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SEC ADOPTS EXTENSIVE REVISIONS TO RULES GOVERNING FINANCIAL INFORMATION OF ACQUIRED AND DISPOSED BUSINESSES

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SEC ADOPTS EXTENSIVE REVISIONS TO RULES GOVERNING FINANCIAL INFORMATION OF ACQUIRED AND DISPOSED BUSINESSES

The US Securities and Exchange Commission (SEC or Commission) on May 20, 2020 adopted a series of amendments to its rules and forms relating to disclosure requirements for financial statements relating to acquisitions and dispositions of businesses. The changes are intended to improve for investors the financial information about acquired or disposed businesses, facilitate more timely access to capital, and reduce the complexity and costs to prepare the disclosure.

The new rules will be effective January 1, 2021. Registrants may elect to comply with the amendments in advance of the effective date, but may not pick and choose among the amended rules and forms; if a registrant opts for early compliance, it must comply with all of the amendments in their entirety from the initial instance of early compliance.

The SEC has been focusing for several years on modifications to its disclosure requirements that would reduce the burden to registrants of compliance with applicable requirements, while not diminishing the effectiveness of the disclosure with respect to apprising investors of material information. The new rules, which were proposed in May 2019 and are being adopted in substantially the form proposed, are an effort to accomplish these goals with respect to information provided regarding significant acquisitions of other businesses as well as dispositions.

While the changes effected by the amendments do not represent a radical departure from the current regime, we do think that they will have an impact on how registrants analyze and then comply with their disclosure obligations in connection with acquisitions and dispositions. Further, they will, to a meaningful though not tremendous extent, reduce and simplify these obligations without diminishing the overall value of disclosure to investors. Among other things, the new rules generally do the following:

- Update the significance tests used under applicable rules to generally improve their application and assist registrants in making more meaningful significance determinations
- Expand the use of pro forma financial information (as opposed to historical financial information, which may no longer be meaningful as a practical matter) in measuring significance
- Conform, to the extent applicable, the significance threshold and tests for a disposed business to those used for an acquired business
- Require the financial statements of the acquired business to cover only up to the two most recent fiscal years (as opposed to the potential for up to three years under the current rules)
- Permit disclosure of abbreviated financial statements for certain acquisitions of a component of an entity, which can be helpful in the case of acquisitions of, for example, a division of a selling entity
- Align Rule 3-14 of Regulation S-X (the requirement relating to acquisitions of real estate operations) with Rule 3-05 of Regulation S-X, so long as no unique industry considerations exist
- Amend the pro forma financial information requirements to improve the content and relevance of such information, including by permitting greater presentation of anticipated synergies
- Make corresponding changes to the smaller reporting company requirements in Article 8 of Regulation S-X

AMENDMENTS TO SIGNIFICANCE TESTS

Rule 3-05 requires the disclosure of separate pre-acquisition historical audited annual and unaudited interim financial statements of an acquired business (Rule 3-05 financial statements) when it is determined that the business was "significant" to the registrant using the prescribed investment, asset, and income tests set forth in the "significant subsidiary" definition in Rule 1-02(w) of Regulation S-X.

Once the business is determined to be "significant," the period of time that must be covered by these financial statements will depend on how significant the business is to the registrant, which significance is measured on a sliding scale using the aforementioned tests. As adopted, the amendments modify the investment and income tests, in each case, as described further below.

Investment Test

Under the current rules, the investment test is determined as follows: the registrant's and its other subsidiaries' investments in and advances to the acquired business are compared to the total assets of the registrant reflected in its most recent annual financial statements required to be filed at or prior to the acquisition date.

The adopted amendments modify the investment test, solely for purposes of determining significance in connection with acquisitions and dispositions, to compare the registrant's investments in and advances to the acquired or disposed business to the *aggregate worldwide market value* of the registrant's voting and nonvoting common equity, which value is calculated daily for the last five trading days of the most recently completed month end prior to the announcement or agreement date of the acquisition or disposition. If a registrant does not have an aggregate worldwide market value, or in contexts outside of acquisitions and dispositions, the existing test will continue to apply. The goal of these changes by the SEC was to more closely align the investment test with the economic significance of the acquisition to the registrant.

