisition of a real estate operation are omitted from a registration statement or proxy statement pursuant to paragraph (b)(3)(i) of this section, refer to § 210.15-01(d)(2).

(iii) Separate financial statements of the acquired real estate operation specified in paragraph (b)(2)(i)(B) of this section need not be presented once the operating results of the acquired real estate operation have been reflected in the audited consolidated financial statements of the registrant for at least nine months.

(c) *Presentation of the financial statements.*

(1) The financial statements prepared and audited in accordance with Regulation S-X may be only statements of revenues and expenses

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excluding expenses not comparable to the proposed future operations such as mortgage interest, leasehold rental, depreciation, amortization, corporate overhead and income taxes.

(2) The notes to the financial statements must include the following disclosures:

(i) The type of omitted expenses and the reason(s) why they are excluded from the financial statements;

(ii) 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

(iii) Information about the real estate operation's operating, investing and financing cash flows, to the extent available.

(d) *Financial statements of a foreign real estate operation.* Financial statements of an acquired or to be acquired foreign business (as defined in § 210.1-02(l)) that is a real estate operation, specified in paragraph (c) of this section and meeting the requirements of Item 17 of Form 20-F (§ 249.220f of this chapter), will satisfy this section. Such financial statements may be reconciled to U.S. Generally Accepted Accounting Principles (U.S. GAAP) or International Financial Reporting Standards as issued by the International Accounting Standards Board (IFRS-IASB) if the registrant is a foreign private issuer that prepares its financial statements in accordance with IFRS-IASB. This reconciliation must generally follow the form and content requirements in Item 17(c) of Form 20-F; however, accommodations in Item 17(c)(2) of Form 20-F that would be inconsistent with IFRS-IASB may not be applied, and IFRS 1, *First-time Adoption of International Financial Reporting Standards*, may be applied.

(e) *Financial statements of an acquired or to be acquired real estate operation that would be a foreign private issuer if it were a registrant.* Financial statements of an acquired or to be acquired real estate operation that is not a foreign business (as defined in § 210.1-02(l)), but would qualify as a foreign private issuer (as defined in §§ 230.405 and 240.3b-4 of this chapter) if it were a registrant, may be prepared in accordance with IFRS-IASB without reconciliation to U.S. GAAP or, if the registrant is a foreign private issuer that prepares its financial statements in accordance with IFRS-IASB, may be prepared according to a comprehensive basis of accounting principles other than U.S. GAAP or IFRS-IASB and must be reconciled to IFRS-IASB or to U.S. GAAP. This reconciliation must generally follow the form and content requirements in Item 17(c) of Form 20-F; however, accommodations in Item 17(c)(2) of Form 20-F that would be inconsistent with IFRS-IASB may not be applied, and IFRS 1, *First-time Adoption of International Financial Reporting Standards*, may be applied.

(f) *Supplemental information.* For each real estate operation for which financial statements are required to be filed by paragraphs (b)(2)(i)(B) and (b)(2)(i)(C)(2) of this section, material factors considered by the registrant in assessing the real estate operation must be described with specificity in the filing, including sources of revenue (including, but not limited to, competition in the rental market, comparative rents, and occupancy rates)

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and expense (including, but not limited to, utility rates, property tax rates, maintenance expenses, and capital improvements anticipated). The disclosure must also indicate that the registrant is not aware of any other material factors relating to the specific real estate operation that would cause the reported financial statements not to be indicative of future operating results.

Instruction 1 to paragraph (f): When the financial statements are presented in Form S-11 (§ 239.18 of this chapter), the discussion of material factors considered should supplement the disclosures required by Item 15 of Form S-11.

Excerpt from S-X Rule 11-01

Presentation requirements.

(a) Pro forma financial information must be filed when any of the following conditions exist:

(1) During the most recent fiscal year or subsequent interim period for which a balance sheet is required by § 210.3-01, a significant business acquisition has occurred (for purposes of this section, this encompasses the acquisition of an interest in a business accounted for by the equity method);

(2) After the date of the most recent balance sheet filed pursuant to § 210.3-01, consummation of a significant business acquisition or a combination of entities under common control has occurred or is probable;

(3) Securities being registered by the registrant are to be offered to the security holders of a significant business to be acquired or the proceeds from the offered securities will be applied directly or indirectly to the purchase of a specific significant business;

(4) The disposition of a significant portion of a business either by sale, abandonment or distribution to shareholders by means of a spin-off, split-up or split-off has occurred or is probable and such disposition is not fully reflected in the financial statements of the registrant included in the filing;

(5) [Reserved]

(6) Pro forma financial information required by § 229.914 of this chapter is required to be provided in connection with a roll-up transaction as defined in § 229.901(c) of this chapter;

(7) The registrant previously was a part of another entity and such presentation is necessary to reflect operations and financial position of the registrant as an autonomous entity; or

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(8) Consummation of other transactions has occurred or is probable for which disclosure of pro forma financial information would be material to investors.

(b) A business acquisition or disposition will be considered significant if:

(1) The business acquisition meets:

(i) The definition of a significant subsidiary in § 210.1-02(w)(1), substituting 20 percent for 10 percent each place it appears therein; or

(ii) If the business is a real estate operation as defined in § 210.3-14(a)(2), the significant subsidiary condition in § 210.1-02(w)(1)(i) (i.e., the investment test condition), substituting 20 percent for 10 percent, as modified by the guidance in § 210.3-14(b)(2)(ii).

(2) The business disposition, including a business that is a real estate operation as defined in § 210.3-14(a)(2), meets the definition of a significant subsidiary in § 210.1-02(w)(1), substituting 20 percent for 10 percent each place it appears therein.

(3) The determination must be made, except as noted in paragraph (b)(4) of this section for the continuous offerings described therein, by using:

(i) For amounts derived from financial statements, 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 or, if the fiscal years differ, the business's most recent fiscal year that would be required if the business had the same filer status as the registrant, however the determination may be made using:

(A) The financial statements for the business described in § 210.3-05(e) or (f) if the business meets the conditions for presenting those financial statements.

(B) Pro forma amounts for the registrant for the periods specified in § 210.11-01(b)(3) that only depict significant business acquisitions and dispositions consummated after the latest fiscal year-end for which the registrant's financial statements are required to be filed and only include Transaction Accounting Adjustments (see § 210.11-02(a)(6)(i)), provided that:

(1) The registrant has filed audited financial statements for any such acquired business for the periods required by § 210.3-05 or § 210.3-14 and the pro forma financial information required by §§ 210.11-01 through 210.11-02 for any such acquired or disposed business. The tests may not be made by "annualizing" data; and

(2) If a registrant has used pro forma amounts to determine significance of an acquisition or disposition, it must continue to use pro forma amounts to determine significance of acquisitions and dispositions through the filing date of its next annual report on Form 10-K (§

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249.310 of this chapter) or Form 20-F (§ 249.220f of this chapter); or

(C) The registrant's annual consolidated financial statements, for the most recent fiscal year ended prior to the acquisition or disposition, that are included in the registrant's Form 10-K (§ 249.310 of this chapter) filed after the date of acquisition or disposition, but before the date financial statements and pro forma financial information for the acquisition or disposition would be required to be filed on Form 8-K (§ 249.308 of this chapter).

(ii) If the business is a related business (see § 210.3-05(a)(3)), combined pre-acquisition financial statements of the group of related businesses for the fiscal year specified in paragraph (b)(3)(i) of this section.

(4) When a registrant, including a real estate investment trust, conducts a continuous offering over an extended period of time and applies the Item 20.D. Undertakings of Industry Guide 5, the income test condition does not apply, and the determination must be made for the investment test condition, when it is based on the total assets of the registrant and its subsidiaries consolidated, and the asset test condition, if applicable, using the following for the registrant:

(i) During the distribution period, total assets as of the date of acquisition or disposition plus the proceeds (net of commissions) in good faith expected to be raised in the registered offering over the next 12 months, except that for acquisitions total assets must exclude the acquired business; and

(ii) After the distribution period ends and until the next Form 10-K is filed, total assets as of the date of acquisition or disposition, except that for acquisitions total assets must exclude the acquired business; and

(iii) After that next Form 10-K is filed, the guidance in paragraph (b)(3).

(c) The pro forma effects of a business acquisition need not be presented pursuant to this section if separate financial statements of the acquired business are not included in the filing, except where the aggregate impact of businesses acquired or to be acquired is significant as determined by § 210.3-05(b)(2)(iv) or § 210.3-14(b)(2)(i)(C).

(d) For purposes of this rule, the term business should be evaluated in light of the facts and circumstances involved and whether there is sufficient continuity of the acquired entity's operations prior to and after the transactions so that disclosure of prior financial information is material to an understanding of future operations. A presumption exists that a separate entity, a subsidiary, or a division is a business. However, a lesser component of an entity may also constitute a business. Among the facts and circumstances which should be considered in evaluating whether an acquisition of a lesser component of an entity constitutes a business are the following:

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(1) Whether the nature of the revenue-producing activity of the component will remain generally the same as before the transaction; or

(2) Whether any of the following attributes remain with the component after the transaction:

(i) Physical facilities,
(ii) Employee base,
(iii) Market distribution system,
(iv) Sales force,
(v) Customer base,
(vi) Operating rights,
(vii) Production techniques, or
(viii) Trade names.

8.2.10 Definition of a real estate operation for SEC reporting purposes

Excerpt from S-X Rule 3-14

Special instructions for financial statements of real estate operations acquired or to be acquired.

(a) *Financial statements required.*

(2) For purposes of determining whether the provisions of this section apply:

(i) The term real estate operation means a business (as set forth in § 210.11-01(d)) that generates substantially all of its revenues through the leasing of real property.

(ii) The acquisition of a real estate operation encompasses the acquisition of an interest in a real estate operation accounted for by the registrant under the equity method or, in lieu of the equity method, the fair value option.

(3) 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 will be treated under this section as if they are a single acquisition. The required financial statements may be presented on a combined basis for any periods they are under common control or management. For purposes of this section, acquisitions will be deemed to be related if:

(i) They are under common control or management;

(ii) The acquisition of one real estate operation is conditional on the acquisition of each other real estate operation; or

(iii) Each acquisition is conditioned on a single common event.

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(4) This section does not apply to a real estate operation that is totally held by the registrant prior to consummation of the transaction.

S-X Rule 3-05 specifically excludes acquisitions of real estate operations, which are subject to the separate and specific requirements of S-X Rule 3-14. Therefore, the first step in applying S-X Rule 3-14 is to determine whether what the registrant has acquired (or will acquire) is a business (see chapter 2) or a real estate operation (or neither) because this will impact whether the entity applies S-X Rule 3-05 or S-X Rule 3-14 (or neither). This determination is governed by the definitions of a 'real estate operation' in S-X Rule 3-14 and a 'business' in S-X Rule 11-01(d).

Observation

Special instructions for real estate acquisitions

S-X Rule 3-14 was adopted because unique considerations specific to the real estate industry warranted differentiated disclosures from acquisitions of non-real estate operations. First, the SEC staff has stated historical financial statements for real property do not usually provide significant information about the trends and factors most likely to affect future operations, such as demographic information, application of managerial techniques, and competition. Second, the SEC staff has recognized that audited financial statements for a real estate operation are rarely available from the seller without additional effort and expense because most real estate managers do not maintain their accounting records on a GAAP basis or obtain audits. [SEC Rel 33-10786.II.C]

Therefore, the objective of S-X Rule 3-14 is to provide industry specific disclosures necessary for investors to make informed investment decisions while reducing the registrant's burden to provide excess financial information otherwise required by S-X Rule 3-05 that is not useful to the investor.

In 2020, S-X Rule 3-14 was amended with the intention of eliminating differences from S-X Rule 3-05 where no unique industry considerations exist.

Question 8.2.10

What is the SEC's definition of the term 'real estate operation'?

Interpretive response: The SEC's definition of a real estate operation refers to an acquisition that meets the SEC's definition of a business (see chapter 2) but generates substantially all revenues through leasing of real property. The term 'substantially all' is not meant to be a bright line and therefore is not further defined by the SEC. [S-X Rule 3-14(a)(2)(i), SEC Rel 33-10786.II.C.2]

In practice, determining whether an acquired business for SEC reporting purposes is the acquisition of a 'real estate operation' often is difficult to determine and is very dependent on specific facts and circumstances.

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The SEC staff has noted that the reduced financial statement requirements available to real estate operations are premised on the continuity and predictability of cash flows ordinarily associated with commercial and apartment property leasing, and generally includes shopping centers and malls. In contrast, businesses that are more susceptible to variations in costs and revenues over shorter periods due to market and managerial factors are not considered real estate operations. Examples of such businesses are nursing homes, hotels, motels, golf courses, auto dealerships, and equipment rental operations. [FRM 2305.2]

Because 'real estate operations' are a subset of 'businesses' for SEC reporting purposes, the general guidance in chapter 2 on reporting requirements for business acquisitions applies unless there is a specific exception included in this chapter. Guidance found elsewhere in this Handbook that may be of particular interest to acquirers of real estate operations are referred to the following table.

Scenario	Reference
Acquisition in the form of a lease	Question 2.2.100
Step acquisitions	Question 2.2.140, section 2.4.20
Acquisition of a joint venture interest	Question 2.2.150
Acquisition of operating real estate	Question 2.2.160 and Example 2.2.100
Acquisition of an equity interest in a preexisting legal entity that holds real estate	Question 2.2.170
Investment in a newly formed legal entity that plans to acquire real estate	Question 2.2.180
Acquisition may involve shell companies, including SPACs, and/or represent reverse acquisitions	Section 10.2
Acquisitions of related businesses, including combinations of entities under common control	Question 2.2.210 Section 2.4.40
Shelf registration statements	Section 4.4.40
Initial registration statements	Chapter 7
Smaller reporting companies	Section 2.4.10
Acquisitions of foreign real estate operations or FPI acquisition of real estate operations	Chapter 6

Comparison to US GAAP

Under US GAAP, operating real estate is often not a business as defined by Topic 805 (business combinations). This is because Step 1 in applying the US GAAP definition requires an acquirer to conclude that a set is not a business when substantially all of the fair value of the gross assets acquired is

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concentrated in a single identifiable asset or a group of similar identifiable assets. Although acquisitions of real estate operations are often not business combinations for US GAAP, the definition of a business for SEC reporting purposes is separate and distinct and focuses on the continuity of the operations before and after the transaction (see Questions 2.2.10 and 2.2.40).

Example 8.2.10

Determining what constitutes 'substantially all'

Registrant owns, leases and manages real estate throughout the US. It must determine whether it has acquired real estate operations subject to the requirements of S-X Rule 3-14 or a business in the scope of S-X Rule 3-05 under the following acquisition scenarios.

Scenario 1: Acquired business generates substantially all revenues through leasing of real property

Registrant acquires Target Shopping Mall, which generates substantially all of its revenue through leasing store locations to mall tenants. Target Shopping Mall has de minimis other revenue (e.g. revenue derived from parking garage fees charged to tenants and retail customers).

Registrant determines the acquired business is a real estate operation in the scope of S-X Rule 3-14 because substantially all of its revenue is rental revenue.

Scenario 2: Acquired business does NOT generate substantially all revenues through leasing of real property

Registrant acquires Target Hotel, which recognizes revenue through room charges, food and beverage service, and other revenues. Target Hotel also leases its dining space to a restaurant chain.

Registrant determines that the acquired business is not a real estate operation because the principal sources of revenue are susceptible to variations due to market and managerial factors. Therefore, the filing requirements in S-X Rule 3-05 apply if the acquisition is significant (see chapter 2).

Question 8.2.20

Is the acquisition of a data center the acquisition of real estate operations?

Interpretive response: It depends.

An acquired business that engages in the operation of colocation data centers solely by leasing the real estate premises used as data centers would qualify as real estate operations under S-X Rule 3-14.

However, some entities that are engaged in the operation of colocation data centers also engage in other activities, such as leasing technology-related assets and offering data center related services to its customers.

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The determination of whether these represent significant other activities and the acquisition of such a business is in the scope S-X Rule 3-05 instead of S-X Rule 3-14 requires a careful analysis of the relevant facts and circumstances. This analysis includes consideration of specific transaction- and entity-specific factors, which may include the following.

- The level/seniority of employees acquired. The acquisition of senior management may indicate the acquisition of a business versus lower-level data center operators that would support real estate operations.
- The significance of revenue generated from leasing real estate premises versus revenue from managed services or other data center related services.
- Whether the predominant value of acquired assets relates to relatively longer-term assets, such as buildings and structural equipment (power, cooling, water, etc.) with greater continuity and predictability than relatively shorter-term leases (racks, servers, etc.) that are more susceptible to variations in costs and revenues due to market, obsolescence and managerial factors.
- Whether the acquisition was valued using a real estate model or using models more common to valuation of a traditional business.

A registrant that acquires a data center business with significant other activities beyond leasing real estate premises may consult with the SEC staff (CF-OCA) if it believes the acquisition is that of a real estate operation and that abbreviated financial statements meeting the requirements of S-X Rule 3-14 would be appropriate.

Question 8.2.30

Is the acquisition of an equity method investment the acquisition of a real estate operation?

Interpretive response: It depends. The initial purchase of an investment accounted for under the equity method is considered the acquisition of a real estate operation if the underlying investee is (or holds) a real estate operation. This is also true in cases in which the registrant elects to account for the investment using the fair value option in lieu of the equity method. [S-X Rule 3-14(a)(2)(ii)]

However, if a registrant acquires an investment in a property that is not a real estate operation or a business for SEC reporting purposes, it may still have to report the acquisition on a Form 8-K if the acquisition is material to an investor's understanding of the registrant's future operations (see Question 2.2.50). That decision is a legal determination.

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Question 8.2.40

What are some of the key differences and similarities between S-X Rule 3-14 and Rule 3-05?

Interpretive response: Some of the key similarities between S-X Rule 3-14 and S-X Rule 3-05 are included in the following table.

Criterion	Requirements of S-X Rule 3-14 and Rule 3-05
Individually significant threshold for *consummated* acquisitions on Form 8-K, registration statements and proxy statements	20%
Aggregation of individually insignificant *consummated or probable* acquisitions for registration statements and proxy statements	A registrant is required to provide pro forma financial information (and perhaps acquiree financial statements) in a registration statement if the aggregate impact of certain acquired or probable-to-be-acquired unrelated businesses and real estate operations aggregate to more than 50%. The businesses and real estate operations that must be combined for this aggregate significance test are those: — consummated but less than 20% significant; — between 20% and 50% significant, but for which financial statements are not yet required because of the 75-day grace period (and have not yet been provided); — probable acquisitions less than 50% significant. See Question 2.3.190 and section 3.2.40.
Use of pro forma information in significance test permitted	Yes (see Question 3.3.110)
Calculation of total assets used in significance test in a continuous offering (i.e. blind pool offering) [S-X Rule 11-01(b)(4)]	*During distribution period:* Sum of (1) the registrant's total assets as of the date of the acquisition, excluding the acquired business, and (2) the proceeds (net of commissions) in good faith expected to be raised in the registered offering over the next 12 months. *After the distribution period ends and until the next Form 10-K is filed:* Total assets as of the date of acquisition excluding the acquired business. See section 8.5.10.
Application of S-X Rule 3-06 permitted	Yes (see section 4.5.20)

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Criterion	Requirements of S-X Rule 3-14 and Rule 3-05
Omission of pre-acquisition financial statements that have been included in the registrant's post-acquisition financial statements	Financial statements of the acquired business or real estate operation may be omitted once the acquired business or real estate operation has been reflected in filed financial statements for nine months (or have been reflected for one year if significance exceeds 40% for a non-real estate operation business where two years of pre-acquisition financial statements would be required). See Question 4.4.80.

Some of the key differences between S-X Rule 3-14 and S-X Rule 3-05 (which are due to unique industry considerations) are included in the following table.

Criterion	S-X Rule 3-14	S-X Rule 3-05
Significance test	Investment test only When using total assets as the denominator, the numerator for the investment test is the registrant's investment(s) in the real estate operations, including any debt secured by the real properties that is assumed by the registrant. See section 8.3	Required to perform investment, income and asset tests
Periods required based on significance thresholds	One year Most recent year-to-date interim period prior to the acquisition See section 8.4.20	Sliding scale approach up to two years, including interim periods
Form and content	Statement of revenue and expenses Supplemental disclosure of material factors impacting future operations See section 8.4.30	Full financial statements (Reg S-X) required Abbreviated financial statements allowed in certain circumstances

8.3 Significance test considerations

Excerpt from S-X Rule 3-14

Special instructions for financial statements of real estate operations acquired or to be acquired.

(b) *Periods to be presented.*

(2) In all cases not specified in paragraph (b)(1) of this section, financial statements of the real estate operation acquired or to be acquired must

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be filed for the periods specified in this paragraph (b)(2) or such shorter period as the real estate operation has been in existence. The periods for which such financial statements are to be filed must be determined using the investment test condition specified in the definition of significant subsidiary in § 210.1-02(w)(1)(i) modified as follows:

(i)

(A) If the condition does not exceed 20 percent, financial statements are not required.

(B) If the condition exceeds 20 percent, financial statements of the real estate operation for at least the most recent fiscal year and the most recent interim period specified in §§ 210.3-01 and 210.3-02 must be filed.

(C) If the aggregate impact of acquired or to be acquired real estate operations since the date of the most recent audited balance sheet filed for the registrant, for which financial statements are either not required by paragraph (b)(2)(i)(A) of this section or are not yet required based on paragraph (b)(3)(i) of this section, exceeds 50 percent, the registrant must provide the disclosures specified in paragraphs (b)(2)(i)(C)(1) and (b)(2)(i)(C)(2) of this section. If there are also businesses acquired or to be acquired as described in § 210.3-05(b)(2)(iv), the requirements in § 210.3-05(b)(2)(iv) will apply instead.

(1) Pro forma financial information pursuant to §§ 210.11–01 through 210.11–02 that depicts the aggregate impact of these acquired or to be acquired real estate operations in all material respects; and

(2) Financial statements covering at least the most recent fiscal year and the most recent interim period specified in §§ 210.3–01 and 210.3–02 for any acquired or to be acquired real estate operation for which financial statements are not yet required based on paragraph (b)(3)(i) of this section.

(ii) When the investment test is based on the total assets of the registrant and its subsidiaries consolidated, include any assumed debt secured by the real properties in the "investments in" the tested real estate operation.

(iii) The determination must be made using § 210.11-01(b)(3) and (4).

Excerpt from S-X Rule 1-02

Definitions of terms used in Regulation S-X (17 CFR part 210).

(w) *Significant subsidiary.*

(1) The term *significant subsidiary* means a subsidiary, including its subsidiaries, which meets any of the conditions in paragraph (w)(1)(i),

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(ii), or (iii) of this section; however if the registrant is a registered investment company or a business development company, the tested subsidiary meets any of the conditions in paragraph (w)(2) of this section instead of any of the conditions in this paragraph (w)(1). In an acquisition by a predecessor to a shell company, use the predecessor's consolidated financial statements instead of those of the shell company registrant in applying the significance tests in paragraphs (w)(1)(i), (ii), and (iii) of this section. A registrant that files its financial statements in accordance with or provides a reconciliation to U.S. Generally Accepted Accounting Principles (U.S. GAAP) must use amounts determined under U.S. GAAP. A foreign private issuer that files its financial statements in accordance with International Financial Reporting Standards as issued by the International Accounting Standards Board (IFRS–IASB) must use amounts determined under IFRS–IASB.

(i) Investment test.

(A) For acquisitions, other than those described in paragraph (w)(1)(i)(B), and dispositions this test is met when the registrant's and its other subsidiaries' investments in and advances to the tested subsidiary exceed 10 percent of the aggregate worldwide market value of the registrant's voting and non-voting common equity, or if the registrant has no such aggregate worldwide market value the total assets of the registrant and its subsidiaries consolidated as of the end of the most recently completed fiscal year.

(1) 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 if required to be recognized at fair value by the registrant at the acquisition date under U.S. GAAP or IFRS-IASB, as applicable; however if recognition at fair value is not required, it must include all contingent consideration, except contingent consideration for which the likelihood of payment is remote.

(2) For dispositions, the "investments in" the tested subsidiary is the fair value of the consideration, including contingent consideration, for the disposed subsidiary when comparing to the aggregate worldwide market value of the registrant's voting and non-voting common equity, or, when the registrant has no such aggregate worldwide market value, the carrying value of the disposed subsidiary when comparing to total assets of the registrant.

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(3) When determining the aggregate worldwide market value of the registrant's voting and non-voting common equity, use the average of such 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.

(B) For a combination between entities or businesses under common control, this test is met when either the net book value of the tested subsidiary exceeds 10 percent of the registrant's and its subsidiaries' consolidated total assets or the number of common shares exchanged or to be exchanged by the registrant exceeds 10 percent of its total common shares outstanding at the date the combination is initiated.

(C) In all other cases, this test is met when the registrant's and its other subsidiaries' investments in and advances to the tested subsidiary exceed 10 percent of the total assets of the registrant and its subsidiaries consolidated as of the end of the most recently completed fiscal year.

Excerpt from S-X Rule 11-01

Presentation requirements.

(b) A business acquisition or disposition will be considered significant if:

(1) The business acquisition meets:

(i) The definition of a significant subsidiary in § 210.1-02(w)(1), substituting 20 percent for 10 percent each place it appears therein; or

(ii) If the business is a real estate operation as defined in § 210.3-14(a)(2), the significant subsidiary condition in § 210.1-02(w)(1)(i) (i.e., the investment test condition), substituting 20 percent for 10 percent, as modified by the guidance in § 210.3-14(b)(2)(ii).

(2) The business disposition, including a business that is a real estate operation as defined in § 210.3-14(a)(2), meets the definition of a significant subsidiary in § 210.1-02(w)(1), substituting 20 percent for 10 percent each place it appears therein.

(3) The determination must be made, except as noted in paragraph (b)(4) of this section for the continuous offerings described therein, by using:

(i) For amounts derived from financial statements, 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 or, if the fiscal years differ, the business's most recent fiscal year that would be required if the

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business had the same filer status as the registrant, however the determination may be made using:

(A) The financial statements for the business described in § 210.3-05(e) or (f) if the business meets the conditions for presenting those financial statements.

(B) Pro forma amounts for the registrant for the periods specified in § 210.11-01(b)(3) that only depict significant business acquisitions and dispositions consummated after the latest fiscal year-end for which the registrant's financial statements are required to be filed and only include Transaction Accounting Adjustments (*see* § 210.11-02(a)(6)(i)), provided that:

(1) The registrant has filed audited financial statements for any such acquired business for the periods required by § 210.3-05 or § 210.3-14 and the pro forma financial information required by §§ 210.11-01 through 210.11-02 for any such acquired or disposed business. The tests may not be made by "annualizing" data; and

(2) If a registrant has used pro forma amounts to determine significance of an acquisition or disposition, it must continue to use pro forma amounts to determine significance of acquisitions and dispositions through the filing date of its next annual report on Form 10-K (§ 249.310 of this chapter) or Form 20-F (§ 249.220f of this chapter); or

(C) The registrant's annual consolidated financial statements, for the most recent fiscal year ended prior to the acquisition or disposition, that are included in the registrant's Form 10-K (§ 249.310 of this chapter) filed after the date of acquisition or disposition, but before the date financial statements and pro forma financial information for the acquisition or disposition would be required to be filed on Form 8-K (§ 249.308 of this chapter).

(ii) If the business is a related business (see § 210.3-05(a)(3)), combined pre-acquisition financial statements of the group of related businesses for the fiscal year specified in paragraph (b)(3)(i) of this section.

(4) When a registrant, including a real estate investment trust, conducts a continuous offering over an extended period of time and applies the Item 20.D. Undertakings of Industry Guide 5, the income test condition does not apply, and the determination must be made for the investment test condition, when it is based on the total assets of the registrant and its subsidiaries consolidated, and the asset test condition, if applicable, using the following for the registrant:

(i) During the distribution period, total assets as of the date of acquisition or disposition plus the proceeds (net of commissions) in good faith expected to be raised in the registered offering over the

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next 12 months, except that for acquisitions total assets must exclude the acquired business; and

(ii) After the distribution period ends and until the next Form 10-K is filed, total assets as of the date of acquisition or disposition, except that for acquisitions total assets must exclude the acquired business; and

(iii) After that next Form 10-K is filed, the guidance in paragraph (b)(3).

(c) The pro forma effects of a business acquisition need not be presented pursuant to this section if separate financial statements of the acquired business are not included in the filing, except where the aggregate impact of businesses acquired or to be acquired is significant as determined by § 210.3-05(b)(2)(iv) or § 210.3-14(b)(2)(i)(C).

8.3.10 Significant real estate operations

Section 3.4 explains how to apply the investment test, which is the only significance test required for real estate operations. S-X Rule 3-14 includes limited additional considerations in applying the investment test, which are unique to an acquisition of real estate operations and outlined in this section.

Question 8.3.10

How is the significance of the acquisition of real estate operations determined?

Interpretive response: An acquisition of real estate operations is evaluated for significance using the investment test, as modified under S-X Rule 3-14 (see Question 8.3.40). [S-X Rule 3-14(b)(2)]

If significance exceeds 20% for an acquired real estate operation, financial statements are required for the periods indicated by S-X Rule 3-14, including supplemental information required by S-X Rule 3-14 (see section 8.4). [S-X Rule 11-01(b)(1)(ii)]

The SEC staff has stated the use of the asset and income tests is not practical for an acquisition of real estate operations because the historical amounts to perform these tests are generally not available since most real estate managers do not maintain their books on a US GAAP basis or obtain audits. Further, S-X Rule 3-14 requires only abbreviated income statements to be filed; therefore, additional financial statements would have to be prepared solely for purposes of significance testing if the asset and income tests were applied to acquisitions of real estate operations. [SEC Rel 33-10786.II.C.3]

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Question 8.3.20

When is the significance test performed?

