Non-GAAP Financial Measures

Issues In-Depth

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Contents

SEC continues to focus on non-GAAP financial measures

Presenting non-GAAP financial measures can be a balancing act. Investors rely on such information to understand a company's performance and liquidity, and yet the SEC staff is focused on making sure that such measures do not undermine the presentation of a company's GAAP-based financial position and financial results.

The SEC issued rules on non-GAAP financial measures in 2003. In May 2016, the SEC staff issued updated Compliance & Disclosure Interpretations (C&DIs) that provide additional guidance about how companies are allowed to use non-GAAP financial measures, specifically listing prohibited practices. These C&DIs were supplemented in December 2022 to address specific recurring issues.

The SEC staff historically has been very active in ensuring compliance with these rules and C&DIs, as evident by non-GAAP financial measures being a perennial topic in SEC speeches. That focus continues today, with the staff actively commenting to companies about their use of non-GAAP financial measures in communications and financial reporting. The majority of these comments point companies to the C&DIs to remind them of their obligation to comply with SEC rules and interpretations. The staff's focus is exemplified in the volume of comments issued related to non-GAAP financial measures, ranking it near the top of the list when analyzed categorically against other staff comments.

Despite the scrutiny placed on non-GAAP financial measures by the SEC staff, companies continue to believe that non-GAAP financial measures play a critical role in their communications with investors, and that investors rely on that information to understand a company's performance and liquidity.

While investors often rely on non-GAAP financial measures, many also support the staff's monitoring efforts and believe they should continue. The SEC Investor Advisory Committee recommended[1] the staff not only continue, but expand their efforts to understand the extent of the use of these metrics and ensure proper compliance with the rules. The Committee also supports development of new rules if studies suggest they are appropriate.

Against this backdrop of perceived importance, this publication outlines our understanding of the SEC requirements related to non-GAAP financial measures.

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1 Recommendation from the Investor-as-Owner Subcommittee (IAO) of the SEC Investor Advisory Committee (IAC) Relating to Accounting and Financial Disclosure (As of April 27, 2020)

About this publication

The purpose of this Issues In-Depth is to assist you in understanding the SEC requirements and the SEC staff's interpretations and views related to the use of non-GAAP financial measures.

The rules and interpretations

The rules referred to in this publication that govern the presentation of non-GAAP financial measures mainly comprise the following:

— Regulation G, Conditions for Use of Non-GAAP Financial Measures (reproduced in Appendix 1).

— Regulation S-K Item 10(e), Use of non-GAAP financial measures in Commission filings (reproduced in Appendix 2).

— Instruction 2 to Item 2.02, The requirements of paragraph (e)(1)(i) of Item 10 of Regulation S-K (17 CFR 229.10(e)(1)(i)) shall apply to disclosures under this Item 2.02 (reproduced in Appendix 3).

The SEC staff has also published a series of interpretations that include guidance and examples for use in applying the rules above.

— Compliance & Disclosure Interpretations (C&DIs), updated December 2022 (reproduced in Appendix 4).

In addition, the following Topics from the FASB's Accounting Standards Codification® are referenced:

— Topic 205, Presentation of Financial Statements
— Topic 230, Statement of Cash Flows
— Topic 260, Earnings per Share
— Topic 280, Segment Reporting
— Topic 326, Financial Instruments – Credit Losses Measurement of Credit Losses on Financial Instruments
— Topic 606, Revenue from Contracts with Customers
— Topic 720, Other Expenses – Advertising Costs
— Topic 842, Leases
— Topic 932, Extractive Activities—Oil and Gas.

Organization of the text

Our commentary is referenced to the rules and to other literature, where applicable. The following are examples.

— G.101(a) is Item 101(a) of Regulation G.

— S-K.10(e)(2) is Item 10(e)(2) of Regulation S-K.

— FR-65 II.A(2)(b) is paragraph II.A(2)(b) of the adopting release of the SEC's Final Rule: Conditions for Use of Non-GAAP Financial Measures.

