



U.S. Securities and Exchange Commission

Frequently Asked Questions Regarding the Use of Non-GAAP Financial Measures

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The answers to these frequently asked questions represent the views of the Division of Corporation Finance. They are not rules, regulations or statements of the Securities and Exchange Commission. Further, the Commission has neither approved nor disapproved them.

Note: Since the Commission's publication of [Release No. 34-47226](#), Conditions for Use of Non-GAAP Financial Measures, we have received questions regarding the implementation and interpretation of the rules adopted in that release. Our responses to 33 of these frequently asked questions are set forth below. Unless otherwise indicated, all references to Item 10(e) of Regulation S-K also apply to Item 10(h) of Regulation S-B and General Instruction C(e) of Form 20-F.

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Transition Issues

Question 1: An annual report or quarterly report is filed with the Commission before March 28, 2003. If that annual report or quarterly report is incorporated by reference into a Securities Act registration statement that is filed after March 28, 2003, must any non-GAAP financial measures included in the annual report or quarterly report comply with Regulation G?

Answer 1: Any registration statement filed after March 28, 2003 must comply with Regulation G if it includes non-GAAP financial measures. As

such, a registration statement filed after March 28, 2003 that incorporates by reference any non-GAAP financial measures must comply with Regulation G with respect to those non-GAAP financial measures. Compliance with Regulation G requires, in part, a reconciliation of each non-GAAP financial measure to the most directly comparable financial measure calculated and presented in accordance with GAAP. Where such a reconciliation is required in a Securities Act registration statement because that registration statement has incorporated by reference a non-GAAP financial measure, the company may provide the required reconciliation in one or more of the following ways:

- amend the previously filed report (with that amendment incorporated by reference into the Securities Act registration statement);
- include a section within the Securities Act registration statement that identifies the non-GAAP financial measures that are contained in the incorporated reports and provides the required reconciliation (s); or
- file a current report on Form 8-K or a periodic report that identifies the non-GAAP financial measures that are contained in the incorporated reports and provides the required reconciliation(s) (with that Form 8-K or periodic report incorporated by reference into the Securities Act registration statement).

To ease transition to the new requirements, we will not object where a registration statement on Form S-8 filed after March 28, 2003 does not include the required reconciliation of non-GAAP financial measures included in a document filed before March 28, 2003 and incorporated by reference into that registration statement on Form S-8.

Question 2: If an annual report or quarterly report filed with the Commission before March 28, 2003 is incorporated by reference into a Securities Act registration statement filed after March 28, 2003, must any non-GAAP financial measures included in the annual report or quarterly report comply with Item 10(e) of Regulation S-K?

Answer 2: Only non-GAAP financial measures calculated for a fiscal period ended after March 28, 2003 are subject to Item 10(e) of Regulation S-K. Unless the annual report or quarterly report filed before March 28, 2003 included a non-GAAP financial measure calculated for a fiscal period ended after March 28, 2003 (for example, a projection), Item 10(e) of Regulation S-K would not apply. If measures for a period ended after March 28, 2003 were included, Item 10(e) would apply only to those measures. Companies should note, however, that the provisions included in Item 10(e) generally codified existing staff practice. Therefore, the annual report or quarterly report previously filed and incorporated by reference into the registration statement already should have conformed to those provisions.

Question 3: If a company filed a Securities Act registration statement prior to March 28, 2003 and amends that registration statement (either before or after effectiveness) after March 28, 2003, must the company comply with Regulation G?

Answer 3: To ease transition to the new requirements, if a non-GAAP financial measure is included (either directly or through incorporation by reference) in a registration statement that was filed before March 28, 2003 and an amendment to the registration statement is filed after March 28, 2003, we would not object if the use of that non-GAAP financial measure does not comply with Regulation G, even where a pre-effective or post-effective amendment to the registration statement was made after March 28, 2003. Nonetheless, any non-GAAP financial measure added to, revised, amended or updated directly in the amendment to the registration statement must comply with Regulation G. Regardless of this position, a company must consider whether its disclosure is rendered misleading if it does not comply with Regulation G with regard to other non-GAAP financial measures in the registration statement, particularly where a non-GAAP financial measure is the same as, or similar to, a non-GAAP financial measure that is in the registration statement and subject to Regulation G.

