Deloitte & Touche

Conditions For Use of

Non-GAAP Financial Measures

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Contents

Overview

The Securities and Exchange Commission (SEC), as directed by the Sarbanes-Oxley Act of 2002, adopted on January 15, 2003, new rules and amendments (the Rule) to address public companies' disclosure or release of certain financial information that is calculated and presented on the basis of methodologies other than in accordance with generally accepted accounting principles (GAAP). The SEC adopted a new disclosure regulation, Regulation G, that requires companies to provide certain disclosures whenever they publicly disclose or release non-GAAP financial measures, and also adopted amendments to Item 10 of Regulation S-K and Item 10 of Regulation S-B (collectively, Item 10) and Form 20-F to provide additional guidance to those companies that include non-GAAP financial measures in filings with the SEC. Additionally, the SEC adopted amendments that require companies to furnish to the SEC, on Form 8-K, earnings releases or similar announcements. As discussed below, the new rules and amendments are applicable equally to domestic and foreign private issuers, with a few exceptions.

Regulation G applies to any public disclosure or release of material information that includes a non-GAAP financial measure made on or after March 28, 2003, whether that information is furnished to, or filed with, the SEC. The amendments to Item 10 and Form 20-F apply to any annual or quarterly report filed with respect to a fiscal period ending after March 28, 2003 (that is, the quarter ended March 31, 2003, for calendar year-end companies). The requirement to furnish earnings releases and similar materials to the SEC on Form 8-K applies to earnings releases and similar announcements made after March 28, 2003.

The Rule can be found on the SEC's Web site at: http://www.sec.gov/rules/final/33-8176.htm.

On June 13, 2003, the SEC Staff published guidance on 33 frequently asked questions (FAQs) regarding the implementation and interpretation of certain aspects of the Rule. The topics covered in the FAQs include certain transition issues, disclosure of non-GAAP financial measures in business combination transactions, interpretative issues related to the non-GAAP liquidity and performance measure prohibitions in Item 10 (including issues related to EBIT and EBITDA and segment performance measures), compliance issues under Item 12 of Form 8-K, and the applicability of the new rules and amendments to foreign private issuers and "voluntary filers." **The FAQs can be found on the SEC's Web site at: http://www.sec.gov/divisions/corpfin/faqs/nongaapfaq.htm.**

The following discussion summarizes certain significant provisions of the Rule and clarifies key aspects of the Rule based on guidance in the FAQs and discussions with the SEC Staff. We have highlighted several of the FAQs below, but companies should review both the Rule and FAQs in their entirety.

Under the new rules and amendments, companies may be permitted to use certain non-GAAP financial measures in press releases, provided the disclosure accompanying the measure demonstrates the usefulness of the measure. However, in SEC filings, many previously disclosed non-GAAP measures, other than EBIT and EBITDA, may now be prohibited. For example, many common adjustments to GAAP earnings (such as, restructuring charges, asset impairments, realized gain or loss on investment securities, and gain or loss on asset sales) may be prohibited in filings. In addition, the use of adjusted EBITDA is limited in filed documents since it would be subject to the prohibitions regarding adjustments to non-GAAP liquidity and performance measures. Disclosure of cash flow per share and other per share measures of liquidity is prohibited in both press releases and filings. In addition, refer to Appendix A, *Non-GAAP Financial Measures – Summary of Disclosure Requirements and Prohibitions*.

Disclosures of Non-GAAP Financial Measures – Regulation G

Requirements

Regulation G is intended to provide investors with balanced financial disclosure whenever non-GAAP financial measures are presented. The regulation is applicable to any entity that is required to file reports pursuant to Sections 13(a) or 15(d) of the Exchange Act, other than a registered investment company. Regulation G applies whenever a company, or a person acting on its behalf, publicly discloses or releases any material information that includes a non-GAAP financial measure, whether that information is furnished to or filed with the SEC.

Regulation G prohibits the public disclosure or release of a non-GAAP financial measure that, taken together with the information accompanying that measure, contains an untrue statement of material fact or omits a material fact that would make the presentation of the measure, in light of the circumstances under which it is presented, not misleading. The regulation also requires disclosure of the most directly comparable financial measure calculated and presented in accordance with GAAP, and a quantitative reconciliation (by schedule or other clearly understandable method) of the differences between the non-GAAP financial measure and the most directly comparable financial measure(s) calculated and presented in accordance with GAAP.

> ***Question:*** What should be reconciled when a ratio or measure utilizes a non-GAAP financial measure in the numerator and/or the denominator?
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> ***Answer:*** Footnote 27 of the Rule states that a company must provide a reconciliation with regard to each non-GAAP financial measure used in the calculation of the ratio or measure. Therefore, companies would need to reconcile both the numerator and the denominator if they are non-GAAP measures. In addition, the ratio or measure calculated using GAAP amounts must be disclosed.