Interpretive response: A registrant performs the significance test once it determines an acquisition is in the scope of S-X Rule 3-14 (see chapter 2 and section 8.2). This is aligned with the requirements of S-X Rule 3-05 (see section 3.2).

Question 8.3.30

What information is used to perform the significance test?

Interpretive response: Both S-X Rule 3-14 and S-X Rule 3-05 require a registrant to determine significance based on the requirements outlined in S-X Rule 11-01(b). The significance test is based on information of the registrant and acquired business or real estate operation from the financial statements of the most recently competed fiscal year. Section 3.3 discusses the information and periods that are used in the significance test. [S-X Rule 3-14(b)(2)(iii)]

However, there are special considerations if the registrant is conducting a continuous offering over an extended period of time and applies the Item 20.D. Undertakings of Industry Guide 5, *Preparation of Registration Statements Relating to Interests in Real Estate Limited Partnerships* (i.e. blind pool offerings). S-X Rule 11-01(b)(4) outlines special considerations for blind pool offerings, which are discussed in section 8.5.10.

Question 8.3.40

How is the investment test calculated for acquisitions of real estate operations?

Interpretive response: The investment test is calculated by dividing the registrant's *investments in and advances to* the acquired business or real estate operation (which for an acquisition is typically the purchase price) by the registrant's aggregate worldwide market value (AWMV), when available. Because the purchase price is generally consistent with fair value, the use of AWMV instead of total assets is intended to provide a more meaningful measure of significance in acquisitions by comparing measures that are generally consistent with fair value.

If AWMV is available, the investment test for real estate operations is calculated in the same manner as S-X Rule 3-05 discussed in section 3.4. Question 8.3.50 discusses how to perform the investment test when total assets must be used for an acquisition of real estate operations.

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Investment test (see section 3.4)

Investments in and advances to the acquired business	÷	**Registrant's AWMV, if applicable; otherwise registrant's consolidated total assets**

Question 8.3.50

How is the investment test calculated when the registrant does not have an AWMV?

Background: A registrant may not have an AWMV. This may be the case for a non-traded REIT (i.e. publicly registered, non-exchange traded real estate investment trust) or when common equity is not publicly traded, as is the case for an entity conducting an IPO.

Interpretive response: In these situations, the registrant uses its consolidated total assets as of the end of the most recent fiscal year for which financial statements are required to be filed. The registrant determines the consolidated total assets consistent with the asset test (see section 3.6).

When the investment test is based on consolidated total assets, S-X Rule 3-14 modifies the numerator in the calculation by requiring the 'investments in' amount to include any debt secured by the real properties that is assumed by the registrant. [S-X Rule 3-14(b)(2)(ii)]

Investments in and advances to the acquired business + Any assumed debt secured by the real properties	÷	**Registrant's consolidated total assets**

Acquisitions of real estate operations typically involve assumed debt secured by the real properties, which reduces the amount of cash paid by the acquirer for the real estate operation. Therefore, the SEC staff has stated this modified investment test is necessary to appropriately determine significance for acquisitions of real estate operations because it considers the unique structure of these types of acquisitions. [SEC Rel 33-10786.II.C.3.c]

Example 8.3.10

Significance test when acquired property is encumbered with mortgage debt

Registrant, a non-traded REIT, acquires Property A for $10, which includes the assumption of mortgage debt on Property A of $5. Registrant's consolidated total assets are $100.

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The investment test is calculated as follows.

Scenario	Outcome
Registrant's investment in Property A ($10 + $5)	$15
Divided by Registrant's consolidated total assets	$100
Significance	**15%**

The acquisition of Property A is not significant because the investment test result (15%) does not exceed 20%.

Question 8.3.60

Is there an alternative when the investment test produces an anomalous result due to the real estate operation's capital structure?

Background: The investment test can produce an anomalous result when a registrant's capital structure is complex or leveraged. An example of when this may happen is when AWMV is significantly less than total assets.

Interpretive response: The SEC staff has commented that an anomalous result is not unique to the application of S-X Rule 3-14. Therefore, the tests must be applied as written but registrants may seek relief under S-X Rule 3-13 if they consider the results anomalous (see section 10.4). [2020 AICPA Conf]

8.3.20 Individually insignificant acquisitions

Question 8.3.70

Is financial information related to individually insignificant acquisitions that are significant in aggregate required in a registration or proxy statement?

Interpretive response: Yes.

Similar to S-X Rule 3-05 (see Question 2.3.190), S-X Rule 3-14 requires a registrant filing a registration or proxy statement to consider the aggregate impact of acquired or probable-to-be acquired real estate operations for which financial statements are not otherwise required due to their individual insignificance or are not yet required due to the 75-day grace period.

To assess the aggregate impact, a registrant must consider the following categories of acquired or probable-to-be acquired real estate operations since the most recent audited balance sheet filed by the registrant:

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— acquisitions consummated, but less than 20% significant;

— acquisitions between 20% and 50% significant, but for which financial statements are not yet required because of the 75-day grace period (and have not otherwise been provided);

— probable acquisitions less than 50% significant.

If the aggregate impact of these acquisitions exceeds 50% significance using the investment test only, the registrant provides the following in the registration or proxy statement: [S-X Rule 3-14(b)(2)(i)(C)]

— pro forma financial information depicting the aggregate impact of these acquired or probable-to-be acquired real estate operations, in all material respects; and

— financial statements covering at least the most recent fiscal year and the most recent interim period for any acquired or probable-to-be acquired real estate operations greater than 20% significant.

See section 3.2.40 for considerations related to determining aggregate significance.

Aggregating individually insignificant acquisitions for the purpose of the 50% test is required only for registration statements and certain proxy materials. Form 8-K requires aggregating individually insignificant acquisitions only if they are related businesses and are, in the aggregate, significant (see Question 2.2.210). [FRM 2035.1]

Example 8.3.20

Individually insignificant acquisitions of real estate operations

Scenario 1: Aggregate significance does not exceed 50%

During 20X2, Registrant identifies five real estate operations it either has acquired or may acquire with individual significance levels as follows based on the investment test.

Real estate operation	Date acquired	Individual significance
A	February 12, 20X2	6%
B	March 16, 20X2	5%
C	April 22, 20X2	14%
D	May 09, 20X2	7%
E	Probable	12%
Aggregate significance		**44%**

On June 30, 20X2, Registrant files a registration statement and no additional acquisitions are completed prior to the registration statement's effective date.

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Because the aggregate of all individually insignificant properties is below 50%, Registrant is not required to include pro forma financial information.

Scenario 2: Aggregate significance exceeds 50%

In addition to the five acquisitions in Scenario 1, on May 15, 20X2, Registrant consummates a sixth acquisition of Real Estate Operation F, which is calculated to be significant at 10%.

Because the aggregate of all individually insignificant real estate operations exceeds 50%, it is required to provide pro forma financial information in the registration statement depicting the aggregate impact of the six real estate operations. However, because none of the acquisitions are individually greater than 20% significant, no historical, audited financial statements of the acquired real estate operations are required in the registration statement.

Question 8.3.80

How is aggregate significance determined when some acquisitions are in the scope of S-X Rule 3-05 and others in the scope of S-X Rule 3-14?

Excerpt from S-X Rule 3-05

Financial statements of businesses acquired or to be acquired.

(b) *Periods to be presented.*

(2) In all cases not specified in paragraph (b)(1) of this section, financial statements of the business acquired or to be acquired must be filed for the periods specified in this paragraph (b)(2) or such shorter period as the business has been in existence. Determine the periods for which such financial statements are to be filed using the conditions specified in the definition of significant subsidiary in § 210.1-02(w), using the lower of the total revenue component or income or loss from continuing operations component for evaluating the income test condition, as follows:

(iv) If the aggregate impact of 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 not required by paragraph (b)(2)(i) of this section or are not yet required based on paragraph (b)(4)(i) of this section, exceeds 50 percent for any condition, the registrant must provide the disclosure specified in paragraphs (b)(2)(iv)(A) and (B) of this section, however in determining the aggregate impact of the investment test condition also include the aggregate impact calculated in accordance with § 210.3-14(b)(2)(ii) of any acquired or to be acquired real estate operations specified in § 210.3-14(b)(2)(i)(C). In determining whether the income test condition (i.e. both the revenue component and the income or loss from continuing operations

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component) exceeds 50 percent, the businesses specified in this paragraph (b)(2)(iv) reporting losses must be aggregated separately from those reporting income. If either group exceeds 50 percent, paragraphs (b)(2)(iv)(A) and (B) of this section will apply to all of the businesses specified in this paragraph (b)(2)(iv) and will not be limited to either the businesses with losses or those with income.

(A) Pro forma financial information pursuant to §§ 210.11-01 through 210.11-02 that depicts the aggregate impact of these acquired or to be acquired businesses and real estate operations, in all material respects; and

(B) Financial statements covering at least the most recent fiscal year and the most recent interim period specified in §§ 210.3-01 and 210.3-02 for any acquired or to be acquired business or real estate operation for which financial statements are not yet required based on paragraph (b)(4)(i) of this section or § 210.3-14(b)(3)(i).

Interpretive response: S-X Rule 3-14 specifies that the requirements in S-X Rule 3-05(b)(2)(iv) apply in this scenario (see Question 2.3.190). The significance tests are performed using the following steps. [S-X Rule 3-14(b)(2)(i)(C)]

Step 1	Determine significance for each individual acquisition in accordance with S-X Rule 3-05 (see chapter 3) or S-X Rule 3-14 (see section 8.3.10), as applicable.
Step 2	Determine which acquisitions, if any, meet the following criteria to be aggregated: — less than 20% significance level — greater than 20% and less than 50% significance level, and: – have not yet been consummated; or – have been consummated but for which financial statements are not yet required because of the 75-day grace period (and have not been previously filed).
Step 3	For any acquisitions meeting the criteria in Step 2: — aggregate the financial data used in Step 1 including both businesses and real estate operations for the investment test; and — aggregate the financial data used in Step 1 including only businesses in the scope of S-X Rule 3-05 for the income and asset tests.
Step 4	If the aggregate exceeds 50% significance for any of the three tests, then the registrant provides the following in a registration or proxy statement: — pro forma financial information depicting the aggregate impact of these acquired or to be acquired real estate operations, in all material respects; and — financial statements covering at least the most recent fiscal year and the most recent interim period for any acquired or to be acquired real estate operation greater than 20% significance.

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Example 8.3.30

Individually insignificant acquisitions in the scope of S-X Rule 3-05 and S-X Rule 3-14

Since the date of its latest audited balance sheet, Registrant acquires the following businesses during 20X2. Registrant files a registration statement that will become effective September 15, 20X2.

	S-X Rule	Date acquired
Company A	3-05	January 15, 20X2
Company B	3-05	January 28, 20X2
Company C	3-05	March 30, 20X2
Company D	3-14	July 25, 20X2
Company E	3-14	August 15, 20X2

Significance of the acquired companies is determined to be the following.

	Asset test	Investment test	Income test[1]
Company A	5%	6%	4%
Company B	3%	12%	8%
Company C	5%	16%	4%
Company D[2]	-	22%	-
Company E	-	8%	-
Aggregate significance	**13%**	**64%**	**16%**

Notes:

1. The lower of the pretax income component and revenue component used for purposes of determining the aggregate significance of insignificant acquisitions for the income test.
2. The audited historical financial statements for Company D are not yet required to be filed on Form 8-K when the registration statement will become effective on September 15, 20X2 (i.e. within the 75-day grace period). As a result, it is included in the aggregate significance calculation even though its separate S-X Rule 3-14 financial statements will ultimately be filed.

Because the highest level of significance is the investment test at 64%, pro forma financial information is required depicting the aggregate effects of all such businesses and real estate operations.

Further, Registrant must provide in the registration statement audited financial statements for acquired businesses or real estate operations that are more than 20% individually significant if the financial statements have not yet been filed by the registrant (i.e. before the financial statements are required to be filed under Item 9.01 of Form 8-K). Therefore, audited S-X Rule 3-14 financial statements are included for Company D because it is individually 22% significant under the investment test.

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8.3.30 Newly formed REIT

Question 8.3.90

Does the SEC permit modifications to the significance test for IPOs of newly formed REITs?

Background: A newly formed REIT having no significant operations may acquire real estate operations immediately prior to filing an IPO, identify properties to be acquired upon closing the IPO, and/or identify properties it is probable to acquire soon after the IPO. In these circumstances, the application of S-X Rule 3-14 could result in the registrant ultimately providing financial statements of acquisitions that are insignificant to investors.

Interpretive response: Yes.

In identifying the financial statements required to be included in the initial registration statement, the SEC staff has allowed registrants to determine individual and aggregate significance using a denominator in the investment test equal to the total cost of: [FRM 2335.1]

- the properties acquired immediately prior to filing an initial registration statement;
- the properties to be acquired upon closing the IPO; and
- the properties identified as probable future acquisitions.

Significance is determined in the same manner as for other filings, except that the denominator described above is substituted for the registrant's AWMV or total assets at the latest audited fiscal year-end. Based on the revised significance test, the registrant applies the same financial statement requirements under S-X Rule 3-14 (see section 8.4). [FRM 2335.1]

Identifying the predecessor in newly formed REITs

It is common in initial registration statements in the real estate industry to involve the combination of multiple entities with related or common ownership. Similar to other put-together transactions (see section 7.3), this may require a predecessor entity to be identified. The financial statement requirements for acquired businesses and real estate operations will depend on whether a predecessor is identified and if so, which entity (or combination of entities) is identified (see Question 2.2.30). [SEC 33-10786 n. 227]

Example 8.3.40

Significance test – Newly formed REIT of unrelated real estate operations

Registrant, a newly formed REIT, files a Form S-11 registration statement for its IPO. Immediately before filing Form S-11, Registrant acquires five real estate operations (A, B, C, D and E) from unrelated parties and none of the acquisitions were contingent upon any single event.

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In addition, Registrant identifies three real estate operations (F, G and H) as probable of being acquired from unrelated parties immediately after the IPO.

Based on the SEC staff interpretation (see Question 8.3.90), Registrant determines significance of the acquisitions using a base equal to the cost of acquiring all of the properties. The costs of each of the properties acquired, or to be acquired, and their significance are as follows.

Real estate operation	Status	Cost (i.e. investments in and advances to) ($)	Individual significance
A	Consummated	80	1%
B	Consummated	3,500	55%
C	Consummated	800	12%
D	Consummated	175	3%
E	Consummated	200	3%
F	Probable	1,000	16%
G	Probable	575	9%
H	Probable	70	1%
Total		**$ 6,400**	**100%**

Audited historical financial statements and pro forma information of Real Estate Operation B are filed on the registration statement because its acquisition is individually greater than 50% significant (the 75-day grace period does not apply to acquisitions greater than 50% significant, see Question 8.3.70).

The aggregate of the remaining individually insignificant acquisitions is 45%. Therefore, pro forma financial information that depicts the aggregate impact of these real estate operations in all material respects is not required in the registration statement. However, Registrant considers whether the disclosure of such information would be material to investors and therefore would need to be provided.

Example 8.3.50

Significance test – Newly formed REIT includes related real estate operations

Assume the same facts as in Example 8.3.40, except that the consummation of the acquisition of Real Estate Operations F, G and H are contingent on the completion of registrant's effective registration statement. Therefore, Real Estate Operations F, G and H are treated as a single acquisition in determining significance (see Question 3.3.200).

Because the combined significance exceeds 20% (26%), audited financial statements of Real Estate Operations F, G and H are required in the registration statement in addition to those of Real Estate Operation B.

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Question 4.5.10 and Example 4.5.10 discuss whether combined or separate financial statements are permitted.

Question 8.3.100

For acquisitions after the initial registration statement but prior to the initial Form 10-K, can the newly formed REIT use the same denominator used in the initial registration statement?

Interpretive response: Yes.

As explained in Question 8.3.90, a newly formed REIT can perform a modified significance test in the initial registration statement. The SEC staff has stated the registrant can use the same denominator as was used in the initial registration statement to determine significance of any future real estate operation acquisitions until the time the registrant files its Form 10-K covering the year the IPO is consummated.

However, the SEC staff also noted that the denominator should be reduced for any real estate operations not acquired or no longer probable. [FRM 2335.2]

8.4 Filing and reporting requirements

8.4.10 Overview

Excerpt from S-X Rule 3-14

Special instructions for financial statements of real estate operations acquired or to be acquired.

(b) *Periods to be presented.*

(1) If registering an offering of securities to the security holders of the real estate operation to be acquired, then the financial statements specified in paragraph (c) of this section and the supplemental information specified in paragraph (f) of this section must be filed for the real estate operation to be acquired for the periods specified in §§ 210.3-01 and 210.3-02, except as provided otherwise for filings on Form S-4 or F-4 (§ 239.25 or § 239.34 of this chapter). The financial statements covering fiscal years must be audited except as provided in Item 14 of Schedule 14A (§ 240.14a-101 of this chapter) with respect to certain proxy statements or in registration statements filed on Form S-4 or F-4 (§ 239.25 or § 239.34 of this chapter).

(2) In all cases not specified in paragraph (b)(1) of this section, financial statements of the real estate operation acquired or to be acquired must be filed for the periods specified in this paragraph (b)(2) or such shorter period as the real estate operation has been in existence. The periods

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for which such financial statements are to be filed must be determined using the investment test condition specified in the definition of significant subsidiary in § 210.1-02(w)(1)(i) modified as follows:

(i)

(A) If the condition does not exceed 20 percent, financial statements are not required.

(B) If the condition exceeds 20 percent, financial statements of the real estate operation for at least the most recent fiscal year and the most recent interim period specified in §§ 210.3-01 and 210.3-02 must be filed.

(C) If the aggregate impact of acquired or to be acquired real estate operations since the date of the most recent audited balance sheet filed for the registrant, for which financial statements are either not required by paragraph (b)(2)(i)(A) of this section or are not yet required based on paragraph (b)(3)(i) of this section, exceeds 50 percent, the registrant must provide the disclosures specified in paragraphs (b)(2)(i)(C)(1) and (b)(2)(i)(C)(2) of this section. If there are also businesses acquired or to be acquired as described in § 210.3-05(b)(2)(iv), the requirements in § 210.3-05(b)(2)(iv) will apply instead.

(1) Pro forma financial information pursuant to §§ 210.11-01 through 210.11-02 that depicts the aggregate impact of these acquired or to be acquired real estate operations in all material respects; and

(2) Financial statements covering at least the most recent fiscal year and the most recent interim period specified in §§ 210.3-01 and 210.3-02 for any acquired or to be acquired real estate operation for which financial statements are not yet required based on paragraph (b)(3)(i) of this section.

(ii) When the investment test is based on the total assets of the registrant and its subsidiaries consolidated, include any assumed debt secured by the real properties in the "investments in" the tested real estate operation.

(iii) The determination must be made using § 210.11-01(b)(3) and (4).

(3) Financial statements required for the periods specified in paragraph (b)(2) of this section may be omitted to the extent specified as follows:

(i) Registration statements not subject to the provisions of § 230.419 of this chapter and proxy statements need not include separate financial statements of the acquired or to be acquired real estate operation if neither the real estate operation nor the aggregate impact specified in paragraph (b)(2)(i)(C) of this section exceeds the condition of significance in the definition of significant subsidiary in § 210.1-02(w)(1)(i), as modified by paragraphs (b)(2)(ii) and (iii) of this section, at the 50 percent level computed in accordance with paragraph (b)(2) of this section, and either:

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(A) The consummation of the acquisition has not yet occurred; or

(B) The date of the final prospectus or prospectus supplement relating to an offering as filed with the Commission pursuant to § 230.424(b) of this chapter, or mailing date in the case of a proxy statement, is no more than 74 days after consummation of the acquisition of the real estate operation, and the financial statements have not previously been filed by the registrant.

(ii) A registrant, other than a foreign private issuer required to file reports on Form 6-K (§ 249.306 of this chapter), or shell company (other than a business combination related shell company), that omits from its initial registration statement financial statements of a recently consummated acquisition of a real estate operation pursuant to paragraph (b)(3)(i) of this section must file those financial statements and any pro forma information specified by §§ 210.11-01 through 210.11-03 (Article 11) under cover of Form 8-K (§ 249.308 of this chapter) no later than 75 days after consummation of the acquisition. When a predecessor to a shell company (other than a business combination related shell company) acquires a real estate operation and the financial statements of that recently consummated acquisition of a real estate operation are omitted from a registration statement or proxy statement pursuant to paragraph (b)(3)(i) of this section, refer to § 210.15-01(d)(2).

(iii) Separate financial statements of the acquired real estate operation specified in paragraph (b)(2)(i)(B) of this section need not be presented once the operating results of the acquired real estate operation have been reflected in the audited consolidated financial statements of the registrant for at least nine months.

(c) *Presentation of the financial statements.*

(1) The financial statements prepared and audited in accordance with Regulation S-X 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.

(2) The notes to the financial statements must include the following disclosures:

(i) The type of omitted expenses and the reason(s) why they are excluded from the financial statements;

(ii) 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

(iii) Information about the real estate operation's operating, investing and financing cash flows, to the extent available.

(d) *Financial statements of a foreign real estate operation.* Financial statements of an acquired or to be acquired foreign business (as defined in § 210.1-02(l)) that is a real estate operation, specified in paragraph (c) of this section and meeting the requirements of Item 17 of Form 20-F (§

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249.220f of this chapter), will satisfy this section. Such financial statements may be reconciled to U.S. Generally Accepted Accounting Principles (U.S. GAAP) or International Financial Reporting Standards as issued by the International Accounting Standards Board (IFRS-IASB) if the registrant is a foreign private issuer that prepares its financial statements in accordance with IFRS-IASB. This reconciliation must generally follow the form and content requirements in Item 17(c) of Form 20-F; however, accommodations in Item 17(c)(2) of Form 20-F that would be inconsistent with IFRS-IASB may not be applied, and IFRS 1, *First-time Adoption of International Financial Reporting Standards*, may be applied.

(e) *Financial statements of an acquired or to be acquired real estate operation that would be a foreign private issuer if it were a registrant.* Financial statements of an acquired or to be acquired real estate operation that is not a foreign business (as defined in § 210.1-02(l)), but would qualify as a foreign private issuer (as defined in §§ 230.405 and 240.3b-4 of this chapter) if it were a registrant, may be prepared in accordance with IFRS-IASB without reconciliation to U.S. GAAP or, if the registrant is a foreign private issuer that prepares its financial statements in accordance with IFRS-IASB, may be prepared according to a comprehensive basis of accounting principles other than U.S. GAAP or IFRS-IASB and must be reconciled to IFRS-IASB or to U.S. GAAP. This reconciliation must generally follow the form and content requirements in Item 17(c) of Form 20-F; however, accommodations in Item 17(c)(2) of Form 20-F that would be inconsistent with IFRS-IASB may not be applied, and IFRS 1, *First-time Adoption of International Financial Reporting Standards*, may be applied.

(f) *Supplemental information.* For each real estate operation for which financial statements are required to be filed by paragraphs (b)(2)(i)(B) and (b)(2)(i)(C)(2) of this section, material factors considered by the registrant in assessing the real estate operation must be described with specificity in the filing, including sources of revenue (including, but not limited to, competition in the rental market, comparative rents, and occupancy rates) and expense (including, but not limited to, utility rates, property tax rates, maintenance expenses, and capital improvements anticipated). The disclosure must also indicate that the registrant is not aware of any other material factors relating to the specific real estate operation that would cause the reported financial statements not to be indicative of future operating results.

Instruction 1 to paragraph (f): When the financial statements are presented in Form S-11 (§ 239.18 of this chapter), the discussion of material factors considered should supplement the disclosures required by Item 15 of Form S-11.

S-X Rule 3-14 requires that financial statements and related information be filed when either of the following conditions have been met: [S-X Rule 3-14(a)(1)]

- a significant real estate operation acquisition has occurred; or
- consummation of a significant real estate operation acquisition is probable.

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It further specifies the periods for which financial statements and related information must be filed. [S-X Rule 3-14(b)]

The table below outlines where the relevant guidance is covered in this Handbook.

Form	Periods required	Form and content
Form 8-K	Section 8.4.20	Section 8.4.30
Registration or certain proxy statements other than Form S-4/F-4	Section 8.4.20	Section 8.4.30
Form S-4/F-4 registration statement or merger proxy statement	Chapter 5	Chapter 5

8.4.20 Periods required

Question 8.4.10

How many financial statement periods must be presented for an acquired real estate operation?

Interpretive response: The following table summarizes the periods required for financial statements of an acquired real estate operation.

Significance	Periods required
Does not exceed 20%	None
Exceeds 20%	— Most recent audited fiscal year — Most recent unaudited interim period (no comparative interim period of the prior year is required).

S-X Rule 3-14(b)(1) outlines the requirements of registrations on Forms S-4 and F-4 of securities offered to security holders of the real estate operation to be acquired, merger proxy statements and tender offers. The special considerations for these scenarios are addressed in chapter 5. This section discusses the SEC reporting requirements for all other instances (i.e. Form 8-K and other registration statements).

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Question 8.4.20

Can rolling 12-month financial statements of an acquired real estate operation be filed?

Interpretive response: No.

The audited financial statements of a significant real estate operation under S-X Rule 3-14 must reflect the fiscal year-end of the real estate operation. The SEC staff has stated a registrant may not: [FRM 2330.4]

- provide audited financial statements for a rolling 12-month period before the acquisition in lieu of the latest fiscal year-end of the real estate operation; or
- combine pre- and post-acquisition periods to produce the full-year financial statements.

Question 8.4.30

Are there special age considerations under S-X Rule 3-14?

Interpretive response: No. The required age of financial statements provided under S-X Rule 3-14 is the same as S-X Rule 3-05 (see section 4.2.10). [FRM 2330.6]

Example 8.4.10

Registration statement – Updating S-X Rule 3-14 financial statements

On January 5, 20X5, Registrant, with a calendar year-end, files a registration statement on Form S-11 related to the issuance of preferred stock. At the filing date, Registrant had not finalized its 20X4 financial statements. Therefore, the registration statement includes Registrant's audited financial statements as of December 31, 20X3 and 20X2 and for the three years ended December 31, 20X3, and unaudited interim period financial statements as of and for the nine months ended September 30, 20X4.

Registrant also includes in the registration statement audited financial statements for the most recently completed fiscal year for the following individually significant real estate operations.

Real estate operation	Date acquired	Individual significance	Financial statement period included in Form S-11
A	July 18, 20X4	22%	as of and for the year-ended Dec 31, 20X3
B	Probable as of Jan 5, 20X5	53%	as of and for the year-ended Dec 31, 20X3

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In March 20X5, Registrant consummates the acquisition of Real Estate Operation B.

On April 10, 20X5, Registrant files another Form S-11 to register additional shares of preferred stock. Before filing this new registration statement, Registrant determines whether updated financial statements are required for the acquired real estate operations.

For Real Estate Operation B, Registrant includes updated audited financial statements as of and for the year-ended December 31, 20X4 in the registration statement to comply with the requirements of S-X Rule 3-14 as of the filing date. The 20X3 financial statements included in the January 20X5 registration statement are stale at the time Registrant files the Form S-11 in April 20X5.

8.4.30 Form and content

Question 8.4.40

What information about a significant real estate operation is included in a filing?

Interpretive response: If a filing requirement is triggered for a real estate operation acquisition (see section 8.2), the following information is included in the filing for an acquired (or probable-to-be acquired) real estate operation.

Historical financial statements	Audited statement of revenues and certain expenses. Expenses not comparable to the proposed future operations may be excluded, such as: [S-X Rule 3-14(c)(1)] — mortgage interest; — leasehold rental; — depreciation; — amortization; — corporate overhead; and — income taxes. The other basic financial statements (e.g. statement of cash flows) are not required.
Notes to the financial statements	The following disclosures: [S-X Rule 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 (see Question 8.4.50).

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Supplemental information	Material factors considered by the registrant in assessing the real estate operation must be described with specificity in the filing, including: [S-X Rule 3-14(f)] — sources of revenue (including, but not limited to, competition in the rental market, comparative rents, and occupancy rates); and — expense (including, but not limited to, utility rates, property tax rates, maintenance expenses, and capital improvements anticipated). The disclosure must also indicate that the registrant is not aware of any other material factors relating to the specific real estate operation that would cause the reported financial statements not to be indicative of future operating results. The SEC staff has noted the following factors that would cause the financial statements to not be indicative of future operating results of the acquired real estate operation: [FRM 2330.7] — a change in how the real estate will be used; — an expected material modification to the real estate; or — a material change in property tax assessment.
Pro forma financial information	Required in accordance with S-X Article 11. [S-X Rule 3-14(b)(3)(ii)]

The financial statements must be prepared and audited in accordance with Reg S-X. This includes compliance with the independence standards in S-X Rule 2-01 or, alternatively, if the acquired real estate operation is not a registrant, the applicable independence standards (e.g. when the independent accountant for a non-issuer is subject to AICPA independence standards). [S-X Rule 3-14(a)(1)]

The periods required to be included in the financial statements and schedules are discussed in Question 8.4.10.

