



U.S. Securities and Exchange Commission

Final Rule: Conditions for Use of Non-GAAP Financial Measures

Securities and Exchange Commission

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Conditions for Use of Non-GAAP Financial Measures

Agency: Securities and Exchange Commission

Action: Final rule

Summary: As directed by the Sarbanes-Oxley Act of 2002, we are adopting new rules and amendments 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). We are adopting a new disclosure regulation, Regulation G, which will require public companies that disclose or release such non-GAAP financial measures to include, in that disclosure or release, a presentation of the most directly comparable GAAP financial measure and a reconciliation of the disclosed non-GAAP financial measure to the most directly comparable GAAP financial measure. We also are adopting amendments to Item 10 of Regulation S-K and Item 10 of Regulation S-B to provide additional guidance to those registrants that include non-GAAP financial measures in Commission filings. Additionally, we are adopting amendments to Form 20-F to incorporate into that form the amendments to Item 10 of Regulation S-K. Finally, we are adopting amendments that require registrants to furnish to the Commission, on Form 8-K, earnings releases or similar announcements.

Dates: Effective Date: March 28, 2003. Compliance Dates: Regulation G will apply to all subject disclosures as of March 28, 2003. The requirement to furnish earnings releases and similar materials to the Commission on Form 8-K will apply to earnings releases and similar announcements made after March 28, 2003. The amendments to Item 10 of Regulation S-K, Item 10 of Regulation S-B and Form 20-F will apply to any annual or quarterly report filed with respect to a fiscal period ending after March 28, 2003.

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Supplementary Information: We are adopting new Regulation G.¹ We also are adopting amendments to Item 10 of Regulation S-K,² Item 10 of Regulation S-B,³ and Securities Exchange Act of 1934⁴ Forms 8-K⁵ and 20-F.⁶

I. Background

On July 30, 2002, President Bush signed into law the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley Act).⁷ As directed by Section 401(b) of the Sarbanes-Oxley Act, we published for comment a number of new rules and amendments to address the use of "non-GAAP financial measures" on November 4, 2002.⁸ As discussed in that proposing release, the Commission has expressed concerns regarding the improper use of non-GAAP financial measures during the past 30 years.⁹ The rules we adopt today reflect the letter and spirit of the Sarbanes-Oxley Act, our history in regulating non-GAAP financial measures, and the comments we received on the proposals.

We are adopting the proposals relating to the use of non-GAAP financial measures substantially as proposed.¹⁰ The rules we adopt today, however, reflect the following changes from those proposals:

- **Regulation G -**

- Regulation G will not apply to a non-GAAP financial measure included in disclosure relating to a proposed business combination, the entity resulting therefrom or an entity that is a party thereto if the disclosure is contained in a communication that is subject to the communications rules applicable to business combination transactions;
- The safe harbor from the application of Regulation G for disclosure of non-GAAP financial measures by foreign private issuers outside of the United States will make clearer that Regulation G does not apply to written communications released in the United States, as well as outside the United States, so long as the communication is released in the United States contemporaneously with or after its release outside the United States and is not otherwise targeted at persons located in the United States;
- The reference to "comparable [GAAP] financial measure or measures" will read "most directly comparable [GAAP] financial measure or measures"; and

- The definition of GAAP for purposes of financial measures prepared by foreign private issuers will be further clarified.
- **Item 10 of Regulation S-K and Item 10 of Regulation S-B -**
 - These items will not include a prohibition on "non-GAAP per share measures" in documents filed with the Commission;¹¹
 - These items will not apply to a non-GAAP financial measure included in disclosure relating to a proposed business combination, the entity resulting therefrom or an entity that is a party thereto if the disclosure is contained in a communication that is subject to the communications rules applicable to business combination transactions;
 - The reference to "comparable [GAAP] financial measure or measures" will read "most directly comparable [GAAP] financial measure or measures";
 - The required quantitative reconciliation will include the same exception for forward-looking non-GAAP financial measures as in Regulation G;
 - The measures EBIT (earnings before interest and taxes) and EBITDA (earnings before interest, taxes, depreciation, and amortization) will be exempted specifically from the prohibition on 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;
 - The prohibition on adjusting a non-GAAP performance measure to eliminate or smooth items identified as non-recurring, infrequent or unusual, when the nature of the charge or gain is such that it is reasonably likely to recur will make clear that such an adjustment is prohibited only 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; and
 - The definition of GAAP for purposes of financial measures prepared by foreign private issuers will be further clarified.
- **Definition of non-GAAP financial measures -**
 - "Non-GAAP financial measures" will not include financial measures that are required to be disclosed by GAAP, Commission rules or a system of regulation that is applicable to a registrant.
- **Form 8-K -**

- The Form 8-K requirement with respect to earnings releases and similar announcements will require that those materials be "furnished to," rather than "filed with," the Commission.

II. The Rules and Amendments

A. Regulation G

We are adopting new Regulation G substantially as proposed. Regulation G will apply whenever a company publicly discloses or releases material information that includes a non-GAAP financial measure.¹²

1. Application

a. General Standard

Regulation G applies 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.¹³ Regulation G applies whenever such a registrant, or a person acting on its behalf, discloses publicly or releases publicly any material information that includes a non-GAAP financial measure.

b. Foreign Private Issuers

Regulation G applies to registrants that are foreign private issuers,¹⁴ subject to a limited exception. Specifically, Regulation G does not apply to public disclosure of a non-GAAP financial measure by, or on behalf of, a registrant that is a foreign private issuer if:

- the securities of the foreign private issuer are listed or quoted on a securities exchange or inter-dealer 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 generally accepted accounting principles in the United States; 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 of the United States. We believe these conditions appropriately take into account the interests of U.S. investors (including both the interests reflected in the Sarbanes-Oxley Act and the interest of receiving information that is communicated globally) and the interests of foreign private issuers in

communicating globally, including in their home markets.

Therefore, we believe that the worldwide availability of information properly disclosed outside the United States and the interests of U.S. investors in information communicated by, or on behalf of, the issuer outside the United States dictate that the exception for foreign private issuers should continue to apply even where any one or more of the following circumstances are present:

- a written communication is released in the United States as well as outside the United States, so 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;
- foreign journalists, U.S. journalists or other third parties have access to the information;
- the information appears on one or more web sites maintained by the registrant, so long as the web sites, taken together, are not available exclusively to, or targeted at, persons located in the United States; or
- following the disclosure or release of the information outside the United States, the information is included in a submission to the Commission made under cover of a Form 6-K.¹⁵

c. Disclosures relating to business combination transactions

As proposed, Regulation G would have applied to disclosures of non-GAAP financial measures that represent projections or forecasts of results of proposed business combination transactions. We sought comment specifically on this point, and several of the comment letters we received in response to the proposal argued strongly that Regulation G should not apply to these measures.¹⁶ After consideration of the comments regarding the application of Regulation G to these disclosures, we are including in Regulation G an exception for non-GAAP financial measures included in disclosure relating to a proposed business combination transaction, the entity resulting from the business combination transaction, or an entity that is a party to the business combination transaction if the disclosure is contained in a communication that is subject to the Commission's communications rules applicable to business combination transactions.¹⁷

2. Non-GAAP Financial Measures

a. Definition

For purposes of Regulation G, a non-GAAP financial measure is a numerical measure of a registrant'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.

In this regard, GAAP refers to generally accepted accounting principles in the United States.

The proposed version of Regulation G indicated that, with respect to foreign private issuers whose primary financial statements are prepared in accordance with non-U.S. generally accepted accounting principles, references to GAAP would "also include" the principles under which those primary financial statements are prepared. Commenters expressed the concern that the words "also include" meant that foreign private issuers would have to reconcile the non-GAAP financial measure to both GAAP in their home country and U.S. GAAP.¹⁸ As adopted, Regulation G clarifies this issue. First, in the case of foreign private issuers whose primary financial statements are prepared in accordance with non-U.S. generally accepted accounting principles, Regulation G makes clear that GAAP refers to the principles under which those primary financial statements are prepared. Second, in the case of foreign private issuers that include a non-GAAP financial measure derived from or based on a measure calculated in accordance with U.S. generally accepted accounting principles, Regulation G makes clear that GAAP refers to U.S. generally accepted accounting principles for purposes of the application of the requirements of Regulation G to the disclosure of that measure.

b. Discussion of the definition

We do not intend the definition of "non-GAAP financial measures" to capture measures of operating performance or statistical measures that fall outside the scope of the definition set forth above. As such, non-GAAP financial measures do not include:

- operating and other statistical measures (such as unit sales, numbers of employees, numbers of subscribers, or numbers of advertisers); and
- ratios or statistical measures that are calculated using exclusively one or both of:
 - financial measures calculated in accordance with GAAP; and
 - operating measures or other measures that are not non-GAAP financial measures.

Non-GAAP financial measures do not include financial information that does not have the effect of providing numerical measures that are different from the comparable GAAP measure. Examples of measures to which Regulation G does not apply include the following:

- disclosure of amounts of expected indebtedness, including contracted and anticipated amounts;
- disclosure of amounts of repayments that have been planned or decided upon but not yet made;
- disclosure of estimated revenues or expenses of a new product line, so long as such amounts were estimated in the same manner as would be computed under GAAP; and
- measures of profit or loss and total assets for each segment required to be disclosed in accordance with GAAP.¹⁹

We do intend that the definition of non-GAAP financial measure 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 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.