If a non-GAAP financial measure is released orally, telephonically, or by Web cast, broadcast, or similar means, the disclosures required by Regulation G may be provided by posting the information on the company's Web site and disclosing the location and availability of the information during the presentation. While the Rule does not state how long a company must keep this information available on its Web site, Footnote 28 of the Rule encourages companies to provide ongoing Web site access to the information for at least 12 months.

Definition of a Non-GAAP Financial Measure

A non-GAAP financial measure is defined as a numerical measure of a company's historical or future financial performance, financial position, or cash flows that:

- Excludes amounts, or is subject to adjustments that have the effect of excluding amounts, that are included in the most directly comparable measure calculated and presented in accordance with GAAP in the statement of income, balance sheet, or statement of cash flows (or equivalent statements) of the issuer; or
- Includes amounts, or is subject to adjustments that have the effect of including amounts, that are excluded from the most directly comparable measure so calculated and presented.

The definition of a non-GAAP financial measure is intended to capture all measures that have the effect of depicting either:

- A measure of performance that is different from that presented in the financial statements, such as income or loss before income taxes or net income or loss, as calculated in accordance with GAAP; or
- A measure of liquidity that is different from cash flow or cash flow from operations computed in accordance with GAAP.

> ***Question:*** Does the Rule provide a specific definition of the term "most directly comparable financial measure calculated and presented in accordance with GAAP"?
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> ***Answer:*** No. The Rule provides companies with flexibility to determine the most directly comparable GAAP financial measure. However, Footnote 26 of the Rule provides general guidance regarding the Staff's historical and continuing view that the presentation of non-GAAP liquidity measures should be balanced with disclosure of amounts

from the statement of cash flows (that is, cash flow from operating, investing, and financing activities) and the presentation of non-GAAP performance measures should be balanced with net income or income from continuing operations taken from the income statement.

A non-GAAP financial measure does not include operating and other statistical measures (such as, unit sales, number of employees, number of subscribers, number of advertisers) and ratios and statistical measures that are calculated using exclusively financial measures calculated in accordance with GAAP. Examples of these measures include operating margin that is calculated by dividing GAAP revenues into GAAP operating income, and sales per square foot and same-store sales (assuming that the sales figure is calculated in accordance with GAAP). Also excluded from the definition are financial measures required to be disclosed by GAAP, SEC rules, or a system of regulation of a government or governmental authority or self-regulatory organization that is applicable to the company.

Question: Companies may report a non-GAAP measure of profit or loss in their segment footnote in the notes to the financial statements if that measure is reported to management for purposes of assessing segment performance and allocating resources. Is non-GAAP segment information presented in conformity with FASB Statement No. 131, *Disclosures about Segments of an Enterprise and Related Information*, a non-GAAP financial measure under the Rule?

Answer: No. The Rule states that a non-GAAP financial measure does not include measures for each segment required to be disclosed in accordance with GAAP. Footnote 19 of the Rule states:

> FASB Statement No. 131, *Disclosures about Segments of an Enterprise and Related Information*, requires that companies report a measure of profit or loss and total assets for each reportable segment. This tabular information is presented in a note to the audited financial statements and is required to be reconciled to the GAAP measures, with all significant reconciling items separately identified and described. A registrant is required to provide a management's discussion & analysis (MD&A) of segment information if such a discussion is necessary to an understanding of the business. Such discussion would generally include the measures reported under FASB Statement No. 131.

However, as described in Question 21 of the FAQs, the presentation of a non-GAAP segment profit or loss measure on a consolidated basis in any context other than the FASB Statement No. 131 – required reconciliation in the footnote is considered a non-GAAP financial measure subject to the non-GAAP liquidity and performance measure prohibitions in Item 10. Therefore, even if a non-GAAP financial measure is permitted to be disclosed in MD&A on a segment basis, disclosure of the same measure in MD&A on a consolidated basis may be prohibited.

The requirements of Regulation G (and Item 10) are not applicable to non-GAAP financial measures included in disclosure that is subject to the SEC's communication rules applicable to business combination transactions.

Regulation G expressly provides that neither the requirements of Regulation G nor a person's compliance or non-compliance with the requirements of Regulation G should, in itself, affect any person's liability under Exchange Act Section 10(b) or Rule 10b-5 thereunder. However, the Rule indicates that, under certain circumstances, materially deficient disclosure under Regulation G could give rise to actions under Rule 10b-5.