Question 4: Company XYZ amends its Form 10-K after March 28, 2003. The Company's Form 10-K was originally filed before March 28, 2003. At the time the Company's Form 10-K was filed, compliance with Regulation G was not required. Must Company XYZ's amendment to Form 10-K comply with Regulation G?

Answer 4: Yes. Any filing made after March 28, 2003 must comply with Regulation G. Accordingly any non-GAAP financial measure included in Company XYZ's amendment to its Form 10-K would have to comply with Regulation G. However, Company XYZ would not have to comply with Regulation G for any other portion of its Form 10-K. Regardless of this position, a company must consider whether its disclosure is rendered misleading if it does not comply with Regulation G with regard to other non-GAAP financial measures in the Form 10-K, particularly where a non-GAAP financial measure is the same as, or similar to, a non-GAAP financial measure that is in the amendment to the Form 10-K and subject to Regulation G.

Question 5: If a company posted a document containing a non-GAAP financial measure on its website prior to March 28, 2003, must the company remove that document on or after March 28, 2003 if it does not contain the Regulation G reconciliation?

Answer 5: A company would not be required to remove such a document from its website on or after March 28, 2003. However, if a non-GAAP financial measure that would be subject to Regulation G is added to, amended, revised or updated and posted on the website on or after March 28, 2003, the company would have to include the Regulation G-

required reconciliation of that measure at that time.

Business Combination Transactions

Question 6: Does the exemption from Regulation G and Item 10(e) of Regulation S-K for disclosure of non-GAAP financial measures made in connection with a business combination transaction extend to non-GAAP financial measures contained in registration statements, proxy statements, and tender offer materials?

Answer 6: There is an exemption from Regulation G and Item 10(e) of Regulation S-K for disclosure of non-GAAP financial measures made in communications that are subject to Rules 425, 14a-12 or 14d-2(b)(2). This exemption also is intended to apply to communications subject to Rule 14d-9(a)(2). This exemption does not extend beyond communications that are subject to those rules. Accordingly, if the same non-GAAP financial measure that was included in a communication filed under one of those rules is also disclosed in a Securities Act registration statement or an Exchange Act proxy statement or tender offer statement, the exemption would be inapplicable to that disclosure.

There also is an exemption from Regulation G and Item 10(e) of Regulation S-K for disclosure of non-GAAP financial measures made in any disclosure that is subject to Item 1015 of Regulation M-A. In contrast to the exemption discussed in the previous paragraph, the exemption for disclosure of non-GAAP financial measures subject to

Item 1015 of Regulation M-A is not limited to pre-commencement communications and, accordingly, the exemption would also be available for Item 1015 disclosure found in registration statements, proxy statements and tender offer statements.

Further, where reconciliation of a non-GAAP financial measure is required and the most directly comparable measure is a "pro forma" measure prepared and presented in accordance with Article 11 of Regulation S-X, companies may use that measure for reconciliation purposes, in lieu of a GAAP financial measure.

Item 10(e) of Regulation S-K

Question 7: What measure was contemplated by "funds from operations" in footnote 50 to the adopting release, which indicates that companies may use "funds from operations per share" in earnings releases and materials that are filed or furnished to the Commission, subject to the requirements of Regulation G and Item 10(e) of Regulation S-K?

Answer 7: Footnote 50 contemplated only the measure "funds from operations" defined and clarified, as of January 1, 2000, by the National Association of Real Estate Investment Trusts. Footnote 50 did not contemplate measures that contain modifications from the measure

"funds from operations" as so defined and clarified. Accordingly, the use of such a modified measure, or a per share amount based on such a modified measure, in materials filed with the Commission would be subject to all of the provisions of Item 10(e) of Regulation S-K.

Question 8: Item 10(e) of Regulation S-K prohibits adjusting a non-GAAP financial 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. Is it appropriate to eliminate or smooth an item that is identified as "recurring"?

Answer 8: Companies should never use a non-GAAP financial measure in an attempt to smooth earnings. Further, while there is no *per se* prohibition against removing a recurring item, companies must meet the burden of demonstrating the usefulness of any measure that excludes recurring items, especially if the non-GAAP financial measure is used to evaluate performance.