An example of a non-GAAP financial measure would be a measure of operating income²⁰ that excludes one or more expense or revenue items that are identified as "non-recurring." Another example would be EBITDA, which could be calculated using elements derived from GAAP financial presentations but, in any event, is not presented in accordance with GAAP. Examples of ratios and measures that would not be non-GAAP financial measures would include sales per square foot (assuming that the sales figure was calculated in accordance with GAAP) or same store sales (again assuming the sales figures for the stores were calculated in accordance with GAAP).

An example of a ratio that would not be a non-GAAP financial measure would be a measure of operating margin that is calculated by dividing revenues into operating income, where both revenue and operating income are calculated in accordance with GAAP. Conversely, an example of a ratio that would be a non-GAAP financial measure would be a measure of operating margin that is calculated by dividing revenues into operating income, where either revenue or operating income, or both, were not calculated in accordance with GAAP.

We received comment regarding the exclusion of financial measures used for regulatory purposes from the definition.²¹ In response to these comments, we have provided an exclusion from the definition of "non-GAAP financial

measure" for financial measures required to be disclosed by GAAP, Commission rules, or a system of regulation of a government or governmental authority or self-regulatory organization that is applicable to the registrant. Examples of such financial measures would include measures of capital or reserves calculated for such a regulatory purpose.

3. Requirements of Regulation G

Regulation G contains a general disclosure requirement and a specific requirement of a reconciliation of the non-GAAP financial measure to the most directly comparable GAAP financial measure.

*a. General disclosure requirement*²²

Regulation G includes the general disclosure requirement 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.²³

*b. Reconciliation Requirement*²⁴

Whenever a company that is subject to Regulation G, or a person acting on its behalf, publicly discloses any material information that includes a non-GAAP financial measure, Regulation G requires the registrant to provide the following information as part of the disclosure or release of the non-GAAP financial measure:²⁵

- a presentation of the most directly comparable financial measure calculated and presented in accordance with GAAP;²⁶ and
- a reconciliation (by schedule or other clearly understandable method), which shall be quantitative for historic measures and quantitative, to the extent available without unreasonable efforts, for prospective measures, of the differences between the non-GAAP financial measure presented and the most directly comparable financial measure or measures calculated and presented in accordance with GAAP.²⁷

If a non-GAAP financial measure is released orally, telephonically, by webcast, by broadcast, or by similar means, the registrant may provide the accompanying information required by Regulation G by: (1) posting that information on the registrant's web site; and (2) disclosing the location and availability of the required accompanying information during its presentation.²⁸

With regard to the quantitative reconciliation of non-GAAP financial measures

that are forward-looking, Regulation G requires a schedule or other presentation detailing the differences between the forward-looking non-GAAP financial measure and the appropriate forward-looking GAAP financial measure. If the GAAP financial measure is not accessible on a forward-looking basis, the registrant must disclose that fact and provide reconciling information that is available without an unreasonable effort. Furthermore, the registrant must identify information that is unavailable and disclose its probable significance.

Some commenters suggested that we define "public" disclosure and persons acting "on behalf of" a registrant.²⁹ In both cases, the commenters made reference to Regulation FD³⁰ as a precedent. We believe that the precedent of Regulation FD is largely inapposite in this regard and, therefore, have not added these definitions. Under Regulation FD, broad "public" disclosure is the requirement, not the triggering event. The perceived need for exclusions from the triggering disclosures and the specified list of company officials that are acting for the company under Regulation FD was the concern that any disclosure - private or otherwise - would trigger a public disclosure requirement. There should be no such concerns with Regulation G. Only "public" disclosure triggers Regulation G, and an issuer is properly responsible for any person making "public" disclosures on its behalf.³¹

We understand, and indeed intend, that Regulation FD and Regulation G will operate in tandem. A "private" communication of material, non-public information to, for example, an analyst or a shareholder triggers a requirement for broad public disclosure under Regulation FD. If that public disclosure is of material information containing a non-GAAP financial measure, Regulation G will apply to that disclosure.

4. Liability matters

Rule 102 of Regulation G³² expressly provides that neither the requirements of Regulation G nor a person's compliance or non-compliance with the requirements of Regulation G shall in itself affect any person's liability under Exchange Act Section 10(b)³³ or Rule 10b-5 thereunder.³⁴ Disclosure pursuant to Regulation G that is materially deficient may, in addition to violating Regulation G, give rise to a violation of Section 10(b) or Rule 10b-5 thereunder if all the elements for such a violation are present. In this regard, we reminded companies in December 2001 that, under certain circumstances, non-GAAP financial measures could mislead investors if they obscure the company's GAAP results.³⁵ We continue to be of the view that some disclosures of non-GAAP financial measures could give rise to actions under Rule 10b-5.³⁶

Section 3(b) of the Sarbanes-Oxley Act provides that a violation of that Act or the Commission's rules thereunder shall be treated for all purposes as a violation of the Exchange Act. Therefore, if an issuer, or any person acting on its behalf, fails to comply with Regulation G, the issuer and/or the person

acting on its behalf could be subject to a Commission enforcement action alleging violations of Regulation G. Additionally, if the facts and circumstances warrant, we could bring an action under both Regulation G and Rule 10b-5.

B. Non-GAAP financial measures in filings with the Commission - Amendments to Item 10 of Regulation S-K, Item 10 of Regulation S-B and Form 20-F

1. Application

a. General standard

We are amending Item 10 of Regulation S-K and Item 10 of Regulation S-B to include a statement concerning the use of non-GAAP financial measures in filings with the Commission. The amendments do not apply to registered investment companies.³⁷ The non-GAAP financial measures provisions in amended Item 10 of Regulation S-K and Item 10 of Regulation S-B apply to the same categories of non-GAAP financial measures as are covered by Regulation G.³⁸

b. Foreign private issuers

We are amending Exchange Act Form 20-F to incorporate Item 10 of Regulation S-K. Accordingly, foreign private issuers will be subject to the same requirements as domestic issuers with respect to the use of non-GAAP financial measures in filings with the Commission on Form 20-F.³⁹ Consistent with the proposal, filers on Form 40-F under the Multi-Jurisdictional Disclosure System are not subject to those requirements.⁴⁰

As noted above, the definition of "non-GAAP financial measure" is the same for purposes of these amendments as for Regulation G. However, a non-GAAP financial measure that would otherwise be prohibited will be permitted in a Form 20-F filing of a foreign private issuer if the measure is (1) required or expressly permitted by the standard-setter that establishes the generally accepted accounting principles used in the foreign private issuer's primary financial statements and (2) included in the foreign private issuer's annual report or financial statements used in its home country jurisdiction or market.⁴¹ We have modified the language of this provision to clarify its application. We intended, however, that this exception cover only situations where the foreign organization affirmatively acts to require or permit the measure, and not situations where the measure was merely not prohibited. We have, therefore, maintained the requirement of "express" permission, notwithstanding certain comments we received.⁴²

2. Requirements of amended Item 10 of Regulation S-K and Item 10 of Regulation S-B

The amendments to Item 10 of Regulation S-K and Item 10 of Regulation S-B require registrants using non-GAAP financial measures in filings with the Commission to provide: ⁴³

- a presentation, with equal or greater prominence, of the most directly comparable financial measure calculated and presented in accordance with GAAP;
- a reconciliation (by schedule or other clearly understandable method), which shall be quantitative for historical non-GAAP 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 or measures calculated and presented in accordance with GAAP;
- a statement disclosing the reasons why the registrant's management believes that presentation of the non-GAAP financial measure provides useful information to investors regarding the registrant's financial condition and results of operations; ⁴⁴ and
- to the extent material, a statement disclosing the additional purposes, if any, for which the registrant's management uses the non-GAAP financial measure that are not otherwise disclosed.

In addition to these mandated disclosure requirements, amended Item 10 of Regulation S-K and Item 10 of Regulation S-B prohibit the following:

- 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;
- 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; ⁴⁵
- presenting non-GAAP financial measures on the face of the registrant'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.

The requirements and prohibitions for filed information are more extensive and detailed than those of Regulation G. The additional requirements and prohibitions are generally consistent with the staff's historical practice in situations where it has reviewed filings containing non-GAAP financial measures.

Commenters expressed the concern that the prohibition on excluding from non-GAAP liquidity measures charges or liabilities that required, or will require, cash settlement, or would have required cash settlement absent an ability to settle in another manner, would prohibit the use of the non-GAAP financial measure EBITDA.⁴⁶ We are exempting EBIT and EBITDA from this provision because of their wide and recognized existing use. However, registrants must reconcile these measures to their most directly comparable GAAP financial measure. Also, in the discussion of why the measure is useful to investors, registrants must discuss why investors would find it valuable in the context in which it is presented, given the excluded items.

We had proposed that the requirements for a reconciliation to the most directly comparable GAAP financial measure be slightly more stringent than those set forth under Regulation G. In particular, in filings with the Commission, it was proposed that there not be an "unreasonable effort" exception for forward-looking information to the requirement for a quantitative reconciliation between the non-GAAP financial measure and the comparable GAAP financial measure. Commenters expressed the view that the need for such an exception was present equally in disclosure that was filed with the Commission and disclosure that was not filed.⁴⁷ In response to these comments, we have revised the requirement for filed documents to include the same exception as in Regulation G. Accordingly, with regard to the quantitative reconciliation of non-GAAP financial measures that are forward-looking, Item 10 of Regulation S-K and Item 10 of Regulation S-B require a schedule or other presentation detailing the differences between the forward-looking non-GAAP financial measure and the appropriate forward-looking GAAP financial measure. If the GAAP financial measure is not accessible on a forward-looking basis, the registrant must disclose that fact and provide reconciling information that is available without an unreasonable effort. Furthermore, the registrant must identify information that is unavailable and disclose its probable significance.