As initially proposed by the SEC, the worldwide market value was to be determined as of the most recent fiscal year end of the registrant (which would align with the time period for measuring total assets), but the SEC was persuaded by commenters suggesting that measuring market value as of the most recent fiscal year would be unnecessarily restrictive and arbitrary.

In addition, some commenters objected to the inclusion of equity held by affiliates in the worldwide market value test, and suggested aligning the test with the test currently used by registrants to determine accelerated filer status under Exchange Act Rule 12b-2, which looks to the value of common equity held by nonaffiliates. The adopted amendments provide that the worldwide market value *does* include equity held by affiliates; thus it looks to the total value of the equity, not just the total public "float," which is a better indicator of the total value of the acquirer and differs from the test to determine accelerated filer status under Exchange Act Rule 12b-2.

The amendments also clarify that the meaning of "investments in" the tested subsidiary requires the inclusion of the fair value of contingent consideration if such consideration is required to be recognized at fair value by the registrant at the acquisition date under US GAAP or IFRS-IASB. If inclusion at fair value is not so required, the amendments require *all* contingent consideration to be included, except where the likelihood of payment is remote. It is worth noting that the SEC originally proposed, but did not ultimately adopt, a blanket exclusion for sales-based milestone and royalty payments.

The amendments also include provisions clarifying that the meaning of "investments in" the tested subsidiary requires exclusion of the registrant's proportionate interest in the carrying value of assets transferred by the registrant to the tested subsidiary that will remain with the combined entity after the acquisition.

Income Test

Under the current rules, the income test is determined by measuring the registrant's and its other subsidiaries' equity in the income from continuing operations of the acquired business before income taxes, exclusive of amounts attributable to any noncontrolling interests, as reflected in the business's most recent annual pre-acquisition financial statements, as compared to the same measure reflected in the registrant's most recent annual financial statements required to be filed at or prior to the acquisition date.

As amended, a new revenue component to the income test is added to compare the registrant's and its other subsidiaries' proportionate share of the tested subsidiary's consolidated total revenues (after intercompany eliminations) to the consolidated total revenues of the registrant for the most recently completed fiscal year. The revenue component does not apply if the registrant and the tested subsidiary do not have material revenue in each of the two most recently completed fiscal years. To satisfy a significance threshold under the income test, when the revenue component applies, the tested subsidiary/business must meet *both* the revenue component *and* the net income component.

In addition, if the tested subsidiary/business meets both the revenue and net income components, the registrant may use the lower of the revenue component and the net income component to determine the number of periods for which Rule 3-05 financial statements are required. The addition of a revenue component to the income test was widely supported by commenters who believe it will provide an important check on acquisitions that are otherwise immaterial to investors but that trip the income test threshold simply because the registrant may have marginal or nonexistent net income in any given fiscal year.

It is worth noting that the SEC elected not to adopt its originally proposed amendment to further modify the income test to calculate income from continuing operations *after* income taxes (which would have allowed registrants to use specific line items from their financial statements), rather than measuring the income *before* income taxes (which is the existing rule), as they were persuaded by commenters who suggested that modifying the test to utilize *after*-tax information may lead to anomalous results because of factors unrelated to the significance of the acquisition (such as changes in tax laws, valuation allowances ,or tax status of the entity).

USE OF PRO FORMA FINANCIAL INFORMATION TO MEASURE SIGNIFICANCE

Under the existing rules, registrants are permitted to base their significance calculations on pro forma financial information reflecting prior acquisitions that the acquirer completed since the last audited balance sheet date *only if* audited financial statements or the acquired business were filed on a Form 8-K. The Commission staff, under SAB 80, has also permitted use of pro forma information in IPO and other initial registration statements under limited circumstances, even though by necessity there would be have been no prior Form 8-K filing.