It is permissible and may well be necessary to identify, discuss, and analyze material restructuring charges and other items, whether they are recurring or non-recurring, in Management's Discussion and Analysis of Financial Condition and Results of Operations. Depending on the nature and materiality of the charge or other item, it will likely be necessary to discuss the nature of such charges or other items, their recurring or non-recurring nature, their significance to an investor in evaluating the company's financial condition and/or results of operations and whether they relate to material known trends, events or uncertainties that must be disclosed.

Whether an item may, or indeed must, be discussed in MD&A is a different question from whether it may be eliminated or adjusted in connection with a non-GAAP financial measure. Whether a non-GAAP financial measure that eliminates a recurring item or items from the most directly comparable GAAP financial measure is acceptable depends on all of the facts and circumstances. Such measures more likely would be permissible if management reasonably believes it is probable that the financial impact of the item will disappear or become immaterial within a near-term finite period. In addition, inclusion of such a measure may be misleading absent the following disclosure:

- the manner in which management uses the non-GAAP measure to conduct or evaluate its business;
- the economic substance behind management's decision to use such a measure;
- the material limitations associated with use of the non-GAAP financial measure as compared to the use of the most directly comparable GAAP financial measure;

- the manner in which management compensates for these limitations when using the non-GAAP financial measure; and
- the substantive reasons why management believes the non-GAAP financial measure provides useful information to investors.

Similar considerations may apply under Item 12 of Form 8-K.

Question 9: Is it permissible to use non-GAAP financial measures that eliminate recurring restructuring charges or other recurring items if those charges or items are not labeled as non-recurring?

Answer 9: For many years, staff practice has been to object to the use of non-GAAP financial measures that eliminate the effect of recurring items by describing them as non-recurring. Management should consider the substantive nature of the item when determining whether to classify it as recurring or non-recurring. Merely labeling an item as non-recurring does not make it so.

Whether a company can present a non-GAAP financial measure that eliminates recurring restructuring charges will depend on all the facts and circumstances. However, if there is a past pattern of restructuring charges, no articulated demonstration that such charges will not continue and no other unusual reason that a company can substantiate to identify the special nature of the restructuring charges, it would be difficult for a company to meet the burden of disclosing why such a non-GAAP financial measure is useful to investors. In such circumstances, Item 10(e) of Regulation S-K would not permit the use of the non-GAAP financial measure. Similar considerations may apply under Item 12 of Form 8-K.

Question 10: Item 10(e) of Regulation S-K prohibits "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 earnings before interest and taxes (EBIT) and earnings before interest, taxes, depreciation and amortization (EBITDA)." A company's credit agreement contains a material covenant regarding the non-GAAP financial measure "Adjusted EBITDA." If presented in a Commission filing, the non-GAAP financial measure "Adjusted EBITDA" would violate the referenced prohibition, as it excludes charges that are required to be cash settled. May the company present the "Adjusted EBITDA" financial measure in its periodic reports?

Answer 10: MD&A requires disclosure of material items affecting liquidity. Despite the prohibition in Item 10(e), if management believes that the credit agreement is a material agreement, that the covenant is a material term of the credit agreement and that information about the covenant is material to an investor's understanding of the company's financial condition and/or liquidity, the company may be required to disclose the measure as calculated by the debt covenant as part of its

MD&A. In this situation, disclosure regarding the covenant may be misleading absent a discussion of the following:

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

Discussion of the non-GAAP financial measure for other purposes would not be permitted unless otherwise allowable under Item 10(e) of Regulation S-K.

Question 11: While Item 10(e) of Regulation S-K does not include a prohibition on the use of per share non-GAAP financial measures, footnote 11 of the release adopting that Item states that "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." In light of Commission guidance, specifically Accounting Series Release No. 142 (which states "per share data other than that relating to net income, net assets and dividends should be avoided in reporting financial results") and FASB Statement 95 (which prohibits cash flow per share), are non-GAAP earnings per share numbers prohibited or has Item 10(e) of Regulation S-K overruled or superseded ASR No. 142?