As proposed, Item 10 of Regulation S-K and Item 10 of Regulation S-B would have included a prohibition on the use of "non-GAAP per share financial measures." We received significant comment expressing concern with this part of the proposal.⁴⁸ The commenters were of the view that the proposed prohibition would deprive investors of useful information and that the other requirements of Regulation G and Item 10 would provide adequate protections with regard to the use of such financial measures.⁴⁹ In response to those comments, we have not included a prohibition on "non-GAAP per share financial measures" in the amendments to Item 10 of Regulation S-K or Item 10 of Regulation S-B.⁵⁰

Some commenters were of the view that the proposed requirements of (1) a statement regarding the purposes for which management uses the non-GAAP financial measure and (2) a statement of the utility of the non-GAAP financial measure to investors would likely result in duplicative disclosure.⁵¹ In response to these comments, we have revised the requirement of a statement of the purposes for which management uses the non-GAAP financial measure to apply only to the extent that the information is material and is not presented in the statement of the utility of the non-GAAP financial measure to investors. Consistent with the proposal, the requirement for these statements may be satisfied by including the statements in the most recent annual report filed with the Commission (or a more recent filing) and by updating those statements, as necessary, no later than the time of the filing containing the non-GAAP financial measure.

The required statements of the purposes for which management uses the non-GAAP financial measure and the utility of the information to investors should not be boilerplate. We intend these statements to be clear and understandable. We also intend these statements to be specific to the non-GAAP financial measure used, the registrant, the nature of the registrant's business and industry, and the manner in which management assesses the non-GAAP financial measure and applies it to management decisions.

C. New Item 12 of Form 8-K

We are amending Form 8-K to add new Item 12, "Disclosure of Results of Operations and Financial Condition."⁵² The addition of Item 12 to Form 8-K will bring earnings information within our current reporting system by requiring registrants to furnish to the Commission all releases or announcements disclosing material non-public financial information about completed annual or quarterly fiscal periods. New Item 12 does not require that companies issue earnings releases or similar announcements. However, such releases and announcements will trigger the requirements of Item 12.

1. General requirement

Item 12 requires registrants to furnish to the Commission a Form 8-K within five business days of any public announcement or release disclosing material non-public information regarding a registrant's results of operations or financial condition for an annual or quarterly fiscal period that has ended.⁵³ The requirements of Item 12 will apply regardless of whether the release or announcement includes disclosure of a non-GAAP financial measure. Item 12 requires the registrant to identify briefly the announcement or release and include the announcement or release as an exhibit to the Form 8-K.

Repetition of information that was publicly disclosed previously or the release of the same information in a different form (for example in an interim or annual report to shareholders) would not trigger the Item 12 requirement. This result would not change if the repeated information were accompanied by information that was not material, whether or not already public.

However, release of additional or updated material non-public information regarding the registrant's results of operations or financial condition for a completed fiscal year or quarter would trigger an additional Item 12 obligation. Issuers that make earnings announcements or other disclosures of material non-public information regarding a completed fiscal quarter or year in an interim or annual report to shareholders would be permitted to specify in the Form 8-K which portion of that report contains the information required to be furnished under Item 12. In addition, the requirement to furnish a Form 8-K under Item 12 would not apply to issuers that make these announcements and disclosures only in their quarterly reports filed with the Commission on Form 10-Q⁵⁴ (or 10-QSB⁵⁵) or their annual reports filed with the Commission on Form 10-K⁵⁶ (or 10-KSB⁵⁷).

Item 12 includes an exception from its requirements where non-public information is disclosed orally, telephonically, by webcast, by broadcast, or by similar means in a presentation that is complementary to, and occurs within 48 hours after, a related, written release or announcement that triggers the requirements of Item 12.⁵⁸ In this situation, Item 12 would not require the registrant to furnish an additional Form 8-K with regard to the information that is disclosed orally, telephonically, by webcast, by broadcast, or by similar means if:⁵⁹

- the related, written release or announcement has been furnished to the Commission on Form 8-K pursuant to Item 12 prior to the presentation;⁶⁰
- the presentation is broadly accessible to the public by dial-in conference call, webcast or similar technology;
- the financial and statistical information contained in the presentation is provided on the registrant's web site, together with any information that would be required under Regulation G;⁶¹ and
- the presentation was announced by a widely disseminated press release that included instructions as to when and how to access the presentation and the location on the registrant's web site where the information would be available.

Item 12 of Form 8-K will apply only to publicly disclosed or released material non-public information concerning an annual or quarterly fiscal period that has ended. While such disclosure may also include forward-looking information, it is the material information about the completed fiscal period that triggers Item 12. Accordingly, Item 12 will not apply to public disclosure of earnings estimates for future or ongoing fiscal periods, unless those estimates are included in the public announcement or release of material non-public information regarding an annual or quarterly fiscal period that has ended.⁶²

2. Filing versus furnishing - liability and incorporation by reference

As proposed, Item 12 would have required registrants to "file" a Form 8-K meeting the requirements of Item 12. This proposal was in contrast to Item 9 of Form 8-K, which permits registrants to "furnish" a Form 8-K to the Commission. The most significant implications of "furnishing" a Form 8-K to the Commission, rather than "filing" a Form 8-K with the Commission are clear:

- information that is "furnished to the Commission" in such a Form 8-K is not subject to Section 18⁶³ of the Exchange Act unless the registrant specifically states that the information is to be considered "filed";
- information that is "furnished to the Commission" in such a Form 8-K is not incorporated by reference into a registration statement, proxy statement or other report unless the registrant specifically incorporates that information into those documents by reference; and
- information that is "furnished to the Commission" in such a Form 8-K is not subject to the requirements of amended Item 10 of Regulation S-K or Item 10 of Regulation S-B, while "filed" information would be subject to those requirements.

We have considered the views of commenters that requiring earnings releases to be filed would have a detrimental effect on the level and quality of information that is provided to investors.⁶⁴ These commenters expressed the concern that the enhanced liability may preclude registrants from making earnings releases or similar disclosures. Further, the commenters were concerned that the need to satisfy the more stringent requirements in amended Item 10 of Regulation S-K and Item 10 of Regulation S-B within the required timeframe of Form 8-K would cause registrants to limit their publication of earnings releases or similar disclosures.

After consideration of these comments, Item 12 of Form 8-K, as adopted, requires that earnings releases or similar disclosures be furnished to the Commission rather than filed. Regulation G would, of course, apply to these releases and disclosures. In addition, to provide certain of the protections provided by the amendments to Item 10 of Regulation S-K and Item 10 of Regulation S-B to earnings releases, even if they are not filed, we have included in Item 12 of Form 8-K the requirements of paragraph (e)(1)(i) of Item 10 of Regulation S-K and paragraph (h)(1)(i) of Item 10 of Regulation S-B. As a result, in addition to the requirements already imposed by Regulation G, registrants would be required to disclose:

- the reasons why the registrant's management believes that presentation of the non-GAAP financial measure provides useful information to investors regarding the registrant's financial condition and results of operations;⁶⁵ and
- to the extent material, the additional purposes, if any, for which the

registrant's management uses the non-GAAP financial measure that are not otherwise disclosed.

Registrants may satisfy this requirement 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. As indicated above, registrants also may satisfy the requirement to provide these additional two statements by including the disclosure in their most recent annual report filed with the Commission (or a more recent filing) and by updating those statements, as necessary, no later than the time the Form 8-K is furnished to the Commission. The other amendments to Item 10 of Regulation S-K and Item 10 of Regulation S-B would not apply.

3. Relationship of Item 12 to Regulation FD

Earnings releases and similar disclosures that trigger the requirements of Item 12 are also subject to Regulation FD. The application of Item 12 would differ from Regulation FD, however, in that the requirements of Item 12 would always implicate Form 8-K for those disclosures, while Regulation FD provides that Form 8-K is an alternative means of satisfying its requirements. Further, a Form 8-K furnished to the Commission pursuant to Item 9 would satisfy an issuer's obligation under Regulation FD only if the Form 8-K were furnished to the Commission within the time frame required by Regulation FD. Regulation FD could, of course, be satisfied by public disclosure other than through the filing of a Form 8-K meeting Regulation FD's requirements; in that case, Item 12 would require that a Form 8-K be furnished to the Commission within the five business day timeframe of Item 12. A Form 8-K furnished within the timeframe required by Regulation FD and otherwise satisfying the requirements of both Item 9 and Item 12 could be furnished to the Commission once, indicating that it is being furnished under both Item 9 and Item 12, and satisfy both requirements.

III. Paperwork Reduction Act

Regulation G and related amendments to Regulation S-K, Regulation S-B, Form 8-K and Form 20-F contain "collections of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA"),⁶⁶ and the Commission has submitted the proposals to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The titles for the information collections are: Regulation G, Regulation S-K, Regulation S-B, Form 8-K and Form 20-F. The Commission did not receive any comments on the paperwork burden. OMB has approved all but one of the collections of information. OMB has not yet approved the changes to Form 8-K. We will announce the approval by separate release.