Under the amended rules, a Form 8-K filing is no longer a condition to testing significance based on pro forma financial information. Pro forma financial information may be used so long as:

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

If the Rule 3-05 financial statements and pro forma financial information are included in an initial registration statement, the registrant can use that pro forma information in determining the significance of additional acquisitions subsequent to those acquisitions. The Commission also codified the staff's position that once a registrant uses pro forma financial information to measure significance, it must

continue to use pro forma financial information to measure significance until the next annual report on Form 10-K or Form 20-F.

REDUCTION OF NUMBER OF YEARS OF RULE 3-05 FINANCIAL STATEMENTS REQUIRED

Under the current rules, Rule 3-05 financial statements are required for the most recent fiscal year and any required interim periods if any of the Rule 3-05 significance tests exceeds 20%, but none exceeds 40%. A second year is required if any test exceeds 40%, but none exceeds 50%, and a third year is generally required if any of the tests exceeds 50%. The Commission proposed and adopted revisions to Rule 3-05 to require only up to a maximum of two years of Rule 3-05 financial statements. The Commission also eliminated the need to provide a comparative interim period when only one year of audited Rule 3-05 financial statements is required.

Conforming amendments were also adopted to the rules governing the application of Rule 3-05 to smaller reporting companies and issuers relying on Regulation A to reflect the new two-year requirement for audited Rule 3-05 financial statements and to permit the continued reliance on lesser periods permitted to those issuers when applicable.

OMISSION OF RULE 3-05 FINANCIAL STATEMENTS FOR ACQUIRED BUSINESSES AFTER THEIR RESULTS HAVE BEEN REFLECTED IN THE REGISTRANT'S AUDITED FINANCIAL STATEMENTS

Under the current rules, Rule 3-05 financial statements may be omitted 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. However, even if more than one year of acquired company results are included in the acquirer's financial statements, the SEC has required the Rule 3-05 financial statements of the acquired business to be included when they have not been previously filed (for example, in connection with an IPO registration statement), or when the Rule 3-05 financial statements have been previously filed but the acquired business is of "major significance" to the registrant.

The SEC proposed to no longer require Rule 3-05 financial statements in registration statements and proxy statements once the acquired business is reflected in filed post-acquisition financial statements of the registrant for a complete fiscal year, even if never separately filed. The Commission also proposed to eliminate the "major significance" exception. As adopted, Rule 3-05 financial statements will no longer be required in registration statements and proxy statements once the acquired business is reflected in the registrant's post-acquisition audited financial statements, regardless of whether previously filed, if the results are reflected for the applicable time period. The Commission also reduced that time period from 12 months to nine months, unless the acquired company's significance exceeds 40%.

In addition, the SEC codified a Commission staff position permitting abbreviated financial statements under certain conditions for acquisitions of assets that constitute a business but was not operated as a separate entity or division or was operated over several subsidiaries or divisions. The business also must constitute less than substantially all of the assets and liabilities of the seller. These abbreviated financial statements would be in the form of statements of assets acquired and liabilities assumed and statements of revenues and expenses.

DISCLOSURE REQUIREMENTS FOR INDIVIDUALLY INSIGNIFICANT ACQUISITIONS

Under the existing rules, Rule 3-05 financial statements are generally not required if an acquired or to be acquired business (1) does not exceed 20% significance, or (2) does not exceed 50% significance and the acquisition has not yet occurred, or the date of the final prospectus or prospectus supplement relating to an offering is no more than 74 days after consummation and the financial statements have not been previously filed. If the aggregate impact of "individually insignificant businesses," as defined below, acquired since the date of the most recent audited balance sheet filed for the registrant exceeds 50%, audited historical pre-acquisition financial statements covering at least the substantial majority of the businesses acquired must be included in a registration statement or proxy statement.