— CFR 229.402 is Section 402 of Part 229 of the Code of Financial Regulation.

— Rel. 34-88914 is SEC Release No. 34-88914.

- FRM 8120.2 is section 8120.2 of the Financial Reporting Manual of the Division of Corporation Finance of the SEC.
- Regs Comm 04/2005 is the April 2005 meeting of the Center for Audit Quality SEC Regulations Committee.
- IPTF 03-2005 App B is Appendix B of the materials from the March 2005 meeting of the International Practices Task Force of the CAQ.
- ASC 280-10-50-1 is paragraph 50-1 of FASB ASC Subtopic 280-10.
- 2016 AICPA Conf is the AICPA Conference on Current SEC and PCAOB Developments held in 2016.

Illustrative SEC comments

To illustrate the requirements and interpretations being discussed, this publication includes comments the SEC staff has provided to registrants on their non-GAAP financial measures. These comments are not copied verbatim, but in many cases have been condensed or adjusted for our editorial style (e.g. abbreviations).

Abbreviations

The following is a list of the abbreviations used in this publication.

AICPA	American Institute of Certified Public Accountants
CAQ	Center for Audit Quality
CD&A	Compensation Discussion and Analysis
C&DIs	Compliance & Disclosure Interpretations
CODM	Chief operating decision maker
DCP	Disclosure and control procedures
EBITDA	Earnings before interest, tax, depreciation and amortization
FASB	Financial Accounting Standards Board
FCF	Free cash flow
FFO	Funds from operations
GAAP	Generally accepted accounting principles
ICFR	Internal control over financial reporting
IPTF	International Practices Task Force
MD&A	Management's Discussion & Analysis
MJDS	Multijurisdictional Disclosure System
NAREIT	National Association of Real Estate Investment Trusts
PCAOB	Public Company Accounting Oversight Board
REIT	Real estate investment trust
SEC	US Securities and Exchange Commission
KPI	Key performance indicator

1. Background

Detailed contents

1.1 What are non-GAAP measures?

A non-GAAP measure is a financial, operating, regulatory or statutory measure that is not determined under US GAAP. It is important to differentiate between non-GAAP financial measures and other non-GAAP measures. Non-GAAP financial measures reported by registrants are subject to certain SEC rules and oversight while operating, regulatory and statutory measures are not subject to those same rules. A non-GAAP financial measure is a numerical measure of a registrant's historical or future financial performance, financial position or cash flows.

This publication focuses on non-GAAP financial measures. The difference between the SEC's definition of non-GAAP financial measures and other operating, regulatory and statutory measures is discussed further in section 1.4.

1.2 How are non-GAAP financial measures used?

Non-GAAP financial measures are often presented in conjunction with GAAP measures in MD&A, earnings releases and other communications. Non-GAAP financial measures are widely used by large public companies.

94% of S&P 500 companies included at least one non-GAAP financial measure in their earnings release in the first calendar quarter of 2020.[1]

Many companies use non-GAAP financial measures to provide investors with additional information and insight into the company's historical and future financial performance, financial position and cash flows. One common example is 'adjusted earnings,' which may be used to remove nonrecurring items from GAAP earnings to provide a better year-over-year comparison of financial performance.

While GAAP measures are audited and provide a reliable and standardized method for understanding a company's historical and future financial performance, financial position and cash flows,

S&P 500 companies reported an average of six non-GAAP financial measures in their first calendar quarter 2020 earnings release.[1]

[2] Center for Audit Quality, *The Role of Auditors in Non-GAAP Financial Measures and Key Performance Indicators: Present and Future* (Sept 2020)

management generally decides which non-GAAP financial measures are used and how they are calculated.