The Commission is adopting Regulation G pursuant to Section 401 of the Sarbanes-Oxley Act. Regulation G will require registrants that publicly disclose material information that includes non-GAAP financial measures to provide a reconciliation to the most directly comparable GAAP financial measures. Regulation G is intended to implement the requirements of the

Sarbanes-Oxley Act. Specifically, Regulation G is intended to provide investors with balanced financial disclosure when non-GAAP financial measures are presented. Regulation G defines a non-GAAP financial measure as a numerical measure of an issuer's historical or future financial performance, financial position or cash flow 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 calculated and presented in accordance with GAAP.

Accordingly, by definition, a non-GAAP financial measure that triggers the application of Regulation G would have been derived from a GAAP measure. We continue to expect the cost of obtaining the additional disclosure required by Regulation G to be minimal. Accordingly, we have estimated for purposes of the PRA that it will take .5 burden hour for each time a respondent complies with Regulation G. We anticipate that on average a company will have to comply with Regulation G roughly six times a year. Since there are approximately 14,000 public companies that would be subject to Regulation G we have estimated that there will be 84,000 disclosures made in accordance with Regulation G for a total of 42,000 burden hours. We would expect that an in house junior accountant would prepare the actual reconciliation.

Regulation S-K (OMB Control No. 3235-0071) and Regulation S-B (OMB Control No. 3235-0417) prescribe disclosure requirements that registrants must follow when filing registration statements, reports and schedules with the Commission. Our amendments to Item 10 of Regulation S-K and Item 10 of Regulation S-B incorporate the requirements of Regulation G and codify existing staff interpretations. Because the collection of information regarding the reconciliation is already being accounted for in Regulation G, we do not believe that adding the same requirement to Item 10 of Regulation S-K and Item 10 of Regulation S-B creates an additional collection of information within the meaning of the PRA. To account for the reconciliation in both Regulation G and Item 10 of Regulation S-K and Item 10 of Regulation S-B would result in double counting. Additionally, companies already, usually and customarily, disclose the purposes for which the registrant's management uses the non-GAAP financial measure and why it believes that its presentation of the non-GAAP financial measure provides useful information to investors. Accordingly, we continue to believe that our amendments to Item 10 of Regulation S-K and Item 10 of Regulation S-B do not contain a new "collection of information" or alter the existing burden of these collections of information within the meaning of the PRA.

Form 8-K (OMB Control No. 3235-0060) prescribes information, such as

material events or corporate changes that a registrant must disclose. Item 12 of Form 8-K requires a company that publicly discloses material information regarding its actual or expected quarterly or annual results of operations or financial condition for a completed fiscal period to furnish the text of the public disclosure and any accompanying analysis. Item 12 of Form 8-K does not require companies to actually issue an earnings announcement or release but only requires that it be furnished if they choose to issue an earnings announcement or release. Item 12 will bring earnings announcements and releases into the formal disclosure system although they would not be deemed filed or, absent additional action by the registrant, incorporated into registration statements or proxy statements filed with the Commission. The Forms 8-K would be available to investors on a widespread basis on our Internet web site.

Item 12 of Form 8-K was modified from our proposing release in that the Form 8-K is no longer considered to be filed with the Commission but, rather, it would be considered furnished to the Commission. This change does not, however, alter the paperwork burden. We estimate, for purposes of the PRA, the burden associated with actually furnishing the Form 8-K to be minimal. We believe that complying with Item 12 of Form 8-K would require approximately .5 of a burden hour. We estimate that approximately 14,000 public companies would make an average of four filings per year. We believe the total burden hours associated with Item 12 would be 28,000 hours. We would expect that companies would use in-house personnel to file the Form 8-K.

We have amended Form 20-F (OMB Control Number 3235-0288) to incorporate our amendments to Item 10 of Regulation S-K. While Regulation G provides a limited exception for foreign private issuers, this exception would not apply to their Form 20-F filings or any disclosure of non-GAAP financial measures made in the United States. Accordingly, we do not believe our amendment to Form 20-F would result in an additional collection of information as any burden is already accounted for in Regulation G.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Compliance with the disclosure requirements is mandatory. There is no mandatory retention period for the information disclosed, and responses to the disclosure requirements will not be kept confidential.

IV. Cost-Benefit Analysis

The Sarbanes-Oxley Act seeks to enhance the financial disclosure of public companies. In furtherance of this goal, the Sarbanes-Oxley Act has required the Commission, among other things, to adopt rules requiring that if a company publicly discloses non-GAAP financial measures or includes them in a Commission filing, the company must reconcile those non-GAAP financial measures to a company's financial condition and results of operations under GAAP. Moreover, the Sarbanes-Oxley Act requires that any public disclosure of a non-GAAP financial measure not contain an untrue statement of a

material fact or omit to state a material fact necessary in order to make the non-GAAP financial measure, in light of circumstances under which it is presented, not misleading. Additionally, the Sarbanes-Oxley Act seeks to have companies that report under Sections 13(a) and 15(d) of the Exchange Act disclose to the public on a rapid and current basis information concerning material changes in their financial condition or operations.

New Regulation G and the amendments to Item 10 of Regulation S-K, Item 10 of Regulation S-B and Form 20-F will fulfill the statutory directive under Section 401(b) of the Sarbanes-Oxley Act. We recognize that any implementation of the Sarbanes-Oxley Act would likely result in costs as well as benefits and have an effect on the economy. We are sensitive to the costs and benefits. While our proposals received significant public comment, no commenter provided any quantitative data on costs or benefits.

A. Benefits

Regulation G and the amendments to our rules are intended to ensure that investors and others are not misled by the use of non-GAAP financial measures. Additionally, the amendments to Form 8-K are intended to create a central depository where investors and other market participants can look to find the latest earnings announcements and releases by public companies and provide enhanced attention to those announcements and releases.

Regulation G and amendments to Item 10 of Regulations S-K and S-B require that any non-GAAP financial measure presented be reconciled with its most directly comparable financial measure prepared in accordance with GAAP. We anticipate that this reconciliation will help investors and market professionals to better evaluate the non-GAAP financial measures presented. We continue to believe that the reconciliation will provide the securities markets with additional information to more accurately evaluate companies' securities and, in turn, result in a more accurate pricing of securities.

B. Costs

We believe that the costs associated with the Regulation G and amendments will be minimal. As noted earlier, no commenter provided any quantitative data in their comment letters to the Commission. We contacted a sample of commenters to gather additional data about the costs associated with reconciling a non-GAAP financial measure with the most directly comparable GAAP financial measure. The commenters stated that, in most cases, for historical measures, registrants have the most directly comparable GAAP financial measure available at the time they prepare or release a non-GAAP financial measure.⁶⁷ In addition, the commenters stated that the cost of reconciling a non-GAAP financial measure with the most directly comparable GAAP financial measure is not significant for historical measures. Most of the commenters that responded to our inquiries already prepare a reconciliation (either for internal use, external release, or both) between a non-GAAP financial measure and the most directly comparable GAAP financial measure when a non-GAAP financial measure, on an historical basis, is presented.

Accordingly, those companies do not expect to incur any significant incremental costs in complying with the proposal in this particular area.⁶⁸

Three commenters in the group that we contacted indicated that they present forward-looking non-GAAP financial measures in earnings releases. Those companies indicated that they do not have the most directly comparable GAAP financial measure available at the time they prepare their non-GAAP measure because they are unable to quantify certain amounts that would be required to be included in the GAAP measure.⁶⁹ However, those companies would be able to explain, at the date the forward-looking non-GAAP financial measure is released, the types of gains, losses, revenues or expenses that would need to be added to or subtracted from the non-GAAP financial measure to arrive at the most directly comparable GAAP measure, even though they cannot quantify all of those items. The companies indicated that if they were to be required to quantify the reconciling items between the non-GAAP forward-looking financial measure and the most directly comparable GAAP financial measure, it would be very difficult and may result in the company deciding not to provide the non-GAAP financial measure to the public. Regulation G requires that, for forward-looking measures, the reconciliation between non-GAAP and GAAP financial measures must be quantitative "to the extent available and without unreasonable efforts." Accordingly, we do not believe Regulation G will impose significant additional costs on registrants with respect to reconciling forward-looking non-GAAP and GAAP financial measures.

We continue to estimate that public companies would have to comply with Regulation G six times a year. There are roughly 14,000 public companies. Using our estimates from the Paperwork Reduction Act section, we would expect that it would take a junior accountant roughly .5 hours to complete the required reconciliation and ensure there are no material misstatements. Accordingly, we have estimated that the total burden hours needed to comply with Regulation G would be 42,000 hours. Using cost data from the Securities Industry Association's Report on Management & Professional Earnings in the Securities Industry 2001 (SIA Report)⁷⁰ and adding an additional 35% for costs associated with overhead, we find that, on average, a junior accountant would earn \$26 an hour. We believe the salary of a junior accountant is appropriate for our estimates because, in most cases, we would expect the most directly comparable GAAP measure to be available. Therefore, we have estimated the total costs associated with complying with Regulation G to be \$1,092,000.