The potential for liability in connection with the disclosure of non-GAAP financial information also was addressed in the December 2001 *Cautionary Advice Regarding the Use of "Pro Forma" Financial Information in Earnings Releases*, in which the SEC stated that the antifraud provisions of the federal securities laws apply to a company issuing pro forma financial information. An example is the action brought against Trump Hotels and Casino Resorts in January 2002 for making misleading statements in its third-quarter 1999 earnings release. In this action, the SEC found that the release cited pro forma figures to tout the company's purportedly positive results of operations but failed to disclose that those results were primarily attributable to an unusual one-time gain rather than to operations.

Foreign Private Issuers

Regulation G applies to the public disclosure of a non-GAAP financial measure by, or on behalf of, a foreign private issuer unless:

- The securities of the foreign private issuer are listed or quoted on a securities exchange or interdealer quotation system outside the United States;
- The non-GAAP financial measure is not derived from or based on a measure calculated and presented in accordance with U.S. GAAP; and
- The disclosure is made by or on behalf of the foreign private issuer outside the United States, or is included in a written communication that is released by or on behalf of the foreign private issuer outside the United States.

These conditions focus on whether the financial measure relates to U.S. GAAP and whether the disclosure is made by or on behalf of the foreign private issuer outside the United States. As a result, the exception for foreign private issuers continues to apply when a written communication is released in or outside of the United States, as long as the communication is released in the United States contemporaneously with or after the release outside the United States, and is not otherwise targeted at persons located in the United States.

With respect to foreign private issuers whose primary financial statements are prepared in accordance with home country GAAP, references to GAAP in the definition of a non-GAAP financial measure refer to the principles under which those primary financial statements are prepared. However, if the foreign private issuer calculates a non-GAAP financial measure derived from or based on a measure calculated in accordance with U.S. GAAP, then, for purposes of the application of the requirements of Regulation G, GAAP for that measure would be defined as U.S. GAAP.

SEC Filings – Item 10 of Regulation S-K, and Item 10 of Regulation S-B

Disclosure Requirements

Item 10 uses the same definition of a non-GAAP financial measure as described under Regulation G. Item 10 requires that companies include the following information in a filing with the SEC when that filing includes one or more non-GAAP financial measures (paragraphs (e)(1)(i) of Item 10 of Regulation S-K and (h)(1)(i) of Item 10 of Regulation S-B):

- A presentation, with equal or greater prominence, of the most directly comparable financial measure(s) calculated and presented in accordance with GAAP;
- A reconciliation (by schedule or other clearly understandable method), which shall be quantitative for historical non-GAAP financial measures presented, and quantitative, to the extent available without unreasonable efforts, for forward-looking information, of the differences between the non-GAAP financial measure disclosed or released with the most directly comparable financial measure(s) calculated and presented in accordance with GAAP;
- A statement disclosing the reasons why the company's management believes that presentation of the non-GAAP financial measure provides useful information to investors regarding the company's financial condition and results of operations; and
- To the extent material, a statement disclosing any additional purposes for which the company's management uses the non-GAAP financial measure that are not otherwise disclosed.

The required statements regarding the purposes for which management uses the non-GAAP financial measure and the utility of the information to investors should not be boilerplate. These statements should be specific to the measure used, the company, its business and industry, and the manner in which management assesses the non-GAAP financial measure and applies it to management decisions. The fact that the measure is used by or useful to analysts (refer to Footnote 44 of the Rule), or that the measure is included in a debt covenant, cannot be the sole support for presenting the non-GAAP financial measure. The justification for the use of the measure must be substantive. **If the disclo-**

sure does not clearly demonstrate the usefulness of the measure to investors, the SEC may conclude that the measure is prohibited.

Question: When a company presents the same non-GAAP financial measure in multiple sections of a filing (for example, description of business, selected financial data, and MD&A), or multiple times within the same section of a filing, are the Item 10 disclosures required to be provided each time the measure is presented?

Answer: The Rule does not address this issue. Presentations that do not repeat the disclosure each time the measure is used should be discussed with legal counsel. However, unnecessary repetition of the disclosure would not seem beneficial. One alternative is to provide the disclosure for all non-GAAP financial measures used throughout the filing in one section of the filing, with a cross-reference to that section each time the measure is presented. Another alternative is to present the full Item 10 disclosures the first time the non-GAAP financial measure is presented in a filing, with a cross-reference to this full disclosure each time the measure is presented thereafter.

Question: Is a company that discloses a non-GAAP financial measure in a prior period required to present the same measure in a current filing where the prior period is compared to the current period?

