This is a commercial communication from Hogan Lovells. See note below.

SEC amends rules on financial reporting of business acquisitions and dispositions

The SEC recently adopted comprehensive amendments to its rules that govern financial statement requirements for acquisitions or dispositions of significant businesses or other assets. The rules specify the historical financial statements of the business or assets and the related pro forma financial information a registrant must include in its Exchange Act and Securities Act filings. Registrants will first be required to comply with the amended rules at the beginning of their fiscal year commencing after December 31, 2020.

The amended rules update tests for measuring the "significance" of an acquired business to limit the over-identification of acquisitions as material to a registrant. Some of the rule changes substantially conform significance testing for disposed businesses to testing for acquired businesses, while others align the financial statement requirements for acquisitions of real estate operations with those applicable to other types of acquired businesses. In addition to enhancing consistency in financial reporting, the amendments reduce some financial statement filing burdens and, consistent with the SEC's disclosure effectiveness initiative, clarify and codify many requirements that previously had developed in market practice or been articulated in SEC staff guidance.

The SEC's 267-page adopting release for the amended rules (Release No. 33-10786) can be viewed here.

Background

Under the current rules, a registrant that acquires a "business" (as defined in the rules), other than a real estate operation, is required to file historical financial statements of the business if it qualifies as a "significant subsidiary" under any one of the following three tests. As they are now labeled in the amendments, the significance tests consist of:

- the "*Investment Test*," which measures the registrant's and its other subsidiaries' investments in and advances to the acquired business as a percentage of the registrant's total consolidated assets;
- the "*Asset Test*," which measures the registrant's and its other subsidiaries' proportionate share of the acquired business's total assets as a percentage of the registrant's total consolidated assets; and
- the "*Income Test*," which measures the registrant's and its other subsidiaries' equity in the income from continuing operations of the acquired business before income taxes as a percentage of the registrant's consolidated income from continuing operations before income taxes.

The tests are used to determine the number of fiscal years of the acquired business's audited financial statements, if any, the registrant must file (a) under Form 8-K, after consummation of the acquisition, and (b) in registration statements and proxy statements, after consummation of the acquisition or, in some circumstances, before consummation if the acquisition is "probable" under the rules. If an acquired business is significant, the registrant also is required to file unaudited pre-acquisition financial statements of the acquired business for interim periods.

The rules use a sliding-scale approach to acquired business financial statement requirements that is intended to reflect the materiality of the business's future impact on the registrant. Once any one of the three significance levels exceeds 20 percent, the registrant currently is required to file audited financial statements:

- for the most recent fiscal year of the acquired business, if any significance level exceeds 20 percent, but none exceeds 40 percent;

- for the two most recent fiscal years, if any significance level exceeds 40 percent, but none exceeds 50 percent; and
- for the three most recent fiscal years, if any significance level exceeds 50 percent.

If the registrant is required to file historical financial statements of an acquired business, it also must file pro forma financial statements to show what the registrant's operating results and financial condition would have looked like if the acquisition had occurred at an earlier date.

The rules also specify the registrant's filing obligations with respect to financial information required to be provided upon the *disposition* or probable disposition of a significant business.

As discussed below, the current rules provide for different significance testing and filing requirements for acquired real estate operations because of industry considerations that apply to those operations.

Rule amendments

The SEC's latest rulemaking in support of disclosure effectiveness amends Regulation S-X and related SEC rules and forms to update the financial statement filing requirements applicable to operating companies for acquisitions and dispositions of businesses and other assets. As discussed below, among other changes to the current rules, the amendments:

- revise the Investment Test and the Income Test for measuring the significance of an acquired business;
- substantially conform, to the extent applicable, the significance tests for a disposed business to those used for an acquired business;
- reduce to two fiscal years the maximum period to be covered by a filing of an acquired business's audited financial statements;
- eliminate the requirement to include separate acquired business financial statements in registration statements and proxy statements once the registrant has included the business in its post-acquisition audited annual financial statements for either nine months or a complete fiscal year, depending on the acquired business's significance;
- align the financial statement filing requirements for acquisitions of real estate operations with those applicable to acquisitions of other types of businesses where no unique industry considerations exist; and
- reformulate and clarify the adjustment criteria for the preparation of pro forma financial statements.