Most commenters had concerns with our amendments to Item 10 of Regulation S-K and Item 10 of Regulation S-B and our requirement to file their earnings release, if any, on Form 8-K. Commenters generally opposed the prohibitions of Item 10 as they would apply to their earnings release. Commenters particularly opposed the prohibition against presenting a non-GAAP per share measure. Accordingly, we have made two modifications to our proposals. First, Item 10 would no longer prohibit the presentation of a non-GAAP per share measure.⁷¹ Second, the earnings release would no longer be required to be filed on Form 8-K but, rather, it would be required to

be furnished to the Commission under Form 8-K. The change from filing to furnishing has two consequences. First, a company's earnings releases would no longer be subject to Item 10 prohibitions. Second, the earnings release would no longer be subject to Section 18 of the Exchange Act.

With regard to other filings with the Commission, Item 10 would continue to apply. Because the costs associated with providing a reconciliation are already being accounted for in Regulation G, we do not believe adding the same requirement to Item 10 of Regulation S-K and Item 10 of Regulation S-B incurs any incremental cost to the registrant. To account for the required reconciliation in both Regulation G and Item 10 of Regulation S-K and Item 10 of Regulation S-B would result in double counting. Additionally, because companies currently are expected to disclose the purposes for which the registrant's management uses the non-GAAP financial measure and why it believes that presentation of the non-GAAP financial measure provides useful information to investors, this aspect of the rule would not increase costs already properly being borne by registrants. Accordingly, we do not believe our amendments to Item 10 of Regulation S-K and Item 10 of Regulation S-B would result in any additional costs not already included in Regulation G or current filing requirements.

With regard to the required submission on Form 8-K, we continue to believe that personnel in finance, investor relations or corporate communications departments would most likely submit the earnings announcements or releases, as most earnings announcements are disseminated via press release. We have estimated that the actual time required to submit an earnings announcement or release on Form 8-K to be .5 hour. In estimating this time burden we note that most press releases are fairly short in length, making the actual process of filing easier. We also note that the software necessary to file a Form 8-K is available free of charge from the Commission. We have estimated that public companies would be required to comply with the required submission on Form 8-K roughly four times a year. Assuming 14,000 public companies and a total burden of .5 hour for the filing, we estimate that companies will spend 28,000 hours complying with our Form 8-K amendment. Again using the SIA Report, and adding an additional 35% for costs associated with overhead, we find that a Corporate Communications Manager, on average, earns \$56.00 an hour. Accordingly, we have estimated the total salary cost associated with our amendments to Form 8-K to be \$1,568,000.

Finally, our amendments to Form 20-F would incorporate Item 10 of Regulation S-K. While Regulation G provides a limited exception for foreign private issuers, this exception would not apply to their Form 20-F filing or any disclosure of non-GAAP financial measures made in the United States. Accordingly, the costs associated with our amendment to Form 20-F are already accounted for in our cost estimates for Regulation G.

V. Regulatory Flexibility Act Certification

Pursuant to 5 U.S.C. §605(b), the Commission has certified that Regulation G

and our amendments to Item 10 of Regulation S-B, Item 10 of Regulation S-K and Form 8-K under the Securities Act and the Exchange Act will not have a significant economic impact on a substantial number of small entities. This certification, including the basis for the certification, was included in the proposing release. We solicited comments on the potential impact of the amendments on small entities, but received none.

VI. Consideration of Impact on the Economy, Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

Section 23(a)(2) of the Exchange Act⁷² requires us to consider the anti-competitive effects of any rules that we adopt under the Exchange Act. Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Furthermore, Section 2(b) of the Securities Act⁷³ and Section 3(f) of the Exchange Act⁷⁴ require us, when engaging in rulemaking, to consider or determine whether an action is necessary or appropriate in the public interest, and consider whether the action will promote efficiency, competition, and capital formation.

We requested comment on any anti-competitive effects of the proposals. We did not receive any comments regarding any anti-competitive effects of the proposal. We do not believe that Regulation G or our amendments to Item 10 of Regulation S-K, Item 10 of Regulation S-B, Form 8-K or Form 20-F will have a quantifiable effect on efficiency, competition, and capital formation.

VII. Statutory Basis

New Regulation G, new Item 12 to Form 8-K and the amendments to the General Instructions to Form 8-K, Item 10 of Regulation S-K, Item 10 of Regulation S-B and Form 20-F are being adopted pursuant to Sections 2(b), 6, 7, 8, 19(a), and 28 of the Securities Act of 1933, as amended, Sections 3, 4, 10, 12, 13, 15, 23, and 36 of the Securities Exchange Act of 1934, as amended, and Sections 3(a), 401, and 409 of the Sarbanes-Oxley Act.

List of Subjects

17 CFR Part 228

Reporting and recordkeeping requirements, Securities, Small businesses.

17 CFR Parts 229, 244 and 249

Reporting and recordkeeping requirements, Securities.

TEXT OF THE AMENDMENTS

In accordance with the foregoing, the Securities and Exchange Commission

amends Title 17, chapter II of the Code of Federal Regulations as follows:

PART 228 - INTEGRATED DISCLOSURE SYSTEM FOR SMALL BUSINESS ISSUERS

1. The general authority citation for Part 228 is revised to read as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z-2, 77z-3, 77aa (25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77jjj, 77nnn, 77sss, 78l, 78m, 78n, 78o, 78u-5, 78w, 78ll, 78mm, 80a-8, 80a-29, 80a-30, 80a-37 and 80b-11.

* * * * *

2. Amend § 228.10 by adding paragraph (h) to read as follows:

§ 228.10 (Item 10) General.

* * * * *

(h) Use of non-GAAP financial measures in Commission filings. (1) Whenever one or more non-GAAP financial measures are included in a filing with the Commission:

(i) The registrant must include the following in the filing:

(A) A presentation, with equal or greater prominence, of the most directly comparable financial measure or measures calculated and presented in accordance with Generally Accepted Accounting Principles (GAAP);

(B) A reconciliation (by schedule or other clearly understandable method), which shall be quantitative for historical non-GAAP 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 or measures calculated and presented in accordance with GAAP identified in paragraph (h)(1)(i)(A) of this section;

(C) A statement disclosing the reasons why the registrant's management believes that presentation of the non-GAAP financial measure provides useful information to investors regarding the registrant's financial condition and results of operations; and

(D) To the extent material, a statement disclosing the additional purposes, if any, for which the registrant's management uses the non-GAAP financial measure that are not disclosed pursuant to paragraph (h)(1)(i)(C) of this section; and

(ii) A registrant must not:

(A) Exclude 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 earnings before interest and taxes (EBIT) and earnings before interest, taxes, depreciation, and amortization (EBITDA);

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

(C) Present non-GAAP financial measures on the face of the registrant's financial statements prepared in accordance with GAAP or in the accompanying notes;

(D) Present non-GAAP financial measures on the face of any pro forma financial information required to be disclosed by Article 11 of Regulation S-X (17 CFR 210.11-01 through 210.11-03); or

(E) Use titles or descriptions of non-GAAP financial measures that are the same as, or confusingly similar to, titles or descriptions used for GAAP measures; and

(iii) If the filing is not an annual report on Form 10-KSB (17 CFR 249.310b), a registrant need not include the information required by paragraphs (h)(1)(i)(C) and (h)(1)(i)(D) of this section if that information was included in its most recent annual report on Form 10-KSB or a more recent filing, provided that the required information is updated to the extent necessary to meet the requirements of paragraphs (h)(1)(i)(C) and (h)(1)(i)(D) of this section at the time of the registrant's current filing.

(2) For purposes of this paragraph (h), a non-GAAP financial measure is a numerical measure of a registrant's historical or future financial performance, financial position or cash flow that:

(i) 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

(ii) 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.

(3) For purposes of this paragraph (h), GAAP refers to generally accepted accounting principles in the United States.

(4) For purposes of this paragraph (h), non-GAAP financial measures exclude:

(i) operating and other statistical measures; and

(ii) ratios or statistical measures calculated using exclusively one or both of:

(A) Financial measures calculated in accordance with GAAP; and

(B) Operating measures or other measures that are not non-GAAP financial measures.

(5) For purposes of this paragraph (h), non-GAAP financial measures exclude financial measures required to be disclosed by GAAP, Commission rules, or a system of regulation of a government or governmental authority or self-regulatory organization that is applicable to the registrant. However, the financial measure should be presented outside of the financial statements unless the financial measure is required or expressly permitted by the standard setter that is responsible for establishing the GAAP used in such financial statements.

(6) The requirements of paragraph (h) of this section shall not apply to a non-GAAP financial measure included in disclosure relating to a proposed business combination, the entity resulting therefrom or an entity that is a party thereto, if the disclosure is contained in a communication that is subject to § 230.425 of this chapter,

§ 240.14a-12 or § 240.14d-2(b)(2) of this chapter or § 229.1015 of this chapter.

PART 229 -STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975 - REGULATION S-K

3. The general authority citation for Part 229 is revised to read as follows:

Authority: 15 U.S.C. 7261, 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78l, 78m, 78n, 78o, 78u-5, 78w, 78ll(d), 78mm, 79e, 79n, 79t, 80a-8, 80a-29, 80a-30, 80a-31(c), 80a-37, 80a-38(a) and 80b-11, unless otherwise noted.

* * * * *

4. Amend § 229.10 by revising the section heading and adding paragraph (e) to read as follows:

§229.10 (Item 10) General.

