

company that registers securities under the Securities Act must provide information in the registration statement about significant acquisitions, including audited financial statements, from such time as the acquisition is probable.<sup>16</sup> One, two or three years of audited financial statements may be required, depending on the relative significance of the acquired business.<sup>17</sup> If the registrant is unable to obtain such financial statements from the potential acquiree for inclusion in the registration statement, the issuer would have to resort to alternative financings. Thus, reporting companies, including those with shelf registrations of securities, may be compelled to forgo public offerings and to undertake private or offshore offerings. The rules proposed today are intended generally to allow companies to provide information about significant acquisitions in Securities Act registration statements on the same time schedule as for Exchange Act reporting.<sup>18</sup>

In addition, the Commission is proposing to provide an automatic waiver of the earliest year of required audited financial statements otherwise required to be provided for a consummated business acquisition in filings made under either the Securities Act or the Exchange Act if those financial statements are not readily available. A similar waiver provision was previously adopted for small business issuers and has proved quite useful in addressing significant practical problems for issuers engaged in acquisitions.<sup>19</sup>

<sup>16</sup> See Rule 3-05 of Regulation S-X and Item 310(c) of Regulation S-B [17 CFR 210.3-05 and 17 CFR 228.310(c)].

Registered offerings that are not primarily of a capital raising nature are permitted to go forward without those financial statements until 75 days following the acquisition, as permitted by Form 8-K. Specifically, the restriction on offerings registered under the Securities Act does not apply to (a) offerings or sales of securities upon the conversion of outstanding convertible securities or upon the exercise of outstanding warrants or rights; (b) dividend or interest reinvestment plans; (c) employee benefit plans; (d) transactions involving secondary offerings; or (e) sales of securities pursuant to Rule 144. The restriction also applies to certain unregistered offerings as well. See Instruction 2 to Item 7 of Form 8-K.

<sup>17</sup> The significance of an acquired business is evaluated based on (i) the amount of the issuer's investment in the acquired business; (ii) the total assets of the acquired business; and (iii) the pre-tax income of the acquired business, all as compared to the registrant's most recent comparable financial items.

<sup>18</sup> The amendments would also permit certain private placements under Rules 505 and 506 of Regulation D under the Securities Act [17 CFR 230.505 and 506] to go forward under the same conditions as a registered offering.

<sup>19</sup> The Commission has established the Advisory Committee on the Capital Formation and Regulatory Processes (the "Advisory Committee"), chaired by

#### *A. Elimination of Required Financial Statements for Pending Acquisitions and Waiver of Financial Statements for Recently Completed Acquisitions*

The Commission proposes to eliminate the requirement to provide audited financial statements for pending business acquisitions in Securities Act registration statements, other than registrations by "blank check companies."<sup>20</sup> In addition, the proposed rules would automatically waive the required financial statements for significant acquisitions completed within 75 days of a registered offering, if such audited financial statements are not readily available at the time the offer commences.<sup>21</sup> However, other than financial statements and pro forma information presented pursuant to Rules 3-05 and Article 11 of Regulation S-X and Item 310 of Regulation S-B, the proposed rule changes do not change information required with respect to significant acquisitions.

Although financial statements of acquirees may be omitted under the proposed amendments, pro forma financial information required by Article 11 of Regulation S-X and Item 310 of Regulation S-B would continue to be required when financial statements of the acquiree are furnished.<sup>22</sup> In any case, likely effects of a probable or recently consummated business combination are required to be discussed in Management's Discussion and Analysis, to the extent material.<sup>23</sup>

Comments are requested concerning whether the accommodations proposed today should only be available with respect to acquisitions below a particular level of significance

Commissioner Steven M.H. Wallman. The Advisory Committee is considering fundamental issues relating to the regulatory framework governing the capital formation process, including whether the current system of registering securities offerings should be replaced with a company registration system. The recommendations of the Advisory Committee may result in rule proposals or legislative recommendations that, if endorsed by the Commission, ultimately may address the matters discussed in this release. Because most financing transactions that would be undertaken within the framework of several of the company registration models now being considered by the Advisory Committee could be conducted primarily on the basis of disclosure provided in a registered company's filed periodic and current reports, business acquisition reporting generally would be rendered consistent in both the public offering and periodic reporting contexts.

<sup>20</sup> A "blank check company" is defined in § 230.419 of Regulation C [17 CFR 230.419(a)].

<sup>21</sup> The date of an offering will be deemed to be the date of a final prospectus or prospectus supplement relating to the offering as filed with the Commission pursuant to Rule 424(b) [17 CFR 230.424(b)] under the Securities Act.

<sup>22</sup> 17 CFR 210.11-01 to 11-03.

<sup>23</sup> See Item 303 of Regulation S-K and S-B [17 CFR 229.303 and 228.303].

compared to the assets and pre-tax income of the registrant. If a significance test is appropriate, should it be, for example, 75%, 60%, 50%, 40%, 30% or 20%? Comment is requested whether other classes of issuers, in addition to "blank check companies," should be excluded from the provisions of the proposed amendments. Is it appropriate to provide the same grace period for offering documents as for Form 8-K reports? Should the grace period be shorter, e.g. 15 days? Further, comment is requested regarding whether such relief should be available to all registrants (including new registrants) or whether minimum reporting history or public float requirements should be established. Comment is requested as to whether audited financial statements with respect to significant business combinations that have not been consummated but are probable should be required to be furnished in the prospectus if the financial statements are readily available. Comment is requested as to whether unaudited financial statements with respect to probable or recently consummated business combinations should be required if they are readily available.

Although a domestic company may proceed with a registered offering of securities without financial statements of a recent or probable acquiree in the circumstances described above, it will be required to file financial statements of each significant acquired business on Form 8-K within 75 days of consummation of the acquisition. The proposed revisions would apply to offerings of domestic and foreign issuers alike. However, foreign private issuers are not subject to quarterly or Form 8-K reporting rules, and are not required currently to furnish financial statements of acquired businesses in the absence of a registered offering of securities. Comment is requested as to whether the rule should therefore include, as a condition for omission of the financial statements in a registration statement, that the foreign private issuer undertake in the registration statement to provide on Form 6-K the audited financial statements of the acquired business within 75 days of consummation of the business combination.

The amendments proposed today would also eliminate the significance threshold that triggers the requirement to provide in registration statements audited financial statements of acquired businesses that, in the aggregate, but not individually, are significant.<sup>24</sup> Comment

<sup>24</sup> In such case, the issuer must furnish audited financial statements of the most recent fiscal year