The SEC also has amended its financial statement filing requirements applicable to acquisitions or dispositions by registered investment companies and business development companies.

Changes to the Investment Test and Income Test

The rule amendments revise the Investment Test and the Income Test used to determine whether an acquired business is significant. The changes modify the significance calculations, but do not alter the current thresholds for different significance levels.

Investment Test. The rules amendments add a measurement alternative to the Investment Test.

- *Aggregate worldwide market value measurement*: Under the amended Investment Test, the registrant will measure its and its other subsidiaries' investments in and advances to the acquired business as a percentage of the "aggregate worldwide market value" of the registrant's voting and non-voting common equity. If the registrant does not have an aggregate worldwide market value, it will determine significance, as in the current test, solely by comparison to its total assets. The purpose of the amendment is to address the "mismatch" in values measured in the current test, under which the purchase or sales price — which typically represents the registrant's and its other subsidiaries' investments in and advances to the acquired business, and is generally consistent with fair value — is compared to the registrant's total consolidated assets, which are measured at book value. The SEC explains that the amendment is intended to provide "a more meaningful measure of significance" by requiring a comparison of measures based on fair value.
- *Calculation:* Aggregate worldwide market value includes the value of voting and non-voting common equity held by the registrant's affiliates as well as non-affiliates (and accordingly differs from the market value test used to determine accelerated filer status under the Exchange Act, which considers only the market value of common equity held by

non-affiliates). The Investment Test measure is an average value, calculated daily for the last five trading days of the registrant's most recently completed month ending before the earlier of the date on which the registrant announces the acquisition or the date on which it enters into an agreement for the transaction. Among other changes, the amended rules clarify that, in calculating its "investments in" the acquired business, the registrant must include the fair value of "contingent consideration," such as sales-based milestones and royalties under an "earn-out," if the consideration is required to be recognized at fair value under U.S. GAAP or, for foreign private issuers using International Financial Reporting Standards as issued by the International Accounting Standards Board (IFRS IASB), under IFRS-IASB. If fair-value recognition is not required, the calculation must include all contingent consideration other than contingent consideration for which the likelihood of payment is remote.

Income Test. The rule amendments add a new component to the Income Test that is intended to reduce the frequency of immaterial acquisitions being deemed significant based on the test.

- *Addition of revenue component:* The amendments add to the Income Test a revenue component designed to correct an over-estimation of significance that can result based on the income calculation alone where the registrant has little income or a loss. The revenue component generally measures the registrant's and its other subsidiaries' proportionate share of the acquired business's consolidated total revenue from continuing operations (after intercompany eliminations) as a percentage of such consolidated total revenue of the registrant for the most recently completed fiscal year. The significance thresholds under the revenue component are the same as those under the income component.
- *Application of revenue and income components:* To satisfy the amended Income Test, the acquired business must exceed *both* the revenue component threshold *and* the income component threshold when the revenue component applies. The revenue component will not apply if *either* the registrant and its consolidated subsidiaries *or* the acquired business did not have "material revenue" in each of the two most recently completed fiscal years. In that case, the registrant must measure significance based solely on the income component. If the testing yields different significance levels under the two components, the registrant may use the lower level to determine the number of periods for which it is required to file financial statements of the acquired business.

Significance testing for dispositions

A registrant is required to provide pro forma financial information upon the disposition or probable disposition of a significant business or portion of a business by sale, abandonment, or distribution to shareholders by means of a spin-off, split-up, or split-off if the disposition is not fully reflected in the registrant's financial statements. To improve consistency in financial reporting of business acquisitions and dispositions, the amendments:

- substantially conform, to the extent applicable, the tests used to determine the significance of a disposed business to those used to determine the significance of an acquired business; and
- increase the threshold for determining the significance of a disposed business from 10 percent to 20 percent.

As a result, under the amended rules, registrants will no longer have to file pro forma financial information for disposed businesses with significance levels that exceed 10 percent, but not 20 percent.

Financial statements for significant acquisitions

Historical financial statements. The amendments modify the filing requirements for both audited and unaudited historical financial statements of a significant acquired business.