* * * * *

(e) Use of non-GAAP financial measures in Commission filings. (1) Whenever one or more non-GAAP financial measures are included in a filing with the Commission:

(i) The registrant must include the following in the filing:

(A) A presentation, with equal or greater prominence, of the most directly comparable financial measure or measures calculated and presented in accordance with Generally Accepted Accounting Principles (GAAP);

(B) A reconciliation (by schedule or other clearly understandable method), which shall be quantitative for historical non-GAAP 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 or measures calculated and presented in accordance with GAAP identified in paragraph (e)(1)(i)(A) of this section;

(C) A statement disclosing the reasons why the registrant's management believes that presentation of the non-GAAP financial measure provides useful information to investors regarding the registrant's financial condition and results of operations; and

(D) To the extent material, a statement disclosing the additional purposes, if any, for which the registrant's management uses the non-GAAP financial measure that are not disclosed pursuant to paragraph (e)(1)(i)(C) of this section; and

(ii) A registrant must not:

(A) Exclude 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 earnings before interest and taxes (EBIT) and earnings before interest, taxes, depreciation, and amortization (EBITDA);

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

(C) Present non-GAAP financial measures on the face of the registrant's financial statements prepared in accordance with GAAP or in the accompanying notes;

(D) Present non-GAAP financial measures on the face of any pro forma

financial information required to be disclosed by Article 11 of Regulation S-X (17 CFR 210.11-01 through 210.11-03); or

(E) Use 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; and

(iii) If the filing is not an annual report on Form 10-K or Form 20-F (17 CFR 249.220f), a registrant need not include the information required by paragraphs (e)(1)(i)(C) and (e)(1)(i)(D) of this section if that information was included in its most recent annual report on Form 10-K or Form 20-F or a more recent filing, provided that the required information is updated to the extent necessary to meet the requirements of paragraphs (e)(1)(i)(C) and (e)(1)(i)(D) of this section at the time of the registrant's current filing.

(2) For purposes of this paragraph (e), a non-GAAP financial measure is a numerical measure of a registrant's historical or future financial performance, financial position or cash flows that:

(i) 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

(ii) 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.

(3) For purposes of this paragraph (e), GAAP refers to generally accepted accounting principles in the United States, except that (i) in the case of foreign private issuers whose primary financial statements are prepared in accordance with non-U.S. generally accepted accounting principles, GAAP refers to the principles under which those primary financial statements are prepared; and (ii) in the case of foreign private issuers that include a non-GAAP financial measure derived from or based on a measure calculated in accordance with U.S. generally accepted accounting principles, GAAP refers to U.S. generally accepted accounting principles for purposes of the application of the requirements of this paragraph (e) to the disclosure of that measure.

(4) For purposes of this paragraph (e), non-GAAP financial measures exclude:

(i) operating and other statistical measures; and

(ii) ratios or statistical measures calculated using exclusively one or both of:

(A) Financial measures calculated in accordance with GAAP; and

(B) Operating measures or other measures that are not non-GAAP financial measures.

(5) For purposes of this paragraph (e), non-GAAP financial measures exclude financial measures required to be disclosed by GAAP, Commission rules, or a system of regulation of a government or governmental authority or self-regulatory organization that is applicable to the registrant. However, the financial measure should be presented outside of the financial statements unless the financial measure is required or expressly permitted by the standard-setter that is responsible for establishing the GAAP used in such financial statements.

(6) The requirements of paragraph (e) of this section shall not apply to a non-GAAP financial measure included in disclosure relating to a proposed business combination, the entity resulting therefrom or an entity that is a party thereto, if the disclosure is contained in a communication that is subject to § 230.425 of this chapter,

§ 240.14a-12 or § 240.14d-2(b)(2) of this chapter or § 229.1015 of this chapter.

(7) The requirements of paragraph (e) of this section shall not apply to investment companies registered under Section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a-8).

Note to paragraph (e). A non-GAAP financial measure that would otherwise be prohibited by paragraph (e)(1)(ii) of this section is permitted in a filing of a foreign private issuer if:

1. The non-GAAP financial measure relates to the GAAP used in the registrant's primary financial statements included in its filing with the Commission;
2. The non-GAAP financial measure is required or expressly permitted by the standard-setter that is responsible for establishing the GAAP used in such financial statements; and
3. The non-GAAP financial measure is included in the annual report prepared by the registrant for use in the jurisdiction in which it is domiciled, incorporated or organized or for distribution to its security holders.

5. Part 244 is added to read as follows:

PART 244 - Regulation G

Sec.

244.100 General rules regarding disclosure of non-GAAP financial measures.

244.101 Definitions.

244.102 No effect on antifraud liability.

Authority: 15 U.S.C. 7261, 78c, 78i, 78j, 78m, 78o, 78w, 78mm, and 80a-29

§ 244.100 General rules regarding disclosure of non-GAAP financial measures.

(a) Whenever a registrant, or person acting on its behalf, publicly discloses material information that includes a non-GAAP financial measure, the registrant must accompany that non-GAAP financial measure with:

(1) A presentation of the most directly comparable financial measure calculated and presented in accordance with Generally Accepted Accounting Principles (GAAP); and

(2) A reconciliation (by schedule or other clearly understandable method), which shall be quantitative for historical non-GAAP 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 comparable financial measure or measures calculated and presented in accordance with GAAP identified in paragraph (a)(1) of this section.

(b) 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 and any other accompanying discussion of 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.

(c) This section shall not apply to a disclosure of a non-GAAP financial measure that is made by or on behalf of a registrant that is a foreign private issuer if the following conditions are satisfied:

(1) The securities of the registrant are listed or quoted on a securities exchange or inter-dealer quotation system outside the United States;

(2) The non-GAAP financial measure is not derived from or based on a measure calculated and presented in accordance with generally accepted accounting principles in the United States; and

(3) The disclosure is made by or on behalf of the registrant outside the United States, or is included in a written communication that is released by or on behalf of the registrant outside the United States.

(d) This section shall not apply to a non-GAAP financial measure included in

disclosure relating to a proposed business combination, the entity resulting therefrom or an entity that is a party thereto, if the disclosure is contained in a communication that is subject to § 230.425 of this chapter, § 240.14a-12 or § 240.14d-2(b)(2) of this chapter or § 229.1015 of this chapter.

Notes to § 244.100:

1. If a non-GAAP financial measure is made public orally, telephonically, by webcast, by broadcast, or by similar means, the requirements of paragraphs (a)(1)(i) and (a)(1)(ii) of this section will be satisfied if:

(i) The required information in those paragraphs is provided on the registrant's web site at the time the non-GAAP financial measure is made public; and

(ii) The location of the web site is made public in the same presentation in which the non-GAAP financial measure is made public.

2. The provisions of paragraph (c) of this section shall apply notwithstanding the existence of one or more of the following circumstances:

(i) A written communication is released in the United States as well as outside the United States, so 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;

(ii) Foreign journalists, U.S. journalists or other third parties have access to the information;

(iii) The information appears on one or more web sites maintained by the registrant, so long as the web sites, taken together, are not available exclusively to, or targeted at, persons located in the United States; or

(iv) Following the disclosure or release of the information outside the United States, the information is included in a submission by the registrant to the Commission made under cover of a Form 6-K.

§ 244.101 Definitions.

This section defines certain terms as used in Regulation G (§§ 244.100 through 244.102).

(a)(1) Non-GAAP financial measure. A non-GAAP financial measure is a numerical measure of a registrant's historical or future financial performance, financial position or cash flows that:

(i) 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

(ii) 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.

(2) A non-GAAP financial measure does not include operating and other financial measures and ratios or statistical measures calculated using exclusively one or both of:

(i) Financial measures calculated in accordance with GAAP; and

(ii) Operating measures or other measures that are not non-GAAP financial measures.

(3) A non-GAAP financial measure does not include financial measures required to be disclosed by GAAP, Commission rules, or a system of regulation of a government or governmental authority or self-regulatory organization that is applicable to the registrant.

(b) GAAP. GAAP refers to generally accepted accounting principles in the United States, except that (1) in the case of foreign private issuers whose primary financial statements are prepared in accordance with non-U.S. generally accepted accounting principles, GAAP refers to the principles under which those primary financial statements are prepared; and (2) in the case of foreign private issuers that include a non-GAAP financial measure derived from a measure calculated in accordance with U.S. generally accepted accounting principles, GAAP refers to U.S. generally accepted accounting principles for purposes of the application of the requirements of Regulation G to the disclosure of that measure.

(c) Registrant. A registrant subject to this regulation is one that has a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or is required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), excluding any investment company registered under Section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a-8).

(d) United States. United States means the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.

§ 244.102 No effect on antifraud liability.

Neither the requirements of this Regulation G (17 CFR § 244.100 through 244.102) nor a person's compliance or non-compliance with the requirements of this Regulation shall in itself affect any person's liability under Section 10 (b) (15 U.S.C. 78j(b)) of the Securities Exchange Act of 1934 or § 240.10b-5

of this chapter.

PART 249 -FORMS, SECURITIES EXCHANGE ACT OF 1934

7. The authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a, et seq., unless otherwise noted.

* * * * *

8. Amend Form 8-K (referenced in §249.308) by adding General Instruction B.6., revising Item 9 and adding Item 12.

Note - The text of Form 8-K does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 8-K

Current Report

Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934

* * * * *

General Instructions

* * * * *

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

* * * * *

6. A report on this form is required to be furnished upon the occurrence of any of the events specified in Item 12 of this form. A report of an event specified in Item 12 is to be furnished within 5 business days after the occurrence of the event; if the event occurs on a Saturday, Sunday or holiday on which the Commission is not open for business, the 5 business day period shall begin to run on and include the first business day thereafter. The information in a report furnished pursuant to Item 12 shall not be deemed to be "filed" for purposes of Section 18 of the Exchange Act or otherwise subject to the liability of that section, except if the registrant specifically states that the information is to be considered "filed" under the Exchange Act or incorporates it by reference into a filing under the Securities Act or the Exchange Act.