Question 8.4.50

Must all available cash flow information be presented in lieu of a statement of cash flows?

Background: The required financial information in S-X Rule 3-14 does not include a statement of cash flows. Further, the cash flow disclosure requirements are aligned with S-X Rule 3-05 for the abbreviated financial statements for net assets that constitute a business; this alignment was part of the larger alignment of S-X Rule 3-14 and S-X Rule 3-05 through 2020 amendments to Reg S-X. [S-X Rule 3-05(e)(2)(iii)(D)]

Interpretive response: No.

The SEC acknowledged that certain historical cash flows of a real estate operation may not be comparable to proposed future operations. However, the SEC believes there may be cash flow information that would be meaningful to investors that should be disclosed if available (e.g. disclosure regarding historical cash flows for capital improvements). [SEC 33-10786 n. 241]

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Question 8.4.60

Has the SEC staff provided any specific accommodations to the financial information required by S-X Rule 3-14?

Interpretive response: Yes.

The SEC has stated certain accommodations are available based on the following scenarios.

Scenario	Accommodation
Rental history fewer than nine months	If the acquired real estate operation has a rental history of fewer than nine months, but more than three months, the financial statements may be presented on an unaudited basis. [FRM 2330.8]
No or nominal rental history	If a registrant acquires a real estate operation that has no prior leasing history (e.g. previously owner-occupied, newly constructed property), financial statements of the acquired property are not required. If leasing history is fewer than three months, financial statements of the property are not required. [FRM 2330.10]
Demolition and build of new property	If a registrant acquires a real estate operation that it will demolish and replace with a new rental property, the SEC staff would not object to the omission of the financial statements if the prior rental revenues and operating costs of the real estate operation are not representative of the new property to be built. A registrant should explain the basis for the omission in the filing. In other cases where the registrant believes the leasing history is not representative, it may request relief from the SEC staff (CF-OCA) in writing. [FRM 2330.9]

Question 8.4.70

Do S-X Rule 3-14 financial statements satisfy the financial statement requirements of an acquired real estate operation in a proxy statement?

Background: Item 14 (Mergers, consolidations, acquisitions and similar matters.) of Schedule 14A specifies the financial statement requirements of the registrant and/or target and pro forma financial information. However, these requirements do not explicitly address abbreviated financial statements under S-X Rule 3-14. See section 5.4 for additional guidance on financial statement requirements in merger proxy statements.

Interpretive response: Yes.

The SEC staff applies the requirements of Item 14 of Schedule 14A to the acquisition of real estate operations. In applying the requirements of Item 14 of Schedule 14A, a registrant provides S-X Rule 3-14 financial statements of

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acquired or probable-to-be acquired real estate operations in lieu of S-X Rule 3-05 financial statements and complies with the disclosure requirements of Item 14. These requirements include that MD&A discuss operating trends depicted by the real estate operations' historical financial statements and applicable property information that is described under Items 14 and 15 of Form S-11 (to the extent not provided elsewhere in the proxy statement). [FRM 2360.1, FRM 2360.2]

Question 8.4.80

Does an increase in equity interest of an existing subsidiary require reporting and financial information in a Form 8-K?

Interpretive response: It depends.

Similar to the requirements of S-X Rule 3-05, an increase in an investment in a consolidated subsidiary does not ordinarily require filing separate financial statements once the operating results of the acquired real estate operation have been reflected in the audited post-acquisition results of the registrant for at least nine months. However, pro forma financial information reflecting the impact of the transaction may be required. [S-X Rule 3-14(b)(3)(iii), FRM 2020.5]

If the registrant currently does not consolidate its investment in a real estate operation, audited financial statements are required at the time of subsequent significant acquisitions regardless of whether control is obtained.

See section 2.4.20 for additional discussion about step acquisitions.

Example 8.4.20

Financial statement requirements – Increase in equity interests

Registrant acquires additional equity interests in certain partnerships during the year. Registrant must determine whether the increase in equity interests triggers SEC reporting under the following scenarios.

Scenario 1: Consolidating interest

Registrant has a 51% interest in Partnership B, a real estate operation. Registrant appropriately consolidates its investment in Partnership B. Registrant previously filed a Form 8-K with the audited financial statements of Partnership B when it acquired the 51% interest.

Registrant acquires the additional 49% interest in Partnership B, which is considered significant. Registrant is not required to provide audited financial statements of Partnership B at the time of its additional investment because its consolidated financial statements already include the acquired real estate operation for at least nine months.

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However, Registrant must file pro forma financial information with the Form 8-K reflecting the impacts of the step acquisition if it determines the information would be material to investors.

Scenario 2: Equity interest

Registrant has a 40% equity interest in Partnership A, a real estate operation. Registrant acquires an additional 21% interest in Partnership A, which is considered significant. Registrant must file audited financial statements of Partnership A on Form 8-K.

Question 8.4.90

Are there special audit considerations for the abbreviated financial statements required by S-X Rule 3-14?

Interpretive response: Yes.

S-X Rule 3-14 financial statements may exclude items (such as historical mortgage interest and depreciation) that are not comparable to the proposed future operations of the property. If items are excluded, the SEC staff has stated auditors ordinarily will issue a report on one or more specified elements, accounts, or items of a financial statement under AU-C 805 or AS 3305. Also, the SEC staff has stated registrants may request relief from the audit requirement for financial statements of real estate operations with a rental history of less than one year. [FRM 2330.1]

8.5 Other specific issues and considerations

8.5.10 Blind pool offerings

Excerpt from S-X Rule 11-01

Presentation requirements.

(b) A business acquisition or disposition will be considered significant if:

(4) When a registrant, including a real estate investment trust, conducts a continuous offering over an extended period of time and applies the Item 20.D. Undertakings of Industry Guide 5, the income test condition does not apply, and the determination must be made for the investment test condition, when it is based on the total assets of the registrant and its subsidiaries consolidated, and the asset test condition, if applicable, using the following for the registrant:

(i) During the distribution period, total assets as of the date of acquisition or disposition plus the proceeds (net of commissions) in good faith expected to be raised in the registered offering over the

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next 12 months, except that for acquisitions total assets must exclude the acquired business; and

(ii) After the distribution period ends and until the next Form 10-K is filed, total assets as of the date of acquisition or disposition, except that for acquisitions total assets must exclude the acquired business; and

(iii) After that next Form 10-K is filed, the guidance in paragraph (b)(3).

Excerpt from Industry Guide 5

20. *UNDERTAKINGS.*

D. The following undertakings relating to investment of the proceeds of an offering in which a material portion of the maximum net proceeds (allowing for reasonable reserves) is not committed (i.e., subject to a binding purchase agreement) to specific properties should be included in the registration statement:

The registrant undertakes to file a sticker supplement pursuant to Rule 424(c) under the Act during the distribution period describing each property not identified in the prospectus at such time as there arises a reasonable probability that such property will be acquired and to consolidate all such stickers into a post-effective amendment filed at least once every three months, with the information contained in such amendment provided simultaneously to the existing Limited Partners. Each sticker supplement should disclose all compensation and fees received by the General Partner(s) and its affiliates in connection with any such acquisition. The post-effective amendment shall include audited financial statements meeting the requirements of Rule 3-14 of Regulation S-X only for properties acquired during the distribution period.

The registrant also undertakes to file, after the end of the distribution period, a current report on Form 8-K containing the financial statements and any additional information required by Rule 3-14 of Regulation S-X, to reflect each commitment (i.e., the signing of a binding purchase agreement) made after the end of the distribution period involving the use of 10% or more (on a cumulative basis) of the net proceeds of the offering and to provide the information contained in such report to the Limited Partners at least once each quarter after the distribution period of the offering has ended.

Note - Offers and sales of the interests may continue after the filing of a post-effective amendment containing information previously disclosed in sticker supplements to the prospectus, as long as the information disclosed in a current sticker supplement accompanying the prospectus is as complete as the information contained in the most recently filed post-effective amendment.

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Question 8.5.10

What is a blind pool offering?

Interpretive response: A blind pool registration statement enables a registrant to sell securities to purchase businesses (including real estate operations) that are unidentified as of the effective date of the registration statement. Most blind pool offerings are subject to Item 20.D., Undertakings of Securities Act Industry Guide 5 (Preparation of Registration Statements Relating to Interests in Real Estate Limited Partnerships). These offerings have incremental 1933 Act and 1934 Act reporting requirements both during and after the distribution period. Question 8.5.70 discusses the required undertakings. [FRM 2325.1]

Blind pool offerings typically involve the acquisition of real estate operations; however, the SEC staff acknowledged they could involve others in the scope of S-X Rule 3-05 (e.g. offerings involving the acquisition of hotels). S-X Rule 11-01(b)(4) allows registrants in both blind pool real estate offerings and other blind pool offerings to apply adapted significance tests due to the nature of a blind pool investment as well as the supplemental undertakings provided. The adapted significance tests and supplemental undertakings required during the distribution period vary from those after the distribution period.

Although Industry Guide 5, by its title, applies only to real estate limited partnerships, the SEC stated that "the requirements contained in the Guide should be considered, as appropriate, in the preparation of registration statements for real estate investment trusts and for all other limited partnership offerings." [SEC 33-10786 (n. 271)]

Question 8.5.20

What is the distribution period?

Interpretive response: The distribution period is the period during which the registrant is conducting a continuous 1933 Act registered offering through a registration statement subject to Industry Guide 5. In other words, it is the period during which the securities registered in the blind pool offering are being sold. [FRM 2325.1]

Question 8.5.30

How is significance of an acquisition determined for a blind pool offering?

Interpretive response: How a registrant conducting a blind pool offering determines the significance of an acquisition depends on whether the acquisition is of a business (in which case S-X Rule 3-05 applies) or a real estate operation (in which case Rule 3-14 applies) (see section 8.2.10). The following

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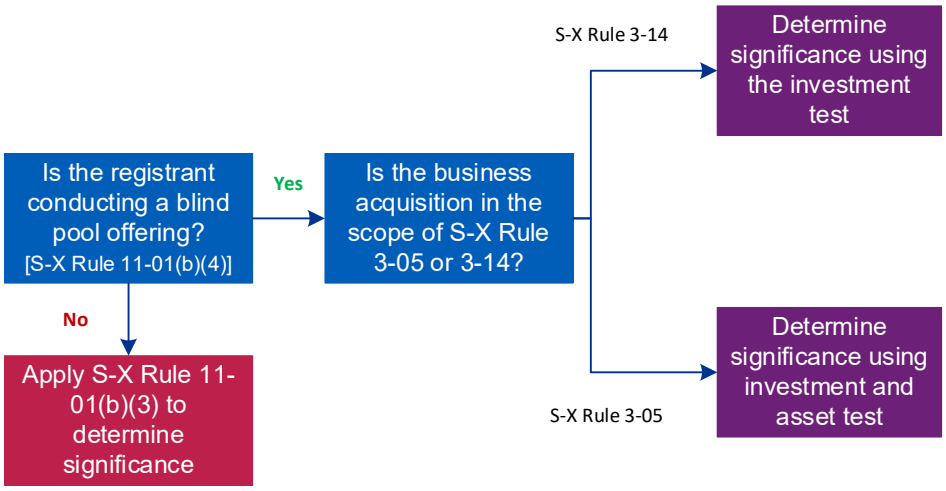
diagram illustrates how to determine significance based on the scope of the acquisition.



The income test does not apply to blind pool offerings, and the investment test and asset test are not applied to blind pool offerings in the same way they are applied in other situations (as described in chapter 3). Instead, there are specific requirements for each test and these requirements differ based on when the tests are performed. [S-X Rule 11-01(b)(4)]

Time of performance	Cross references
During the distribution period for:	
Real estate operations	Questions 8.5.40 to 8.5.110
Non-real estate operations	Question 8.5.140
After the distribution period for:	
Real estate operations	Question 8.5.120
Non-real estate operations	Question 8.5.150

If significance exceeds 20% for an acquisition (including acquisitions of a group of related businesses), financial statements must be filed for the periods indicated by S-X Rule 3-14 (or Rule 3-05). [S-X Rule 11-01(b)(1)]

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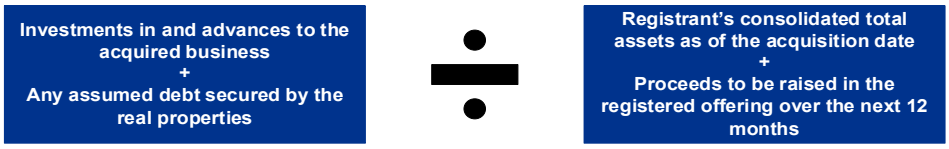
During the distribution period of a blind pool real estate offering

Question 8.5.40

How is the investment test performed for a blind pool real estate offering if the registrant does not have an AWMV?

Interpretive response: AWMV only includes publicly traded common shares (see Question 3.4.110). Registrants conducting blind pool real estate offerings are typically REITs that do not have securities listed for trading on a national securities exchange (i.e. non-traded REITs). In these situations, S-X Rule 11-01(b)(4) allows registrants in blind pool offerings to apply an adapted significance test shown in the diagram below.



The registrant calculates the numerator of the investment test consistent with other acquisitions of real estate operations (see section 8.3.10).

When the investment test is based on consolidated total assets, S-X Rule 11-01 modifies the denominator in the calculation. Specifically, it requires the registrant to include the proceeds (net of commissions) in good faith expected to be raised in the registered offering over the next 12 months. [S-X Rule 11-01(b)(4)(i)]

The SEC staff has acknowledged registrants conducting these types of offerings generally do not initially own any real estate assets, and the specific intended use of the proceeds raised from investors is not initially identified because such registrants have not yet selected any assets for their portfolios. Therefore, without this accommodation, virtually all acquisitions in the early part of the distribution period would be deemed significant regardless of their size. [SEC Rel 33-10786.II.C.6]

Question 8.5.120 discusses how to determine significance after the distribution period of a blind pool offering.

Question 8.5.140 discusses how to determine significance during the distribution period of other (i.e. non-real estate) blind pool offering.

Question 8.5.50

How does the registrant estimate the offering proceeds during the distribution period?

Interpretive response: In estimating the offering proceeds, the SEC staff has stated the registrant should consider the pace of fundraising as of the

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measurement date, the sponsor or dealer-manager's prior public fundraising experience, and offerings by similar entities. [FRM 2325.3]

Question 8.5.60

Does a registrant include the acquired business's assets in the denominator when determining significance?

Interpretive response: No.

When determining significance, the denominator in each significance test excludes assets of the acquired business from the registrant's consolidated financial information. Example 3.3.110 illustrates this concept. [S-X Rule 11-01(b)(4)]

Question 8.5.70

What are the undertakings required by Industry Guide 5 during the distribution period?

Interpretive response: Registrants are required to file the following during the distribution period. [Industry Guide 5 Item 20.D, FRM 2325.2]

Sticker supplement	A sticker supplement is filed whenever a reasonable probability exists that a property will be acquired. The supplement must describe each **significant** real estate operation that was not identified in the prospectus. The SEC staff has stated the disclosure should include the information required for significant properties in Items 14 and 15 of Form S-11.
Post-effective amendment	A post-effective amendment must be filed at least once every three months to consolidate all sticker supplements. The SEC staff has stated the post-effective amendment must include or incorporate by reference audited financial statements under S-X Rule 3-14 for all acquired **significant** real estate operations that have been filed or should have been filed on Form 8-K. Pro forma information also is required.

A post-effective amendment filed to consolidate stickers or to update financial statements under section 10(a)(3) of the 1933 Act need not include financial statements for significant property acquisitions during the 71-day extension period allowed by Item 9.01 of Form 8-K.

Fundamental change

However, a post-effective amendment filed as a result of a fundamental change (as required by S-K Item 512(a)) must include financial statements for all significant acquisitions, including financial statements not yet filed during the 71-day extension period provided by Item 9.01 of Form 8-K. See Questions

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4.4.250 and 4.4.260 for additional information on what constitutes a fundamental change. [FRM 2325.2]

Question 8.5.80

What are the Form 8-K filing requirements during the distribution period?

Interpretive response: During the distribution period of a blind pool offering, a Form 8-K that includes S-X Rule 3-14 financial statements and the related pro forma information must be filed in a timely manner to report all real estate acquisitions that exceed the 20% significance level once the acquisition has been consummated. [FRM 2325.4]

If audited financial statements included in the sticker supplement (or the post-effective amendment) are considered substantially the same as those that would have been required in the Form 8-K, updated financial statements are not required. The previously filed financial statements may be incorporated by reference into the current Form 8-K. Question 4.3.40 explains when financial statements are considered substantially the same.

Question 8.5.90

Does the 71-day extension period permitted under Form 8-K apply to the undertaking to consolidate sticker supplements?

Interpretive response: No.

The 71-day extension period permitted under Form 8-K, Item 9.01 to file the financial statements for an acquired real estate operation and related pro forma information does not apply to filing post-effective amendments required under Item 20.D of Industry Guide 5. Therefore, a post-effective amendment that includes or incorporates by reference audited financial statements under S-X Rule 3-14 for acquired real estate operations must be filed when required by Item 20.D of Industry Guide 5 (i.e. every three months). [C&DI Exch Act Form 8-K §229.01]

Question 8.5.100

During the 71-day extension period, are sales prohibited from being made until financial statements for real estate operations acquired during the offering period have been filed?

Background: During the 71-day extension period that applies to Form 8-K filings, offerings and sales of securities may not occur except as provided in the Instruction to 9.01 of Form 8-K (see Question 2.3.140).

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Interpretive response: No. If real estate operations are acquired during the offering period and financial statements for the acquired real estate operation have not yet been filed on Form 8-K, the SEC staff has stated a registrant may continue sales activities during the 71-day extension period that applies to Form 8-K as long as the post-effective amendments containing the financial statements of the acquired properties are filed when required by Item 20.D of Industry Guide 5. [CD&I Exch Act Form 8-K §229.02]

Question 8.5.110

Does the undertaking to consolidate sticker supplements require updated financial statements?

Interpretive response: No.

Post-effective amendments that consolidate supplements are not considered new filings for purposes of updating the financial statements if they are filed by entities under Item 20.D of Industry Guide 5 solely to provide the financial statements of acquired businesses. [FRM 2325.2]

The significance of this guidance is that, while post-effective amendments filed for this purpose must include financial statements of acquired businesses as of a date that meets the age requirements of S-X Rule 3-12 at the date the sticker supplement was filed, the financial statements of the acquired businesses and the registrant are not required to be updated to comply with S-X Rule 3-12 at the date the consolidating post-effective amendment is filed or declared effective.

After the distribution period of a blind pool real estate offering

Question 8.5.120

How is the investment test calculated after the distribution period of a blind pool real estate offering if the registrant does not have an AWMV?

Background: AWMV only includes publicly traded common shares (see Question 3.4.110). Registrants conducting blind pool real estate offerings are typically REITs that do not have securities listed for trading on a national securities exchange (i.e. non-traded REITs).

Interpretive response: S-X Rule 11-01(b)(4) requires a registrant to determine significance using the adapted investment test shown in the diagram below until it files its first annual report after the distribution period ends.

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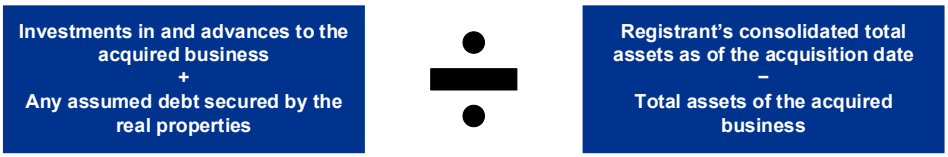

After the distribution period has ended, the registrant determines significance using the total assets as of the acquisition date, excluding assets of the acquired business, until it files its next Form 10-K. After that next Form 10-K is filed, the registrant determines significance in the normal manner described in section 8.3 for acquisitions of real estate operations. [S-X Rule 11-01(b)(4)]

Question 8.5.150 discusses how to determine significance after the distribution period of other (i.e. non-real estate) blind pool offerings.

Question 8.5.130

What are the reporting requirements after the distribution period?

Interpretive response: It depends. The following describes the reporting requirements that apply after the distribution period of a blind pool offering, but before all of the net proceeds are invested.

Form 8-K

The SEC staff has stated the registrant is required to file on Form 8-K audited financial statements of real estate operations (in the format described in S-X Rule 3-14) after the distribution period is completed even though it does not undertake to file sticker supplements. Until it files its first annual report after the distribution period ends, the registrant must file a Form 8-K with the required S-X Rule 3-14 financial statements for every significant real estate operation it purchases.

The SEC staff has not objected to the view that the undertaking to provide audited financial statements is not applicable to individually insignificant properties. Therefore, S-X Rule 3-14 financial statements may be omitted for individually insignificant properties. This position is consistent with the Form 8-K guidance, which does not require a registrant to aggregate individually insignificant acquisitions. [FRM 2325.5, CFDG Topic 6]

This SEC staff interpretation differs from the authoritative guidance outlined in Industry Guide 5, which states that a Form 8-K containing the financial statements be filed for "each commitment (i.e. the signing of a binding purchase agreement) made after the end of the distribution period involving the use of 10% or more (on a cumulative basis) of the net proceeds of the offering". In support of its position, the SEC staff indicated the Item 20.D post-distribution period significance measure and Form 8-K filing trigger do not benefit investors and result in unnecessary regulatory complexity. [Industry Guide 5 Item 20.D, CFDG Topic 6]

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Registration or proxy statements

There is not a separate undertaking related to registration or proxy statements after the distribution period. However, if the registrant were to file a registration or proxy statement after the distribution period but before the first Form 10-K, it would be required to aggregate individually insignificant acquisitions consistent with the requirements for any other registration statement (see Question 2.3.190).

Other blind pool offerings (i.e. non-real estate)

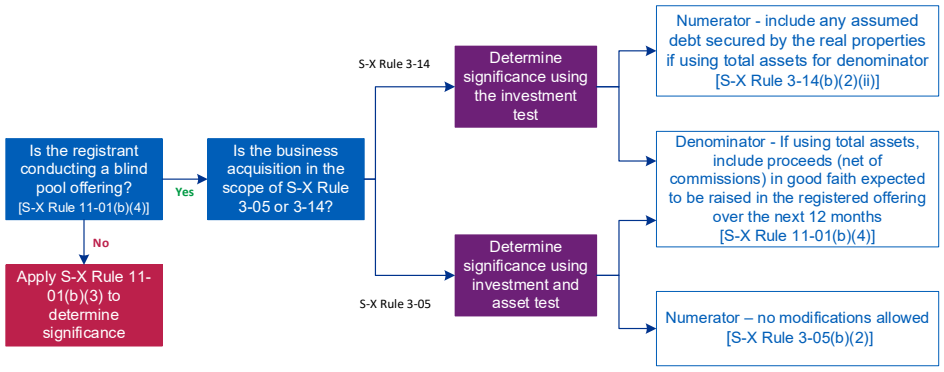
Question 8.5.140

Is the adapted significance test for blind pool real estate offerings the same for other blind pool offerings during the distribution period?

Interpretive response: No.

The following diagram illustrates the differences between the significance test during the distribution period for blind pool real estate offerings and blind pool offerings in the scope of S-X Rule 3-05 (e.g. offerings involving the acquisition of hotels).

Although the denominator (if using total assets) is calculated in the same manner for both S-X Rule 3-05 and S-X Rule 3-14 acquisitions during the distribution period of a blind pool offering, the numerator is not.



The following diagrams summarize the significance tests applied during the distribution period for blind pool offerings in the scope of S-X Rule 3-05 using the asset and investment tests (as modified under S-X Rule 11-01 when total assets must be used). [S-X Rule 11-01(b)(4)]

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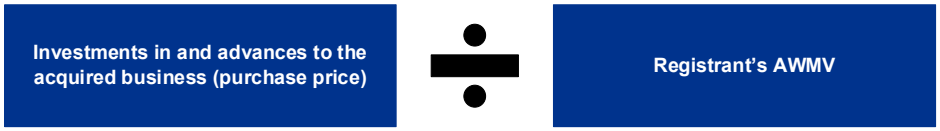
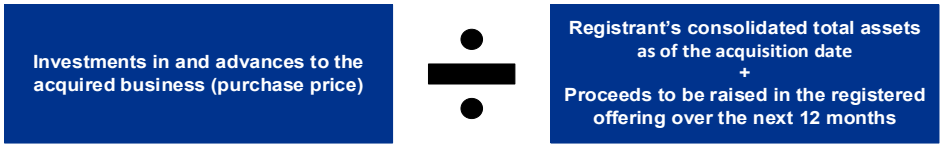
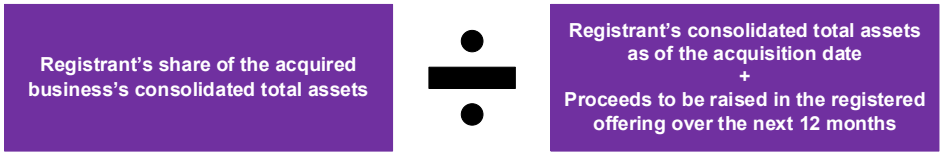
Investment test



If AWMV is not available, the following modified investment test applies.



Asset test

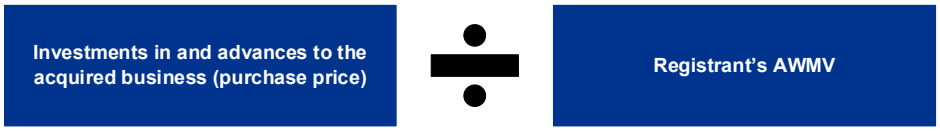


Question 8.5.150

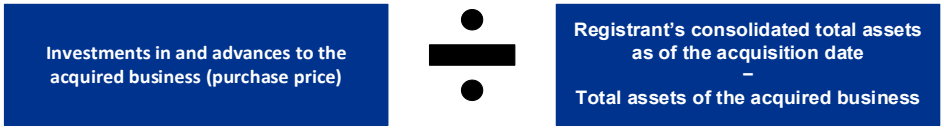
How is significance for other blind pool offerings determined after the distribution period?

Interpretive response: The following diagrams summarize the significance tests for blind pool offerings in the scope of S-X Rule 3-05 using the asset and investment tests (as modified under S-X Rule 11-01 when total assets must be used). [S-X Rule 11-01(b)(4)]

Investment test



If AWMV is not available, the following modified investment test applies.



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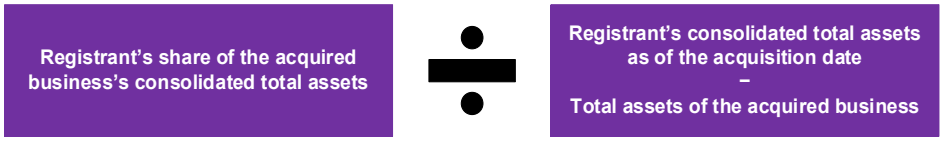
Asset test



8.5.20 Properties securing mortgage loans

A registrant may make a loan that is secured by a real estate operating property (i.e. a mortgage loan). SAB Topic 1.I, Financial Statements of Properties Securing Mortgage Loans, provides guidance on the financial statement requirements for such transactions when the economic substance of the loan represents an investment in real estate.

Excerpt from S-X Rule 3-14

Special instructions for financial statements of real estate operations acquired or to be acquired.

(a) *Financial statements required.*

(2) For purposes of determining whether the provisions of this section apply:

(i) The term real estate operation means a business (as set forth in § 210.11-01(d)) that generates substantially all of its revenues through the leasing of real property.

(ii) The acquisition of a real estate operation encompasses the acquisition of an interest in a real estate operation accounted for by the registrant under the equity method or, in lieu of the equity method, the fair value option.

Excerpt from SAB Topic 1.I

Financial Statements Of Properties Securing Mortgage Loans

Facts: A registrant files a Securities Act registration statement covering a maximum of $100 million of securities. Proceeds of the offering will be used to make mortgage loans on operating residential or commercial property. Proceeds of the offering will be placed in escrow until $1 million of securities are sold at which point escrow may be broken, making the proceeds immediately available for lending, while the selling of securities would continue.

Question 1: Under what circumstances are the financial statements of a property on which the registrant makes or expects to make a loan required to be included in a filing?

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Interpretive Response: Rule 3-14 of Regulation S-X specifies the requirements for financial statements when the registrant has acquired one or more properties which in the aggregate are significant, or since the date of the latest balance sheet required has acquired or proposes to acquire one or more properties which in the aggregate are significant.

Included in the category of properties acquired or to be acquired under Rule 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. Certain characteristics of a lending arrangement indicate that the "lender" has the same risks and potential rewards as an owner or joint venturer. Those characteristics are set forth in the Acquisition, Development, and Construction Arrangements (ADC Arrangements) Subsection of FASB ASC Subtopic 310-10, Receivables — Overall.[6], [7] In September 1986 the EITF[8] reached a consensus on this issue[9] to the effect that, although the guidance in the ADC Arrangements Subsection of FASB ASC Subtopic 310-10 was issued to address the real estate ADC arrangements of financial institutions, preparers and auditors should consider that guidance in accounting for shared appreciation mortgages, loans on operating real estate and real estate ADC arrangements entered into by enterprises other than financial institutions.