- *Audited annual financial statements:* Current Rule 3-05 of Regulation S-X requires a registrant to file audited financial statements (Rule 3-05 financial statements) for up to the three most recent fiscal years of an acquired business. The amendments revise the rule to require only a maximum of two fiscal years of Rule 3-05 financial statements, which must be filed for an acquired business if any significance level exceeds 40 percent. The SEC concluded that, due to their age, financial statements for the earliest year in the three-year period are less likely to provide investors with meaningful financial information to evaluate the acquisition. One year of audited financial statements will continue to be required if any significance level exceeds 20 percent, but none exceeds 40 percent.

- *Unaudited financial statements for interim periods:* Current Rule 3-05 also requires the registrant to file unaudited financial statements of the acquired business for the most recent pre-acquisition interim period (three, six, or nine months) and for the comparative interim period in the prior year. The amendments eliminate the requirement to provide a comparative interim period when only one year of audited Rule 3-05 financial statements is required. Accordingly, the registrant will be required to file unaudited financial statements only for the most recent interim period where any significance level exceeds 20 percent, but none exceeds 40 percent. The SEC notes that the comparative interim period would have limited usefulness for investors in the absence of financial statements covering the comparative annual period.
- *Financial statements for net assets that constitute a business:* The SEC has codified, in a new Rule 3-05(e), SEC staff positions permitting registrants to file audited annual and unaudited interim abbreviated financial statements of acquired operations — such as a product line or a line of business contained in more than one subsidiary of the selling entity — that qualify as a "business," but do not constitute a separate entity, subsidiary, or division. If the acquired business meets specified "qualifying" and "presentation" conditions, including that separate financial statements for the business have not previously been prepared, the registrant may file (a) statements of assets acquired and liabilities assumed and (b) statements of revenues and expenses (exclusive of specified corporate overhead, interest, and income tax expense). A key qualifying condition is that the acquired business's total assets and total revenues (both after intercompany eliminations) constitute 20 percent or less of the total assets and total revenues of the seller and its subsidiaries consolidated as of and for the most recently completed fiscal year. The filing accommodation is limited to the acquisition of a small portion of the selling entity to ensure that the acquired component is not so large that presentation of the seller's financial statements, along with pro forma financial information that removes the portion of the seller not acquired, would better inform investors about the acquired business.
- *Financial statements of foreign businesses acquired by foreign private issuers:* The amendments increase the consistency between the basis of accounting used by registrants that are foreign private issuers and by the "foreign businesses" (as defined in the rules) they acquire. The amended rules permit:
  - foreign private issuers that prepare their financial statements using IFRS-IASB to reconcile to IFRS-IASB, rather than to U.S. GAAP, Rule 3-05 financial statements of a foreign business prepared using home-country GAAP;
  - Rule 3-05 financial statements of a business to be prepared in accordance with IFRS-IASB without reconciliation to U.S. GAAP if the acquired business would qualify as a foreign private issuer if it were a registrant; and
  - an acquired business that would qualify as a foreign private issuer if it were a registrant to reconcile its financial statements to IFRS-IASB rather than to U.S. GAAP when the registrant is a foreign private issuer that uses IFRS-IASB.

Financial statements included in registration statements and proxy statements. The SEC has amended portions of Rule 3-05 that govern the inclusion of Rule 3-05 financial statements in certain registration statements and proxy statements. Among the most noteworthy changes, the amendments:

- permit the omission from such filings of pre-acquisition historical financial statements of an acquired business if the financial statements have been reflected in the registrant's audited post-acquisition results for (a) nine months, if the business exceeds the 20 percent, but not the 40 percent, significance threshold and (b) one complete fiscal year, if the business exceeds the 40 percent significance threshold;
- codify and expand existing staff positions to permit a registrant, in considering whether to omit or substitute acquired or disposed business financial statements in an initial registration statement, to measure significance using filed *pro forma financial information* that only depicts significant acquisitions and dispositions completed after the registrant's latest fiscal year-end for which the registrant's financial statements are required to be filed, so long

as the registrant has filed (a) Rule 3-05 financial statements for any such acquired business and (b) pro forma financial information required by Article 11 of Regulation S-X for any such acquired or disposed business; and

- modify the filing requirements for financial statements of "individually insignificant businesses" acquired or to be acquired whose aggregate impact exceeds any 50 percent significance threshold, by requiring the registrant to provide pre-acquisition *historical* financial statements only for those businesses whose individual significance exceeds 20 percent, so long as the registrant provides *pro forma financial information* depicting the aggregate effects of all such individually insignificant businesses in all material respects.