The amended rule will continue to require Rule 3-05 financial statements if the aggregate impact of independently insignificant businesses exceeds 50%. "Individually insignificant businesses" include the following:

- Any acquisition consummated after the registrant's audited balance sheet date the significance of which does not exceed 20%
- Any probable acquisition the significance of which does not exceed 50%
- Any consummated acquisition the significance of which exceeds 20%, but does not exceed 50%, for which financial statements are not yet required because of the 75-day filing period

When applying the income test, the registrant will also have to consider individually insignificant real estate operations. The amended rule will require registrants to provide historical financial statements only for those businesses the individual significance of which exceeds 20%. In conjunction with this change, the amended rule will require registrants to provide pro forma financial information depicting the aggregate effects of *all* "individually insignificant businesses" in all material respects.

The Commission addressed concerns that accountants may need to perform additional work to be able to provide negative assurance on pro forma financial information that is based on financial statements that they have not audited or reviewed. The Commission observed that the "reasonable investigation" and "reasonable care" provisions of Sections 11 and 12 of the Securities Act are also fact specific and depend on a variety of factors. Whether steps taken to provide the required disclosures satisfy "reasonable investigation" or "reasonable care," or whether additional work is needed to provide negative assurance, should be determined by accountants and their clients based on facts and circumstances. The Commission believes those concerns are outweighed by the need to improve the usefulness of information provided to investors when the aggregate impact of the acquired or to be acquired businesses exceeds 50%.

The Commission further noted that registrants will have to negotiate the timely provision of historical balance sheet and income statement information for each acquisition to the extent necessary to present pro forma financial information depicting their aggregate effects in all material respects when aggregate significance exceeds 50%. Full historical financial statements, however, will be required only for acquisitions that have individual significance exceeding 20%.

PRO FORMA FINANCIAL INFORMATION

The presentation of pro forma financial information, which by definition is not a financial statement, is intended to supplement financial statements by demonstrating the effects on a registrant that may have resulted from an acquisition or disposition at an earlier date. Under the current pro forma presentation regime, management adjusts the historical financial statements based on assumptions and expectations related to the hypothetical earlier occurrence of the significant event.

The SEC's historic regulations and guidance with respect to when and in what presentation format registrants must present pro forma financial information—initially adopted more than 30 years ago—have often been unclear or inconsistently applied. Unquestionably, this has at times resulted in misapplication of the rules, in addition to less meaningful disclosure to investors.

In general, under current SEC rules, non–Smaller Reporting Company registrants are required to file pro forma financial information pursuant to Article 11 when the registrant engages in a "significant business combination" or disposition of a "significant portion of a business" or any such transaction is probable. To measure the significance of the transaction in question, Rule 11-02 of Regulation S-X adopts the three tests from Rule 1-02(w) for significant subsidiaries, which tests are discussed above. In each instance, the significance threshold for an acquired business is 20% and the significance threshold for a disposed of business is 10% (noting that the final amendments increase this percentage threshold to 20%). If any of the significance tests are met, the registrant must file pro forma financial information for the acquired or disposed of business.

In most cases, Rule 11-01 of Regulation S-X requires presentation of (1) a pro forma condensed balance sheet as of the most recent fiscal year end and through the most recent interim period presented and (2) pro forma condensed statements of comprehensive income for all periods for which historical statements of comprehensive income are presented. Rule 11-02 also requires explanatory notes to the pro forma financial information.

As the SEC has long explained, the requirements for applying pro forma adjustments have been intended to elicit the presentation of financial information that is directly related or attributable to the transaction at hand. To that end, Rule 11-02(b) calls for adjustments to the pro forma condensed statement of comprehensive income where they are (1) directly attributable to the transaction, (2) expected to have a continuing impact on the registrant and (3) factually supportable. On the other hand, adjustments are made to the pro forma balance sheet where they are directly attributable to the transaction and factually supportable, whether or not they will have a lasting effect or are nonrecurring.