Answer: No. A company's facts and circumstances could change such that the purpose for which management previously used the measure is no longer valid or a non-GAAP financial measure that was previously used is judged to be no longer useful to investors. However, whatever non-GAAP financial measure is disclosed should be calculated and presented consistently for all periods presented. Footnote 23 of the Rule states that:

> Registrants should consider whether a change in the method of calculating or presenting a non-GAAP financial measure from one period to another, without a complete description of the change in that methodology, complies with the requirement of Regulation G that a registrant, or a person acting on its behalf, shall not make public a non-GAAP financial measure that, taken together with the information accompanying that measure, contains an untrue statement of a material fact or omits to state a material fact necessary in order to make the presentation of the non-GAAP financial measure, in light of the circumstances under which it is presented, not misleading.

Prohibitions

In addition to the mandated disclosure requirements, Item 10 prohibits the following (paragraphs (e)(1)(ii) of Item 10 of Regulation S-K and (h)(1)(ii) of Regulation S-B):

- Excluding charges or liabilities that required, or will require, cash settlement or would have required cash settlement absent an ability to settle in another manner, from non-GAAP liquidity measures, other than the measures EBIT and EBITDA.

Question: Since EBIT and EBITDA are exempt from the liquidity measure prohibition, do they need to be reconciled to the most directly comparable GAAP measure?

Answer: Yes. Although there is an exemption for EBIT and EBITDA in the Rule, they are still considered non-GAAP financial measures. The Rule requires a quantitative reconciliation (by schedule or other clearly understandable method) of the differences between the non-GAAP financial measure and the most directly comparable GAAP measure. No exemption to this reconciliation requirement has been provided for EBIT or EBITDA.

Question: What is the most directly comparable GAAP financial measure for EBIT and EBITDA?

Answer: Determining the most directly comparable GAAP financial measure depends on whether EBIT or EBITDA are presented as non-GAAP measures of liquidity or performance. If they are presented as a measure of liquidity, the most directly comparable GAAP financial measure would be a liquidity measure, such as cash flows from operating activities.

Because they exclude recurring items, a company should consider the appropriateness of presenting EBIT or EBITDA as a performance measure (refer to Question 8 of the FAQs). Provided a company can justify the presentation of EBIT or EBITDA as a performance measure, Question 15 of the FAQs states that they should be reconciled to GAAP net income. Operating income would not be considered the most directly comparable GAAP financial measure as EBIT and EBITDA make adjustments for items that are not included in operating income. Reconciliation to net income may represent a change in practice as many companies have historically interpreted "earnings" as used in EBIT and EBITDA to mean operating income and, therefore, reconciled the measures to operating income.

Question: Does the exemption for EBIT and EBITDA also apply to the presentation of adjusted EBIT and adjusted EBITDA?

Answer: No. The non-GAAP measures EBIT and EBITDA are specifically permitted in the Rule. However, Question 14 of the FAQs states that "earnings" as used in EBIT and EBITDA is intended to mean net income. Therefore, any adjustments to net income beyond those identified in the traditional definition of EBIT (that is, interest and taxes) or EBITDA (that is, interest, taxes, depreciation and amortization) are subject to the non-GAAP liquidity and performance measure prohibitions in Item 10. These prohibitions will limit the use of adjusted EBIT and adjusted EBITDA in filed documents.

Even if an adjusted EBIT or adjusted EBITDA measure is not prohibited by Item 10, the measure should not be characterized as EBIT or EBITDA. Instead, the title of the measure should clearly identify the earnings measure being used and all adjustments.

Question: May a company disclose an otherwise prohibited adjusted EBITDA measure when such a measure represents a material covenant to a credit agreement?

Answer: Yes, if management believes the credit agreement is a material agreement, the covenant is a material term of the credit agreement, and the information about the covenant is material to an investor's understanding of the company's financial condition and/or liquidity, then the company may disclose the measure as calculated in the credit agreement. Question 10 of the FAQs states that MD&A requires disclosure of material items that affect liquidity. However, disclosure of the covenant may be misleading absent a discussion of the following:

- The materiality of the credit agreement and the covenant;
- The amount or limit required for compliance with the covenant; and
- The actual or reasonably likely effects of compliance or non-compliance with the covenant on the company's financial condition and liquidity.

Discussion of the non-GAAP financial measure outside the context of the credit agreement (for example, in discussing and comparing results of operations) would be prohibited unless otherwise permitted under Item 10.

Question: Are the requirements in Item 10 for the prominent presentation of, and reconciliation to, the most directly comparable GAAP financial measure(s) intended to change the Staff's historical practice of requiring the prominent presentation of amounts for the three major categories of the statement of cash flows when a non-GAAP liquidity measure is presented?

Answer: No. The requirements in Item 10 are consistent with the Staff's historical practice. The three major categories of the statement of cash flows (that is, cash flow from operating, investing and financing activities) should be presented when a non-GAAP liquidity measure is presented.