The SEC observes that the amendments generally will not affect the financial statements related to the acquisition of a business that is the subject of a proxy statement or registration statement filed on Form S-4, but notes that the amended significance tests may affect whether the financial statements of an acquired business that is not an Exchange Act reporting company are required to be included in such a proxy statement or registration statement.

Financial statements for acquisitions of real estate operations

The SEC has adopted amendments to bring the financial statement requirements for acquisitions of real estate operations more closely into line with those that apply to acquisitions of other types of businesses and assets. The SEC notes that Rule 3-14 of Regulation S-X, which governs the presentation of financial statements of acquired real estate operations (Rule 3-14 financial statements), historically has differed from Rule 3-05 in part because "unique industry considerations for real estate operations warrant differentiated disclosure." The amendments narrow the gap between Rule 3-05 and Rule 3-14 for financial presentations in which the SEC concludes that no unique industry considerations exist, and clarify the application of Rule 3-14 regarding the scope of the requirements.

Alignment of Rule 3-14 with Rule 3-05. The changes to Rule 3-14 to align it with Rule 3 05 include the following:

- *Significance thresholds:* Under current practice, Rule 3-14 financial statements are required (a) for individual acquisitions based on the 10 percent significance threshold contained in the definition of "significant subsidiary" in Rule 1-02(w) of Regulation S-X and (b) where the registrant has acquired or proposes to acquire a group of properties that are significant in the aggregate. If the significance of the aggregated group exceeds 10 percent, Rule 3-14 financial statements must be provided for each acquisition that is significant at the level of 5 percent or more and for enough other acquisitions to cover the substantial majority of the group. The amendments conform the Rule 3-14 significance thresholds to those in Rule 3-05 to specify (i) a 20 percent significance threshold for individual acquisitions and (ii) a 50 percent significance threshold for the aggregate impact of acquisitions. The changes also remove the current ambiguity under Rule 3-14 by defining which businesses must be aggregated and clarify that, as under Rule 3-05, the filing requirement for an aggregated group applies only to registration statements and proxy statements and not to Form 8-K.
- *Years of required financial statements for acquisitions from related parties:* Current Rule 3-14 requires registrants to provide three years of financial statements for significant acquisitions from related parties. The rule amendments eliminate this requirement so that, under amended Rule 3-14, as under Rule 3-05, the number of periods for which historical financial statements are required does not turn on whether the seller is a related party. The amendments do not affect the financial statements specified in Rules 3-01 and 3-02 for acquisitions of a predecessor of the registrant, including acquisitions from related parties.
- *Financial statements covering a period of nine to twelve months:* Rule 3-06 has been amended, in parallel to the treatment of Rule 3-05 financial statements, to permit the filing of financial statements covering a period of nine to twelve months to satisfy the requirement for filing financial statements for a period of one year for an acquired or to be acquired real estate operation.
- *Timing of filings in registration statements and proxy statements:* Rule 3-14 has been amended to include the same period for the filing of Rule 3-14 financial statements in certain registration statements and proxy statements as the period

prescribed for Rule 3-05 financial statements. Registration statements and proxy statements will not need to include separate financial statements of an acquired or to be acquired real estate operation and related pro forma financial information if the real estate operation does not exceed significance at the 50 percent level and either (a) the acquisition has not been consummated or (b) the date of the final prospectus or prospectus supplement filed for an offering, or the mailing date of a proxy statement, is no more than 74 days after the consummation of the acquisition, and the registrant has not previously filed the financial statements.

- *Omission of filed Rule 3-14 financial statements:* Rule 3-14 has been amended to line up with amended Rule 3-05 by no longer requiring Rule 3-14 financial statements to be filed in registration statements and proxy statements once the acquired real estate operation is reflected in the registrant's post-acquisition financial statements for nine months.