In proposing the amendments, the SEC acknowledged that the requirements "are not clearly defined nor easily applied and, in practice, can yield inconsistent presentations for similar fact patterns." Equally as important, limiting the permissible adjustments to only those identified in Article 11 does not provide management the ability to demonstrate the potential (and likely sought-after) effects of post-transaction activities that management may intend to implement at the consolidated or deconsolidated entities—which intents are often driving forces behind the decision to engage in the transaction.

To address the inconsistent application of, and limitations on registrants by, Article 11, the SEC adopted amendments to implement "simplified requirements to depict the accounting for the transaction and to provide the option to depict synergies and dis-synergies of the acquisitions and dispositions for which pro forma effect is given," in addition to general clarifying updates. The amendments to Article 11 resulted in three substantive categories for disclosure: Transaction Accounting Adjustments, Autonomous Entity Adjustments, and Management's Adjustments.

Transaction Accounting Adjustments and Autonomous Entity Adjustments

Seemingly the least controversial amendments to Article 11 are the implementations of the Transaction Accounting Adjustments and the Autonomous Entity Adjustments. First, the amendments will replace the current pro forma adjustment criteria in Rule 11-02(b) with the requirement to present pro forma financial information depicting the accounting treatment required by either US GAAP or IFRS-IASB, as applicable, known as the Transaction Accounting Adjustment. Notably, the SEC discussed in its economic analysis that Transaction Accounting Adjustments "may lead to more consistent pro forma presentations than the current adjustment criteria, which may be subject to some interpretation."

Next, the amendments have retained, but relabeled as Autonomous Entity Adjustments, an existing requirement to provide pro forma disclosure for an entity as a separate, stand-alone entity if the

registrant was previously part of another entity, and such presentation of the stand-alone pro forma information is necessary to reflect the registrant as an autonomous entity.

We believe registrants should take note of the following key points with respect to these categories:

- Transaction Accounting Adjustments and Autonomous Entity Adjustments will be required adjustments when their conditions are met, *regardless of whether management believes any such adjustments are recurring or nonrecurring*.
- Transaction Accounting Adjustments and Autonomous Entity Adjustments must be shown in separate columns in the pro forma presentations.
- Historical and pro forma per share data must give effect to both Transaction Accounting Adjustments and Autonomous Entity Adjustments.
- Explanatory notes must include disclosure of revenues, expenses, gains and losses, and related tax effects that will not recur in the registrant's income beyond 12 months after the transaction.

We expect that the application of Transaction Accounting Adjustments and Autonomous Entity Adjustments, by requiring conformity with authoritative standards, has the potential to result in significantly more meaningful disclosure to investors. Additionally, these amendments should allow for greater comparability between substantially similar fact patterns. On the other hand, we expect that registrants may see increased deal timelines and greater transactional expenses associated with these new compliance requirements, and registrants would be well served in considering the effect of these requirements earlier in the transaction.

Management's Adjustments

The final amendments create a new category of disclosure, known as Management's Adjustments, that are intended to provide investors insight into the anticipated synergies or dis-synergies and other transaction effects of the transaction. The creation of Management's Adjustments represents a notable shift in longstanding policy at the SEC. Historically, the SEC has allowed the presentation of pro forma effects on a retrospective basis only. This new category of permitted disclosure will enable registrants to present the forward-looking prospects of the combined or disaggregated entities, within certain parameters.

Notably, the proposed amendments contemplated that Management's Adjustments would be a required disclosure and "limited to synergies and other effects of the transaction, such as closing facilities, discontinuing product lines, terminating employees, and executing new or modifying existing agreements, that are both reasonably estimable and have occurred or are reasonably expected to occur."