FASB ASC Subtopic 815-15, Derivatives and Hedging – Embedded Derivatives, generally requires that embedded instruments meeting the definition of a derivative and not clearly and closely related to the host contract be accounted for separately from the host instrument. If the embedded expected residual profit component of an ADC arrangement need not be separately accounted for as a derivative under FASB ASC Topic 815, then the disclosure requirements discussed below for ADC loans and similar arrangements should be followed.[10]

In certain cases the "lender" has virtually the same potential rewards as those of an owner or a joint venturer by virtue of participating in expected residual profit.[11] In addition, the ADC Arrangements Subsection of FASB ASC Subtopic 310-10 includes a number of other characteristics which, when considered individually or in combination, would suggest that the risks of an ADC arrangement are similar to those associated with an investment in real estate or a joint venture or, conversely, that they are similar to those associated with a loan. Among those other characteristics is whether the lender agrees to provide all or substantially all necessary funds to acquire the property, resulting in the borrower having title to, but little or no equity in, the underlying property. The staff believes that the borrower's equity in the property is adequate to support accounting for the transaction as a mortgage loan when the borrower's initial investment meets the criteria in FASB ASC paragraph 360-20-40-18 (Property, Plant, and Equipment Topic)[12] and the borrower's payments of principal and interest on the loan are adequate to maintain a continuing investment in the property which meets the criteria in FASB ASC paragraph 360-20-40-19.[13]

The financial statements of properties which will secure mortgage loans made or to be made from the proceeds of the offering which have the characteristics of real estate investments or joint ventures should be included as required by Rule 3-14 in the registration statement when such properties secure loans previously made, or have been identified as security for probable loans prior to

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effectiveness, and in filings made pursuant to the undertaking in Item 20D of Securities Act Industry Guide 5.

Rule 1-02(w) of Regulation S-X includes the conditions used in determining whether an acquisition is significant. The separate financial statements of an individual property should be provided when a property would meet the requirements for a significant subsidiary under this rule using the amount of the "loan" as a substitute for the "investment in the subsidiary" in computing the specified conditions. The combined financial statements of properties which are not individually significant should also be provided. However, the staff will not object if the combined financial statements of such properties are not included if none of the conditions specified in Rule 1-02(w), with respect to all such properties combined, exceeds 20% in the aggregate.

Under certain circumstances, information may also be required regarding operating properties underlying mortgage loans where the terms do not result in the lender having virtually the same risks and potential rewards as those of owners or joint venturers. Generally, the staff believes that, where investment risks exist due to substantial asset concentration, financial and other information should be included regarding operating properties underlying a mortgage loan that represents a significant amount of the registrant's assets. Such presentation is consistent with Rule 3-13 of Regulation S-X and Rule 408 under the Securities Act of 1933.

Where the amount of a loan exceeds 20% of the amount in good faith expected to be raised in the offering, disclosures would be expected to consist of financial statements for the underlying operating properties for the periods contemplated by Rule 3-14. Further, where loans on related properties are made to a single person or group of affiliated persons which in the aggregate amount to more than 20% of the amount expected to be raised, the staff believes that such lending arrangements result in a sufficient concentration of assets so as to warrant the inclusion of financial and other information regarding the underlying properties.

Question 2: Will the financial statements of the mortgaged properties be required in filings made under the 1934 Act?

Interpretive Response: Rule 3-09 of Regulation S-X specifies the requirement for significant, as defined, investments in operating entities, the operations of which are not included in the registrant's consolidated financial statements.[14] Accordingly, the staff believes that the financial statements of properties securing significant loans which have the characteristics of real estate investments or joint ventures should be included in subsequent filings as required by Rule 3-09. The materiality threshold for determining whether such an investment is significant is the same as set forth in paragraph (a) of that Rule.[15]

Likewise, the staff believes that filings made under the 1934 Act should include the same financial and other information relating to properties underlying any loans which are significant as discussed in the last paragraph of Question 1, except that in the determination of significance the 20% disclosure threshold should be measured using total assets. The staff believes that this presentation would be consistent with Rule 12b-20 under the Securities Exchange Act of 1934.

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*[**Note:** Question 3 is not included in this excerpt]*

Question 4: What financial statements should be included in filings made under the Securities Act regarding investment-type arrangements that individually amount to 10% or more of total assets?

Interpretive Response: In the staff's view, separate audited financial statements should be provided for any investment-type arrangement that constitutes 10% or more of the greater of (i) the amount of minimum proceeds or (ii) the total assets of the registrant, including the amount of proceeds raised, as of the date the filing is required to be made. Of course, the narrative information required by items 14 and 15 of Form S-11 should also be included with respect to these investment-type arrangements.

Question 5: What information must be provided under the Securities Act for investment-type arrangements that individually amount to less than 10%?

Interpretive Response: No specific financial information need be presented for investment-type arrangements that amount to less than 10%. However, where such arrangements aggregate more than 20%, a narrative description of the general character of the properties and arrangements should be included that gives an investor an understanding of the risks and rewards associated with these arrangements. Such information may, for example, include a description of the terms of the arrangements, participation by the registrant in expected residual profits, and property types and locations.

*[**Note:** Questions 6 and 7 are not included in this excerpt]*

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[6] [Original footnote removed by SAB 114.]

[7] [Original footnote removed by SAB 114.]

[8] The Emerging Issues Task Force ("EITF") was formed in 1984 to assist the Financial Accounting Standards Board in the early identification and resolution of emerging accounting issues. Topics to be discussed by the EITF are publicly announced prior to its meetings and minutes of all EITF meetings are available to the public.

[9] FASB ASC paragraph 310-10-05-9.

[10] The equity kicker (the expected residual profit) would typically not be separated from the host contract and accounted for as a derivative because FASB ASC subparagraph 815-15-25-1(c) exempts a hybrid contract from bifurcation if a separate instrument with the same terms as the embedded equity kicker is not a derivative instrument subject to the requirements of FASB ASC Topic 815.

[11] Expected residual profit is defined in the ADC Arrangements Subsection of FASB ASC Subtopic 310-10 as the amount of profit, whether called interest or another name, such as equity kicker, above a reasonable amount of interest and fees expected to be earned by the "lender."

[12] FASB ASC Subtopic 360-20 establishes standards for the recognition of profit on real estate sales transactions. FASB ASC paragraph 360-20-40-18 states that the buyer's initial investment shall be adequate to demonstrate the buyer's commitment to pay for the property and shall indicate a reasonable

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likelihood that the seller will collect the receivable. Guidance on minimum initial investments in various types of real estate is provided in FASB ASC paragraphs 360-20-40-55-1 and 360-20-40-55-2.

[13] FASB ASC paragraph 360-20-40-19 states that the buyer's continuing investment in a real estate transaction shall not qualify unless the buyer is contractually required to pay each year on its total debt for the purchase price of the property an amount at least equal to the level annual payment that would be needed to pay that debt and interest on the unpaid balance over not more than (a) 20 years for debt for land and (b) the customary amortization term of a first mortgage loan by an independent established lending institution for other real estate.

[14] Rule 3-14 states that the financial statements of an acquired property should be furnished if the acquisition took place during the period for which the registrant's income statements are required. Paragraph (b) of the Rule states that the information required by the Rule is not required to be included in a filing on Form 10-K. That exception is consistent with Item 8 of Form 10-K which excludes acquired company financial statements, which would otherwise be required by Rule 3-05 of Regulation S-X, from inclusion in filings on that Form. Those exceptions are based, in part, on the fact that acquired properties and acquired companies will generally be included in the registrant's consolidated financial statements from the acquisition date.

[15] Rule 3-09(a) states, in part, that "[i]f any of the conditions set forth in [Rule] 1-02(w), substituting 20 percent for 10 percent in the tests used therein to determine significant subsidiary, are met . . . separate financial statements . . . shall be filed."

[17] Registrants are reminded that in filings on Form 8-K that are triggered in connection with an acquisition of an investment-type arrangement, separate audited financial statements are required for any such arrangement that individually constitutes 10% or more.

Question 8.5.160

In general, why does a registrant need to evaluate financial statement requirements associated with mortgage loans?

Background: The Acquisition, Development, and Construction (ADC) Arrangements Subsection of Subtopic 310-10 provides guidance for determining whether a lender accounts for an ADC arrangement as a loan or as an investment in real estate or a joint venture. ADC arrangements are acquisition, development or construction arrangements in which a lender, usually a financial institution, participates in expected residual profit from the sale or refinancing of property and shares in the risk and rewards of the owner. [FRM 2345.1, ASC 310-10-05-8]

Interpretive response: SAB Topic 1.I contemplates the following SEC rules, which may require financial information of the underlying property securing mortgage loans. [SAB Topic 1.I, S-X Rule 3-14(a)(2)(ii)]

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- S-X Rule 3-09 (Separate financial statements of subsidiaries not consolidated and 50 percent or less owned persons) and Rule 4-08(g) (Summarized financial information of subsidiaries not consolidated and 50 percent or less owned persons) apply when the loan is accounted for as an investment that is not consolidated.
- S-X Rule 3-13 (Filing of other financial statements in certain cases) and Rule 408 under the Securities Act of 1933 (Additional information) apply when investment risks exist due to substantial asset concentration.
- S-X Rule 3-14 (Special instructions for financial statements of real estate operations acquired or to be acquired) applies when the economic substance of the mortgage loans represent an investment in real estate or a joint venture rather than a loan because certain characteristics of the lending arrangement indicate the lender has the same risks and potential rewards as an owner or joint venturer. Importantly, acquisitions of an interest in a real estate operation accounted for as an equity method investment are in the scope of S-X Rule 3-14. [S-X Rule 3-14(a)(2)(ii)]

The following table summarizes the relevant SEC rules that may require financial information of underlying properties securing mortgage loans in certain filings.

	S-X Rule 3-09 and S-X Rule 4-08(g)	S-X Rule 3-13 and Rule 408	S-X Rule 3-14
Form 8-K	No	No	Yes
Registration statement	Yes	Yes	Yes
Annual reports on Form 10-K	Yes	Yes	No

Question 8.5.170

At the time it enters a mortgage loan, must a registrant provide the underlying property's financial information?

Interpretive response: Yes.

When a registrant enters into a significant ADC arrangement that is accounted for as an investment, financial statements of the underlying property securing the mortgage loan are filed under S-X Rule 3-14 in the Form 8-K. This is because acquisitions of an interest in a real estate operation accounted for as an equity method investment are in the scope of S-X Rule 3-14. [S-X Rule 3-14(a)(2)(ii), SAB Topic 1.I]

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Question 8.5.180

How is significance determined for properties securing mortgage loans?

Interpretive response: It's not clear. The SEC staff previously stated financial statements of operating properties securing ADC loans are required in a registration statement when the amount loaned (or to be loaned) is 10% or more of the greater of the registrant's total assets or the offering proceeds. [FRM 2345.2, SAB Topic 1.I (Q4)]

However, the SEC amended S-X Rule 3-14 in 2020 by increasing of the significance threshold from 10% to 20%. Although the amendment suggests registrants may also use the 20% threshold when determining significance for properties securing mortgage loans, the SEC staff's guidance in SAB Topic 1.I (i.e. the 10% threshold described in the previous paragraph) remain unchanged. Accordingly, registrants should consider consultation with the SEC staff (CF-OCA) before applying the increased significance thresholds to the acquisition of an ADC loan (see Question 8.5.160).

Question 8.5.190

If a mortgage loan is not accounted for as an equity method investment, must a registrant provide underlying property information?

Interpretive response: Yes.

There are certain circumstances in which information may be required about properties securing mortgage loans, even when the terms do not result in the lender having the same risks and potential rewards as an owner or joint venturer. Generally, the SEC staff believes that, if investment risks exist due to substantial asset concentration, then financial and other information should be included regarding operating properties underlying a mortgage loan that represents a significant amount of the registrant's assets. This guidance is consistent with S-X Rule 3-13 and Rule 408 under the Securities Act of 1933. [SAB Topic 1.I]

If over 20% of offering proceeds in a registration statement (or total assets at the latest audited year-end balance sheet date, if greater) have been or will be invested in a single loan (or in several loans on related properties to the same or affiliated borrowers), financial statements of the property securing the loan are required in both 1933 and 1934 Act filings. Properties are related if they are subject to cross default or collateralization agreements. [FRM 2350.1, FRM 2350.2]

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8.5.30 Other scenarios

Question 8.5.200

How do the requirements of S-X Rule 3-14 apply to the acquisition of a real estate operation subject to a triple net lease?

Background: Registrants may acquire a real estate operation subject to a triple net lease with a single lessee. 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.

Prior to the SEC's amendments to S-X Rule 3-14 in 2020, registrants often provided audited financial statements of *the lessee* when acquiring property subject to a triple net lease if the lessee was considered significant, as opposed to S-X Rule 3-14 financial statements of *the real estate operation*. Historical practice developed this way on the basis that triple-net lease arrangements are more like financing transactions given the responsibilities of the lessee to cover most of the operating costs of the leased asset.

Interpretive response: In connection with the 2020 amendments to S-X Rule 3-14, the SEC staff clarified: [SEC Rel 33-10786.II.C.1 (n 219)]

- financial statements of a lessee under a triple net lease would not meet the requirements of S-X Rule 3-14 to provide financial information of the acquired real estate operation(s); and
- acquisitions of real estate operations subject to triple net leases are not treated differently from any other types of acquisitions subject to S-X Rule 3-14.

Additional consideration: Significant asset concentration

Incrementally, and separately from the applicability of S-X Rule 3-14 to the acquisition of a real estate operation subject to a triple net lease, a registrant may *also* need to provide the financial statements of the lessee when the arrangement results in a significant asset concentration.

The SEC staff has stated that financial and other information may be necessary (by analogy to SAB Topic 1.I) when the registrant has investment risk due to a substantial asset concentration. When a registrant has triple net leases on one or more real estate operations with a single lessee (including in the capacity as co-lessee or guarantor), and the underlying assets represent a significant portion of the registrant's total assets, an investor may need to consider providing the lessee's financial statements (or other financial information) to evaluate the risk to the registrant from this asset concentration. [FRM 2340, FRM 2820]

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9. Registered investment companies and business development companies

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9.1 How the SEC Rules work

This chapter explains the SEC reporting requirements specific to acquired (or to be acquired) funds.

Reg S-X Rule 6-11 covers financial reporting in a fund acquisition and applies only to such acquisitions by a registrant that is a registered investment company or a business development company (collectively referred to as 'investment company registrants'). S-X Rule 6-11 includes requirements to file financial statements and related information when certain significance conditions have been met (section 9.3) and specifies the periods for which these items must be filed (section 9.4).

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9.2 Scope and applicability

Excerpt from S-X Rule 6-11

§210.6-11 Financial statements of funds acquired or to be acquired

(a) *Financial statements required.*

(2) For purposes of this section:

(i) The term *fund* includes any investment company as defined in section 3(a) of the Investment Company Act of 1940, including a business development company, or any company that would be an investment company but for the exclusions provided by sections 3(c)(1) or 3(c)(7) of that Act, or any private account managed by an investment adviser.

(ii) The determination of whether a fund has been acquired or will be acquired should be evaluated in light of the facts and circumstances involved. Among the facts and circumstances which should be considered in evaluating whether a fund acquisition has occurred or will occur are whether it will result in the acquisition by the registrant of all or substantially all of the portfolio investments held by another fund.

(3) Acquisitions of a group of related funds 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 will be treated under this section as if they are a single acquisition. For purposes of this section, funds will be deemed to be related if:

(i) They are under common control or management;

(ii) The acquisition of one fund is conditional on the acquisition of each other fund; or

(iii) Each acquisition is conditioned on a single common event.

(4) This section does not apply to a fund which is totally held by the registrant prior to consummation of the transaction.

S-X Rule 6-11 applies when an investment company registrant acquires a 'fund' as defined in the Rule.

Question 9.2.10

How is the term 'fund' defined for purposes of S-X Rule 6-11?

Interpretive response: Under S-X Rule 6-11, the term 'fund' includes any of the following: [S-X Rule 6-11(a)(2)(i)]

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— an investment company as defined in section 3(a) of the Investment Company Act of 1940 (1940 Act);
— a business development company;
— a company that would be an investment company but for the exclusions provided by sections 3(c)(1) or 3(c)(7) of the 1940 Act; or
— any private account managed by an investment adviser.

As a result, the scope of S-X Rule 6-11 includes the acquisition or probable acquisition of any of the above.

Question 9.2.20

Which S-X Rule applies to a non-fund acquisition by an investment company registrant?

Interpretive response: When making non-fund acquisitions, investment company registrants must follow the requirements in S-X Rule 3-05 and Article 11. See chapters 2 to 4 for a discussion of these requirements. [SEC Rel 33-10786 sec II.E.4.a. (n 417)]

Question 9.2.30

How does an investment company registrant determine if an acquisition has occurred or is probable?

Interpretive response:

Determining whether a 'fund' acquisition has occurred

An investment company registrant must consider all the facts and circumstances to determine whether it has acquired a 'fund', including whether it will result in the acquisition of all or substantially all of the portfolio investments held by another fund. [S-X Rule 6-11(a)(2)(ii)]

The legal form of the transaction is not determinative when evaluating whether a fund has been acquired. The reporting requirements are intended to capture all situations in which additional disclosure about the acquisition is appropriate – i.e. an investment company registrant cannot circumvent disclosures about an acquired fund merely by structuring the transaction as a sale of another fund's assets instead of a merger. However, the scope of S-X Rule 6-11 does not include all acquisitions of interests in another fund. For example, S-X Rule 6-11 does not apply when a registrant acquires a non-substantial portion of another fund's portfolio investments that constitute substantially all of the initial assets of the registrant. [SEC Rel 33-10786 sec II.E.2.c]

At the March 2022 AICPA Investment Companies Expert Panel meeting, the SEC staff offered the following considerations when evaluating the relevant facts and circumstances surrounding the acquisition of less than substantially all of the portfolio investments held by another fund. These considerations should not be taken as a checklist or a complete inventory of all facts and circumstances.

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- How was it determined that the acquisition of investments equates to less than substantially all of the selling fund's assets?
- What is the underlying business purpose of the transaction?
- What is the nature of the relationship between the transacting parties?
- What are the future operating plans of the selling fund and the retained assets? Will the selling fund continue its operations, be winding down, or be changing its strategy?
- Will any investors from the selling fund be transferring into the registrant?
- Will any of the selling fund's management be involved with the registrant post asset purchase?
- How will the purchase impact the future strategy of the registrant?
- Is the transaction meant to seed the registrant with assets? Is it akin to a warehousing transaction?

In some instances, the SEC staff may expect other information to be provided, such as an audited special purpose schedule of investments to be acquired, to allow for investors to better understand the investments to be acquired, even if the transaction is not in the scope of S-X Rule 6-11.

Assessing probability

Reg S-X does not provide information on how to assess probability. We believe the assessment of probability includes analyzing the progress of the potential acquisition, considering economic and legal penalties associated with failure to consummate, and evaluating the significance of any required regulatory approvals. See Question 2.2.250 for additional discussion.

Question 9.2.40

Does an investment company registrant treat the acquisition of multiple related funds as a single acquisition?

Interpretive response: It depends. Like acquisitions of businesses, an investment company registrant's acquisition of a group of 'related' funds is treated as a single acquisition (see Question 2.2.210). Funds are deemed *related* if any of the following are true. [S-X Rule 6-11(a)(3)]

- They are under common control or management.
- The acquisition of one fund is conditional on the acquisition of each other fund.
- Each acquisition is conditioned on a single common event.

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9.3 Tests of significance

Excerpt from Reg S-X Rule 1-02

Definitions of terms used in Regulation S-X (17 CFR part 210).

(w) *Significant subsidiary.*

(1) … if the registrant is a registered investment company or a business development company, the tested subsidiary meets any of the conditions in paragraph (w)(2) of this section instead of any of the conditions in this paragraph (w)(1) …

(2) For a registrant that is a registered investment company or a business development company, the term *significant subsidiary* means a subsidiary, including its subsidiaries, which meets any of the following conditions using amounts determined under U.S. GAAP and, if applicable, section 2(a)(41) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(41)):

(i) *Investment test.* The value of the registrant's and its other subsidiaries' investments in and advances to the tested subsidiary exceed 10 percent of the value of the total investments of the registrant and its subsidiaries consolidated as of the end of the most recently completed fiscal year; or

(ii) *Income test.* The absolute value of the sum of combined investment income from dividends, interest, and other income, the net realized gains and losses on investments, and the net change in unrealized gains and losses on investments from the tested subsidiary (except, for purposes of § 210.6-11, the absolute value of the change in net assets resulting from operations of the tested subsidiary), for the most recently completed fiscal year exceeds:

(A) 80 percent of the absolute value of the change in net assets resulting from operations of the registrant and its subsidiaries consolidated for the most recently completed fiscal year; or

(B) 10 percent of the absolute value of the change in net assets resulting from operations of the registrant and its subsidiaries consolidated for the most recently completed fiscal year and the investment test (paragraph (w)(2)(i) of this section) condition exceeds 5 percent. However, if the absolute value of the change in net assets resulting from operations of the registrant and its subsidiaries consolidated is at least 10 percent lower than the average of the absolute value of such amounts for each of its last five fiscal years, then the registrant may compute both conditions of the income test using the average of the absolute value of such amounts for the registrant and its subsidiaries consolidated for each of its last five fiscal years.

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Excerpt from Reg S-X Rule 6-11

Financial statements of funds acquired or to be acquired.

(b) *Periods to be presented.*

(2) In all cases not specified in paragraph (b)(1) of this section, financial statements of the fund acquired or to be acquired for the periods specified in this paragraph (b)(2) or such shorter period as the fund has been in existence and the supplemental information specified in paragraph (d) of this section must be filed. Whether such financial statements and supplemental information are to be filed must be determined using the conditions specified in the definition of significant subsidiary in § 210.1-02(w)(2)(i) and (w)(2)(ii)(B) as follows:

(i) If none of the conditions set forth in § 210.1-02(w)(2)(i) and (w)(2)(ii)(B), substituting 20 percent for 10 percent each place it appears therein, are satisfied, the financial statements and supplemental financial information in paragraph (d) of this section are not required.

(ii) If any of the conditions set forth in § 210.1-02(w)(2)(i) and (w)(2)(ii)(B), substituting 20 percent for 10 percent each place it appears therein, are satisfied, the financial statements of the acquired fund must be filed. If the acquired fund is subject to § 210.3-18, then the financial statements for the periods described therein must be filed. For all other acquired funds, the financial statements for the most recent fiscal year and the most recent interim period must be filed. The registrant must also provide the supplemental financial information in paragraph (d) of this section.

(iii) If the aggregate impact of funds acquired or to be acquired since the date of the most recent audited balance sheet filed for the registrant, for which financial statements are not required by paragraph (b)(2)(i) of this section, satisfies any of the conditions set forth in § 210.1-02(w)(2)(i) and (w)(2)(ii)(B), substituting 50 percent for 10 percent each place it appears therein, the registrant must provide financial statements for any fund acquired or to be acquired for which financial statements are not yet required by paragraph (b)(2)(i) of this section. If any of the acquired funds are subject to § 210.3-18, then the financial statements for the periods described therein must be filed. For any other acquired funds, the financial statements for the most recent fiscal year and the most recent interim period must be filed. The registrant must also provide the supplemental financial information in paragraph (d) of this section for such funds.

(3) The determination must be made by comparing the most recent annual financial statement of each such fund, or for acquisitions each group of related funds on a combined basis, to the registrant's most recent annual financial statements filed at or prior to the date of acquisition. However, the determination may be made by using pro forma amounts as calculated by the registrant for the periods specified in § 210.1-

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02(w)(2) that only give effect to an acquisition consummated after the latest fiscal year-end for which the registrant's financial statements are required to be filed when the registrant has filed audited financial statements of such acquired fund and provided the supplemental financial information for the periods required by this section.

An investment company registrant, including a business development company, acquiring another investment company registrant or other type of fund (see Question 9.2.10) may be required to file financial statements of the acquired fund. In determining whether this filing requirement is triggered, an investment company registrant determines the significance of the acquired fund using tests that differ from the significance tests applied to operating company registrants (see chapter 3). [S-X Rule 1-02(w)(1) - (2), S-X Rule 6-11(a)]

In addition, an investment company registrant may be required to file separate financial statements or disclose additional information for non-consolidated entities when certain significance thresholds are met. [S-X Rule 3-09, S-X Rule 4-08(g)]

Question 9.3.10

How does an investment company registrant determine if an acquired fund is significant?

Interpretive response: An acquired fund is evaluated as a significant subsidiary using an investment test and an income test. For purposes of S-X Rule 6-11, the 'primary income test' under S-X Rule 1-02(w)(2)(ii)(A) is not applied. [S-X Rule 1-02(w)(2), S-X Rule 6-11(b)(2), SEC Rel 33-10786 sec II.E.2.c.]

If significance exceeds 20% under either test for an acquired fund (see Questions 9.3.30 and 9.3.40), financial statements must be filed for the periods indicated by S-X Rule 6-11 (see section 9.4.10) including supplemental information required by S-X Rule 6-11 (see section 9.4.30).

Further, S-X Rule 6-11 requires a registrant to consider the aggregate impact of acquired or to be acquired funds for which financial statements are not otherwise required due to their individual insignificance. If the aggregate impact of these acquisitions exceeds 50% significance, the registrant must provide the financial information discussed in section 9.4. [S-X Rule 6-11(b)(2)(iii)]

The definition of significant subsidiary and the corresponding tests are separate and distinct from the definition and tests applicable to non-investment company registrants. These provisions were added by the SEC to specifically tailor the requirements of the significance tests to the specific characteristics of investment companies. The tests use amounts determined under US GAAP and, if applicable, section 2(a)(41) of the 1940 Act (15 U.S.C. 80a-2(a)(41)). [S-X Rule 1-02(w)(2), SEC Rel 33-10786 sec II.E.1]

Impacts of significant subsidiary test beyond S-X Rule 6-11

The definition of significant subsidiary also has an impact on an investment company's application of: [SEC Rel 33-10786 sec II.E.1 (n 353)]

— S-X Rule 3-09 regarding separate financial statements for significant subsidiaries not consolidated; and

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— S-X Rule 4-08(g) regarding summarized financial information of subsidiaries not consolidated.

As a result, there may be instances in which a non-consolidated subsidiary (e.g. a portfolio company) triggers a reporting requirement for an investment company registrant due to being significant under either of the above rules. The reporting requirement may include separate financial statements or summarized financial information for the subsidiary. [S-X Rule 3-09, S-X Rule 4-08(g)]

Question 9.3.20

What financial statements are used by an investment company registrant to determine the significance of the acquired fund?

Interpretive response: An investment company registrant performs the significance tests by comparing the following. [S-X Rule 6-11(b)(3)]

The most recent annual financial statements of each such fund (or for acquisitions of related funds, each group of related funds on a combined basis, see Question 9.2.40)	**vs**	The registrant's most recent annual financial statements filed at or prior to the date of acquisition

Alternatively, if the registrant has filed audited financial statements of a fund acquired after its latest fiscal year-end and provided the supplemental financial information for the periods required (Question 9.4.30), the significance tests for a *subsequent* acquisition may be performed by using pro forma amounts that give effect to the previous acquisition. [S-X Rule 6-11(b)(3)]

Question 9.3.30

How is the investment test for an investment company registrant performed?

Interpretive response: An acquired fund is considered significant if the following is true. [S-X Rule 1-02(w)(2)(i), S-X Rule 6-11(b)(2)(ii), S-X Rule 6-11(b)(3)]

Total value of the sum of the following from the acquired fund:		Compared to the following from the investment company registrant:
the investment company registrant's (and the registrant's other subsidiaries') investments in the acquired fund AND the investment company registrant's (and the registrant's other subsidiaries') advances to the acquired fund	>	20% of the value of the total investments of the registrant and its subsidiaries consolidated from the registrant's most recent annual financial statements filed prior to the acquisition

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The SEC used total investments rather than total assets as a significance test because total investments focuses the significance determination on the impact to the registrant's investment portfolio as opposed to other non-investment assets that may be held by the registrant.

In addition, the SEC has expressed the view that total investments represent a more transparent measure than total assets for registrants that use a statement of net assets instead of a balance sheet, and as a result, the asset test does not apply to investment company registrants. [SEC Rel 33-10786 sec II.E.1.a]

Example 9.3.10
Investment test

Fund1, an investment company registrant, has $9,900 in investments (exclusive of investments from wholly owned subsidiaries).

Fund1 acquired Subsidiary1, an investment company, for $800 (exclusive of investments in and advances to Subsidiary1 from wholly owned subsidiaries).

Subsidiary2 (a wholly owned subsidiary of Fund1) has an investment in Subsidiary1 of $50, and total investments of $100. In addition, Subsidiary2 advanced $25 to Subsidiary1 to cover certain operating expenses.

Fund1 performs the investment test as shown in the following table.

Fund1's investment in Subsidiary1	$ 800	
Subsidiary2's investment in Subsidiary1	50	
Subsidiary2's advance to Subsidary1	25	
Total investments in/advances to Subsidiary1		$ 875
Divided by Fund1's consolidated total investments (including $100 from Subsidiary2)		$10,000
Significance		**9%**
Threshold (Question 9.3.30)		20%

Subsidiary1 is not significant to Fund1 under the investment test. Fund1 must now perform the income test before concluding Subsidiary1 is not a significant subsidiary.

Question 9.3.40
How is the income test for an investment company registrant performed?