Question: How does the liquidity measure prohibition affect the ability of companies to present "free cash flow" in documents filed with the SEC?

Answer: Free cash flow is commonly defined as cash flow from operating activities less capital expenditures. Question 13 of the FAQs indicates that this measure would not ordinarily violate the liquidity measure prohibition in Item 10. However, companies should use caution when presenting the measure as free cash flow does not have a uniform definition and its title does not describe how it is calculated. Accordingly, a clear description of its calculation, along with a reconciliation to the most directly comparable GAAP liquidity measure, should be disclosed. Companies should also be careful to avoid inappropriate or potentially misleading inferences about the usefulness of the measure, and all material limitations of the measure should be disclosed.

- Adjusting a non-GAAP performance measure to eliminate or smooth items identified as non-recurring, infrequent, or unusual, when (1) the nature of the charge or gain is such that it is reasonably likely to recur within two years, or (2) there was a similar charge or gain within the prior two years.

  Question: Does this prohibition mean that companies may adjust a GAAP performance measure to eliminate "recurring" items?

  Answer: While companies should never use a non-GAAP financial measure in an attempt to smooth earnings, Question 8 of the FAQs states that there is no per se prohibition against adjusting a financial measure for recurring items. However, companies must be able to demonstrate the usefulness of any measure that excludes recurring items, particularly if the measure is used to evaluate performance. Determining the acceptability of a financial measure that eliminates a recurring item depends on all of the facts and circumstances. Question 8 states that such measures are more likely to be permissible if management reasonably believes it is probable that the financial impact of the item will disappear or become immaterial within a near-term finite period. In addition, the Staff indicates that presentation of such a measure may be misleading absent disclosure of the following:

  - The manner in which management uses the non-GAAP financial measure to conduct or evaluate its business;
  - The economic substance behind management's decision to use such a measure;
  - The material limitations associated with use of the non-GAAP financial measure as compared to the use of the most directly comparable GAAP financial measure;
  - The manner in which management compensates for these limitations when using the non-GAAP financial measure; and
  - The substantive reasons why management believes the non-GAAP financial measure provides useful information to investors.

Question: How should the terms "nature of the charge" and "similar" be interpreted?

Answer: We expect the Staff to interpret these terms broadly. For example, a restructuring charge may be similar regardless of the individual components of the charge or the size of the charge. That is, a charge for employee termination and severance payments in the prior two years may be considered similar to a current charge for lease termination payments.

Question: For prohibited adjustments to a non-GAAP performance measure, can a company disclose in MD&A the effect of the item(s) on GAAP earnings and earnings per share?

Answer: Narrative, quantified disclosure of the effect on GAAP earnings and earnings per share of a significant charge or gain would generally be permitted. As described in Question 3 of Staff Accounting Bulletin Topic 5:P, *Restructuring Charges:*

> Discussions in MD&A and elsewhere, which quantify the effects of unusual or infrequent items on net income and earnings per share, are beneficial to a reader's understanding of the financial statements and are therefore acceptable.

Therefore, it is permissible and may well be necessary to identify, quantify, discuss, and analyze material charges and other items, whether they are recurring or non-recurring, in MD&A. Whether an item may, or indeed must, be discussed in MD&A is a different question from whether it may be eliminated or adjusted in connection with a non-GAAP financial measure.

Question: What measure was contemplated by "funds from operations" (FFO), a common non-GAAP measure in the real estate industry, in Footnote 50 of the Rule? Should FFO be considered a performance or liquidity measure?

Answer: Footnote 50 of the Rule explicitly permits the presentation of FFO per share and, therefore, by derivation, FFO, but does not define the measure. However, Question 7 of the FAQs indicates that Footnote 50 contemplated only the measure "funds from operations" defined and clarified, as of January 1, 2000, by the National Association of Real Estate Investment Trusts (NAREIT). Accordingly, the presentation in filed documents of any FFO measure that departs from this definition, or a per share amount based on such a modified measure, is subject to all of the prohibitions in Item 10.

We understand that the Staff generally believes that FFO should be considered a performance measure. As a result, the discussion in Footnote 50 regarding the acceptability of FFO per share measures should not be interpreted to override the prohibition in Footnote 11 of the Rule on the presentation of cash flow per share data and other per share measures of liquidity. Therefore, disclosure of FFO per share is prohibited when FFO is presented as a non-GAAP measure of liquidity.

- Presenting non-GAAP financial measures on the face of the company's financial statements prepared in accordance with GAAP or in the accompanying notes;
- Presenting non-GAAP financial measures on the face of any pro forma financial information required to be disclosed by Article 11 of Regulation S-X; and
- Using titles or descriptions of non-GAAP financial measures that are the same as, or confusingly similar to, titles or descriptions used for GAAP financial measures. For example, a non-GAAP measure identified as "operating earnings" would not be permitted since the title is confusingly similar to "operating income," a GAAP measure.