The SEC has amended Items 2.01 and 9.01 of Form 8-K to reflect the consistent treatment of financial statement requirements under amended Rules 3-05 and 3-14. As amended, Item 2.01 clarifies that the item requires the disclosure of the acquisition or disposition of assets that constitute a significant real estate operation as defined in Rule 3-14, while Item 9.01(a) provides for consistent application of the item's financial statement filing requirements for all business acquisitions, including acquisitions of real estate operations.

Other amendments. The SEC has adopted other amendments to clarify the application of Rule 3-14 and related rules to acquisitions and dispositions of real estate operations, including the following:

- *Definition of "real estate operation":* Rule 3-14 has been amended to define a "real estate operation" as "a business that generates substantially all of its revenues through the leasing of real property." Consistent with current practice and staff guidance, the definition clarifies that (a) a real estate operation constitutes a "business" for purposes of Rule 3-14 and (b) a limited amount of non-leasing revenues (such as revenues from property management or other services related to leasing) will not preclude an operation from classification as a real estate operation.
- *Significance testing:* Under amended Rule 3-14, the significance of an acquired real estate operation will be determined solely by the Investment Test as that test has now been amended (as described above) and as adapted to take account of debt assumed by the registrant. If the registrant does not have an aggregate worldwide market value, it must use the total assets test for the significance determination, and measure its and its other subsidiaries' "investments in" the acquired real estate operation as a percentage of the registrant's total assets as of the end of the most recently completed fiscal year. For this purpose, the registrant's and its other subsidiaries' investments in the acquired real estate operation will include the amount of any debt secured by the real properties assumed by the registrant.
- *Interim financial statements:* Unlike Rule 3-05, Rule 3-14 does not expressly require a registrant to file interim financial statements for an acquired real estate operation. In accordance with existing practice, the SEC now has amended the rule specifically to require registrants to file Rule 3-14 financial statements for the most recent year-to-date interim period prior to an acquisition.

Pro forma financial information

The rule amendments make numerous changes to Article 11 of Regulation S-X, which contains rules and instructions for the presentation of pro forma financial information relating to significant acquisitions and dispositions.

Pro forma financial statements are presented to show investors how the acquisition or disposition would have affected the registrant's historical financial statements if the transaction had occurred at an earlier date. The amendments principally reformulate and clarify the adjustments that must or may be made to the historical financial statements for this presentation.

Pro forma financial statements. The pro forma financial statements consist of (a) a pro forma condensed balance sheet as of the end of the most recent period for which a balance sheet of the registrant is required, (b) pro forma condensed statements of comprehensive income for the registrant's most recent fiscal year and for the period from the most recent fiscal year-end to the most recent interim date for which a balance sheet is required, and (c) accompanying explanatory notes. The pro forma financial statements are presented in columnar form showing the condensed historical financial statements of each of the registrant and the acquired or disposed business, the pro forma adjustments, and the pro forma results.

Current pro forma adjustment criteria. Under current Article 11, pro forma adjustments to the comprehensive income statement must give effect to events that are "directly attributable" to the transaction, are expected to have a "continuing impact" on the registrant, and are "factually supportable." Balance sheet adjustments must be directly attributable to the transaction and factually supportable, but need not have a continuing impact on the registrant.

Amended pro forma adjustment criteria. The SEC has amended Article 11 to organize the pro forma adjustment criteria into three categories that it refers to as (a) "Transaction Accounting Adjustments," (b) "Autonomous Entity Adjustments," and (c) "Management Adjustments." Transaction Accounting Adjustments and Autonomous Entity Adjustments are required adjustments, while Management Adjustments are optional. The SEC believes that the new adjustment criteria will facilitate pro forma financial presentations by clarifying and simplifying criteria that are currently ill-defined, ensuring greater consistency of presentation for similar fact patterns, and permitting registrants to adjust for certain effects of post-acquisition actions expected to be taken by management.

Transaction Accounting Adjustments. This category of adjustments reflects only the application of accounting for the transaction required by U.S. GAAP or IFRS-IASB. Historical and pro forma per share data must be presented on the face of the pro forma condensed statement of comprehensive income and give effect to these adjustments. Where, as discussed above, a registrant uses pro forma financial information to determine the significance of an acquisition or disposition for disclosure in a registration statement, only Transaction Accounting Adjustments may be considered.