Answer 11: ASR No. 142, *Reporting Cash Flow and Other Related Data*, was issued in 1973 primarily to address the confusion over the use of cash flow per share and the basis of presentation of other non-GAAP data. In ASR No. 142, the Commission noted that significant questions arise as to the relevance of per share data presented on any basis other than earnings. The Commission also noted that certain figures cannot logically be related to the common shareholder without adjustment and that certain aggregate financial data, while of importance to analysts and management, are not items that accrue directly to the benefit of the owner of a part of the common equity. While those same concerns continue to be present, the new Item recognizes, consistent with the view of many commenters regarding the proposal, that certain non-GAAP per share measures may be meaningful from an operating viewpoint. However, the disclosure that explains how these measures are used by management and in what way they provide meaningful information to investors (as the per share measure would not depict the amount that accrues directly to shareholders' benefit) is critical to addressing these concerns. Also critical is a reconciliation of the measure to the GAAP financial measure of earnings per share. Finally, the GAAP prohibition on presenting cash flow per share is maintained and per share measures of liquidity continue to be prohibited.

Question 12: Are the requirements in Item 10(e)(1)(i) of Regulation S-K for

the prominent presentation of, and reconciliation to, the most directly comparable GAAP financial measure or measures intended to change the staff's historical practice of requiring the prominent presentation of amounts for the three major categories of the statement of cash flows when a non-GAAP liquidity measure is presented?

Answer 12: No. The requirements in Item 10(e)(1)(i) are consistent with the staff's historical practice. The three major categories of the statement of cash flows should be presented when a non-GAAP liquidity measure is presented.

Question 13: Some companies present a measure of "free cash flow," typically calculated as cash flows from operating activities as presented in the statement of cash flows under GAAP less capital expenditures. Does Item 10 (e) of Regulation S-K permit this measure?

Answer 13: The deduction of cash flows for capital expenditures from the GAAP financial measure of cash flows from operating activities would not ordinarily violate the prohibitions in Item 10(e)(1)(ii). However, companies should be cautious when using such a measure. "Free cash flow" does not have a uniform definition and its title does not describe how it is calculated. Accordingly, a clear description of its calculation, as well as the necessary reconciliation, should accompany the measure where it is used. Companies should also be careful to avoid inappropriate or potentially misleading inferences about its usefulness. All material limitations of the measure should be disclosed. For example, "free cash flow" should not be used in a manner that inappropriately implies that the measure represents the residual cash flow available for discretionary expenditures, since many companies have mandatory debt service requirements or other non-discretionary expenditures that are not deducted from the measure.

EBIT and EBITDA

Question 14: Section I of the adopting release describes EBIT as "earnings before interest and taxes" and EBITDA as "earnings before interest, taxes, depreciation and amortization." What GAAP measure is intended by the term "earnings"? May measures other than those intended by the description in the release be characterized as "EBIT" or "EBITDA"? Does the exception for EBIT and EBITDA from the prohibition in Item 10(e)(1)(ii)(A) of Regulation S-K apply to these other measures?

Answer 14: "Earnings" is intended to mean net income as presented in the statement of operations under GAAP. Measures that are calculated differently than those described as EBIT and EBITDA in the adopting release should not be characterized as "EBIT" or "EBITDA." Instead, the titles of these measures should clearly identify the earnings measure being used and all adjustments. These measures are not exempt from the prohibition in Item 10(e)(1)(ii)(A) of Regulation S-K.

Question 15: If EBIT or EBITDA is presented as a performance measure, to which GAAP financial measure should it be reconciled?

Answer 15: Because EBIT and EBITDA exclude recurring charges, companies should consider the answer to Question 8 if they intend to use EBIT or EBITDA as a performance measure. If a company is able to justify such use, EBIT or EBITDA should be reconciled to net income as presented in the statement of operations under GAAP. Operating income would not be considered the most directly comparable GAAP financial measure because EBIT and EBITDA make adjustments for items that are not included in operating income.

Segment Information

Question 16: Company XYZ presents a table illustrating a breakdown of revenues by product. Is such a breakdown considered a non-GAAP financial measure under Regulation G and Item 10(e) of Regulation S-K?