In response to a high number of comments on the topic, the final amendments will allow, but not require, presentation of Management's Adjustments and eliminate the required line-item disclosures originally contemplated. Instead, Management's Adjustments, as determined by management, will be permitted if the following conditions precedent, among others, are met:

- Management must have a *reasonable basis* for each adjustment.
- Management must believe that such adjustments would enhance an understanding of the pro forma effects of the transaction.
- Adjustments must be limited to the effect of synergies and dis-synergies on the historical financial statements.
- Expenses shall not be reduced beyond the amount of the related expense historically incurred during the pro forma period presented.

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- Management must state that all of Management's Adjustments are, in the opinion of management, necessary to a fair statement of the pro forma financial information presented.

Considering the forward-looking nature of Management's Adjustments, the proposed amendments included an instruction that the safe harbors found in Securities Act Rule 175 and Exchange Act Rule 3b-6 expressly cover any forward-looking information supplied. Comments were generally supportive that the ambit of Rule 175 and Rule 3b-6 provide sufficient protection, and such instruction was included in the final amendments.

While Rule 175 and Rule 3b-6 do not require the Private Securities Litigation Reform Act's more stringent disclosure of meaningful cautionary statements identifying factors that could cause actual results to differ, the final amendments borrow from the SEC's policy statement on projections to provide additional disclosure requirements necessary for registrants to avail themselves of the opportunity to present Management's Adjustments. Accordingly, in addition to the above requirements, registrants should also be aware that the presentation of Management's Adjustments will require explanatory notes to the pro forma financial information that include the following:

- Certain reconciliations to specified GAAP metrics after giving effect to the Management's Adjustments.
- Disclosure of the basis for and material limitations of each Management's Adjustment, including any material assumptions or uncertainties of such adjustment.
- An explanation of the method of the calculation of the adjustment, if material.
- The estimated time frame for achieving the synergies and dis-synergies of such adjustment.

Disclosure of forward-looking financial projections in any scenario invites certain risks, such as subjectivity, the occurrence of unanticipated events, and misleading disclosure or investor confusion. If appropriately tailored and presented according to the requirements in the final amendments, however, Management's Adjustments have the potential to provide market participants greater access to information and foresight, and the ability to make more informed investment decisions.

BUSINESS DISPOSITION SIGNIFICANCE TEST AND SMALLER REPORTING COMPANY RULES

Under the existing Rule 11-01, the significance of a business disposition, and thus the determination of whether pro forma financial information is required, is determined in accordance with Rule 1-02(w). In turn, Rule 1-02(w) considers a business disposition to be significant at a 10% percent threshold, as opposed to the 20% threshold used for measuring a business acquisition under Rules 3-05 and 11-01. Furthermore, Item 2.01 of Form 8-K requires certain disclosure if a registrant engages in an acquisition or disposition of assets exceeding 10% of the registrant's consolidated assets.

The final amendments will raise the Rule 11-01 threshold for determining the significance of a business disposition to 20%, matching that applied to business acquisitions under Rules 3-05 and 11-01. Conforming changes will also be made to Form 8-K.

Lastly, the pro forma presentation requirements for Smaller Reporting Companies is located in Rule 8-05 of Regulation S-X. Furthermore, Form 1-A relies on the pro forma financial information presentation requirements in Rule 8-05. The final amendments will make substantially similar changes to Rule 8-05 to conform to the new disclosure requirements contained in Article 11.

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FOREIGN ISSUERS

Among other changes proposed and adopted by the Commission were changes to the rules governing the application of Rule 3-05 to foreign issuers. Foreign private issuers that prepare their financial statements using IFRS-IASB will be permitted to reconcile Rule 3-05 financial statements of foreign businesses prepared using home country GAAP to IFRS-IASB rather than US GAAP because this will provide more comparable information and better facilitate analysis of the financial statements.

In addition, Rule 3-05 financial statements will be permitted to be prepared in accordance with IFRS-IASB without reconciliation to US GAAP if the acquired business would qualify as a foreign private issuer if it were a registrant, even when the registrant prepares its financial statement using US GAAP.

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