Autonomous Entity Adjustments. This category includes adjustments that are necessary to reflect the operations and financial position of the registrant as an autonomous entity when the registrant was previously part of another entity. Pro forma per share data also will have to give effect to Autonomous Entity Adjustments.

Management Adjustments. These adjustments are intended to afford a registrant the flexibility to depict synergies and dis-synergies of the acquisition or disposition for which pro forma effect is being given. The rule proposal would have required the presentation of Management Adjustments. In response to comments on this aspect of the proposal, however, the SEC eliminated mandatory application of Management Adjustments and provided that those adjustments may be given in the registrant's discretion. As summarized in the adopting release, commenters raised concerns relating to "the inherent uncertainty/subjectivity of synergy expectations; the burden of preparing the disclosure; the potential liability; the risk of synergy disclosure changing over time and confusing or misleading investors; and other unintended consequences," including premature disclosure of sensitive information.

Under the final rules, a registrant has the option to present Management Adjustments "if in its management's opinion, such adjustments would enhance an understanding of the pro forma effects of the transaction." Any election to present Management Adjustments must comply with specific conditions as to the basis and form of the adjustments. Among the conditions, there must be "a reasonable basis" for each such adjustment and the pro forma financial information must reflect all Management Adjustments "that are, in the opinion of management, necessary to a fair statement of the pro forma financial information presented," and the registrant must disclose a statement to this effect. Further, when synergies are presented, any related dis-synergies also must be presented. To address liability concerns about disclosure of forward-looking information, the SEC has included an instruction in the rule indicating that any such information supplied in the Management Adjustments is "expressly covered" by the safe harbor protection for forward-looking information afforded by Securities Act Rule 175 and Exchange Act Rule 3b-6.

Definition of "significant subsidiary"

As discussed above, the rule amendments make a number of changes to the Investment Test and the Income Test used to evaluate the significance of acquired and disposed businesses for financial reporting purposes. Those tests, as well as the Asset Test, are included in the definition of "significant subsidiary" in Rule 1-02(w) of Regulation S X, which is used for purposes of certain Regulation S X and Regulation S K requirements, as well as certain rules and forms under the Securities Act and Exchange Act. The amendments do not modify the long-standing significance threshold of 10 percent in Rule 1-02(w) used for those purposes.

Transition to amended rules

Although the amended rules will be effective on January 1, 2021, registrants will first be required to comply with the amended rules at the beginning of their fiscal year commencing after December 31, 2020, which is the mandatory compliance date. Acquisitions and dispositions that are "probable" under the rules or consummated after the mandatory compliance date must be evaluated for significance under the amendments.

Under transition guidance provided in the adopting release:

- For registration statements filed on or after the mandatory compliance date, registrants that are subject to Exchange Act reporting at the mandatory compliance date may evaluate the significance of acquisitions and dispositions consummated before the mandatory compliance date using rules that were in effect when the transactions were consummated.
- Registrants filing initial registration statements are not required to apply the amended rules until the initial registration statement is first filed on or after the mandatory compliance date. For initial registration statements first filed on or after the mandatory compliance date, all "probable" or consummated acquisitions and dispositions, including those consummated before the mandatory compliance date, must be evaluated for significance under the amendments.

The adopting release also addresses the situation where a registrant (a) has consummated the acquisition or disposition of a significant business before the mandatory compliance date and (b) has reported (or was required to report) the transaction before the mandatory compliance date under Item 2.01 of Form 8-K, but where the Rule 3-05 financial statements and Article 11 pro forma financial information relating to the transaction are not required to be filed under Item 9.01 of Form 8-K until after the mandatory compliance date. In that case, the registrant must file the financial statements and pro forma financial information required by the rules in effect when the Item 2.01 Form 8-K was required to be filed.

A registrant may elect to comply with the amendments before the mandatory compliance date, but if it does so, the SEC indicates that it must apply the amendments "in their entirety" from the date of early compliance.

This SEC Update is a summary for guidance only and should not be relied on as legal advice in relation to a particular transaction or situation. If you have any questions or would like any additional information regarding this matter, please contact your relationship partner at Hogan Lovells or any of the lawyers listed on the following page of this update.

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