Answer 16: If the aggregate revenues presented for each product sum to the revenue amount presented on Company XYZ's financial statements, such a table would not be considered a non-GAAP financial measure. In fact, FASB Statement 131, *Disclosures about Segments of an Enterprise and Related Information*, requires disclosure of revenues from external customers for each product and service, based on the revenue amounts reported in the financial statements. The presentation would be considered a non-GAAP financial measure under Regulation G and Item 10(e) of Regulation S-K, however, if the revenue is adjusted in any manner.

Question 17: Company XYZ includes a table illustrating a breakdown of revenues by geographic location. In this table, Company XYZ adjusts its GAAP revenue measure for its international operations to exclude the effects of changes in foreign exchange rates associated with the current fiscal period. The table also presents the related foreign currency effect for the period. Company XYZ presents revenue in this manner to show changes in revenue derived from increases in sales volumes, prices, and exchange rates from period to period as part of its MD&A discussion. Is this table considered a non-GAAP financial measure under Regulation G and Item 10(e) of Regulation S-K?

Answer 17: If the aggregate revenues presented for each geographic location sum to the revenue amount presented on Company XYZ's financial statements, such a table would not be considered a non-GAAP financial measure. However, if Company XYZ presents the foreign exchange adjusted measure by itself, it has presented a non-GAAP financial measure under Regulation G and Item 10(e) of Regulation S-K.

Question 18: Is segment information presented in conformity with FASB Statement 131 a non-GAAP financial measure under Regulation G and Item 10(e) of Regulation S-K?

Answer 18: No. Non-GAAP financial measures do not include financial measures that are required to be disclosed by GAAP. Section II.A.2.b of the adopting release lists "measures of profit or loss and total assets for each segment required to be disclosed in accordance with GAAP" as an example of such a measure. The measure of segment profit or loss and segment total assets under FASB Statement 131 is the measure reported to the chief operating decision maker for purposes of making decisions about allocating resources to the segment and assessing its performance.

The example in the adopting release was not intended to be all-inclusive. As an additional example, because FASB Statement 131 requires or expressly permits the footnotes to the company's consolidated financial statements to include specific additional financial information for each segment, that information also would be excluded from the definition of non-GAAP financial measures.

Question 19: Does Item 10(e) of Regulation S-K prohibit the discussion in MD&A of segment information determined in conformity with FASB Statement 131?

Answer 19: No. A company may discuss segments or other subdivisions of its business in the MD&A, and may be required to do so if such a discussion is necessary to an understanding of the business. Such a discussion generally would include the measures reported in the footnotes to the company's consolidated financial statements in accordance with FASB Statement 131.

FASB Statement 131 requires footnote disclosure of segment profit or loss, segment total assets, and other specified segment measures. FASB Statement 131 also requires the footnote to include a reconciliation of those segment measures to consolidated amounts determined in accordance with GAAP. In a company's disclosure document, if the first discussion of the segment profit or loss measure precedes the financial statements — for example, in the MD&A — the company should either: (1) present the FASB Statement 131-required information in the MD&A; or (2) include a cross reference in the MD&A to the FASB Statement 131-required information in the footnote to the company's consolidated financial statements.

Under FASB Statement 131, a company may determine segment profitability on a basis that differs from consolidated operating profit as defined by GAAP or excludes the effects of items attributable to that segment. In this situation, FASB Statement 131 requires that a footnote to the company's consolidated financial statements provide a reconciliation. Where a company includes in its MD&A a discussion of segment profitability determined in such a manner, the company also should include in the segment discussion in the MD&A a complete discussion of the reconciling items that apply to the particular segment

being discussed. In this regard, see Financial Reporting Codification Section 501.01.a, footnote 28, as added by Commission Release 33-7620, *Segment Reporting*.

Question 20: Is a measure of segment profit/loss or liquidity that is not in conformity with FASB Statement 131 a non-GAAP financial measure under Regulation G and Item 10(e) of Regulation S-K? Does Item 10(e) of Regulation S-K prohibit such a presentation?