As a result of the reconciliation requirement, Item 10 implicitly requires a company to characterize any non-GAAP financial measure included in a filing as either a liquidity or performance measure. In certain situations, different companies may characterize the same non-GAAP financial measure differently. This determination is important as it dictates the nature of the adjustments to the non-GAAP measure that are permitted under Item 10. If the measure is a liquidity measure, excluding cash charges is prohibited. If the measure is a performance measure, excluding cash or non-cash charges may be prohibited depending on the nature of the charges excluded.

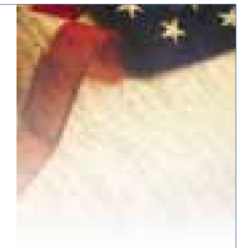
Non-GAAP Per-Share Measures

The Rule does not include a prohibition on the presentation of non-GAAP per-share financial measures. However, Footnote 11 of the Rule states that:

> While we have not included a prohibition on per-share non-GAAP financial measures in Item 10 of Regulation S-K or Item 10 of Regulation S-B, per-share measurements that are prohibited specifically under GAAP or SEC rules continue to be prohibited in materials filed with or furnished to the SEC. See, for example, the prohibition on cash flow per share in paragraph 33 of FASB Statement No. 95, *Statement of Cash Flows*.

Further clarification on the presentation of non-GAAP per share measures is provided in Question 11 of the FAQs. While Question 11 acknowledges that non-GAAP per share measures may be meaningful from an operating viewpoint, it indicates that disclosure of how these measures are used by management and why they provide useful information to investors (as the per share measure would not depict the amount that accrues directly to shareholders' benefit) is critical to ensuring such presentation is not misleading. Question 11 also reiterates the Staff's view that presenting cash flow per share data and other per share measures of liquidity is prohibited.

Question: Is it permissible to present a non-GAAP per-share measure that is derived from a prohibited non-GAAP financial measure?



Answer: No. While the Rule has no explicit restriction on the presentation of non-GAAP per-share measures, other than the prohibition on cash flow per-share data and other per-share measures of liquidity, the Staff has indicated that companies are not allowed to disclose in a filing a non-GAAP per-share measure that is derived from a prohibited non-GAAP financial measure. That is, the numerator in the non-GAAP per-share measure must be a permitted non-GAAP financial measure under Item 10.

Question: Is a company required to reconcile both the numerator and denominator of a non-GAAP per-share financial measure to the most directly comparable GAAP per-share measure?

Answer: Yes. However, as long as the denominator is diluted shares, per FASB Statement No. 128, *Earnings Per Share*, there likely will be nothing to reconcile. When determining the denominator in a non-GAAP per-share financial measure, companies should consider the guidance in Footnote 49 of the Rule, which states, in part:

> Registrants should consider whether the use of any per share measure that is not calculated using a share figure that is presented on a diluted basis complies with (1) the requirement of Regulation G that a registrant, or a person acting on its behalf, shall not make public a non-GAAP financial measure that, taken together with the information accompanying that measure, contains an untrue statement of a material fact or omits to state a material fact necessary in order to make the presentation of the non-GAAP financial measure, in light of the circumstances under which it is presented, not misleading; and (2) generally accepted accounting principles (see, for example, FASB Statement No. 128, *Earnings Per Share*).

Foreign Private Issuers

Exchange Act Form 20-F has been amended to incorporate Item 10 of Regulation S-K. Accordingly, foreign private issuers are subject to the same requirements as domestic companies with respect to the use of non-GAAP financial measures in filings with the SEC, with the following limited exception.

While the definition of non-GAAP financial measures under Item 10 is consistent with the definition in Regulation G, a non-GAAP financial measure for foreign private issuers that would otherwise be prohibited is permitted in a Form 20-F if the measure: (1) relates to the GAAP used in the primary financial statements included in the filing; (2) is required or expressly permitted by the standard-setter that establishes the GAAP used is such financial statements; and (3) is included in the annual report or financial statements used in the company's home country jurisdiction or market. This exception is provided only if the foreign standard-setter affirmatively acts to require or permit the measure, and not in situations where the measure merely was not prohibited.

> ***Question:*** What does "expressly permitted" mean?
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> ***Answer:*** Question 28 of the FAQs states that a measure is expressly permitted if the particular measure is clearly and specifically identified as an acceptable measure by the standard setter that is responsible for establishing the GAAP used in the company's primary financial statements included in its filing with the commission.

Filers on Form 40-F under the multijurisdictional disclosure system are not subject to the requirements of Item 10.