Interpretive response: An acquired fund is considered significant if the following is true. [S-X Rule 1-02(w)(2)(ii), S-X Rule 6-11(b)(2)(ii), S-X Rule 6-11(b)(3)]

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The following from the acquired fund:		Compared to the following from the investment company registrant:
Absolute value of the change in net assets resulting from operations of the acquired fund from its most recent annual financial statements	>	20% of the absolute value of the change in net assets resulting from operations of the investment company registrant and its subsidiaries consolidated from the registrant's most recent annual financial statements filed prior to the acquisition AND the investment test condition (Question 9.3.30) exceeds 5%

If the absolute value of the change in net assets resulting from operations of the investment company registrant and its subsidiaries consolidated is at least 10% lower than the average of the absolute value of such amounts for each of its last five fiscal years, then the registrant may perform the income test using the average of the absolute value of such amounts for the registrant and its subsidiaries consolidated for each of its last five fiscal years. [AICPA IC EP July 2022]

Example 9.3.20
Income test

Fund1, an investment company registrant, has change in net assets resulting from operations of $200 (exclusive of changes in net assets from wholly owned subsidiaries). Fund1 has $9,900 in investments (exclusive of investments from wholly owned subsidiaries).

Fund1 acquired Subsidiary1, an investment company, for $800 (exclusive of investments in and advances to Subsidiary1 from wholly owned subsidiaries). Subsidiary1 has change in net assets resulting from operations of ($50).

Subsidiary2 (a wholly owned subsidiary of Fund1) has change in net assets resulting from operations of $20. Subsidiary2 has an investment in Subsidiary1 of $50, and total investments of $100. In addition, Subsidiary2 advanced $25 to Subsidiary1 to cover certain operating expenses.

Fund1 performs step 1 of the income test as shown in the following table.

Subsidiary1's change in net assets resulting from operations	($ 50)
Absolute value of Subsidiary1's change in net assets resulting from operations	$ 50
Divided by Fund1's consolidated change in net assets resulting from operations (including $20 from Subsidiary2)	$ 220
Significance	**23%**
Threshold (Question 9.3.40)	20%

Based on this calculation, step 1 of the income test indicates that the acquisition of Subsidiary1 is significant. However, Fund1 needs to perform step

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2 of the income test (the investment test) before concluding the acquisition is significant.

Fund1 performs step 2 of the income test as shown in the following table.

Fund1's investment in Subsidiary1	$ 800	
Subsidiary2's investment in Subsidiary1	50	
Subsidiary2's advance to Subsidary1	25	
Total investments in/advances to Subsidiary1		$ 875
Divided by Fund1's consolidated total investments (including $100 from Subsidiary2)		$10,000
Significance		**9%**
Threshold (Question 9.3.40)		5%

Based on this calculation, the income test indicates that Subsidiary1 is a significant subsidiary of Fund1.

Example 9.3.30
Income test – 5-year averaging

Assume the same facts as Example 9.3.20. In addition, Fund1's consolidated change in net assets resulting from operations for the last five fiscal years is shown in the following table.

	20X1	20X2	20X3	20X4	20X5 (CY)
Actual	($1,000)	($950)	($150)	$400	$220
Absolute value	$1,000	$950	$150	$400	$220

Analysis

Average of the absolute values of Fund1's consolidated change in net assets resulting from operations for each of the last five fiscal years	$544	**A**
Absolute value of Fund1's consolidated change in net assets resulting from operations from Fund1's most recent annual financial statements i	$220	**B**
Percentage lower than the five-year average	(60%)	**(B-A)÷A**
Threshold (Question 9.3.40)	(10%)	

As calculated above, the absolute value of Fund1's consolidated change in net assets resulting from operations is at least 10% lower than the average of the absolute values of such amounts for each of Fund1's last five fiscal years. As a result, Fund1 can perform the income test using the average of the absolute values of Fund1's consolidated change in net assets resulting from operations for the previous five fiscal years.

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Fund1 performs step 1 of the income test as shown in the following table.

Subsidiary1's change in net assets resulting from operations	($ 50)
Absolute value of Subsidiary1's change in nets assets resulting from operations	$ 50
Divided by Fund1's consolidated change in net assets resulting from operations – five-year average (calculated above)	$ 544
Significance	**9%**
Threshold (Question 9.3.40)	20%

Based on this calculation, step 1 of the income test indicates that the acquisition of Subsidiary1 is not significant. Calculation of step 2 of the income test is not necessary, as both step 1 and step 2 must be met for Subsidiary1 to be significant under the income test.

9.4 Financial statement periods required

Excerpt from Reg S-X Rule 6-11

Financial statements of funds acquired or to be acquired.

(a) *Financial statements required.*

(1) Financial statements described in §§ 210.3-01 and 210.3-02, or § 210.3-18, as applicable, including the schedules specified in §§ 210.12-01 through 210.12-29 (Article 12), prepared and audited in accordance with Regulation S-X (including the independence standards in § 210.2-01 or, alternatively if the fund is not a registrant, the applicable independence standards) for the periods specified in paragraph (b) of this section and the supplemental information specified in paragraph (d) of this section must be filed if any of the following conditions exist:

(i) During the most recent fiscal year or subsequent interim period for which a balance sheet is required by § 210.3-01 or § 210.3-18, a fund acquisition has occurred; or

(ii) After the date of the most recent balance sheet filed pursuant to § 210.3-01 or § 210.3-18 or, if no relevant balance sheet has been filed in connection with a post-effective amendment for a new series submitted pursuant to § 230.485(a)(2) of this chapter (Rule 485(a)(2) under the Securities Act), the filing of such amendment, consummation of a fund acquisition has occurred or is probable

(b) *Periods to be presented.*

(1) If securities are being registered to be offered to the security holders of the fund to be acquired, the financial statements specified in §§ 210.3-01 and 210.3-02 or § 210.3-18 for the fund to be acquired and the supplemental information specified in paragraph (d) of this section must be filed, except as provided otherwise for filings on Form N-14 (§

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239.23 of this chapter). The financial statements covering the fiscal year must be audited except as provided in Item 14 of Schedule 14A (§ 240.14a-101 of this chapter) with respect to certain proxy statements or in registration statements filed on Form N-14 (§ 239.23 of this chapter).

(2) In all cases not specified in paragraph (b)(1) of this section, financial statements of the fund acquired or to be acquired for the periods specified in this paragraph (b)(2) or such shorter period as the fund has been in existence and the supplemental information specified in paragraph (d) of this section must be filed. Whether such financial statements and supplemental information are to be filed must be determined using the conditions specified in the definition of significant subsidiary in § 210.1-02(w)(2)(i) and (w)(2)(ii)(B) as follows:

(i) If none of the conditions set forth in § 210.1-02(w)(2)(i) and (w)(2)(ii)(B), substituting 20 percent for 10 percent each place it appears therein, are satisfied, the financial statements and supplemental financial information in paragraph (d) of this section are not required.

(ii) If any of the conditions set forth in § 210.1-02(w)(2)(i) and (w)(2)(ii)(B), substituting 20 percent for 10 percent each place it appears therein, are satisfied, the financial statements of the acquired fund must be filed. If the acquired fund is subject to § 210.3-18, then the financial statements for the periods described therein must be filed. For all other acquired funds, the financial statements for the most recent fiscal year and the most recent interim period must be filed. The registrant must also provide the supplemental financial information in paragraph (d) of this section.

(iii) If the aggregate impact of funds acquired or to be acquired since the date of the most recent audited balance sheet filed for the registrant, for which financial statements are not required by paragraph (b)(2)(i) of this section, satisfies any of the conditions set forth in § 210.1-02(w)(2)(i) and (w)(2)(ii)(B), substituting 50 percent for 10 percent each place it appears therein, the registrant must provide financial statements for any fund acquired or to be acquired for which financial statements are not yet required by paragraph (b)(2)(i) of this section. If any of the acquired funds are subject to § 210.3-18, then the financial statements for the periods described therein must be filed. For any other acquired funds, the financial statements for the most recent fiscal year and the most recent interim period must be filed. The registrant must also provide the supplemental financial information in paragraph (d) of this section for such funds.

(4) Separate financial statements of the acquired fund and the supplemental information specified in paragraph (d) of this section need only to be filed once and not included in any subsequent filing or shareholder report.

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9.4.10 Overview

S-X Rule 6-11 covers financial reporting for fund acquisitions and applies only to the acquisition of a fund by an investment company registrant (as discussed in section 9.2).

S-X Rule 6-11 includes requirements to file financial statements and related information when either of the following conditions have been met: [S-X Rule 6-11(a)(1)]

- a fund acquisition has occurred; or
- consummation of a fund acquisition is probable.

S-X Rule 6-11 further specifies the periods for which financial statements and related information must be filed. [S-X Rule 6-11(b)]

Question 9.4.10

When does a fund acquisition trigger a filing requirement for an investment company registrant?

Interpretive response: When the 20% threshold has been met (see Question 9.3.10) for a fund acquisition, a filing requirement for an investment company registrant is triggered if either of the following conditions exists.

A fund acquisition has occurred	If a fund acquisition has occurred during the most recent fiscal year or subsequent interim period for which a balance sheet is required by S-X Rule 3-01 or S-X Rule 3-18) [S-X Rule 6-11(a)(1)(i)]
Subsequent consummation of a fund acquisition has occurred or is probable	If consummation of a fund acquisition has occurred or is probable in either of the following scenarios: [S-X Rule 6-11(a)(1)(ii)] — after the date of the most recent balance sheet filed pursuant to S-X Rule 3-01 or Rule 3-18, or — after the date of filing of a post-effective amendment for a new series submitted pursuant to Rule 485(a)(2) under the Securities Act of 1933, if no relevant balance sheet has been filed in connection with such amendment

Question 9.4.20

When a filing requirement is triggered for an investment company registrant, what is included in the filing?

Interpretive response: When a filing requirement is triggered for a fund acquisition by an investment company registrant (see Question 9.4.10), the following is included in the filing for an acquired (or to be acquired) fund, as applicable. [S-X Rule 6-11(a)(1)]

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Financial statements	For a registrant other than a registered management investment company (e.g. a business development company), the financial statements described in S-X Rule 3-01 and Rule 3-02.[1] For a registered management investment company or company required to be registered as a management investment company, the financial statements described in S-X Rule 3-18.
Schedules	The financial statements must include the schedules specified in S-X Rules 12-01 to 12-29 ('S-X Article 12'), as applicable.
Supplemental information	The supplemental information required is discussed in section 9.4.30.

Note:

1. Business development companies are also permitted to use Rule 3-18 pursuant to the instructions set forth in Form N-2. [SEC Rel. 33-10786 sec II.E.2.c n 402]

The financial statements and schedules must be prepared and audited in accordance with Reg S-X. This includes the independence standards in S-X Rule 2-01 or, alternatively, if the acquired fund is not a registrant, the applicable independence standards (e.g. when the independent accountant for a non-registered US domiciled fund is subject to AICPA independence standards). [S-X Rule 6-11(a)(1)]

Question 9.4.30

When an investment company registrant is filing financial statements for an acquired fund, how many periods must be presented?

Interpretive response: When a filing requirement is triggered for a fund acquisition by an investment company registrant (see Question 9.4.10), the number of periods required to be presented depends on whether the acquired fund is subject to S-X Rule 3-18. If it is, financial statements for the periods described in S-X Rule 3-18 must be filed. This generally includes two years for the statement of changes in net assets, and one year for the other statements. If the acquired fund is not subject to S-X Rule 3-18, only financial statements for the most recent fiscal year and the most recent interim period must be filed. [S-X Rule 6-11(b)(2)(ii) – (iii)]

Determining if financial statements are required to be filed for an acquired fund, and the periods that must be presented, is summarized by the following decision tree. [S-X Rule 6-11(b)(2)(i) – (iii), S-X Rule 6-11(b)(1)(i)]

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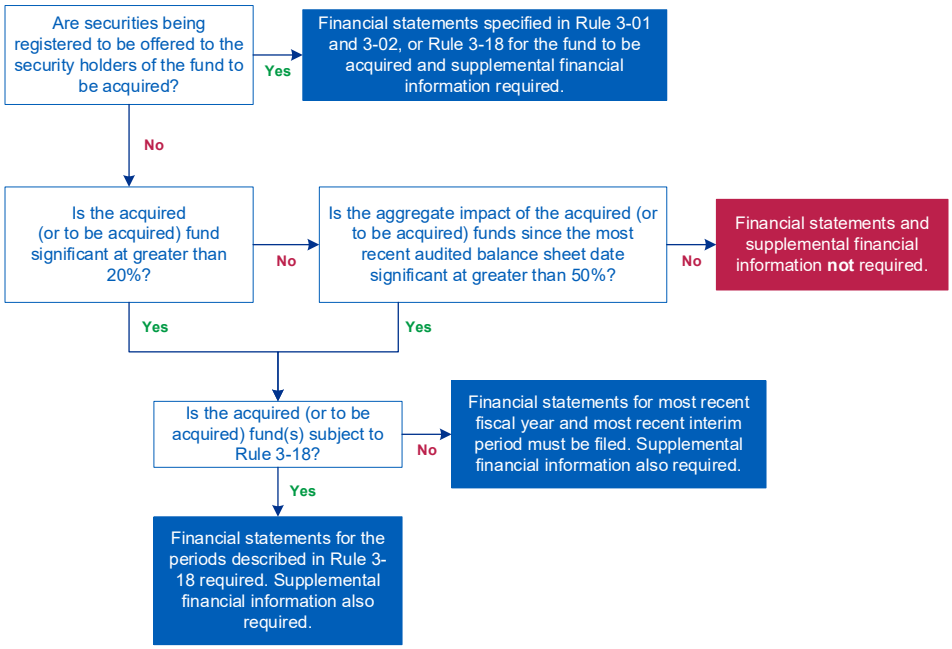

Notes:

1. Required supplemental financial information is discussed further in section 9.4.30.
2. The significance conditions are discussed in section 9.3.
3. Except as provided otherwise for filings on Form N-14 (§239.23).
4. The financial statements covering the fiscal year must be audited except as provided in Item 14 of Schedule 14A (§240.14a-101) with respect to certain proxy statements or in registration statements filed on Form N-14 (§239.23).

Question 9.4.40

Are separate financial statements of the acquired fund included in subsequent filings or shareholder reports of the investment company registrant?

Interpretive response: No.

S-X Rule 6-11 requires the investment company registrant to file acquired fund financial statements and supplemental information only once. Such financial statements and supplemental information are not required to be included in any subsequent filing or shareholder report. [S-X Rule 6-11(b)(4)]

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Question 9.4.50

If an acquired fund previously filed financial statements, is the investment company registrant's filing requirement eliminated?

Interpretive response: No.

The SEC has indicated that the requirement to file acquired fund financial statements is predominantly for the benefit of the investment company registrant's shareholders, not the acquired fund's shareholders. As a result, S-X Rule 6-11 does not eliminate this filing requirement, regardless of whether the acquired fund has previously filed financial statements with the SEC. [SEC Rel 33-10786 sec II.E.2.c]

However, some forms, such as Form N-14, permit backwards incorporation by reference of information not included in the prospectus. See General Instruction G to Form N-14 for further guidance. [SEC Rel 33-10786 sec II.E.2.c (n 405)]

9.4.20 Acquisitions of private funds

Excerpt from Reg S-X Rule 6-11

Financial statements of funds acquired or to be acquired.

(b) *Acquisitions involving private funds or private accounts.* If the fund acquired or to be acquired would be an investment company under the Investment Company Act but for the exclusion provided from that definition by either sections 3(c)(1) or 3(c)(7) of that Act, then the required financial statements may comply with U.S. Generally Accepted Accounting Principles and only Article 12. In situations of any private account managed by an investment adviser provide the schedules specified in Article 12 for the assets acquired or to be acquired.

S-X Rule 6-11 permits the financial statements of an acquired (or to be acquired) private fund to comply with US GAAP and S-X Article 12 in lieu of applying Reg S-X in its entirety. [S-X Rule 6-11(c)]

Question 9.4.60

Is an investment company registrant required to file audited financial statements if the acquired fund is private?

Background: Funds that are not registered with the SEC under the 1940 Act ('private funds') are not regulated by the SEC under that Act. Therefore, there may be instances where an investment company registrant acquires a private fund and the private fund has not historically had audits performed.

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Interpretive response: Yes.

The SEC has made clear its view that requiring audited financial statements ensures that investors are provided appropriate information about the acquired (or to be acquired) private fund. It also has cited the fact that many private funds prepare audited financial statements, among other reasons, to satisfy their investment advisers' safekeeping obligations under the Investment Advisers Act of 1940. [SEC Rel 33-10786 sec II.E.2.c, S-X Rule 6-11(a)]

Question 9.4.70

If the acquired fund is private, are the financial statements required to comply with Reg S-X?

Interpretive response: No.

The financial statements of an acquired (or to be acquired) private fund must: [S-X Rule 6-11l]

- be audited (see Question 9.4.60);
- comply with US GAAP; and
- comply with S-X Article 12.

These requirements are focused on balancing costs (i.e. not requiring funds to re-issue audited financial statements in compliance with Reg S-X), while still providing investors appropriate information about the acquired fund (i.e. requiring funds to comply with S-X Article 12 by including schedules listing each investment).

Question 9.4.80

Is an audited condensed SOI prepared in accordance with US GAAP sufficient to satisfy the requirements of S-X Article 12?

Interpretive response: Typically, no.

A condensed schedule of investments (SOI) prepared under US GAAP generally does not include the same prescriptive level of detail when compared to an S-X Article 12 compliant SOI.

US GAAP	Article 12 of Reg S-X
A nonregistered investment company is required to include a condensed SOI in the financial statements. While the condensed SOI requirements under US GAAP are prescriptive (e.g. categorizing investments, disclosing the name and number of shares or principal amount), the requirements allow for funds to aggregate investments that are	Generally, all investments and derivative contracts are required to be listed separately in the S-X Article 12 schedules. In addition, the instructions under the S-X Article 12 schedules require additional information that is incremental to the SOI requirements under US GAAP. [S-X Rules 12-12 – 12-29]

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US GAAP	Article 12 of Reg S-X
individually less than 5% of fund net assets. [946-210-50-6]	

As a result, we expect companies that typically present a condensed SOI in accordance with US GAAP will have to perform incremental work to provide the level of detail required by S-X Article 12. In addition, auditors will need to perform incremental procedures to audit this information.

Question 9.4.90

Can the financial statements of an acquired private fund be prepared on a combined basis?

Background: Certain types of private funds, specifically those in the private equity (PE) industry, often prepare combined financial statements. Typically, PE funds employ a variety of structuring mechanisms to accommodate the needs of their LPs, the fund's investment strategy, or both. In those cases, it is not unusual for the fund structure to present on a combined basis multiple special purpose vehicles that are managed as a single entity.

Interpretive response: It depends.

Combined financial statements are often prepared for commonly controlled entities when it is more meaningful than presenting the separate financial statements of each entity. We believe combined financial statements, including those of an acquired private fund, may be appropriate for SEC reporting purposes if the requirements under Subtopic 810-10 are met. [810-10-55-1B]

However, S-X Rule 6-11 does not explicitly allow for the presentation of combined financial statements. The SEC staff has indicated that there may be certain situations in which combined financial statements could be used to satisfy the requirements under S-X Rule 6-11 and encourages investment company registrants to reach out for further guidance. The SEC staff also has indicated that registrants should consider whether all the funds being presented on a combined basis are included in the acquisition. If only a portion of those funds are being acquired, the combined financial statement presentation may not be consistent with the objectives of S-X Rule 6-11 and may not provide investors with sufficient information to understand the assets being acquired.

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9.4.30 Supplemental financial information

Excerpt from Reg S-X Rule 6-11

Financial statements of funds acquired or to be acquired.

(d) *Supplemental financial information.*

(1) Supplemental financial information must consist of:

(i) A table showing the current fees for the registrant and the acquired fund and pro forma fees, if different, for the registrant after giving effect to the acquisition using the format prescribed in the appropriate registration statement under the Investment Company Act;

(ii) If the transaction will result in a material change in the acquired fund's investment portfolio due to investment restrictions, a schedule of investments of the acquired fund modified to reflect such change and accompanied by narrative disclosure describing the change; and

(iii) Narrative disclosure about material differences in accounting policies of the acquired fund when compared to the registrant.

(2) With respect to any fund acquisition, registered investment companies and business development companies must provide the supplemental financial information required in this section in lieu of any pro forma financial information required by §§ 210.11-01 through 210.11-03.

Supplemental financial information is provided for an acquired (or to be acquired) fund in lieu of pro forma financial information. This includes: [S-X Rule 6-11(d)]

- information on fees;
- expected material changes in the acquired fund's investment portfolio; and
- material differences in accounting policies between the acquired fund and the investment company registrant.

Question 9.4.100

Why is supplemental financial information required in lieu of pro forma financial statements by an investment company registrant?

Background: Prior to S-X Rule 6-11, S-X Rule 11-01 required pro forma financial statements to be provided in connection with fund acquisitions by an investment company registrant. However, S-X Rule 11-02 allowed registrants to provide a narrative description of the pro forma effects of a transaction in lieu of pro forma financial statements in certain circumstances.

Historically, funds were required to apply acquisition related rules that were not designed primarily for investment companies. As a result, the cost of providing

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the information required (ultimately borne by the investors) may have outweighed the benefit to the investors.

Interpretive response: To better align the rules governing acquired funds with the needs of the investors, S-X Rule 6-11 requires supplemental financial information in lieu of pro-forma financial statements. This supplemental financial information includes the following. [S-X Rule 6-11(d)]

Fee table	A table showing: — the current fees for the investment company registrant and the acquired fund; and — if different, pro forma fees for the investment company registrant after giving effect to the acquisition
Material changes in acquired fund portfolio	An SOI of the acquired fund modified to reflect: — any material changes in the acquired fund's investment portfolio due to investment restrictions (see Question 9.4.120); and — narrative disclosure describing such changes
Material differences in accounting policies	Narrative disclosure about material differences in the accounting policies of the acquired fund when compared to the investment company registrant

Merger transactions can be complex, and a variety of outcomes may exist when multiple target funds are involved. As a result, multiple pro forma presentation alternatives may be required based on strict interpretation of the rules. To help alleviate potential burden on the investment company registrant and reduce potential confusion to shareholders, the staff of the Chief Accountant's Office of the Division of Investment Management of the SEC has provided its views regarding pro forma fee tables and capitalization tables to be included in a registration statement where multiple potential outcomes may exist. [IM-DCFO 1995-11]

Question 9.4.110

Does S-X Rule 6-11 require a specific format for the fee table?

Interpretive response: No. S-X Rule 6-11 does not directly provide the format for the fee table, but instead refers to the format prescribed in the 'appropriate registration statement' under the 1940 Act.

This generally means for open-end management investment companies, the format prescribed in Form N-1A is used, and for closed-end management investment companies, the format prescribed in Form N-2 is used. Therefore, the relevant item and corresponding instructions on the respective forms are used when preparing the fee table required as part of the supplemental financial information under S-X Rule 6-11. [S-X Rule 6-11(d)(1)(i)]

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Form N-1A	Item 3. Risk/ Return Summary: Fee Table
Form N-2	Item 3. Fee Table and Synopsis

Question 9.4.120

What is meant by 'investment restrictions' and how could they impact an acquired fund's portfolio?

Interpretive response: An acquired fund's investment portfolio may be impacted by investment restrictions of the investment company registrant. If so, an SOI of the acquired fund is presented in a modified format to reflect the resulting changes in investment holdings. This SOI is accompanied by narrative disclosure describing the change. [S-X Rule 6-11(d)(1)(ii)]

For example, prior to the acquisition, the investment company registrant and acquired fund may both have positions in the same portfolio investment. Upon acquisition, the aggregated position may exceed the amount allowed to be held in any single portfolio investment (e.g. due to fund governing documents, statutory limits). As a result, a portion of the portfolio investment would need to be divested upon consummation of the acquisition to avoid violating this investment restriction. This divestiture would trigger the corresponding supplementary information requirement under S-X Rule 6-11.

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10. Other financial reporting matters

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Item significantly updated in this edition: #

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10.2.30 Financial statement requirements for a reverse recapitalization

10.2.40 Reverse acquisition between two operating companies

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10.3 Carve-out and other forms of financial statements

10.3.10 Overview

10.3.20 Carve-out financial statements

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10.3.40 Abbreviated financial statements for acquisitions of oil and gas properties

Questions

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10.3.20 What form can the financial statements for a portion of a larger entity take when provided to comply with S-X Rule 3-05?

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10.3.70 How are expenses allocated in carve-out financial statements, including taxes?

10.3.80 When can a registrant provide abbreviated financial statements under Rule 3-05(e)?

10.3.90 Does the acquirer need to determine whether the acquired business would have been an operating segment as if the seller was a public company?

10.3.100 What is the form and content of abbreviated financial statements under Rule 3-05(e)?

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10.3.120 What periods are required when presenting a statement of assets acquired and liabilities assumed?

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Examples

10.3.10 Product line

10.3.20 Statements of assets acquired and liabilities assumed together with statements of operations

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10.4 Inability to comply with financial statement requirements

Questions

10.4.10 What is the extent of the SEC staff's ability to waive S-X Rule 3-05 requirements?

10.4.20 If a registrant cannot comply with S-X Rule 3-05 requirements, what action can it take?

10.4.30 What is 'unreasonable expense and effort' when the SEC staff considers waiver requests?

10.4.40 Will the SEC staff waive S-X Rule 3-05 requirements if an auditor is unwilling or unable to provide a report or consent?

10.4.50 What is the effect of not being able to provide an audit report?

10.4.60 Can a registrant obtain a new auditor to issue a report, if the previous auditor is unwilling?

10.4.70 What is the impact to a registrant's future S-3 registration statements if S-X Rule 3-05 financial statements are not filed timely?

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Examples

10.4.10 Waiver request letter

10.4.20 Form S-3 eligibility

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10.1 How the SEC Rules work

This chapter discusses various topics including:

- how SEC reporting requirements apply to reverse acquisitions and shell companies;
- when a registrant can use abbreviated financial statements in lieu of full financial statements; and
- how a registrant can address the inability to comply with financial statement requirements.

Reverse acquisitions and shell companies

The acquisition of a business can be structured in a way that results in a reverse acquisition and/or involves public shell companies. These scenarios may require special consideration to determine how and whether S-X Rule 3-05 (and related rules) apply. In addition, they may result in the identification of a predecessor to the registrant involved in the transaction.

Abbreviated financial statements

When a registrant acquires part of an entity that constitutes a business, it may be able to provide abbreviated financial statements of the acquired business (as opposed to full financial statements) to comply with S-X Rule 3-05.

The following decision tree is a high-level summary of the determination of whether abbreviated financial statements can be provided.

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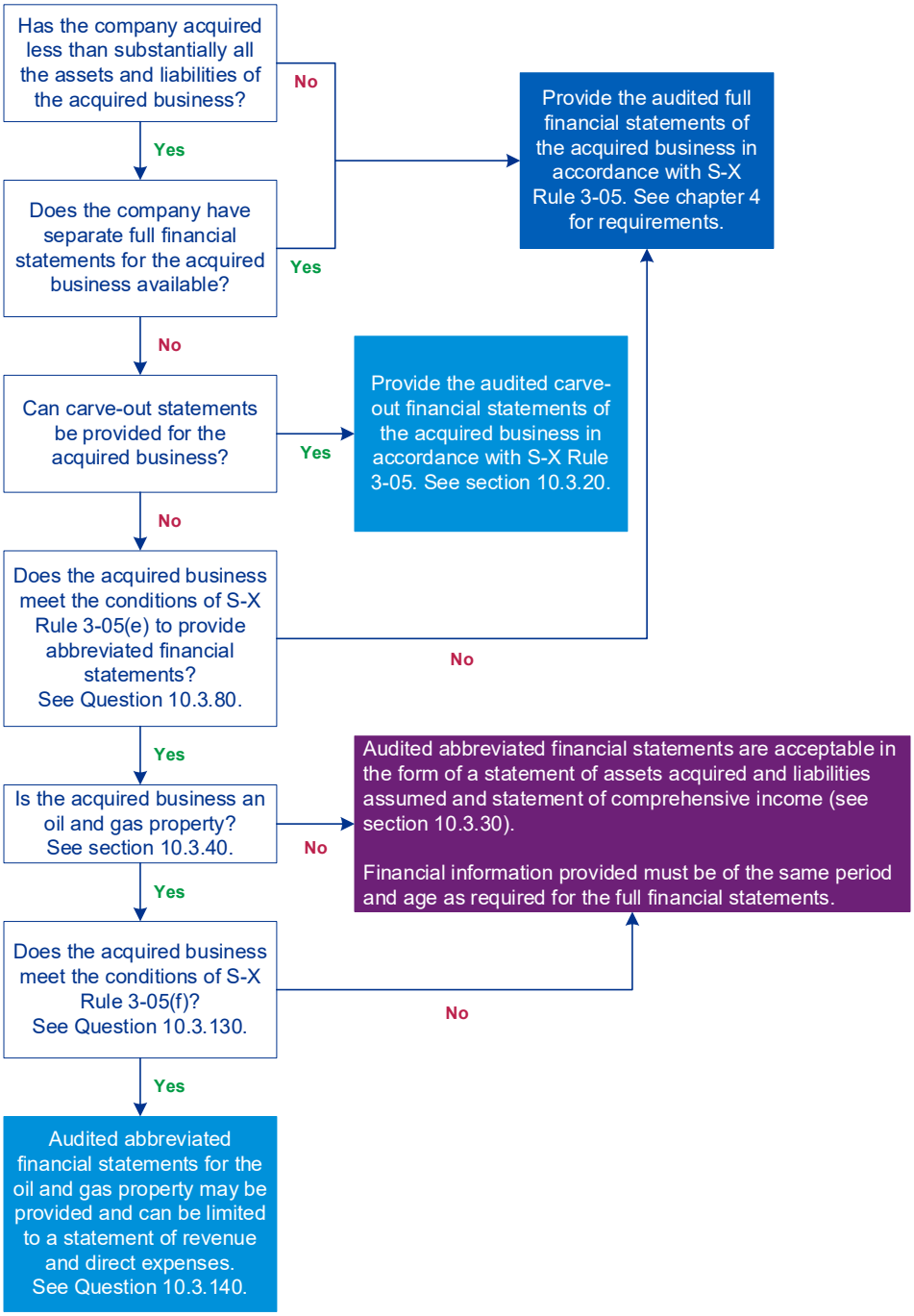

Inability to comply with financial statement requirements

In some instances, it may be impossible to obtain audited financial statements of an acquired entity for some or all of the periods required by S-X Rule 3-05 or obtaining such statements could involve unreasonable expense and effort. In these instances, the SEC staff may waive some of these financial statement requirements upon written request. For example, the SEC staff may permit a registrant to omit one or more years of financial statements that would

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otherwise be required. The SEC staff can also issue a no action letter, in which it agrees not to take action against a registrant solely as a result of noncompliance with the financial statement requirements of Rule 3-05.