Answer 20: Segment measures that are adjusted to include amounts excluded from, or to exclude amounts included in, the measure reported to the chief operating decision maker for purposes of making decisions about allocating resources to the segment and assessing its performance do not comply with FASB Statement 131. Such measures are, therefore, non-GAAP financial measures.

Such measures are subject to all of the provisions of Regulation G and Item 10(e) of Regulation S-K. Further, the staff believes it would be difficult to demonstrate that segment measures that are not reported to or used by the chief operating decision maker, or otherwise are not in conformity with FASB Statement 131, are useful for investors.

Question 21: In the footnote that reconciles the segment measures to the consolidated financial statements, a company may total the profit or loss for the individual segments as part of the FASB Statement 131-required reconciliation. Would the presentation of such a "consolidated" segment profit or loss measure in any context other than the FASB Statement 131-required reconciliation in the footnote be the presentation of a non-GAAP financial measure?

Answer 21: Yes. The presentation of such a "consolidated" segment profit or loss measure in any context other than the FASB Statement 131-required reconciliation in the footnote would be the presentation of a non-GAAP financial measure. We believe that this interpretation is appropriate, as such a "consolidated" segment profit or loss measure has no authoritative meaning outside of the FASB Statement 131-required reconciliation in the footnotes to the company's consolidated financial statements.

Item 12 of Form 8-K

Question 22: Item 12 contains a conditional exemption from its requirement to furnish a Form 8-K where earnings information is presented orally, telephonically, by webcast, by broadcast or by similar means. Among other conditions, the company must provide on its website any financial and other statistical information contained in the presentation, together with any information that would be required by Regulation G. Would an audio file of the initial webcast satisfy this condition to the exemption?

Answer 22: Yes, provided that: (1) the audio file contains all material

financial and other statistical information included in the presentation that was not previously disclosed, and (2) investors can access it and replay it through the company's website. Alternatively, slides or a similar presentation posted on the website at the time of the presentation containing the required, previously undisclosed, material financial and other statistical information would satisfy the condition. In each case, the company must provide all previously undisclosed material financial and other statistical information, including information provided in connection with any questions and answers. Regulation FD also may impose disclosure requirements in these circumstances.

Question 23: A company issues its earnings release after the close of the market and holds a properly noticed conference call to discuss its earnings two hours later. That conference call contains material, previously undisclosed, information of the type described under Item 12 of Form 8-K. Because of this timing, the company is unable to furnish its earnings release on a Form 8-K before its conference call. Accordingly, the company cannot rely on the exemption from the requirement to furnish the information in the conference call on a Form 8-K. What must the company file with regard to its conference call?

Answer 23: The company must furnish the material, previously non-public, financial and other statistical information required to be furnished on Item 12 of Form 8-K as an exhibit to a Form 8-K and satisfy the other requirements of Item 12 of Form 8-K. A transcript of the portion of the conference call or slides or a similar presentation including such information will satisfy this requirement. In each case, all material, previously undisclosed, financial and other statistical information, including that provided in connection with any questions and answers, must be provided. Regulation FD also may impose disclosure requirements in these circumstances.

Question 24: Item 12 contains a conditional exemption from its requirement to furnish a Form 8-K where earnings information is presented orally, telephonically, by webcast, by broadcast or by similar means. Among other conditions, the company must provide on its website any material financial and other statistical information not previously disclosed and contained in the presentation, together with any information that would be required by Regulation G. When must all of this information appear on the company's website?

Answer 24: The required information must appear on the company's website at the time the oral presentation is made. In the case of information that is not provided in a presentation itself but, rather, is disclosed unexpectedly in connection with the question and answer session that was part of that oral presentation, the information must be posted on the company's website promptly after it is disclosed. Any requirements of Regulation FD also must be satisfied. A webcast of the oral presentation would be sufficient to meet this requirement. See, also, the answer to Question 22.

Question 25: Company XYZ issues its earnings release after the close of the market on Tuesday. Company XYZ then files its earning release as an exhibit to its Form 10-Q on Wednesday morning, prior to holding its conference call Wednesday afternoon. Must Company XYZ also furnish a Form 8-K under Item 12 in order to rely on the Item 12 exemption for its conference call?