Press Releases Furnished to the SEC – Item 12 of Form 8-K

Requirements

Item 12, which will bring earnings releases and announcements into the formal disclosure system, requires companies to furnish a Form 8-K to the SEC within five business days of any public release or announcement disclosing material information regarding a company's results of operations or financial condition for an annual or quarterly fiscal period that has ended. This requirement is applicable regardless of whether the release or announcement includes disclosure of a non-GAAP financial measure. Item 12 does not apply to public disclosure of earnings estimates for future or ongoing fiscal periods, unless those estimates are included in a public release or announcement of material non-public information about completed annual or quarterly fiscal periods.

A separate Item 12 Form 8-K is not required to be furnished for non-public information that is disclosed orally, telephonically, or by Web cast, broadcast, or similar means within 48 hours of a related written release or announcement that has already been furnished to the SEC on Form 8-K. This exception is applicable as long as the presentation is broadly accessible to the public, the disclosures required by Regulation G for non-GAAP financial measures is available on the company's Web site, and the presentation is announced by a widely disseminated press release that includes instructions as to when and how to access the presentation and the location on the company's Web site where the information is available.

> ***Question:*** Information provided under Item 12 of Form 8-K is considered to be furnished not filed. What is the difference between "furnishing" and "filing" the information required by Item 12?
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> ***Answer:*** The information provided under Item 12 of Form 8-K is considered to be "furnished," not "filed," with the SEC. As a result, the information is not subject to Section 18 of the Exchange Act unless the company specifically states that the information is to be considered "filed," and is not incorporated by reference into a registration statement, proxy statement or other report unless the company specifically incorporates the information into those documents by reference. The concept of furnishing information rather than filing is common in Regulation FD disclosures made under Item 9 of Form 8-K.

If the release or announcement includes a non-GAAP financial measure, the disclosures regarding the utility and purpose of the measure required in paragraph (e)(1)(i) of Item 10 of Regulation S-K (paragraph (h)(1)(i) of Item 10 of Regulation S-B) apply to the Item 12 Form 8-K. However, the non-GAAP liquidity and performance measure prohibitions in paragraph (e)(1)(ii) of Item 10 of Regulation S-K (paragraph (h)(1)(ii) of Item 10 of Regulation S-B) are not applicable to non-GAAP financial measures disclosed in a public release or announcement "furnished" under Item 12 of Form 8-K. **Nevertheless, companies must be able to demonstrate the usefulness of non-GAAP financial measures used in a furnished press release.** If a company elects to "file" the release or announcement with the SEC, all of the provisions in Item 10 are applicable.

> ***Question:*** Are non-GAAP financial measures disclosed in earnings releases or announcements furnished under Item 12 subject to the non-GAAP liquidity and performance measure prohibitions in Item 10?
>
> ***Answer:*** The non-GAAP financial measures disclosed in furnished earnings releases or announcements are not technically subject to the non-GAAP liquidity and performance measure prohibitions in Item 10. However, the Staff may question the appropriateness of a non-GAAP financial measure disclosed in an earnings release furnished to the SEC under Item 12 of Form 8-K if the company's disclosure does not include a persuasive reason for the usage and purpose of the measure, as required by paragraph (e)(1)(i) of Item 10. Therefore, notwithstanding the fact that the Rule does not contain any specific prohibition (other than the prohibition on presenting cash flow per share data and other per-share measures of liquidity) on the use of non-GAAP financial measures in an earnings release, companies must demonstrate the usefulness of any non-GAAP financial measure disclosed in a furnished release.

Question: Is the prohibition on the presentation of cash flow per-share data and other per share measures of liquidity in Footnote 11 of the Rule applicable to both filed and furnished documents?

Answer: Yes. This footnote prohibits the disclosure of cash flow data on a per-share basis and other per share measures of liquidity in both materials filed with or furnished to the SEC, including press releases furnished under Item 12 of Form 8-K. This view is consistent with the SEC's long-standing position on non-GAAP per-share measures detailed in ASR 142, *Reporting Cash Flow*, and paragraph 33 of FASB Statement No. 95, *Statement of Cash Flows*.

Companies may satisfy the requirement to disclose the purposes for which management uses a non-GAAP financial measure and the utility of the information to investors by including the disclosure in the Form 8-K or in the release or announcement that is included as an exhibit to the Form 8-K. Companies may also satisfy this requirement by including the disclosure in their most recent annual report filed with the SEC (or a more recent filing) and by updating the disclosure, as necessary, no later than the time the Form 8-K is furnished to the SEC.

Foreign Private Issuers

Foreign private issuers are not subject to the requirements of Form 8-K. Therefore, the requirements under Item 12 are not applicable.