* * * * *

Information to Be Included in the Report

* * * * *

Item 12. Results of Operations and Financial Condition.

(a) If a registrant, or any person acting on its behalf, makes any public announcement or release (including any update of an earlier announcement or release) disclosing material non-public information regarding the registrant's results of operations or financial condition for a completed quarterly or annual fiscal period, the registrant shall briefly identify the announcement or release and include the text of that announcement or release as an exhibit;

(b) A Form 8-K is not required to be furnished to the Commission under this Item 12 in the case of disclosure of material non-public information that is disclosed orally, telephonically, by webcast, by broadcast, or by similar means if:

(1) The information is provided as part of a presentation that is complementary to, and initially occurs within 48 hours after, a related, written announcement or release that has been furnished on Form 8-K pursuant to this Item 12 prior to the presentation;

(2) The presentation is broadly accessible to the public by dial-in conference call, by webcast, by broadcast, or by similar means;

(3) The financial and other statistical information contained in the presentation is provided on the registrant's web site, together with any information that would be required under §244.100 of Regulation G; and

(4) The presentation was announced by a widely disseminated press release, that included instructions as to when and how to access the presentation and the location on the registrant's web site where the information would be available.

Instructions.

1. The requirements of this Item 12 are triggered by the disclosure of material non-public information regarding a completed fiscal year or quarter. Release of additional or updated material non-public information regarding a completed fiscal year or quarter would trigger an additional Item 12 requirement.

2. The requirements of paragraph (e)(1)(i) of Item 10 of Regulation S-K (or paragraph (h)(1)(i) of Item 10 of Regulation S-B in the case of a small business issuer) shall apply to disclosures under this Item 12.

3. Issuers that make earnings announcements or other disclosures of

material non-public information regarding a completed fiscal year or quarter in an interim or annual report to shareholders, are permitted to specify which portion of the report contains the information required to be furnished under Item 12.

4. This Item 12 does not apply in the case of a disclosure that is made in a quarterly report filed with the Commission on Form 10-Q (or 10-QSB) or an annual report filed with the Commission on Form 10-K (or 10-KSB).

* * * * *

9. By amending Form 20-F (referenced in §249.220) by removing in General Instruction C.(e) the words "performance and the Commission's policy on securities ratings" and adding, in their place, the words "performance, the Commission's policy on securities ratings, and the Commission's policy on use of non-GAAP financial measures in Commission filings".

By the Commission.

January 22, 2003

Margaret H. McFarland
Deputy Secretary

Endnotes

¹ 17 CFR 244.100 - 244.102.

² 17 CFR 229.10.

³ 17 CFR 228.10.

⁴ 15 U.S.C. §§ 78a *et seq.*

⁵ 17 CFR 249.308.

⁶ 17 CFR 249.220.

⁷ Pub. L. No. 107-204, 116 Stat. 745 (2002).

⁸ See Release No. 33-8145 (Nov. 4, 2002) [67 FR 68490].

⁹ See *Accounting Series Release No. 142*, Release No. 33-5337 (Mar. 15, 1973); *Cautionary Advice Regarding the Use of "Pro Forma" Financial Information*, Release No. 33-8039

(Dec. 4, 2001); and *In the Matter of Trump Hotels & Casino Resorts, Inc.*, Release No. 34-45287 (Jan. 16, 2002). We also note that the Financial Accounting Standards Board (FASB) has initiated a project called *Financial Performance Reporting by Business Enterprises*. The objective of the project is to ensure that users of financial statements have sufficient quality information in order to evaluate a company's performance. The project's focus includes the presentation of key performance measures, or information necessary to permit calculation of key financial measures, used by investors and creditors. However, it will not address non-GAAP measures in press releases or other communications outside financial statements.

¹⁰ Regulation G and the amendments to our rules are intended to ensure that investors receive adequate information in evaluating a company's use of non-GAAP financial measures. In addition, having earnings announcements furnished on Form 8-K would provide the public a source of reference for obtaining a company's most recent statements regarding its financial condition. Therefore, we believe that the new rules and amendments are in the public interest and consistent with the protection of investors.

¹¹ 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 measures that are prohibited specifically under GAAP or Commission rules continue to be prohibited in materials filed with or furnished to the Commission. See, for example, the prohibition on cash flow per share in paragraph 33 of FASB Statement No. 95, *Statement of Cash Flows*.

¹² Section 401(b) of the Sarbanes-Oxley Act directs the Commission to adopt rules concerning the public disclosure or release of "pro forma financial information" by a company filing reports under Section 13(a) [15 U.S.C. § 78m(a)] or 15(d) [15 U.S.C. § 780(d)]. Because the Commission's rules and regulations address the use of "pro forma financial information" in other contexts, particularly in Regulation S-X, and use that term differently from its use in the Sarbanes-Oxley Act, we are adopting the term "non-GAAP financial measures" to identify the types of information targeted by Section 401(b) of the Sarbanes-Oxley Act.

¹³ See Rule 101(c) of Regulation G [17 CFR 244.101(c)]. Registered investment companies are excluded from the definition of "registrant" for purposes of Regulation G, as Section 405 of the Sarbanes-Oxley Act exempts investment companies registered under Section 8 of the Investment Company Act of 1940 (15 U.S.C. § 80a-8) from Section 401 of the Sarbanes-Oxley Act and any rules adopted by the Commission under Section 401.

¹⁴ "Foreign private issuer" is defined in Rule 405 [17 CFR 230.405] under the Securities Act 1933 [15 U.S.C. §§ 77a *et seq.*].

¹⁵ 17 CFR 249.306.

¹⁶ See, for example, the comment letters of the Association of the Bar of the City of New York, Special Committee on Mergers, Acquisitions, and Corporate Control Contests; Association of the Bar of the City of New York, Committee on Securities Regulation; Deloitte & Touche, LLP; and Cleary, Gottlieb, Steen & Hamilton.

¹⁷ See Exchange Act Rules 14a-12 [17 CFR 240.14a-12] and 14d-2 [17 CFR 240.14d-2], Securities Act Rules 165 [17 CFR 230.165] and 425 [17 CFR 230.425], and Item 1015 of Regulation M-A [17 CFR 229.1015].

¹⁸ See, for example, the comment letters of Deloitte & Touche, LLP and the Association of Private French Enterprises-Association of Large French Enterprises.

¹⁹ 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 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.

²⁰ Rule 5-03(b)(1) through Rule 503(b)(7) of Regulation S-X [17 CFR 210.5-03(b)(1) through 17 CFR 210.5-03(b)(7)] includes guidance on the components of operating income (loss).

²¹ See, for example, the comment letters of America's Community Bankers and the American Bankers Association.

²² 17 CFR 244.100(b).

²³ In its comment letter, the Association for Investment Management and Research expressed concern regarding the presentation of non-GAAP financial measures that appear to have been calculated and presented in a manner consistent with prior presentations of that measure when, in fact, the method of calculating or presenting the measure has changed since prior periods. We agree with this concern. As such, 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.

24 17 CFR 244.100(a).

25 A registrant's failure to include all of the information required to be included in a public disclosure or release by Regulation G would not affect that registrant's form eligibility under the Securities Act or whether there is adequate current public information regarding the registrant for purposes of Securities Act Rule 144(c) [17 CFR 230.144(c)].

26 Examples of financial measures calculated and presented in accordance with GAAP would include, but not be limited to, earnings or cash flows as reported in the GAAP financial statements. We believe that it is most appropriate to provide registrants with the flexibility to best make the determination as to which is the "most directly comparable financial measure calculated and presented in accordance with GAAP." We, therefore, do not believe that it is appropriate to provide a specific definition of that term. As general guidance, however, we note that our staff has been, and continues to be, of the view that (1) non-GAAP financial measures that measure cash or "funds" generated from operations (liquidity) should be balanced with disclosure of amounts from the statement of cash flows (cash flows from operating, investing and financing activities); and (2) non-GAAP financial measures that depict performance should be balanced with net income, or income from continuing operations, taken from the statement of operations.

27 In the case of ratios or measures where a non-GAAP financial measure is the numerator and/or the denominator in the calculation of that ratio or measure, the registrant must provide a reconciliation with regard to each non-GAAP financial measure used in the calculation. The registrant must also show the ratio or measure as calculated using the most directly comparable GAAP financial measure(s).

28 Note 1 to Rule 100 of Regulation G [17 CFR 244.100]. While Note 1 to Regulation G does not state how long a company must keep this information available on its web site, we encourage companies to provide ongoing web site access to this information. At a minimum, we suggest that companies provide web site access to this information for at least a 12-month period.

29 See, for example, the comment letter of the American Bar Association Committee on Federal Regulation of Securities and the American Bar Association Committee on Law and Accounting.

30 17 CFR 243.100 - 243.103.

31 Whether disclosure is "public" will, of course, depend on all of the facts and circumstances surrounding that disclosure. Whether disclosure is "on behalf of" the registrant also will depend on all of the facts surrounding that

disclosure. However, consistent with Regulation FD, we intend that a person who discloses material non-public information in breach of a duty of trust or confidence to the registrant should not be considered to be acting "on behalf of" the registrant.