Answer 25: No. Assuming that all of the other conditions are met, Company XYZ's filing of the earnings release as an exhibit to its Form 10-Q before the conference call takes place would be sufficient for it to rely on the Item 12 exemption for the conference call.

Question 26: Does a company's failure to furnish to the Commission the Form 8-K required by Item 12 in a timely manner affect the company's eligibility to use Form S-3?

Answer 26: No. Form S-3 requires the company to have filed in "a timely manner all reports required to be filed in twelve calendar months and any portion of a month immediately preceding the filing of the registration statement . . ." Because an Item 12 Form 8-K is furnished to the Commission, rather than filed with the Commission, failure to furnish such a Form 8-K in a timely manner would not affect a company's eligibility to use Form S-3. While not affecting a company's Form S-3 eligibility, failure to comply with Item 12 of Form 8-K would, of course, be a violation of Section 13(a) of the Exchange Act and the rules thereunder.

Question 27: Company ABC issued a press release on April 3, 2003 that contained previously non-public material information. Specifically, Company ABC announced that it would not meet its previous earnings estimates for the fiscal period ended March 31, 2003. The press release also stated that it expected its adjusted earnings (a non-GAAP financial measure) for the fiscal period ended March 31, 2003 to be in the range of \$1.20 to \$1.25. Does Company ABC have to furnish its press release pursuant to Item 12 of Form 8-K and satisfy the requirements of Item 12 applicable to non-GAAP financial measures?

Answer 27: Company ABC's press release would be subject to Item 12 of Form 8-K because it contained non-public material information regarding its results of operations for a completed fiscal period. The adjusted earnings range presented also would be subject to the requirements of Item 12 applicable to non-GAAP financial measures.

Foreign Private Issuers

Question 28: The Note to Item 10(e) of Regulation S-K permits a foreign private issuer to include in its filings a non-GAAP financial measure that otherwise would be prohibited by Item 10(e)(1)(ii) if, among other things, the non-GAAP financial measure is required or expressly permitted by the standard setter that is responsible for establishing the GAAP used in the company's primary financial statements included in its filing with the

Commission. What does "expressly permitted" mean?

Answer 28: A measure is expressly permitted if the particular measure is clearly and specifically identified as an acceptable measure by the standard setter that is responsible for establishing the GAAP used in the company's primary financial statements included in its filing with the Commission.

Some non-US GAAP standard setters specify a minimum level of caption detail for financial statement presentation, but require or permit additional caption detail. In some cases, the standard setter does not specify the particular additional captions to be presented. The staff believes that additional detail of the components of the financial statements determined in conformity with the GAAP used in the primary financial statements will generally be useful to US investors. The "expressly permitted" condition is not intended to prohibit the inclusion of those captions.

Some non-US GAAP standard setters permit or require subtotals in financial statements that are not calculated consistently with those permitted or required by US GAAP. Provided that the subtotal is clearly derived from the appropriately classified financial statement captions that precede it, the "expressly permitted" condition is not intended to prohibit inclusion of those subtotals.

Although additional detail of the components of the primary financial statements is acceptable as discussed above, measures that are prohibited by Item 10(e) of Regulation S-K should not be added to the face of the primary financial statements unless expressly permitted under the GAAP used in the company's primary financial statements.

Some non-US GAAP standard setters specifically permit alternative earnings per share measures to be presented but do not specify the particular earnings measures that may be used. In those circumstances, the expressly permitted condition is not intended to prohibit inclusion of earnings per share measures where the numerator of the per share measure is directly derived from an appropriately presented measure in the home country GAAP income statement.

Question 29: A foreign private issuer furnishes a press release on a Form 6-K that includes a section with non-GAAP financial measures. Can a foreign private issuer incorporate by reference into a Securities Act registration statement only those portions of the furnished press release that do not include the non-GAAP financial measures?