Effective Date and Transition Issues

Regulation G applies to any public disclosure or release of material information that includes a non-GAAP financial measure made on or after March 28, 2003, whether that information is furnished to, or filed with, the SEC. The amendments to Item 10 of Regulation S-K, Item 10 of Regulation S-B and Form 20-F apply to any annual or quarterly report filed with respect to a fiscal period ending after March 28, 2003 (that is, the quarter ended March 31, 2003 for calendar year-end companies). The requirement to furnish earnings releases and similar materials to the SEC on Form 8-K applies to earnings releases and similar announcements made after March 28, 2003.

Notwithstanding the effective date of the Rule, Question 1 of the FAQs indicates that any periodic report (for example, Form 10-K, Form 10-Q or Form 8-K) incorporated by reference in a registration statement filed after March 28, 2003 must comply with the requirements of Regulation G, even if Regulation G was not applicable at the time the periodic report was initially filed. Compliance with Regulation G requires, in part, a reconciliation of each non-GAAP financial measure to the most directly comparable GAAP financial measure. If the required reconciliation is missing from the previously filed periodic report, a company may provide it in one or more of the following ways:

- Amend the previously filed periodic report (with that amendment incorporated by reference into the registration statement);
- Include a section within the registration statement that identifies the non-GAAP financial measures that are contained in the incorporated reports and provides the required reconciliations; or
- File a current report on Form 8-K or a periodic report that identifies the non-GAAP financial measures that are contained in the incorporated reports and provides the required reconciliations (with that Form 8-K or periodic report incorporated by reference into the registration statement).

Compliance with Item 10 in periodic reports that are incorporated by reference in a registration statement filed after March 28, 2003, is only required for non-GAAP financial measures calculated for fiscal periods ended after March 28, 2003. However, Question 2 of the FAQs indicates that the provisions of the Rule generally are consistent with and codify existing Staff views on non-GAAP financial measures in SEC filings. As a result, the Staff believes that any periodic report previously filed and incorporated by reference in a registration statement already should have conformed to the provisions of Item 10.

Appendix A

Non-GAAP Financial Measures — Summary of Disclosure Requirements and Prohibitions

Disclosure Requirements/Prohibitions	**All Disclosure of Non-GAAP Financial Measures** (Regulation G[1])	**SEC Filings** (Item 10 of Regulation S-K[2])	**Press Releases Furnished to the SEC** (Item 12 of Form 8-K[3])
Presentation of the most directly comparable GAAP financial measure	X		
Presentation, **with equal or greater prominence**, of the most directly comparable GAAP financial measure		X	X
Quantitative reconciliation of the non-GAAP financial measure to the most directly comparable GAAP financial measure	X	X	X
No material misstatements or omissions that would make the presentation of the non-GAAP financial measure misleading	X	X	X
Statement disclosing the reasons why management believes the non-GAAP financial measure provides useful information to investors		X	X
Statement disclosing the additional purposes for which management uses the non-GAAP financial measure		X	X
Prohibitions on certain presentations of non-GAAP financial measures:			
■ Presenting per-share measures of liquidity		X	X
■ Excluding charges or liabilities that require, or will require, cash settlement, or would have required cash settlement absent an ability to settle in another manner, from non-GAAP liquidity measures (other than EBIT and EBITDA)		X	
■ Adjusting a non-GAAP performance measure to eliminate or smooth items identified as nonrecurring, infrequent or unusual, when the nature of the charge or gain is such that is reasonably likely to recur within two years or there was a similar charge or gain within the prior two years		X	
■ Presenting non-GAAP financial measures on the face of the GAAP financial statements or in the accompanying notes		X	
■ Presenting non-GAAP financial measures on the face of any pro forma financial statements required to be disclosed by Article 11 of Regulation S-X		X	
■ Using titles or descriptions of non-GAAP financial measures that are the same as, or confusingly similar to, titles or descriptions used for GAAP financial measures		X	

[1] Regulation G applies whenever a registrant, or person acting on its behalf, publicly discloses or releases material information that includes a non-GAAP financial measure, whether that information is furnished to, or filed with, the SEC.

[2] Item 10 of Regulation S-K (and Item 10 of Regulation S-B) applies to all SEC filings that include non-GAAP financial measures. Form 20-F has been amended to incorporate the requirements of Item 10 of Regulation S-K.

[3] Item 12 of Form 8-K requires registrants to furnish to the SEC all releases or announcements disclosing material nonpublic financial information about completed annual or quarterly fiscal periods, regardless of whether the release or announcement includes disclosure of a non-GAAP financial measure. If a registrant elects to file the release or announcement with the SEC, such disclosure is subject to the requirements of Item 10 of Regulation S-K and S-B.