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10.2 Reverse acquisitions and transactions with shell companies, including SPACs

A reverse acquisition occurs when the legal acquirer is identified as the acquiree for accounting purposes, and the legal acquiree is considered the accounting acquirer.

In many cases, these transactions require shareholders to vote and a related filing of a merger proxy statement that includes specific requirements. Chapter 5 discusses additional considerations relevant to merger proxy statements.

Reverse acquisitions and transactions with shell companies can often result in the change in the entity identified as the predecessor of the registrant. For example, when a public shell company (e.g. a SPAC) acquires an operating company and accounts for the transaction as a business combination, the acquired business is often deemed the predecessor of the registrant for which pre-acquisition financial statements are required.

Question 10.2.10#

What is a shell company under the SEC's rules and regulations?

Interpretive response: A shell company is an entity (other than an asset-backed issuer) that has no or nominal operations and either has: [Reg C Rule 405]

- no or nominal assets;
- assets consisting solely of cash and cash equivalents; or
- assets consisting of any amount of cash and cash equivalents and nominal other assets.

A special purpose acquisition company (SPAC) is an example of a shell company. SPACs are generally structured as legal entities with no initial business activities and are funded through an initial public offering of equity securities based on an agreement with the investors that the proceeds will be used to complete an acquisition within a predetermined time period or the unused proceeds will be returned to the investors. Because a SPAC generally has no current or ongoing operations and no infrastructure to operate a business, management of the acquired operating company is often retained to operate the business post-acquisition.

A de-SPAC transaction is a business combination, such as a merger, consolidation, exchange of securities, acquisition of assets, reorganization, or similar transaction, involving a SPAC and one or more target companies (i.e. operating company, business or assets). At the time of the business combination (i.e. de-SPAC transaction), the SPAC would generally no longer be considered a shell company.

The disclosure requirements for de-SPAC transactions are aligned with those of traditional IPOs. This alignment comes by treating the private operating company as a 'co-registrant' in certain filings and making a de-SPAC transaction a 'sale' of securities.

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For guidance on accounting for SPAC transactions, see section 9 of KPMG Handbook, Business combinations.

Question 10.2.15**

Where are the SEC regulations specific to SPACs and de-SPAC transactions?

Interpretive response: Subpart 1600 of Regulation S-K, Article 15 of Regulation S-X, and Rule 145a contain SEC regulations specific to SPACs and de-SPAC transactions.

Reg S-X Article 15 was created in 2024 to align the reporting required for target private operating companies with that required in registration statements for IPOs. As a result, regulations under Article 2, Article 3, Article 8 and Article 10 were also updated for conforming amendments. Article 15 contains the financial statement reporting requirements.

Excerpt from S-X Article 15

§ 210.15-01 Acquisitions of businesses by a shell company (other than a business combination related shell company).

(a) *Audit requirements.* The term *audit* (or *examination*), when used in regard to financial statements of an entity that is or will be a predecessor to a shell company (other than a business combination related shell company), means an examination of the financial statements by an independent accountant in accordance with the standards of the Public Company Accounting Oversight Board ("PCAOB") for the purpose of expressing an opinion thereon. When used in regard to financial statements of an entity that is not a predecessor that are included in a registration statement or proxy statement filed for a combination with an issuer that is a shell company (other than a business combination related shell company), the term means an examination of the financial statements by an independent accountant in accordance with either the standards of the PCAOB or U.S. generally accepted auditing standards ("U.S. GAAS") as specified or permitted in this part and forms applicable to those entities for the purpose of expressing an opinion thereon. In transactions involving a shell company that is not a SPAC (as defined in § 229.1601(b) of this chapter), the predecessor must be audited by an independent accountant registered with the PCAOB.

(b) *Financial statements.* When a registrant is a shell company (other than a business combination related shell company) and the financial statements of a business that will be combining with such registrant are required in a registration statement or proxy statement, such registrant must file financial statements of the business in accordance with §§ 210.3-01 through 210.3-12 and 210.10-01 (Articles 3 and 10 of Regulation S-X) as if the filing were a Securities Act registration statement for the initial public offering of the business's equity securities. The financial statements of the

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business may be filed pursuant to §§ 210.8-01 through 210.8-08 (Article 8) when that business would qualify to be a smaller reporting company based on its annual revenues as of the most recently completed fiscal year for which audited financial statements are available, if it were filing a registration statement alone.

(c) *Age of financial statements.* The financial statements of a business that will be acquired by a shell company (other than a business combination related shell company) must comply with the requirements in § 210.3-12 (§ 210.8-08 when that business would qualify to be a smaller reporting company based on its annual revenues as of the most recently completed fiscal year for which audited financial statements are available, if it were filing a registration statement alone) as if the financial statements were included in an initial registration statement in determining the age of financial statements of the business in the registration statement or proxy statement of the registrant.

(d) *Acquisition of a business or real estate operation by a predecessor.* Registrants must apply § 210.3-05 (§ 210.8-04 when the predecessor would qualify to be a smaller reporting company based on its annual revenues as of the most recently completed fiscal year for which audited financial statements are available if it were filing a registration statement alone) or §210.3-14 (§ 210.8-06 when the predecessor would qualify to be a smaller reporting company based on its annual revenues as of the most recently completed fiscal year for which audited financial statements are available if it were filing a registration statement alone) to acquisitions of a business or real estate operation, respectively, by a predecessor.

(1) See § 210.1-02(w)(1) for rules on applying the significance tests to acquisitions of a business or real estate operation that is not or will not be the predecessor.

(2) When the financial statements of a recently acquired business or real estate operation that is not or will not be the predecessor are omitted from a registration statement or proxy statement pursuant to § 210.3-05(b)(4)(i) (Rule 3-05(b)(4)(i) of Regulation S-X) or § 210.3-14(b)(3)(i) (Rule 3-14(b)(3)(i) of Regulation S-X), those financial statements must be filed in a Form 8-K by the later of the filing of the Form 8-K filed pursuant to Item 2.01(f) of Form 8-K or 75 days after consummation of the acquisition.

(e) *Financial statements of shell company.* After a shell company registrant (other than a business combination related shell company) acquires a business that is its predecessor, the financial statements of the shell company for periods prior to consummation of the acquisition are not required to be included in any filing once the financial statements of the predecessor have been filed for all required periods through the acquisition date and the financial statements of the registrant include the period in which the acquisition was consummated. If a registrant is to acquire or has acquired a shell company (other than a business combination related shell company), the financial statements of the shell company are required to be included in any filing that requires the registrant's financial statements, as if the shell company were the registrant for the filing, unless the financial

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statements of the registrant include the period in which the acquisition of the shell company was consummated.

Question 10.2.16**

Is a business combination between a shell company and a private operating company considered to involve the 'sale' of securities?

Interpretive response: Yes. A business combination of a registered shell company with a private operating company, including a de-SPAC transaction, is deemed as a 'sale' of securities to the shell company's shareholders – regardless of whether securities are changing hands. This is because any direct or indirect business combination of a reporting shell company with another entity that is not a shell company is deemed to involve an offer, offer to sell, offer for sale, or sale within the meaning of the Securities Act. The transaction is then required to be registered with the Securities Act unless an exemption is available. The SEC believes exemptions generally would not be available for de-SPAC transactions. [§ 230.145A]

The rules do not impact traditional business combination transactions between two or more operating businesses, including transactions structured as traditional reverse mergers and traditional business combination transactions that make use of only business-combination-related shells. A SPAC (or any entity formed for facilitating a transaction with a SPAC) is never a business-combination-related shell company based on the definition in Securities Act Rule 405 and Exchange Act Rule 12b-2, which states:

> The term business-combination-related shell company means a shell company (as defined in § 240.12b-2) that is:
>
> (1) Formed by an entity that is not a shell company solely for the purpose of changing the corporate domicile of that entity solely within the United States; or
>
> (2) Formed by an entity that is not a shell company solely for the purpose of completing a business combination transaction (as defined in § 230.165(f) among one or more entities other than the shell company, none of which is a shell company.

This 'sale' treatment also does not apply to the merger of an existing reporting shell company into a new shell company where the surviving company remains a shell.

See additional discussion of co-registrants in Question 10.2.17 through Question 10.2.19.

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Question 10.2.17**

Is a private operating company a co-registrant in a de-SPAC transaction?

Interpretive response: Yes. Any shell company directly or indirectly combining with a private operating company is deemed to be issuing or proposing to issue securities under Section 2(a)(3) of the Securities Act in a de-SPAC transaction regardless of the transaction structure. [§ 230.145a]

This is facilitated through the registration statement process (e.g. Form S-4 or F-4) and the requirement that both the target operating company and the SPAC be included. This results in the private operating company always being a co-registrant in a de-SPAC transaction. [Form S-4 General Instructions L.1]

If multiple private operating companies are included in a de-SPAC transaction, all private operating companies are considered to be issuers and co-registrants to the transaction. [§ 229.1601]

Question 10.2.18**

What are the main impacts of a private operating company being treated as a co-registrant?

Interpretive response: The treatment of a target private operating company as a co-registrant generally results in the alignment of the disclosure and liability of the co-registrants (i.e. SPAC and target private operating company) in the registration process (and their experts), with that of a traditional IPO.

Upon effectiveness of the registration statement, all of the co-registrants, including the SPAC and any target operating companies, are individually subject to the reporting requirements because each becomes an individual registrant. [§ 229.1601, Form S-4 General Instructions L.1]

A target private operating company's principal officers and a majority of the board of directors are required signatories on Form S-4 or F-4 in this type of transaction, along with the SPAC's officers and directors. This requirement extends the liability for material misstatements and omissions in the forms to all signatories, including those of the SPAC and a target private operating company. [Form S-4 General Instructions L.1]

A difference between a de-SPAC transaction and traditional IPO exists relative to the underwriter's liability. Given a de-SPAC transaction is a distribution of securities, Section 11 liability applies to anyone acting as an underwriter for a de-SPAC transaction, even if not named as an underwriter in an offering. This guidance is specific to de-SPAC transactions and does not extend to traditional merger and acquisition scenarios. [Form S-4 General Instructions L.1]

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Question 10.2.19**

What actions does a co-registrant need to take upon completion of the de-SPAC transaction?

Interpretive response: Upon effectiveness of the de-SPAC registration statement, each target private operating company included in the transaction becomes a registrant. Upon the completion of the de-SPAC transaction, the entities merge and become a single consolidated entity, both legally and for financial reporting purposes. However, each co-registrant that was included in the registration statement remains a registrant and the reporting obligations for each continues. [15 U.S. Code § 78m]

To suspend its reporting obligations, a registrant must de-register with the SEC (i.e. file a Form 15). Entities should consider which registrations are sought to be deregistered and make the appropriate filings in consultation with legal counsel. If deregistration is not filed and then completed, the obligation to file periodic reports will continue for those registrants.

Question 10.2.20

How is the predecessor determined for SEC reporting purposes?

Interpretive response: Designation of a predecessor is required if a registrant succeeds to substantially all of the business of another entity and the registrant's own operations before the succession appear insignificant relative to the operations assumed or acquired. [FRM 1170.1]

This can occur in any of the following scenarios.

Scenario	Description	Reference
Reverse recapitalization	A nonoperating public shell company acquires a private operating entity in a transaction accounted for as the acquisition of the shell company by the operating entity (i.e. shell company is the legal acquirer, but the accounting acquiree). [FRM 2005.7]	See Question 10.2.40 to Question 10.2.80
Reverse acquisition with a domestic registrant that is not a shell company	Operating public company (the legal acquirer) acquires a private operating company (the legal acquiree).	See Question 10.2.90 to Question 10.2.120
Forward merger (i.e. business combination)	A public shell company (e.g. a SPAC) acquires an operating company in a transaction in which the shell company is both the legal and accounting acquirer and accounts for the transaction as a business combination under Topic 805. [FRM 2005.7]	See chapter 5

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The SEC's rules do not directly address a registrant's reporting requirements when completing these transactions. However, the SEC staff's position is that the financial statements filed should follow the same form as the financial reporting required by GAAP. As a result, the reports filed with the SEC after the transaction are those of the legal acquiree, and accounting acquirer, as the legal successor to the original registrant's (the legal acquirer's) reporting obligation as of the date of the acquisition. Further, it is not necessary to determine the significance of the transaction because the accounting acquirer is considered to be the registrant's predecessor. [FRM 12210.1]

For in-depth guidance on accounting for these transactions, see section 9 of KPMG Handbook, Business combinations.

More than one acquisition

When a registrant (e.g. a SPAC) will acquire more than one business, a determination must be made as to which target entity (or in certain circumstances, entities) is the predecessor.

Given the significant judgment involved, the SEC staff expects robust disclosures about the predecessor determination and the specific facts and circumstances considered critical in reaching the conclusion. The staff has noted that some of the key factors to consider in making this determination may include:

- the relative size and fair value of the target companies;
- the historical and ongoing management structure; and
- the order in which the entities were acquired.

As with any judgmental analysis, all facts and circumstances should be considered and no one of the above factors outweighs the others. In very limited cases, this analysis may result in a determination that multiple businesses represent co-predecessors of the registrant. [2015 AICPA Conf]

Question 10.2.30#

What are the general financial statement requirements when a predecessor is identified?

Interpretive response: When an acquired business is designated the registrant's predecessor, the SEC staff has stated that S-X Rule 3-05 does not apply. In this case, S-X Rules 3-01 and 3-02 apply for purposes of determining the financial statement requirements for the acquired business that is determined to be the registrant's predecessor. [FRM 2005.6]

Financial statements on file for the registrant and its predecessor collectively need to be *as of* all dates and *for* all periods required by S-X Articles 3 and 10 (or Article 8 for SRCs), with no lapse in audited periods. For example, assume Target Company is acquired by Registrant on April 15, 20X3 and Target is identified as its predecessor. The financial statements of Target become that of the registrant and Target's entire annual period of 20X3 needs to be audited [FRM 1170.2]

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Predecessor financial statements must be full financial statements because they become the financial statements of the registrant for all periods before the acquisition. Abbreviated financial statements that might otherwise satisfy the requirements of S-X Rule 3-05 cannot satisfy the requirement for predecessor financial statements. For example, statements of revenues and direct expenses cannot be filed in lieu of full financial statements.

In addition to the basic financial statements, the schedules required by S-X Article 12 (e.g. Valuation and Qualifying Accounts) are required for predecessor entities. [FRM 1170.2, Regs Comm 06/2009]

Example 10.2.10

Acquired business deemed the predecessor

Newco is a small US-based operating company, formed in May 20X1, and will acquire the stock of Company A, a UK operating company with a December 31 year-end. Initially capitalized with $2,000, Newco had minimal activity between inception and the acquisition date of September 10, 20X1, except for issuing debt to fund the acquisition. After the acquisition, Newco files a registration statement in the US to sell its common shares.

The registration statement includes:

- Company A's pre-acquisition financial statements as Newco's predecessor; and
- consolidated financial statements of Newco and Company A for reporting periods after the acquisition date.

Company A is considered the predecessor business because Newco had minimal operations (see Question 10.2.20).

The consolidated financial statements of Newco and Company A are also required in post-acquisition Form 10-Ks that are filed by Newco. Although Form 10-K does not require inclusion of Rule 3-05 financial statements, it does require inclusion of Newco's financial statements and those of its predecessor, Company A. [FRM 1170.2]

Example 10.2.20

Predecessor financial statements – Reverse recapitalization

On February 1, 20X3, Registrant, a calendar year-end shell company, acquires Company A, a private operating company.

Company A is determined to be Registrant's predecessor and meets the definition of an SRC at the time of the transaction.

Registrant files a Form 8-K on February 5, 20X3 and includes Company A's audited financial statements for 20X1 and 20X0 and unaudited financial statements for the interim periods ended September 30, 20X2 and 20X1. An

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amended Form 8-K would be required to file Company A's audited financial statements for 20X2.

The registrant includes the following financial statements in its periodic SEC filings.

Periodic filing	Periods presented
Form 10-K for the year ended December 31, 20X2	— Registrant's (shell company) audited financial statements for the year ended December 31, 20X2 and 20X1.
Form 10-Qs for the quarterly periods ended March 31, June 30 and September 30, 20X3	— Registrant's interim and year-to-date 20X3 financial statements, which include its predecessor financial information from the date of acquisition, February 1, 20X3 — Company A's (predecessor's) interim and year-to-date 20X2 financial statements for the respective periods, including the balance sheet as of December 31, 20X2.
Form 10-K for the year ended December 31, 20X3	— Registrant's (Company A's) audited financial statements for the years ended December 31, 20X3 and 20X2, which reflect the recapitalization

Question 10.2.35**

What are the financial statement requirements for business or real estate acquisitions by the predecessor that are unrelated to the de-SPAC transaction?

Interpretive response: Financial statements of the target private operating company deemed to be the predecessor are required in a de-SPAC filing. Because the target is a co-registrant, it determines whether it also must include the financial statements of other businesses, including real estate operations, that it has acquired or is probable of acquiring, as required by Reg S-X Rule 3-05, or Rule 3-14 for real estate operations (Rules 8-04 or 8-06, respectively, for SRCs). [§ 210.15-01]

Question 10.2.36**

How are the significance tests performed for business or real estate acquisitions by the predecessor that are unrelated to the de-SPAC transaction?

Interpretive response: The denominator in the significance tests uses the target's (i.e. predecessor's) financial information rather than the shell

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company's (i.e. registrant's) financial information. Absent this requirement, virtually all other acquisitions would be significant. Using the target's financial information in the denominator should produce results more consistent with the sliding scale approach in Reg S-X Rule 3-05, which recognizes that certain acquisitions have a greater effect than others. [§ 210.15-01].

See Chapter 3 for significance test application considerations (e.g. how the significance tests are performed, use of the same accounting basis in applying the significance tests, application of the significance test when the registrant does not have an AWMV, etc.).

Example 10.2.25**

Significance test – Target is the predecessor

Company B is the co-registrant in a de-SPAC transaction with SPAC A. Company B has acquired Company C in the current fiscal year. Of the three significance tests, the asset test yields the highest level of significance and therefore is used to determine what information is required.

SPAC A, Company B and Company C have total assets of $26 and $100 and $17, respectively.

The asset test is performed as follows.

Asset test – correct application	Outcome
Company C's total assets	$17
Divided by Company B's total assets	$100
Significance	**17.0%**

It would be incorrect to perform the asset test in the following manner.

Asset test – incorrect application	Outcome
Company C's total assets	$17
Divided by SPAC A's total assets (before acquisition)	$26
Significance	**65.4%**

Based on the correct application, the acquisition of Company C is not significant under the asset test (17.0%) because its significance is below 20%.

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Question 10.2.37**

How and when are the financial statements of a recently acquired business or real estate operation that is not the predecessor in a de-SPAC transaction put on file?

Interpretive response: The financial statements of a recently acquired business or real estate operation that is not, or will not be, the predecessor in a de-SPAC transaction may be included in the initial de-SPAC registration statement. However, if the financial statements have been omitted from the registration statement pursuant to Reg S-X Rule 3-05 or Rule 3-14, the financial statements of the acquired business must be filed in a Form 8-K by the later of the filing of the 8-K pursuant to Item 2.01(f) or 75 days after consummation of the acquisition. [§ 210.15-01]

Reverse recapitalization involving a shell company

Question 10.2.40

Does a reverse recapitalization involving a shell company require a Form 8-K to be filed?

Background: If a nonoperating public shell company (the legal acquirer) acquires a private operating company (the legal acquiree) in a reverse acquisition, for financial reporting and SEC reporting purposes the transaction is treated as an acquisition of the nonoperating public shell company (the legal acquirer) by the operating company (the legal acquiree).

Interpretive response: Yes. However, the SEC staff considers these transactions to be capital transactions in substance. The transaction is accounted for as a reverse recapitalization – i.e. equivalent to the issuance of securities by the private operating company in exchange for the net monetary assets of the shell company accompanied by a recapitalization. As a result, Item 2.01(f) of Form 8-K specifies that the registrant must include all information required in a Form 10 initial registration statement for the private operating company (accounting acquirer). [FRM 12100, FRM 12220.1]

Question 10.2.50

What are the basic reporting requirements for a reverse recapitalization that involves a public shell company?

Interpretive response: Reverse recapitalization transactions between a shell company that is a registrant before the transaction and a private operating company generally result in the registrant ceasing to be a shell company

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because the operating company is the predecessor and therefore legal successor to the shell company's reporting obligation (see Question 10.2.20).

When these transactions occur, a Form 8-K that includes the information listed in the table below must be filed no later than four business days after the consummation of the acquisition. Item 9.01(c) of Form 8-K does not provide for a 71- calendar day extension to file the financial statements of the private operating company, the pro forma financial information, or other required information. [FRM 12220.1]

Form 8-K Item	Description
Item 2.01	Information about the completed merger transaction
Item 5.01	Information about a change in control of the registrant
Item 5.06	Material terms of the transaction that caused the shell company to cease being a shell company
Item 9.01	Financial statements of the operating company and pro forma financial information

Question 10.2.54**

Does a combined company, formed as part of a de-SPAC transaction, have to redetermine its status as an SRC?

Interpretive response: Yes. SPACs often qualify as SRCs before undertaking a de-SPAC transaction due to the nature of the entity, which generally includes no or nominal operations and limited assets (e.g. cash or cash equivalents).

The combined company on consummation of a de-SPAC is required to redetermine whether it qualifies as an SRC based on:

- its public float as of a date within four days after the consummation of the de-SPAC transaction; and
- the target's revenue from the most recently completed fiscal year reported in the required Form 8-K post-transaction.

This redetermination must be made prior to the time the combined entity makes its first SEC filing. Any change in SRC status should be reflected in filings made beginning 45 days after consummation of the de-SPAC transaction. [§ 230.405]

Question 10.2.55**

Does a SPAC need to evaluate if it is an investment company under the 1940 Act?

Interpretative response: Yes. A safe harbor is not provided to allow a SPAC to avoid determining its status under the 1940 Act. Instead, the SEC believes that a SPAC must evaluate whether it meets the definition of an investment

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company, thereby subjecting it to the filing and disclosure requirements of the 1940 Act. In evaluating whether an issuer (either a SPAC or another type of entity) meets the definition of an investment company, the SEC generally looks to the issuer's historical development, public statements on policy, management activities, and the nature of the issuer's assets and income sources. [26 S.E.C. 426 at 427 (1947)]

A SPAC's asset composition and income sources prior to a de-SPAC transaction will often raise concerns that the SPAC is an investment company if it invests substantially all of its assets in securities – particularly for a period that exceeds one year. If this is the case, during this phase before the de-SPAC transaction, the SPAC's income is generally attributable to its securities holdings.

The following table identifies several factors we believe are relevant in thoroughly analyzing whether a SPAC meets the definition of an investment company.

Asset and income composition	Primarily engaging in the business of investing, reinvesting and trading of securities weighs heavily in favor of investment company status. However, a SPAC holding solely cash items, US government securities and money market funds is not consistent with this investment company attribute, unless the SPAC intends to acquire investment securities and substantially derive income from those securities.
Management activities	SPAC officers, directors and employees should consider whether their managerial activities are primarily focused on achieving a de-SPAC transaction or achieving investment returns. Management activities that involve considerable time towards the business of investing, rebalancing, reinvesting or trading in securities could suggest the SPAC is primarily engaged in achieving investment returns, which would weigh in favor of investment company status.
Duration	A SPAC should operate with the goal of completing a de-SPAC transaction within a reasonable timeframe. Operating a SPAC beyond a reasonable timeframe may be more indicative of management and operating activities that are consistent with investment company status.
SPAC activities	A SPAC that holds itself out in a manner that suggests investors should invest in it primarily to gain exposure to its portfolio of securities prior to a de-SPAC transaction weighs heavily in favor of investment company status.
Transaction with an investment company	If a SPAC engages or propose to engage in a de-SPAC transaction with a target that meets the definition of an investment company, such as a closed-end fund or a business development company, then it is likely an investment company.

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Question 10.2.56**

Does a SPAC provide nonfinancial disclosures in the registration statement for its de-SPAC transaction?

Interpretive response: Yes. De-SPAC transaction filings are required to provide all of the information typical of an IPO by a private company. Requiring these disclosures provides investors with information before deciding whether to vote for the transaction or redeem shares.

The nonfinancial disclosures include: [§ 240.14a-101]

- Item 101: Description of business
- Item 102: Description of property
- Item 103: Legal proceedings
- Item 304: Changes in and disagreements with accountants on accounting and financial disclosure
- Item 403: Security ownership of certain beneficial owners and management, assuming completion of the de-SPAC transaction and any related financing transaction
- Item 701: Recent sales of unregistered securities.

Question 10.2.57**

Are there unique disclosure requirements for SPAC IPOs and de-SPAC transactions?

Interpretive response: Yes. Subpart 1600 of Regulation S-K requires specialized disclosures for SPAC IPOs and de-SPAC transactions. The disclosure requirements focus on sponsors, material conflicts of interest, the fairness of the transaction, and the potential for dilution, among other things. The following table provides a non-exclusive list of some of the enhanced requirements related to sponsors and material conflicts of interest.

Disclosures related to sponsors	Disclosures related to conflicts of interest (when material) and fiduciary duties
— Details of a sponsor's background and experience — Arrangements between the sponsor and SPAC in determining whether to proceed with a de-SPAC transaction — The nature and amounts of all compensation earned or to be earned by a sponsor for its services in connection with the completion of a de-SPAC transaction	— Actual and potential material conflicts of interest between the SPAC sponsor, officers, directors and unaffiliated investors, including those: – that would influence the SPAC's decision on whether to proceed with a de-SPAC transaction – arising from the manner of compensation between (1) a SPAC and its officers and directors, (2) a SPAC and the

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Disclosures related to sponsors	Disclosures related to conflicts of interest (when material) and fiduciary duties
— Circumstances or arrangements under which the sponsor has or could have transferred ownership — Parties with direct or indirect material interests in the sponsor, and the nature and amounts of their interests — Agreements regarding the redemption of outstanding securities — Tabular disclosure of material terms of any lock-up agreements with the sponsor	sponsor, and (3) the sponsor and its officers and directors — Fiduciary duties that each SPAC officer and director owe to other companies

Disclosures related to the fairness of the transaction and any related financing transaction(s) to the SPAC's unaffiliated shareholders are also required if the law of the SPAC's jurisdiction has such mandate. A description of the material sources of dilution and a tabular disclosure of the amount of potential dilution expected to be absorbed by nonredeeming shareholders to the extent quantifiable are also required following the SPAC's IPO and during the subsequent phases of a SPAC's life cycle.

To the extent the disclosure requirements in Subpart 1600 address the same subject matter as other disclosure requirements of forms or schedules, the requirements of Subpart 1600 are controlling.

Question 10.2.58**

Is there a safe harbor for SPACs related to forward looking statements?

Interpretive response: No. There is no safe harbor for SPACS related to forward looking statements, including projections. The liability is the same as that for traditional IPOs.

Further, to drive transparency in the use of financial projections, SPACs are required to (non-exclusive):

— clearly distinguish projections that are based on historical results from those that are not;

— present historical results and operational history with equal or greater prominence as a projection based on that information; and

— explain a non-GAAP financial measure, describe the most closely related GAAP financial measure and explain why the non-GAAP financial measure was used instead of a GAAP financial measure.

The following disclosures, among others, are required in filings related to a de-SPAC transaction when projections are disclosed: [§ 229.1609]

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— the purpose for which the projections were prepared and the party that prepared the projections;

— all material bases of disclosed projections, including material assumptions used to develop projections (specifically including selection and reason for selection of material growth rates or discount multiples used), and any factors that may affect such assumptions included in a de-SPAC transaction; and

— a statement indicating whether the disclosed projections are reflective of the views of management of the SPAC or the target company as of the most recent practicable date prior to the date of the disclosure document required to be disseminated to security holders.

Question 10.2.59**

Is there a minimum time period for dissemination of information as part of a de-SPAC transaction?