Answer 29: Reports on Form 6-K are not incorporated by reference automatically into Securities Act registration statements. In order to incorporate a Form 6-K into a Securities Act registration statement, a foreign private issuer must specifically provide for such incorporation by reference in the registration statement and in any subsequently filed

Form 6-K. See Item 6(c) of Form F-3. Where a foreign private issuer wishes to incorporate by reference a portion or portions of the press release provided on a Form 6-K, the foreign private issuer should either: (1) specify in the Form 6-K those portions of the press release to be incorporated by reference, or (2) furnish two Form 6-K reports, one that contains the full press release and another that contains the portions that would be incorporated by reference (and specifies that the second Form 6-K is so incorporated). We believe that the second method, using two reports on Form 6-K, may provide more clarity for investors in most circumstances. A company must also consider whether its disclosure is rendered misleading if it incorporates only a portion (or portions) of a press release.

Question 30: If a Form F-3 is filed after March 28, 2003 and the company incorporates by reference a Form 20-F annual report for the fiscal year ended December 31, 2002 that includes a non-GAAP financial measure, how may the company comply with Regulation G?

Answer 30: See the answer to Question 1. The company could comply with Regulation G by one or a combination of: (1) amending the Form 20-F annual report; (2) filing a report on Form 6-K that is incorporated by reference into the Form F-3; or (3) providing the Regulation G disclosure in the Securities Act filing.

Question 31: A foreign private issuer publishes a non-GAAP financial measure that does not comply with Regulation G, in reliance on Rule 100(c), and then furnishes the information in a report on Form 6-K. Must the foreign private issuer comply with Item 10(e) of Regulation S-K with respect to that information if the company chooses to incorporate that Form 6-K report into a Securities Act registration statement (other than an MJDS registration statement) filed after March 28, 2003?

Answer 31: Yes. If the non-GAAP financial measure is for a period ending after March 28, 2003, the company must comply with all of the provisions of Item 10(e) of Regulation S-K.

Question 32: If a Canadian company includes a non-GAAP financial measure in an annual report on Form 40-F, does the company need to comply with Regulation G or Item 10(e) of Regulation S-K with respect to that information if the company files a non-MJDS Securities Act registration statement that incorporates by reference the Form 40-F?

Answer 32: No. Information included in a Form 40-F is not subject to Regulation G or Item 10(e) of Regulation S-K.

"Voluntary Filers"

Question 33: Section 15(d) of the Exchange Act suspends automatically its application to any company that would be subject to the filing requirements of that section where, if other conditions are met, on the first day of the

company's fiscal year it has fewer than 300 holders of record of the class of securities that created the Section 15(d) obligation. This suspension, which relates to the fiscal year in which the fewer than 300 record holders determination is made on the first day thereof, is automatic and does not require any filing with the Commission. The Commission adopted Rule 15d-6 to require the filing of a Form 15 as a notice of the suspension of a company's reporting obligation under Section 15(d). Such a filing, however, is not a condition to the suspension. A number of companies whose Section 15(d) reporting obligation is suspended automatically by the statute choose not to file the notice required by Rule 15d-6 and continue to file Exchange Act reports as though they continue to be required. Must a company whose reporting obligation is suspended automatically by Section 15(d) but continues to file periodic reports as though it were required to file periodic reports comply with Regulation G and the requirements of Item 10(e) of Regulation S-K?

Answer 33: Regulation S-K and Regulation S-B relate to filings with the Commission. Accordingly, a company that is making filings as described in this question must comply with Regulation S-K or Regulation S-B, or Form 20-F, as applicable, in their filings.

As to other public communications, any company "that has a class of securities registered under Section 12 of the Securities Exchange Act of 1934, or is required to file reports under Section 15(d) of the Securities Exchange Act of 1934" must comply with Regulation G. The application of this standard to those companies that no longer are "required" to report under Section 15(d) but choose to continue to report presents a difficult dilemma, as those companies technically are not subject to Regulation G but their continued filing is intended to and does give the appearance that they are a public company whose disclosure is subject to the Commission's regulations. It is reasonable that this appearance would cause shareholders and other market participants to expect and rely on a company's required compliance with the requirements of the federal securities laws applicable to companies reporting under Section 15(d). Accordingly, while Regulation G technically does not apply to a company such as the one described in this question, the failure of such a company to comply with all requirements (including Regulation G) applicable to a Section 15(d)-reporting company can raise significant issues regarding that company's compliance with the anti-fraud provisions of the federal securities laws.

<http://www.sec.gov/divisions/corpfin/faqs/nongaapfaq.htm>