³² 17 CFR 244.102

³³ 15 U.S.C. § 78j.

³⁴ 17 CFR 240.10b-5.

³⁵ See Release No. 33-8039 (Dec. 4, 2001) [59 FR 63731].

³⁶ See Release No. 33-8039 (Dec. 4, 2001) [59 FR 63731] and *In the Matter of Trump Hotels & Casino, Inc.*, Release No. 34-45287 (Jan. 16, 2002).

³⁷ Regulation S-B does not apply to registered investment companies, as they are excluded from the definition of "small business issuer" [17 CFR 228.10(a)(1)(iii)]. The amendments to Regulation S-K include a specific exemption for registered investment companies [17 CFR 229.10(e)(7)].

³⁸ These amendments apply only to non-GAAP financial measures in filings with the Commission. Regulation G applies to any public disclosure of material information that includes a non-GAAP financial measure, regardless of whether it is in a filing with the Commission. Accordingly, the requirement of Regulation G that the presentation of a non-GAAP financial measure, taken together with the information accompanying the measure and any other accompanying discussion, not contain a material misstatement or material omission necessary in order to make the presentation not misleading, in light of the circumstances in which the presentation is made, also applies to disclosures in documents filed with the Commission.

³⁹ Item 10 of Regulation S-K will not apply to materials submitted to the Commission on Form 6-K. However, if the information in the Form 6-K is incorporated by reference into a registration statement, prospectus or annual report, Item 10 of Regulation S-K would then apply to that information.

⁴⁰ Any public disclosure by these issuers that is not covered by the exclusion for foreign private issuers would, however, be subject to Regulation G.

⁴¹ While such a non-GAAP financial measure would not be prohibited in a Form 20-F, the remaining requirements of Item 10 of Regulation S-K would, of course, continue to apply.

⁴² See, for example, the comment letters of the American Institute of Certified Public Accountants; Deloitte & Touche, LLP; and Cleary, Gottlieb,

Steen & Hamilton.

⁴³ As with Regulation G, the requirements of Item 10 of Regulation S-K and Item 10 of Regulation S-B will not apply to non-GAAP financial measures included in disclosure relating to a proposed business combination transaction, the entity resulting from the business combination transaction, or an entity that is a party to the business combination transaction if the disclosure is contained in a communication that is subject to the Commission's communications rules applicable to business combination transactions.

⁴⁴ With regard to the issuer's statement as to why management believes the non-GAAP financial measure provides useful information to investors, the fact that the non-GAAP financial measure is used by or useful to analysts cannot be the sole support for presenting the non-GAAP financial measure. Rather, the justification for the use of the measure must be substantive; it can, of course, be a substantive justification that causes a measure to be used by or useful to analysts.

⁴⁵ Permitted adjustments (including those permitted because they satisfy the two-year condition) would, of course, be subject to the reconciliation requirement.

⁴⁶ See, for example, the comment letters of Latham & Watkins; Intel Corporation; the Association of the Bar of the City of New York, Committee on Securities Regulation; BDO Seidman, LLP; and Ernst & Young LLP.

⁴⁷ See, for example, the comment letters of the Securities Law Committee of the American Society of Corporation Secretaries and Deloitte & Touche, LLP.

⁴⁸ See, for example, the comment letters of Fannie Mae; the Securities Law Committee of the American Society of Corporate Secretaries; the American Council of Life Insurers; the American Institute of Certified Public Accountants; the National Association of Real Estate Investment Trusts; the Real Estate Roundtable; the New York Clearing House Association; and the Committee on Corporate Reporting of Financial Executives International.

⁴⁹ See footnote 11 for additional information regarding the use of "non-GAAP per share financial measures." Further, despite the absence of a prohibition against the use of "non-GAAP per share financial measures" in Item 10 of Regulation S-K and Item 10 of Regulation S-B, 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*).

⁵⁰ A number of commenters in the real estate industry expressed concern regarding the use of the non-GAAP financial measure "funds from operations per share" in earnings releases and materials that are filed with or furnished to the Commission. Because amended Item 10 of Regulation S-K and amended Item 10 of Regulation S-B do not include a prohibition on "non-GAAP per share financial measures," registrants may use the "funds from operations per share" measure, subject to the requirements of Regulation G, amended Item 10 of Regulation S-K and amended Item 10 of Regulation S-B.

⁵¹ See, for example, the comment letter of the American Bar Association Committee on Federal Regulation of Securities and the American Bar Association Committee on Law and Accounting.

⁵² In Release No. 33-8106 (June 17, 2002) [67 FR 42913], we proposed significant amendments to Form 8-K. We intend to address those proposals in the near future. As we have not yet revised Form 8-K as proposed in Release No. 33-8106, we have adopted the proposed requirement regarding earnings releases and similar disclosures without using the new numbering system proposed for Form 8-K. At the time we address the proposals in Release No. 33-8106, we will consider the need to renumber all of the items in Form 8-K, including new Item 12.

⁵³ The proposing release would have required a registrant to file the Form 8-K under Item 12 within two business days after the earnings release or similar disclosure. We had proposed this deadline in anticipation of the adoption of our proposal, in Release No. 33-8106, to shorten the filing deadline for all reports on Form 8-K. As we have not yet addressed those proposals, we believe it is appropriate to adopt a temporary deadline for furnishing a report on Form 8-K under Item 12 of five business days, the shorter of the two existing Form 8-K deadlines. When we address the Form 8-K proposals, we may then shorten the Item 12 deadline. At that time, we will consider the comments received in response to the proposing release and our proposal therein to set a two-business day deadline for earnings releases or similar disclosures on Form 8-K.

⁵⁴ 17 CFR 249.308a.

⁵⁵ 17 CFR 249.308b.

⁵⁶ 17 CFR 249.310.

⁵⁷ 17 CFR 249.310b.

⁵⁸ We intend this exception to permit current practices where these presentations include information that, although not already included in the related, written release or announcement, is complementary thereto. We do not intend this exception to foster changes in practice whereby disclosure is shifted from the written release or announcement to the complementary presentation.

⁵⁹ In its comment letter, the American Bar Association Committee on Federal Regulation of Securities asked whether the phrase "similar means" in proposed Item 1.04(b) related to the entire preceding list (as proposed, this list read "orally, telephonically, webcast, or by similar means") or whether it merely related to "webcast." We intend the phrase "similar means" to relate to the entire preceding list. We have revised Item 12 to be clearer in this regard.

⁶⁰ As the deadline for furnishing the Form 8-K to the Commission is five business days, this exception would be available only to registrants that furnish that Form 8-K to the Commission in advance of the deadline specified in Item 12.

⁶¹ While Item 12 does not state how long a company must keep this information available on its web site, we encourage companies to provide ongoing web site access to this information. At a minimum, we suggest that companies provide web site access to this information for at least a 12-month period. Further, we understand that a company may have multiple web sites that it uses for various purposes, such as investor relations, product information and business-to-business activities. We interpret this requirement to mean that the information is provided on the web site or page that the company normally uses for its investor relations functions.

⁶² Of course, Regulation FD would continue to apply to disclosure of such forward-looking information if it were material.

⁶³ 15 U.S.C. § 78r.

⁶⁴ See, for example, the comment letters of the American Bar Association Committee on Federal Regulation of Securities; the American Bar Association Committee on Law and Accounting; the American Council of Life Insurers; and the Association of the Bar of the City of New York, Committee on Securities Regulation.

⁶⁵ See footnote 44 and the related discussion of the amendments to Item 10 of Regulation S-K and Item 10 of Regulation S-B for additional information with regard to this requirement.

⁶⁶ 44 U.S.C. § 3501 *et seq.*

[67](#) We continue to believe that, in cases where the GAAP financial measure is not available for historical measures, any costs associated with obtaining the GAAP financial measure would reduce future costs associated with filing other forms, such as the Form 10-Q and Form 10-K where the GAAP measure must be presented. See also footnote 68.

[68](#) One company indicated that, for a performance-based non-GAAP financial measure, the company already prepares a reconciliation to net income determined in accordance with GAAP by the date of the earnings release. However, for non-GAAP measures that are liquidity measures, the company does not currently prepare a reconciliation to the most comparable GAAP measure by the date of the company's earnings release because the statement of cash flows is not prepared until later in the financial reporting process. This company estimated that, under the proposal, the company would not necessarily incur significant additional costs to reconcile its non-GAAP liquidity financial measures to GAAP-based cash flow measures, but some salaried employees would be required to work additional hours earlier in the financial reporting process to complete the preparation of the statement of cash flows by the date of the earnings release.

[69](#) For example, one company that uses a non-GAAP financial measure derived from net income told us that it excludes realized capital gains and losses, gains and/or losses on dispositions of operations, and accounting changes in preparing its non-GAAP financial measure, because it is unable to forecast with any degree of comfort the amounts that would be recorded under GAAP for these items.

[70](#) The cost estimates are based on the SIA Report for employees based outside the New York City metropolitan area.

[71](#) However, see the guidance on the use of per share measures in footnote 11.

[72](#) 15 U.S.C. §78w(a)(2).

[73](#) 15 U.S.C §77b(b).

[74](#) 15 U.S.C. §78c(f).

<http://www.sec.gov/rules/final/33-8176.htm>