Interpretive response: Yes. Rules 14a-6 and 14c-2, as well as Forms S-4 and F-4, require that prospectuses, proxy and information statements that are filed in connection with a de-SPAC transaction be distributed to shareholders no later than the lesser of: [§ 240.14c-2]

— 20 days before the shareholder meeting is scheduled to occur or action is scheduled to be taken in connection with the de-SPAC transaction; or
— the number of days permitted for disseminating the information statement under the applicable laws of the jurisdiction of incorporation or organization.

Question 10.2.60

What are the reporting requirements in a reverse merger that causes an FPI to cease being a public shell company?

Interpretive response: If an FPI ceases to be a public shell company because of a reverse acquisition or merger, the transaction must be reported on a Form 20-F within four business days of its completion. The Form 20-F includes the financial statements of the other party to the transaction (i.e. the legal acquiree).

The Form 20-F includes the same information that would be included in a registration of securities on Form 20-F. The accommodations in Form 20-F permitting two years of financial statements instead of three years apply. [Exch Act Rules 13a-19, 15d-19, Form 20-F Instr A(d)]

If the FPI shell company engages in a transaction that causes it to lose its status as an FPI at the transaction date, reports filed or furnished during the remainder of the fiscal year may continue to be made using forms and requirements applicable to FPIs. Beginning on the first day of the following fiscal year, the registrant must use the forms and follow the requirements for domestic registrants. [FRM 6410.5, FRM 6120.2]

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Question 10.2.70#

What financial statements are required for a reverse recapitalization that involves a public shell company?

Interpretive response: As discussed in Question 10.2.40, the Form 8-K must include all content that would be required by a Form 10 initial registration statement – i.e. as if the private operating company was newly registering its existing securities on Form 10. Therefore, the financial statements for all periods required by Reg S-X must be included. [Form 10 Item 13]

Article 15 of Regulation S-X includes the reporting requirements for a target in de-SPAC transaction and are determined as if the target were conducting its own IPO.

S-X Rule 3-06, which permits the filing of financial statements of an acquired business for nine to twelve months to satisfy one year, does not apply to the financial statements of the accounting acquirer in a reverse recapitalization. See section 4.5.20 for additional guidance on Rule 3-06. [FRM 12210.2]

The financial statement periods required in the Form 8-K are determined as of the earlier of the Form 8-K's filing date or due date.

The age and number of periods of the financial statements to be included in the Form 8-K depends on whether the operating company (the accounting acquirer) would qualify as an SRC. [FRM 12220.1]

- If the operating company would qualify as an SRC, the requirements of Article 8 apply (i.e. two years of financial statements permitted).
- If the operating company would not qualify as an SRC, the requirements of Article 3 apply (i.e. two or three years of financial statements required).

If both the shell company and the operating company qualifies (or would qualify) as EGCs and the shell company has not yet filed its first Form 10-K, then two years of financial statements are permitted, if not, three years are required. See further discussion of the financial statement periods and the age requirements in chapter 4.

Age requirement may be different for Form 8-K versus Form 10

The pre-acquisition financial statements of the operating company may require updating after the initial Form 8-K is filed. This is because the financial statements required by Form 8-K under Items 2.01(f) and 9.01 may not include the operating company's most recently completed full fiscal year or latest interim period – e.g. because the transaction occurs so soon after the end of the of the operating company's fiscal year (or interim period) that those financial statements would not yet be required to be filed.

In this situation, an amended Form 8-K must be filed that includes all the information about the operating company that would be included in an annual or periodic report (e.g. Form 10-K or Form 10-Q), including financial statements for the most recently completed pre-acquisition annual (or interim) period. [FRM 12220.1]

If the most recently completed pre-acquisition period for which financial information was not provided in the initial Form 8-K is: [FRM 12220.1]

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— an annual period, the amended Form 8-K is due within 90 days of the operating company's year-end if the registrant is a non-accelerated filer;

— an interim period, the amended Form 8-K is due within 45 days of the operating company's interim period-end if the registrant is a non-accelerated filer.

In addition, the registrant (i.e. the shell company) remains subject to the requirements of the 1934 Act requiring the filing of continuous annual and quarterly reports. As a result, the registrant must continue to file its periodic reports for periods ending before consummation of the transaction as they become due in the ordinary course.

Question 10.2.75**

When are the financial statements of a shell company required after a business combination transaction?

Interpretive response: The historical financial statements of the shell company are required in all filings that require financials statements, until the first periodic report that includes the post-business combination financial statements is filed. This requirement applies to any registration statement as well as the Form 8-K with Form 10 information filed following the de-SPAC transaction. For example, a registration statement to register the resale of shares issued in connection with a PIPE financing filed shortly after the de-SPAC transaction will require the shell company financial statements if filed before the first periodic report including the post-business combination financial statements.

This requirement applies regardless of whether the business combination is accounted for by the shell company as a forward acquisition of the business or as a reverse recapitalization of the business. The financial statements of the shell company for periods before the de-SPAC transaction may be excluded from SEC filings when both the following conditions are met: [§ 210.15-01]

— the financial statements of the predecessor have been filed for all required periods through the acquisition date; and
— the financial statements of the registrant include the period in which the acquisition was consummated.

The financial statements of the shell company are required to be included in SEC filings until the conditions outlined above are satisfied. If the de-SPAC transaction occurs after the end of a required SEC financial statement reporting period but before the filing deadline for that period, we believe it is appropriate to include the SPAC's financial statements in the continuing registrant's subsequent filing. However, there is no need to include a Management's Discussion and Analysis (MD&A) section for the SPAC.

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Example 10.2.30
Financial statement requirements for a reverse recapitalization

Scenario 1: Financial statements in initial Form 8-K comply with Form 10

Registrant, a non-accelerated public shell company, acquires Company A, a private operating company, in a transaction accounted for as a reverse recapitalization on March 5, 20X2. Both Registrant and Company A have calendar year-ends and the deadline for Registrant to file its Form 10-K for 20X1 is March 31, 20X2. Company A would meet the definition of an SRC at the time of the transaction.

Registrant files a Form 8-K on March 9, 20X2 and includes Company A's audited financial statements for 20X1 and 20X0.

Registrant is not required to file an amended Form 8-K because the financial statements filed on the initial Form 8-K include all content required by a Form 10 initial registration statement.

In addition, Registrant (shell company) is required to file its annual report on Form 10-K for 20X1 by March 31, 20X2, which includes audited financial statements for 20X1 and 20X0.

Scenario 2: Initial financial statements in Form 8-K do not comply with Form 10

Registrant, a non-accelerated public shell company, acquires Company A, a private operating company, in a reverse recapitalization on February 1, 20X2. Both Registrant and Company A have calendar year-ends and the deadline for Registrant to file its Form 10-K for 20X1 is March 31, 20X2. Company A would meet the definition of an SRC at the time of the transaction.

Registrant files a Form 8-K on February 5, 20X2 and includes Company A's audited financial statements for 20X0, and 20W9 and unaudited financial statements for the interim period ended September 30, 20X1 and the comparable interim period in the prior year. [FRM 12220.1]

Registrant is required to file:

- its annual report on Form 10-K for 20X1 by March 31, 20X2 that includes audited financial statements for the shell company for the year ended December 31, 20X1 and 20X0.
- an amended Form 8-K within 90 days after Company A's year-end (i.e. March 31, 20X2). The amended Form 8-K must include Company A's financial statements for its most recently completed pre-acquisition annual period – i.e. the year ended December 31, 20X1. This is considered Registrant's (Company A's) first annual report. [Reg S-K C&DI 215.02]

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Question 10.2.80#

What are the audit requirements for financial statements filed in connection with a reverse recapitalization that involves a public shell company?

Interpretive response: The financial statements of an operating company that is determined to be the predecessor of a nonoperating public shell company (e.g. a SPAC) must be audited under PCAOB standards when those financial statements will be filed by the public shell company. This is because the SEC staff considers the transaction to be equivalent to an IPO of the target operating company. Therefore, the Form 8-K must include all content that would be required by a Form 10 initial registration statement – i.e. financial statements meeting the requirements of Reg S-X (see Question 4.2.70) and the target financial statements included in Form S-4 must be audited in accordance with PCAOB standards. [FRM 2200.7]

The financial statements of a non-reporting target entity that is not the predecessor may be audited under either PCAOB standards or US GAAS if they are included in the de-SPAC filing. [§ 210.1-02(d)]

The auditor of the accounting acquirer must be independent under PCAOB/SEC independence rules for all years required to be filed on the Form 8-K. [FRM 4110.5, 12250.1]

Reverse acquisition with a domestic registrant that is not a shell company

Question 10.2.90

Does a reverse acquisition with a domestic registrant that is not a shell company require a Form 8-K to be filed?

Interpretive response: Yes. When a domestic registrant that is not a shell company is part of a reverse acquisition, it must file a Form 8-K reporting the transaction (see Question 10.2.110 for financial statement requirements).

Question 10.2.100

What are the basic reporting requirements for a reverse acquisition involving a domestic registrant that is not a shell company?

Interpretive response: A Form 8-K that includes information listed in the table below must be filed by the registrant. However, unlike a reverse recapitalization with a shell company, the domestic registrant that is not a shell company may

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apply the 71-calendar day extension to file the required legal acquiree financial statements and pro forma information under Item 9.01. [FRM 12220.2a/b]

Form 8-K Item	Description
Item 2.01	Information about the completed merger transaction
Item 4.01	Information about a change in registrant's certifying accountant
Item 5.01	Information about a change in control of the registrant
Item 5.03	Information about a change in fiscal year of the registrant
Item 9.01	Financial statements of the operating company and pro forma financial information

Question 10.2.110

What financial statements are required for a reverse acquisition with a domestic registrant that is not a shell company?

Interpretive response: Similar to a reverse recapitalization involving a public shell company (see Question 10.2.40), the legal acquiree is the accounting acquirer and may be the predecessor for SEC reporting purposes (see Question 10.2.20). Financial statements for all periods required by S-X Rules 3-01 through 3-04 (including pre-acquisition financial statements) must be on file for the predecessor because that entity is the legal successor entity to the original registrant's reporting obligation as of the date of the acquisition.

S-X Rule 3-06, which permits the filing of financial statements of an acquired business for nine to twelve months to satisfy one year, does not apply to the financial statements of the accounting acquirer in a reverse acquisition. See section 4.5.20 for additional guidance on Rule 3-06. [FRM 12220.2]

Registrant financial statement requirements after consummation of the transaction

After a reverse acquisition, the financial statements of the legacy registrant for periods prior to the acquisition may not be required in Forms 10-K and 10-Q once the financial statements in those forms include the period in which the transaction was consummated. Generally, these financial statements would not be required if the registrant had only nominal income statement activity before the transaction. [FRM 1170.2]

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Question 10.2.120

What are the audit requirements for the financial statements file in connection with a reverse acquisition with a domestic registrant that is not a shell company?

Interpretive response: A private operating company that is the accounting acquirer in a reverse acquisition with a public operating company (i.e. not a shell company) is not considered an 'issuer' for purposes of its pre-acquisition financial statements included in any Form S-4, proxy statement, or Form 8-K related to the merger. Therefore, the pre-acquisition financial statements of the accounting acquirer included in these filings can be audited in accordance with AICPA standards by an auditor that has complied with the AICPA independence standards required for audits of those periods. PCAOB and SEC auditing and independence requirements for those pre-acquisition periods need not be applied.

However, because the financial statements of the accounting acquirer become the historical financial statements of the registrant/issuer once the reverse acquisition is reported in a periodic report that includes the period in which the merger is consummated, any reissuance of the pre-acquisition annual financial statements in a registration statement (or Form 10-K) would require all periods presented to be audited in accordance with the standards of the PCAOB. In addition, the need for these audited financial statements may be accelerated when a Securities Act registration statement is filed [Regs Comm 03/2018, FRM 12220.2d]

Example 10.2.40

Reverse acquisition between two operating companies

Registrant, an operating company, acquires Company A, a private operating company, in a transaction accounted for as a reverse acquisition in May 20X2. Company A is the accounting acquirer and both companies have calendar year-ends. Company A, the accounting acquirer, is determined to be the predecessor for SEC reporting purposes.

The Form 8-K filed by Registrant related to the merger includes the pre-acquisition financial statements of Company A. These financial statements are not considered to be those of an 'issuer' and therefore would be audited under AICPA standards.

However, because Company A's 20X1 and 20X0 financial statements are presented as those of the issuer in the December 31, 20X2 Form 10-K, they must comply with the requirements of any other issuer. Therefore, all years presented in the 20X2 Form 10-K must be audited in accordance with PCAOB standards and include disclosures that are unique to issuers (e.g. segment disclosures required by Topic 280). [Regs Comm 03/2018]

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10.3 Carve-out and other forms of financial statements

Excerpt from S-X Rule 3-05

Financial statements of businesses acquired or to be acquired.

(e) *Financial statements for net assets that constitute a business.* For an acquisition of net assets that constitutes a business (e.g., an acquired or to be acquired product line), the financial statements prepared and audited in accordance with Regulation S-X may be abbreviated financial statements prepared in accordance with paragraph (e)(2) of this section if the business meets all of the qualifying conditions in paragraph (e)(1) of this section.

(1) *Qualifying conditions.*

(i) The total assets and total revenues (both after intercompany eliminations) of the acquired or to be acquired business constitute 20 percent or less of such corresponding amounts of the seller and its subsidiaries consolidated as of and for the most recently completed fiscal year.

(ii) Separate financial statements for the business have not previously been prepared;

(iii) The acquired business was not a separate entity, subsidiary, operating segment (as defined in U.S. GAAP or IFRS-IASB, as applicable) or division during the periods for which the acquired business financial statements would be required; and

(iv) The seller has not maintained the distinct and separate accounts necessary to present financial statements that, absent this paragraph (e), would satisfy the requirements of this section and it is impracticable to prepare such financial statements.

(2) *Presentation requirements.*

(i) The balance sheet may be a statement of assets acquired and liabilities assumed;

(ii) The statement of comprehensive income must include expenses incurred by or on behalf of the acquired business during the pre-acquisition financial statement periods to be presented including, but not limited to, costs of sales or services, selling, distribution, marketing, general and administrative, depreciation and amortization, and research and development, but may otherwise omit corporate overhead expense, interest expense for debt that will not be assumed by the registrant or its subsidiaries consolidated, and income tax expense. The title of the statement of comprehensive income must be appropriately modified to indicate it omits certain expenses; and

(iii) The notes to the financial statements must include:

(A) A description of the type of omitted expenses and the reason(s) why they are excluded from the financial statements.

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(B) An explanation of the impracticability of preparing financial statements that include the omitted expenses.

(C) A description of how the financial statements presented are not indicative of the financial condition or results of operations of the acquired business going forward because of the omitted expenses.

(D) Information about the business's operating, investing and financing cash flows, to the extent available.

(f) *Financial statements of a business that includes oil and gas producing activities.*

(1) Disclosures about oil and gas producing activities must be provided for each full year of operations presented for an acquired or to be acquired business that includes significant oil- and gas-producing activities (as defined in the FASB ASC Master Glossary). The financial statements may present the disclosures in FASB ASC Topic 932 *Extractive Activities - Oil and Gas,* 932-235-50-3 through 50-11 and 932-235-50-29 through 50-36 as unaudited supplemental information. If prior year reserve studies were not made, they may be computed using only production and new discovery quantities and valuation, in which case there will be no "revision of prior estimates" amounts. Registrants may develop these disclosures based on a reserve study for the most recent year, computing the changes backward. The method of computation must be disclosed in a footnote.

(2) The financial statements prepared and audited in accordance with Regulation S-X may consist of only statements of revenues and expenses that exclude expenses not comparable to the proposed future operations such as depreciation, depletion and amortization, corporate overhead, income taxes, and interest for debt that will not be assumed by the registrant or its subsidiaries consolidated if:

(i) The acquisition generates substantially all of its revenues from *oil and gas producing activities* (as defined in § 210.4-10(a)(16)); and
(ii) The qualifying conditions specified in paragraph (e)(1) of this section are met.

(3) If the financial statements are presented in accordance with paragraph (f)(2) of this section, the disclosures specified in paragraph (e)(2)(iii) of this section must be provided.

10.3.10 Overview

Registrants frequently acquire a portion of an entity that is a business as defined in Rule 11-01(d) but does not constitute a separate entity, subsidiary, operating segment, or division. Examples are a product line, or a line of business contained in more than one subsidiary of the selling entity. [SEC Rel 33-10786 §II.A.3]

When a registrant acquires even a portion of an entity, S-X Rule 3-05 will apply if the acquisition is an acquisition of a 'business' (see chapter 2). If a business

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acquisition is significant, a registrant must provide the acquired business's historical financial statements required under Rule 3-05. Registrants may have the ability to provide abbreviated financial statements (as opposed to full financial statements) to comply with Rule 3-05, if certain conditions are met.

Question 10.3.10

What are the S-X Rule 3-05 requirements when substantially all of a parent entity's key operating assets are acquired in a significant acquisition?

Interpretive response: When a registrant acquires substantially all of the parent entity's key operating assets in a significant business combination, full audited financial statements of the entire entity are generally required to provide investors with a complete and comprehensive financial history of the acquired parent entity's business. [FRM 2065.1]

In these cases, when the historical financial statements of the acquired parent entity's business include the assets and liabilities that are not acquired/assumed, a registrant should adjust the pro forma financial information provided by eliminating those assets and liabilities to reflect only the business acquired. [FRM 2065.1]

Question 10.3.20

What form can the financial statements for a portion of a larger entity take when provided to comply with S-X Rule 3-05?

Interpretive response: The objective of financial statements for components of larger businesses is to present financial information reflecting the acquired component's operating history as if that business had operated on a stand-alone basis. Financial statements in these scenarios may take several forms to present this information and could consist of the following:

— carve-out special purpose financial statements (see section 10.3.20); or

— abbreviated financial statements when the Rule 3-05(e) conditions have been met. Abbreviated financial statements include statements of assets acquired and liabilities assumed and statements of comprehensive income of the acquired activities (see section 10.3.30).

Financial statements for the business component must meet the same period and age requirements under S-X-Rule 3-05 as full financial statements (see chapter 4). There are additional considerations related to providing abbreviated financial statements for acquisitions of oil and gas properties under Rule 3-05(e) (see section 10.3.40).

There may also be situations for which carve-out or abbreviated financial statements accepted under Rule 3-05(e) cannot be provided for the acquired business component (e.g. due to the inability to obtain or complete an audit, lack of records, etc.). In these instances, registrants would need to obtain a

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waiver from the SEC staff to provide an alternative form of financial information. See section 10.4 for discussion of waivers.

Question 10.3.30

What is considered when determining the appropriate form and content of financial statements when only a portion of an entity is acquired?

Interpretive response: The key to determining the appropriate form and content of the financial statements is to define the business being acquired (i.e. identify the operations and net assets to be acquired/assumed by the buyer). Other items to consider in determining the appropriate form and content of the financial statements are:

- the substance of the acquisition transaction;
- the intended purpose and use of the financial statements; and
- the availability of financial information of the acquired business.

Registrants also evaluate whether the financial statements for the portion of the entity acquired may have to comply with certain requirements beyond those of S-X Rule 3-05 for a business acquisition. The financial statements may also be required for other transactions or purposes, such as initial registration statements (e.g. Forms S-1 or F-1), private offerings under Rule 144A, spin-offs, split-offs, or sales of assets or a business that should be considered in determining the appropriate form and content. For example, when carve-out or abbreviated financial statements of an acquired business represent the financial statements of a registrant in an initial registration statement, the registrant must present full financial statements that comply with Reg S-X.

Question 10.3.40

How does a registrant determine significance when only a portion of an entity is acquired?

Interpretive response: If an acquired business was previously part of another larger entity, the registrant continues to determine significance as required by S-X Rule 3-05 (see chapter 3) and performs the significance tests using available financial information that is the closest possible equivalent to full financial statements. [S-X Rule 11-01(b)(3)(i)(A)]

Asset test

The asset test requires the registrant to compare its proportionate interest in the total assets of the acquired business with the registrant's total assets. When the only financial information available is less than full financial statements or are carve-out financial statements, the registrant compares the book value of the assets acquired to its total assets. [FRM 2065.9]

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Income test

The income test requires the comparison of income or loss from continuing operations before income taxes attributable to the controlling interests of the acquired business with the income of the registrant.

If the only financial information available is less than full financial statements or are carve-out financial statements, the SEC has indicated that a registrant should apply the income test in S-X Rule 1-02(w) as literally as possible by comparing revenues less direct costs of the acquired business (or other similar measure) to the registrant's income from continuing operations before income taxes (i.e. the normal denominator). The income test should also include the comparison of the proportionate share of revenue of the acquired business with the registrant's total revenue (i.e. the revenue component of the income test).

The registrant's income from continuing operations before income taxes should not be adjusted to exclude corporate overhead even though the revenues less direct costs of the acquired business excludes such indirect expenses. In circumstances in which an unreasonable answer results from literal application of the rule, registrants may seek relief from the SEC staff. See section 10.4 for discussion of waiver process. [FRM 2065.9, FRM 2020.7]

10.3.20 Carve-out financial statements

If it is impracticable to prepare the full financial statements of an acquired business as required by Reg S-X, the SEC staff will accept audited carve-out financial statements of the acquired business. The registrant's filing that includes the carve-out financial statements of the acquired business must explain the impracticability. [FRM 2065.3]

'Carve-out financial statements' is a generic term used to describe a special form of separate financial statements that are derived from the financial statements of a parent company. The SEC's rules do not directly address or define carve-out financial statements. However, they generally reflect all the assets and liabilities of the acquired business even if they are not acquired/assumed as part of the acquisition, and include a reasonable allocation of indirect costs like corporate overhead. This differentiates carve-out financial statements from abbreviated financial statements that are discussed further in section 10.3.30. [SEC Rel. 33-10786 (FN 1072), FRM 2065.3]

Question 10.3.50

When are carve-out financial statements appropriate?

Interpretive response: Carve-out financial statements may be appropriate when the acquired business represents a discrete activity for which assets and liabilities are specifically identifiable and a reasonable basis exists to allocate items not specifically identifiable to the acquired business, such as debt and indirect expenses not directly involved in the revenue producing activity. [FRM 2065.3]

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The SEC staff expects carve-out financial statements to comply with the guidance in SAB Topic 1.B.1, which relates to the allocation of expenses in the abbreviated financial statements (see Question 10.3.70). [FRM 2065.3]

Question 10.3.60

What is generally included in carve-out financial statements?

Interpretive response: Carve-out financial statements generally include a balance sheet, and statements of operations (through net income), cash flows, stockholders' equity (presented separately or in a note to the financial statements) and comprehensive income, and related notes. When carve-out financial statements are prepared and presented, a note to the financial statements must be provided to disclose the basis of presentation, the methods used for allocation, and any additional information necessary for investors. [SAB Topic 1.B.1 (Q 2)]

The appropriate level of carve-out financial statements to satisfy S-X Rule 3-05 depends on how the business being acquired is defined. For example, assume Registrant acquires all of the domestic operations of Company A's Product Z but Company A retains Product Z's international operations. In this case, Registrant may define the business acquired as the domestic operations and not include the operations, assets and liabilities related to the international operations in the financial statements prepared to satisfy S-X Rule 3-05, even though both the international and domestic operations were under common management at Company A.

Though this definition of the business is acceptable for purposes of complying with S-X Rule 3-05, it may not be appropriate if the financial statements will be used on a stand-alone basis as the financial statements of a registrant (e.g. in a spin-off of a business on Form 10 or an IPO). The legal form of a restructuring preceding an initial registration may affect the content of standalone carve-out financial statements in an initial registration statement.

For example, the contribution of capital stock of a legal entity to a Newco (with certain assets/liabilities/operations of that entity transferred out of the entity at or before the effective date of the related registration statement) may require all of the operations of the contributed legal entity to be included in the historical financial statements of the Newco's predecessor entity. Alternatively, the contribution of the business's net assets (as opposed to capital stock) that will be retained by Newco may allow the historical financial statements of the predecessor to be prepared on a carve-out basis reflecting only the contributed business. [Regs Comm 03/2015]

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Question 10.3.70

How are expenses allocated in carve-out financial statements, including taxes?

Interpretive response: When expenses are not specifically identifiable, the registrant allocates expenses based on reasonable assumptions to reflect all expenses of the acquired business in the carve-out financial statements. For example, this may be necessary when the previous owner of the acquired business did not specifically allocate all expenses incurred on behalf of the business, division, product line, etc. due to the way the business was managed as part of the larger entity. The SEC staff expects the carve-out financial statements to comply with SAB Topic 1.B.1, which includes the following guidance.

Excerpt from SAB 1.B

Allocation Of Expenses And Related Disclosure In Financial Statements Of Subsidiaries, Divisions Or Lesser Business Components Of Another Entity

Facts: A company (the registrant) operates as a subsidiary of another company (parent). Certain expenses incurred by the parent on behalf of the subsidiary have not been charged to the subsidiary in the past. The subsidiary files a registration statement under the Securities Act of 1933 in connection with an initial public offering.

1. Costs reflected in historical financial statements

Question 1: Should the subsidiary's historical income statements reflect all of the expenses that the parent incurred on its behalf?

Interpretive Response: In general, the staff believes that the historical income statements of a registrant should reflect all of its costs of doing business. Therefore, in specific situations, the staff has required the subsidiary to revise its financial statements to include certain expenses incurred by the parent on its behalf. Examples of such expenses may include, but are not necessarily limited to, the following (income taxes and interest are discussed separately below):

1. Officer and employee salaries,
2. Rent or depreciation,
3. Advertising,
4. Accounting and legal services, and
5. Other selling, general and administrative expenses.

When the subsidiary's financial statements have been previously reported on by independent accountants and have been used other than for internal purposes, the staff has accepted a presentation that shows income before tax as previously reported, followed by adjustments for expenses not previously allocated, income taxes, and adjusted net income.

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Question 2: How should the amount of expenses incurred on the subsidiary's behalf by its parent be determined, and what disclosure is required in the financial statements?

Interpretive Response: The staff expects any expenses clearly applicable to the subsidiary to be reflected in its income statements. However, the staff understands that in some situations a reasonable method of allocating common expenses to the subsidiary (e.g., incremental or proportional cost allocation) must be chosen because specific identification of expenses is not practicable. In these situations, the staff has required an explanation of the allocation method used in the notes to the financial statements along with management's assertion that the method used is reasonable.

In addition, since agreements with related parties are by definition not at arm's length and may be changed at any time, the staff has required footnote disclosure, when practicable, of management's estimate of what the expenses (other than income taxes and interest discussed separately below) would have been on a stand alone basis, that is, the cost that would have been incurred if the subsidiary had operated as an unaffiliated entity. The disclosure has been presented for each year for which an income statement was required when such basis produced materially different results.

Question 3: What are the staff's views with respect to the accounting for and disclosure of the subsidiary's income tax expense?

Interpretive Response: Recently, a number of parent companies have sold interests in subsidiaries, but have retained sufficient ownership interests to permit continued inclusion of the subsidiaries in their consolidated tax returns. The staff believes that it is material to investors to know what the effect on income would have been if the registrant had not been eligible to be included in a consolidated income tax return with its parent. Some of these subsidiaries have calculated their tax provision on the separate return basis, which the staff believes is the preferable method. Others, however, have used different allocation methods. When the historical income statements in the filing do not reflect the tax provision on the separate return basis, the staff has required a pro forma income statement for the most recent year and interim period reflecting a tax provision calculated on the separate return basis.1

Question 4: Should the historical income statements reflect a charge for interest on intercompany debt if no such charge had been previously provided?

Interpretive Response: The staff generally believes that financial statements are more useful to investors if they reflect all costs of doing business, including interest costs. Because of the inherent difficulty in distinguishing the elements of a subsidiary's capital structure, the staff has not insisted that the historical income statements include an interest charge on intercompany debt if such a charge was not provided in the past, except when debt specifically related to the operations of the subsidiary and previously carried on the parent's books will henceforth be recorded in the subsidiary's books. In any case, financing arrangements with the parent must be discussed in a note to the financial statements. In this connection, the staff has taken the position that, where an interest charge on intercompany debt has not been provided, appropriate disclosure would include an analysis of the intercompany accounts as well as the average balance due to or from related parties for each period for which an income statement is required. The analysis of the intercompany accounts has

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taken the form of a listing of transactions (e.g., the allocation of costs to the subsidiary, intercompany purchases, and cash transfers between entities) for each period for which an income statement was required, reconciled to the intercompany accounts reflected in the balance sheets.

Although SAB Topic 1.B requires a reasonable estimate of expenses incurred on behalf of a subsidiary (or business component) to be reflected in the audited financial statements, alterations of actual amounts based on expected future results is not permitted in the audited historical financial statements.

Because the transactions reported in carve-out financial statements have income tax implications, the SEC staff has indicated that carve-out financial statements should reflect income tax expense and deferred tax assets/liabilities attributable to the carved-out entity. If the carved-out entity did not file separate tax returns, the registrant should reflect an adjustment in the pro forma financial information to include the effect of income taxes as if the carved-out entity were included in a consolidated tax return with its parent or on a separate reporting basis, if appropriate. [SAB Topic 1.B]

10.3.30 Abbreviated financial statements under S-X Rule 3-05(e)

A registrant may present audited abbreviated financial statements for an acquired business when:

- it is not practicable to provide full financial statements or carve-out financial statements of the acquired business; and
- the conditions in Question 10.3.80 are met.

The audited abbreviated financial statements consist of statements of assets acquired and liabilities assumed and statements of comprehensive income. [Rule 3-05(e)(2)]

Unlike full financial statements or carve-out financial statements, these statements will not include all of the indirect costs (e.g. overhead) of operating the business but will include the expenses incurred by or on behalf of the acquired business during the pre-acquisition periods. If any expenses are omitted, the title of the statement of comprehensive income must be modified. To the extent available, information about the acquired business's operating, investing and financing cash flows is provided in a note to the abbreviated financial statements or in unaudited supplemental disclosures. [S-X Rule 3-05(e)(2)(ii)-(iii)]

Question 10.3.80

When can a registrant provide abbreviated financial statements under Rule 3-05(e)?

Interpretive response: To provide abbreviated financial statements, all of the following conditions must be met. [S-X Rule 3-05(e)(1)(i)-(iv)]

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— The total assets and total revenues of the acquired business are 20% or less of the total assets and total revenues of the seller and its consolidated subsidiaries as of and for the most recently completed fiscal year.

— The acquired business was not a separate entity, subsidiary, operating segment or division during the periods required to be presented.

— Separate financial statements for the acquired business have not been prepared.

— The seller did not maintain the distinct and separate accounts necessary to present financial statements that include the omitted expenses.

— It is impracticable to prepare such separate financial statements.

If all of these conditions are met, the registrant may present audited abbreviated financial statements without requesting relief from the SEC staff. Although it is not required, registrants may still consult with the SEC staff to obtain concurrence prior to filing abbreviated financial statements.

There are additional considerations if the acquired business is an oil and gas property (see Questions 10.3.130 and 10.3.140).

Question 10.3.90

Does the acquirer need to determine whether the acquired business would have been an operating segment as if the seller was a public company?

Background: As discussed in Question 10.3.80, one of the conditions to provide abbreviated financial statements is that the acquired business was not a separate operating segment during the periods for which the acquired business financial statements would be required. A private company is not required to present segment information in its financial statements under Topic 280.

Interpretive response: Yes, the SEC staff has commented that the conditions regarding abbreviated financial statements apply to all acquired businesses, regardless of whether they were PBEs or private companies. Therefore, a registrant may have to evaluate whether the acquired business would have qualified as an operating segment under Topic 280, if relevant. [2020 AICPA Conf]

Question 10.3.100

What is the form and content of abbreviated financial statements under Rule 3-05(e)?

Interpretive response: If abbreviated financial statements are permitted under Rule 3-05(e), the following presentation principles apply. [S-X Rule 3-05(e)(2)(i)-(ii)]

— The balance sheet may be a statement of assets acquired and liabilities assumed.

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— The statement of comprehensive income must include expenses incurred by, or on behalf of, the acquired business during the pre-acquisition financial statement periods to be presented. The Rule outlines certain expenses that should be included, and notes other expenses that a registrant could omit in the abbreviated financial statements. [S-X 3-5(e)(2)(ii)]

Expenses to be included	Expenses that may be omitted
Cost of sales and services	Corporate overhead expense
Selling, distribution and marketing	Interest expense for debt that will not be assumed by the registrant
General and administrative	Income tax expense
Depreciation and amortization	
Research and development	

If certain expenses are omitted (i.e. if a statement of revenue and direct expenses is provided), the title of the statement of comprehensive income must be adjusted to reflect that it omits certain expenses. [S-X 3-5(e)(2)(ii)]

In addition, the notes of the abbreviated financial statements must include the following: [S-X 3-5(e)(2)(iii)]

— a description of the type of omitted expenses and the rationale for why they are excluded;

— an explanation of impracticability of preparing financial statements that include those omitted expenses;

— a description of how the financial statements presented are not indicative of the financial condition or results of operations of the acquired business going forward because of the omitted expenses; and

— information about the business's operating, investing and financing cash flows, to the extent available.

Question 10.3.110

Is it possible to provide abbreviated financial statements when the conditions of Rule 3-05(e) have not been met?

Interpretive response: It depends. If a registrant obtains a waiver from the SEC staff, it may be able provide:

— abbreviated financial statements when the qualifying conditions of Rule 3-05(e) are not met (see Question 10.3.80); or
— another form of abbreviated financial statements that is deemed more appropriate for the acquisition.

See waiver discussion in section 10.4.

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Example 10.3.10
Product line

Registrant produces a wide range of prescription pharmaceuticals. It acquires the license to manufacture Hearthrob, a medication that has been on the market since 20X4, from Company A. Company A previously sold and marketed Hearthrob through a shared sales force and marketing department with other product lines not being licensed to Registrant.

The acquisition includes the patents, licenses, manufacturing approvals, customer lists, vendor lists, a trade name, worldwide marketing rights and trademarks. The acquisition does not include manufacturing facilities, employees, inventory or any tangible assets. Registrant will manufacture Hearthrob at its existing manufacturing facilities and market the product through its existing sales force.

Assuming the qualifying conditions in Question 10.3.80 are met, a statement of revenues and direct expenses may be provided. The statement of revenues and direct expenses for the Hearthrob product line must include sales and marketing costs directly associated with producing Hearthrob revenues. In this case, Company A's sales and marketing costs must be allocated on a reasonable basis to the Hearthrob product line.

If the qualifying conditions in Question 10.3.80 are not met, the registrant could request a waiver to provide a statement of revenues and direct expenses from the SEC staff. If the SEC objects to the waiver request, the registrant would need to provide full Rule 3-05 financial statements.

Example 10.3.20
Statements of assets acquired and liabilities assumed together with statements of operations

Company A, an operator of diverse hotel and resort facilities, owns Target, an all-seasons vacation resort that includes golf and tennis courts, swimming pools, and an area for skiing. Ancillary to the recreational facilities are retail stores consisting of pro shops, gift shops, and restaurants (which represent less than 20% of the revenues and assets of Company A). The results of operating the resort facilities, retail shops, and restaurants are reported as a single business unit of Company A.

Registrant, a large corporation with diversified retail and restaurant activities, is acquiring the retail shop and restaurants but not the operations of the resort facilities. The acquisition consists of assuming leases on the stores and restaurants together with all inventory, operating equipment, licenses, trade names, and customer and vendor relationships.

Receivables and trade payables will not be assumed but are minimal to the operations. No employees will be retained and none of the previous management will be carried over in the acquired business. No other liabilities will be assumed. Most of the cost of the acquisition will be allocated to business rights and goodwill.

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Carve-out financial statements are considered impracticable because the operations were conducted as an integrated unit by a management group that will be restructured to continue management of the resort operations only. Registrant will hire all new employees to operate and manage the pro and gift shops and restaurants. Company A is able to identify the revenues, costs of sales, salaries, depreciation, utilities, maintenance, and store management expenses of the retail stores and restaurants; however, separate financial statements for the retail stores and restaurants have never been prepared nor has Company A maintained separate accounts for this portion of the business. In addition to taxes (other than employment-related taxes), corporate overhead, general marketing and financing expense cannot be reasonably allocated because the costs were incurred at the Company A level and were never allocated to operating units.

Assuming the conditions in Question 10.3.80 are met, statements of assets acquired and liabilities assumed, as well as statements of operations reflecting the operations of the retail stores and restaurants (excluding corporate expenses for which there is no reasonable allocation methodology) may be provided together with pro forma financial information that includes factually supportable adjustments for the acquired operations.

Question 10.3.120

What periods are required when presenting a statement of assets acquired and liabilities assumed?

Interpretive response: Audited statements of assets acquired and liabilities assumed are to be presented as of the end of each period required under S-X Rule 3-05, on the basis of the seller's historical GAAP carrying value. If the registrant is unable to obtain these statements prepared on the basis of the seller's historical GAAP carrying value for each of the reporting dates required under S-X Rule 3-05, the SEC staff (CF-OCA) will consider a registrant's request to present a statement of assets and liabilities prepared on the basis of the allocation of the registrant's purchase price as of the acquisition date. The registrant would still need to present the statement of revenues and direct expenses for the periods indicated by S-X Rule 3-05. [FRM 2065.5]

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10.3.40 Abbreviated financial statements for acquisitions of oil and gas properties

Question 10.3.130

When can a registrant that acquires an oil and gas property provide abbreviated financial statements?

Interpretive response: Consistent with Question 10.3.80, a registrant can provide abbreviated financial statements if it acquires less than substantially all of the assets and liabilities of an oil and gas property. The abbreviated financial statements may consist of only audited statements of revenues and expenses if: [S-X Rule 3-05(f)]

- substantially all of the revenue of the acquired business is generated from oil-and-gas-producing activities; and
- the qualifying conditions for abbreviated financial statements noted in Questions 10.3.80 have been met.

Question 10.3.140

What must be included in the abbreviated financial statements of an acquired oil and gas property?

Interpretive response: If a registrant provides abbreviated financial statements for an acquisition of an oil and gas property, it: [S-X Rule 3-05(f)]

- may omit the statement of assets acquired and liabilities assumed if the business acquired consists solely of interest(s) in one or more oil or natural gas properties (e.g. working interests, net profit interests, etc.);
- must include the supplementary disclosures described in Topic 932 (oil and gas), which may be presented as unaudited supplementary information for each full year of operations presented for the acquired property; and
- must include the disclosures required as part of S-X Rule 3-05(e)(2)(iii) in the notes to the financial statements.

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10.4 Inability to comply with financial statement requirements

Excerpt from S-X Rule 3-13

Filing of other financial statements in certain cases.

The Commission may, upon the informal written request of the registrant, and where consistent with the protection of investors, permit the omission of one or more of the financial statements herein required or the filing in substitution therefor of appropriate statements of comparable character. The Commission may also by informal written notice require the filing of other financial statements in addition to, or in substitution for, the statements herein required in any case where such statements are necessary or appropriate for an adequate presentation of the financial condition of any person whose financial statements are required, or whose statements are otherwise necessary for the protection of investors.1

In connection with the acquisition of a significant business, it may be impossible to obtain audited financial statements of the acquired entity for some or all of the periods required by S-X Rule 3-05. This may be the result of the auditors' refusal to issue a report or consent, circumstances of the acquisition (e.g. purchase of a company out of bankruptcy or from debtor's estate), or the absence of record keeping and/or the inability to perform timely audit procedures (e.g. lack of physical inventory observation).

In addition, there are circumstances when complying with the Rule could involve 'unreasonable expense and effort' on the part of the registrant, and therefore it may not make sense for the registrant to comply.

In these situations, registrants may ask the SEC staff to waive requirements for certain financial statements. Governed by S-X Rule 3-13, the waiver process is based on the specific facts and circumstances.

Question 10.4.10

What is the extent of the SEC staff's ability to waive S-X Rule 3-05 requirements?

Interpretive response: The SEC staff has the delegated authority to permit registrants to omit, or substitute for, required financial statements when the waiver is consistent with investor protection. It implements this authority through the waiver process described in S-X Rule 3-13. [FRM Comm CF-OCA]

For example, the waiver process may be used:

— to provide a statement of revenue and direct expenses in lieu of full financial statements for a recently acquired business;

— to omit one or more years of historical financial statements for a recently acquired business; or

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— to provide audited financial statements for a shorter time than is required under S-X Rule 3-05.

The SEC may grant a waiver request if a registrant can show good cause that the waiver should be granted. Each waiver request is reviewed by SEC staff to ensure that investors are receiving meaningful and useful information and that the registrant can appropriately and legally engage in certain activities.

Generally, the SEC staff will not waive the requirement for auditors' reports, audited financial statements or timely filing of the S-X Rule 3-05 financial statements. In addition, while S-X Rule 3-13 allows the staff to waive the financial statement requirements under Reg S-X, the staff does not have the delegated authority to waive the Form 8-K requirement. For example, even if the SEC staff allows a registrant to omit financial statements of an acquired entity that is significant under S-X Rule 3-05, the registrant is still required to file an Item 2.01 Form 8-K for the acquisition. [Reg Comm 3/2019]

No action

If a registrant is unable to comply with S-X Rule 3-05 for an issue that cannot be resolved through an omission or substitution, it can request that the SEC staff issue a no action letter. The SEC staff may agree not to recommend action against a registrant solely as a result of noncompliance with the audited financial statement requirements, provided that the inability to comply cannot be corrected (see Question 10.4.20).

Question 10.4.20

If a registrant cannot comply with S-X Rule 3-05 requirements, what action can it take?

Interpretive response: If a registrant is unable to meet its information filing requirements, it is recommended that a letter be directed to the SEC staff to request a waiver to omit or provide alternative financial information or that it take no action solely as a result of the noncompliance.

The letter should include sufficient facts about the hardship associated with compliance so that the SEC staff is able to make a reasonable conclusion whether to grant relief.

The SEC staff has encouraged registrants to include the following items in waiver requests: [2022 AICPA Conf]

— all relevant facts and circumstances including the key terms of the transaction and how it affects the company;

— results of all three significance tests and why the significance tests are not reflective of the relative size of the acquisition;

— registrant's reasoning why the information subject to the waiver is not necessary for the protection of investors; and

— an explanation of other disclosures that are being provided or will be provided to investors to convey the necessary information about the transaction.

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The registrant should provide a quantification of the estimated expense of compliance if expense is a factor in the consideration of the noncompliance. The SEC staff will consider whether the cost of obtaining audited financial statements creates an unreasonable expense or effort that outweighs the benefits provided.

The SEC FRM includes the names of the staff members to contact to request relief under Rule 3-13. [FRM Comm CF-OCA]

Question 10.4.30

What is 'unreasonable expense and effort' when the SEC staff considers waiver requests?

Interpretive response: There is no published guidance concerning circumstances that constitute 'unreasonable burden or expense'. The SEC staff determines what constitutes unreasonable on a case-by-case basis.

Factors that may be considered in determining whether cost is unreasonable include:

- relative significance of the acquisition;
- circumstances causing the inability to obtain audited financial statements;
- financial and other costs of compliance; and
- the ability to provide other meaningful information.

Example 10.4.10

Waiver request letter

In May 20X8, Registrant, with a calendar year-end, acquires Company A out of a bankruptcy. Company A had been in bankruptcy for more than two years and had not prepared US GAAP financial statements throughout that period. Management had been terminated and an audit was impossible due to the inability to obtain a management representation letter.

Significance under the investment test was 24%. As a result of the inability to obtain US GAAP financial statements for pre-acquisition periods, the significance tests for assets and income could only be estimated. Registrant estimates the results of the asset and income tests would be in the same range as the investment test.

Registrant is planning a public offering of equity securities in April 20X9. Post-acquisition results of Company A have been included in Registrant's audited financial statements for eight months of the 20X8 fiscal year. Company A was operated as an autonomous business post-acquisition with breakeven operations for 20X8. On written request, the SEC staff may accept the post-acquisition results of Company A in satisfaction of the requirement for financial statements of Company A.

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Question 10.4.40

Will the SEC staff waive S-X Rule 3-05 requirements if an auditor is unwilling or unable to provide a report or consent?

Background: As part of complying with S-X Rule 3-05, a registrant is required to provide audited financial statements of significant acquired businesses, which necessitates obtaining audit reports and accountants' consents from the auditors of the acquired business.

Occasionally, an auditor who previously has issued a report on the financial statements of an acquired business may be unwilling or unable to reissue a report or provide a consent to the report being included in filings with the SEC. The auditor's refusal may be the result of disputes over unpaid fees, unresolved issues in connection with the purchase itself (such as disputes over assets and liabilities that were the subject of the earlier audits), inability to get updated management representation letters (where management was terminated in connection with the acquisition), subsequent events such as default or bankruptcy, or other events that make the *down-to-date* review difficult or risky.

Interpretive response: It depends. In most cases, the SEC will not waive the requirement for audited financial statements, regardless of the hardship. The SEC staff believes investors derive significant benefit from the audit of financial statements and will not waive that protection of investors. As a result, 1933 Act registration statements must include audit reports and consents for all required financial statements and periods.

In rare circumstances, the SEC staff may grant a waiver (such as in hostile takeovers where a consent cannot be obtained). If circumstances change, the registration statement should be amended to include the audited financial statements and auditor's consent. [FRM 4810.1, FRM 4810.5]

Question 10.4.50

What is the effect of not being able to provide an audit report?

Interpretive response: The SEC staff generally will not take enforcement action against a registrant that cannot provide or obtain an audit report on an acquired entity's financial statements when the impossibility is beyond the registrant's control.

However, this no action position does not give the registrant the ability to proceed with securities offerings. Therefore, a critically important aspect of the due diligence process in an acquisition is to ensure that the registrant will be able to obtain the audited financial statements needed to satisfy the requirements of S-X Rule 3-05. This includes obtaining assurance that the auditors of the acquired business will be willing and able to continue to provide reports and consents as needed for future registration statements.

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Question 10.4.60

Can a registrant obtain a new auditor to issue a report, if the previous auditor is unwilling?

Interpretive response: Yes, a registrant can retain a new auditor and have the necessary periods reaudited. However, reaudit may be impossible if there has been a change in management. In addition, the cost and delay of reaudit are frequently prohibitive if a registrant is trying to get to market within a given window of time or needs to meet the timely filing requirements for Form 8-K.

Question 10.4.70

What is the impact to a registrant's future S-3 registration statements if S-X Rule 3-05 financial statements are not filed timely?

Background: To be eligible to use Form S-3, a registrant must meet the requirements of Item I.A.3. to the Form's General Instructions, which requires that all the registrant's required filings have been filed timely for at least 12 months before the filing on Form S-3. For purposes of the eligibility requirements, a calendar month begins on the first day of the month and ends on the last day of that month. Therefore, if a registrant has missed a due date during the month, it would be eligible to use Form S-3 on the first day of the subsequent calendar month a year later. [C&DI 115.06]

Interpretive response: A filing made by the due date is not considered to be timely filed if it is materially deficient. For example, a Form 8-K is considered materially deficient if the required Rule 3-05 financial statements are not filed within the 71-day extension period. This is true even if the registrant receives a no action letter from the SEC.

When a registrant has received a no action letter for a Form 8-K filing of a significant acquired business, no registration statement may be declared effective until audited financial statements of the significant acquired business are provided for a time span equal to the periods required by S-X Rule 3-05. In other words, even if the registrant reestablishes its Form S-3 eligibility (after timely filing all 1934 Act documents in the previous 12-month period) it may not be able at that point to satisfy the financial statement requirements of a registration statement.

However, the timely filing requirement is considered met if the SEC has provided a Rule 3-13 waiver to permit audited financial statements for fewer periods than required by S-X Rule 3-05 and those financial statements are timely filed.

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Example 10.4.20
Form S-3 eligibility

Scenario 1: Ineligible to file Form S-3

Registrant's acquisition of Company A on November 1, 20X8 is significant at 65%. Registrant files a Form 8-K on November 8, 20X8, which is past the four business-day due date. Registrant files the two years of audited financial statements of Company A required by S-X Rule 3-05 on an amended Form 8-K on January 1, 20X9.

Registrant is ineligible to file a registration statement on Form S-3 until it has filed all information required by the SEC in a timely manner for 12 months. As a result, based on the Form 8-K due date of November 5, 20X8, Registrant would first be eligible to use Form S-3 on December 1, 20X9 (assuming future filings are timely and other eligibility criteria are met). [C&DI 115.06]

Scenario 2: Ineligible to file Form S-3 with no action letter

Registrant's acquisition of Company A on November 1, 20X8 is significant at 85%. Registrant files a Form 8-K on November 8, 20X8, which is past the four business-day due date.

Registrant is unable to obtain the two years of audited financial statements of Company A required by S-X Rule 3-05. However, registrant is able to provide audited financial statements of Company A for the year ended December 31, 20X7, which it files on an amended Form 8-K on January 1, 20X9. Registrant receives a no action letter from the SEC for the deficient Form 8-K/A filing.

Registrant is ineligible to file a registration statement on Form S-3 until it has filed all information required by the SEC in a timely manner for 12 months (approximately until December 20X9).

However, even if Registrant becomes S-3 eligible, the SEC will not declare any registration statement requiring Rule 3-05 financial statements effective until either:

- a total of two years of audited financial results of Company A are on file; or
- the post-acquisition results of Company A have been included in Registrant's audited consolidated financial statements for at least 12 months (i.e. when the December 31, 20X9 audited consolidated financial statements are filed).

Scenario 3: Eligible to file Form S-3 with waiver

Registrant's acquisition of Company A on June 1, 20X9 is significant at 42%. Registrant files a Form 8-K reporting the acquisition on June 4, 20X9. Company A's audited financial statements for the year ended December 31, 20X8 are available but audited financial statements for the year ended December 31, 20X7 are not available without unreasonable expense and effort.

Registrant requests in writing and receives from the SEC staff permission to provide audited financial statements for only the year ended December 31, 20X8 in satisfaction of the S-X Rule 3-05 audited financial statement requirement. As long as those audited financial statements are filed on an amended Form 8-K within four business days plus 71 calendar days of

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consummation of the acquisition, registrant will be considered a timely filer for this transaction.

Question 10.4.80

Will the SEC provide a waiver if a registrant cannot comply with S-X Rule 3-05 due to an acquisition of a troubled financial institution?

Interpretive response: If a financial institution is acquired in a federally assisted transaction and constitutes a business having material continuity of operations, the SEC staff will likely waive the requirements of S-X Rule 3-05 if audited financial statements are not reasonably available. The SEC staff has provided guidance for such waivers in SAB Topic 1.K (excerpted below). Requests for waivers should be directed to the SEC staff (CF-OCA). If a waiver is granted, an audited statement of assets acquired and liabilities assumed reflecting the purchase basis of accounting as of the acquisition date will be required, as well as Industry Guide 3 (now codified in Subpart 1400 of Reg S-K) data and various additional disclosures. [FRM 2055.3]

Excerpt from SAB 1.K

Financial Statements Of Acquired Troubled Financial Institutions

Facts: Federally insured depository institutions are subject to regulatory oversight by various federal agencies including the Federal Reserve, Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation and Office of Thrift Supervision. During the 1980s, certain of these institutions experienced significant financial difficulties resulting in their inability to meet necessary capital and other regulatory requirements. The Financial Institutions Reform, Recovery and Enforcement Act of 1989 was adopted to address various issues affecting this industry.

Many troubled institutions have merged into stronger institutions or reduced the scale of their operations through the sale of branches and other assets pursuant to recommendation or directives of the regulatory agencies. In other situations, institutions that were taken over by or operated under the management of a federal regulator have been reorganized, sold or transferred by that federal agency to financial and nonfinancial companies.

A number of registrants have acquired, or are contemplating acquisition of, these troubled financial institutions. Complete audited financial statements of the institutions for the periods necessary to comply fully with Rule 3-05 of Regulation S-X may not be reasonably available in some cases. Some troubled institutions have never obtained an audit while others have been operated under receivership by regulators for a significant period without audit. Auditors' reports on the financial statements of some of these acquirees may not satisfy the requirements of Rule 2-02 of Regulation S-X because they contain qualifications due to audit scope limitations or disclaim an opinion.

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A registrant that acquires a troubled financial institution for which complete audited financial statements are not reasonably available may be precluded from raising capital through a public offering of securities for up to three years following the acquisition because of the inability to comply with Rule 3-05.

Question 1: Are there circumstances under which the staff would conclude that financial statements of an acquired troubled financial institution are not required by Rule 3-05?

Interpretive Response: Yes. In some case, financial statements will not be required because there is not sufficient continuity of the acquired entity's operations prior to and after the acquisition, so that disclosure of prior financial information is material to an understanding of future operations, as discussed in Rule 11-01 of Regulation S-X. For example, such a circumstance may exist in the case of an acquisition solely of the physical facilities of a banking branch with assumption of the related deposits if neither income-producing assets (other than treasury bills and similar low-risk investment) nor the management responsible for its historical investment and lending activities transfer with the branch to the registrant. In this and other circumstances, where the registrant can persuasively demonstrate that continuity of operations is substantially lacking and a representation to this effect is included in the filing, the staff will not object to the omission of financial statements. However, applicable disclosures specified by Industry Guide 3, Article 11 of Regulation S-X (pro forma information), and other information which is descriptive of the transaction and of the assets acquired and liabilities assumed should be furnished to the extent reasonably available.

Question 2: If the acquired financial institution is found to constitute a business having material continuity of operations after the transaction, are there circumstances in which the staff will waive the requirements of Rule 3-05?

Interpretive Response: Yes. The staff believes the circumstances surrounding the present restructuring of U.S. depository institutions are unique. Accordingly, the staff has identified situations in which it will grant a waiver of the requirements of Rule 3-05 of Regulation S-X to the extent that audited financial statements are not reasonably available.

For purposes of this waiver a "troubled financial institution" is one which either:

1. Is in receivership, conservatorship or is otherwise operating under a similar supervisory agreement with a federal financial regulatory agency; or
2. Is controlled by a federal regulatory agency; or
3. Is acquired in a federally assisted transaction.

A registrant that acquires a troubled financial institution that is deemed significant pursuant to Rule 3-05 may omit audited financial statements of the acquired entity, if such statements are not reasonably available and the total acquired assets of the troubled institution do not exceed 20% of the registrant's assets before giving effect to the acquisition. The staff will consider requests for waivers in situations involving more significant acquisitions, where federal financial assistance or guarantees are an essential part of the transaction, or where the nature and magnitude of federal

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assistance is so pervasive as to substantially reduce the relevance of such information to an assessment of future operations. Where financial statements are waived, disclosure concerning the acquired business as outlined in response to Question 3 must be furnished.

Question 3: Where historical financial statements meeting the requirements of Rule 3-05 of Regulation S-X are waived, what financial statements and other disclosures would the staff expect to be provided in filings with the Commission?

Interpretive Response: Where complete audited historical financial statements of a significant acquiree that is a troubled financial institution are not provided, the staff would expect filings to include an audited statement of assets acquired and liabilities assumed if the acquisition is not already reflected in the registrant's most recent audited balance sheet at the time the filing is made. Where reasonably available, unaudited statement of operations and cash flows that are prepared in accordance with GAAP and otherwise comply with Regulation S-X should be filed in lieu of any audited financial statements which are not provided if historical information may be relevant.

In all cases where a registrant succeeds to assets and/or liabilities of a troubled financial institution which are significant to the registrant pursuant to the tests in Rule 1-02(w) of Regulation S-X, narrative description should be required, quantified to the extent practicable, of the anticipated effects of the acquisition on the registrant's financial condition, liquidity, capital resources and operating results. If federal financial assistance (including any commitments, agreements or understandings made with respect to capital, accounting or other forbearances) may be material, the limits, conditions and other variables affecting its availability should be disclosed, along with an analysis of its likely short term and long term effects on cash flows and reported results.

If the transaction will result in the recognition of any significant intangibles that cannot be separately sold, such as goodwill or a core deposit intangible, the discussion of the transaction should describe the amount of such intangibles, the necessarily subjective nature of the estimation of the life (in the case of intangibles subject to amortization) and value of such intangibles, and the effects upon future results of operations, liquidity and capital resources, including any consequences if a recognized intangible will be excluded from the calculation of capital for regulatory purposes. The discussion of the impact on future operations should specifically address the period over which intangibles subject to amortization will be amortized and the period over which any discounts on acquired assets will be taken into income. If amortization of intangibles subject to amortization will be over a period which differs from the period over which income from discounts on acquired assets will be recognized (whether from amortization of discounts or sale of discounted assets), disclosure should be provided concerning the disparate effects of the amortization and income recognition on operating results for all affected periods.

Information specified by Industry Guide 3 should be furnished to the extent applicable and reasonably available. For the categories identified in the Industry Guide, the registrant should disclose the fair value of loans and investments acquired, as well as their principal amount and average contractual yield and term. Amounts of acquired investments, loans, or other assets that are

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nonaccrual, past due or restructured, or for which other collectibility problems are indicated should be disclosed. Where historical financial statements of the acquired entity are furnished, pro forma information presented pursuant to Rule 11-02 should be supplemented as necessary with a discussion of the likely effects of any federal assistance and changes in operations subsequent to the acquisition. To the extent historical financial statements meeting all the requirements of Rule 3-05 are not furnished, the filing should include an explanation of the basis for their omission.

Question 4: If an audited statement of assets acquired and liabilities assumed is required, but certain of the assets conveyed in the transaction are subject to rights allowing the registrant to put the assets back to the seller upon completion of a due diligence review, will the staff grant an extension of time for filing the required financial statement until the put period lapses?

Interpretive Response: If it is impracticable to provide an audited statement at the time the Form 8-K reporting the transaction is filed, an extension of time is available under certain circumstances. Specifically, if more than 25% of the acquired assets may be put and the put period does not exceed 120 days, the registrant should timely file a statement of assets acquired and liabilities assumed on an unaudited basis with full disclosure of the terms and amounts of the put arrangement. Within 21 days after the put period lapses, the registrant should furnish an audited statement of assets acquired and liabilities assumed unless the effects of the transaction are already reflected in an audited balance sheet which has been filed with the Commission. However, until the audited financial statement has been filed, certain offerings under the Securities Act of 1933 would be prevented, as described in the instructions to Item 9.01 of Form 8-K.

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Index of changes

This index lists the significant additions and changes made in this edition to assist you in locating recently added or updated content. New Questions and Examples added in this edition are identified throughout the Handbook with **, and items that have been significantly updated or revised are identified with #.

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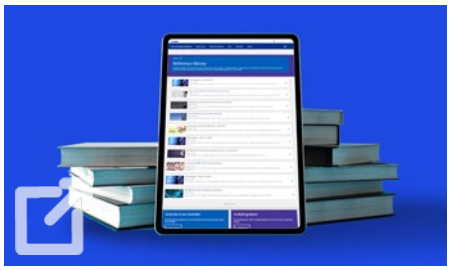

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