There is no audit requirement or generally standardized method for calculating non-GAAP financial measures. For example, similarly titled non-GAAP financial measures may not be consistently calculated across a company's industry, or more broadly. Additionally, companies within the same industry may present entirely different non-GAAP financial measures, which may lead to a lack of comparability. However, expected methods of calculation exist for certain commonly used non-GAAP measures (e.g. EBITDA or free cash flow), and when calculations deviate from those methods, the staff expects registrants to clearly label the measure (i.e. Adjusted EBITDA).

For these reasons, disclosure is necessary so that investors can understand the non-GAAP financial measures provided. Management is required to disclose: (1) how a non-GAAP financial measure is calculated by reconciling from a comparable GAAP measure, (2) why the non-GAAP financial measure is considered useful to investors, and (3) whether management uses the non-GAAP financial measure for its own purposes.

1.3 Where are non-GAAP financial measures presented?

Non-GAAP financial measures are often presented in documents or communications required of an SEC registrant, or by companies conducting an initial public offering. SEC non-GAAP presentation and disclosure requirements may be more or less restrictive depending on where and how the non-GAAP financial measure is presented and communicated (see section 3.2).

Common examples of where non-GAAP financial measures are presented	
- Earnings release in furnished Form 8-K	- Websites
- Earnings release in filed Form 8-K	- Business section of Form 10-K
- Earnings calls	- MD&A section of Form 10-K
- Webcasts	- MD&A section of Form 10-Q
- Investor presentations	- Operating and Financial Review and Prospects section of Form 20-F

1.4 What measures meet the SEC's definition of non-GAAP financial measures?

1.4.10 Non-GAAP financial measures

The SEC defines a non-GAAP financial measure as 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 based on GAAP in the registrant's income statement, balance sheet or cash flows statement (or equivalent statements); or
- **includes** amounts, or is subject to adjustments that have the effect of including amounts, that are excluded from the most directly comparable GAAP measure calculated and presented in conformity with GAAP. [G.101(a), S-K.10(e)(2)]

The stated intent of the non-GAAP financial measure rules is to include in the definition all measures that have the effect of depicting a measure of either:

- performance that differs from that presented in the financial statements (e.g. income or loss before taxes or net income or loss) as calculated based on GAAP; or
- liquidity that differs from cash flows or cash flows from operations computed based on GAAP. [FR-65 II.A(2)(b)]

Common examples of non-GAAP financial measures		
- EBITDA	- Earnings excluding restructuring	- Distributable cash flow
- EBIT	- Net income excluding impairment	- GAAP one-time adjusted
- FFO	- Adjusted net income	- GAAP adjusted
- Adjusted FFO	- Adjusted loss	- Cash earnings
- Adjusted EBITDA	- Normalized earnings	- Cash loss
- Core earnings	- Recurring earnings	- PV-10
- Net debt	- Normalized EPS	
- Free cash flow		
- Adjusted free cash flow		

1.4.20 Operating and statistical measures

Certain measures of operating performance and statistical measures fall outside the scope of the SEC's definition of a non-GAAP financial measure. [FR-65 II.A(2)(b)]

Measures excluded from the scope of the SEC's non-GAAP financial measure rules include:

- operating and other statistical measures – e.g. unit sales, numbers of employees and numbers of customers.
- ratios and statistical measures calculated using only financial measures calculated based on GAAP and/or operating measures or other measures that are not non-GAAP financial measures. Examples include:
  - sales per square foot or same store sales, if those sales are determined based on GAAP; and
  - operating margin calculated by dividing revenues into operating income, if both revenues and operating income are determined based on GAAP. [G.101(a)(2), S-K.10(e), FR-65 II.A(2)(b)]

Depending on the nature of the measure, an operating performance or statistical measure may also be considered 'key performance indicator or metric', even if it does not meet the SEC's definition of a non-GAAP financial measure. In those cases, additional disclosure or information may be necessary. Key performance indicators and metrics are discussed further in section 7.4.

The SEC's definition of non-GAAP financial measures also excludes financial information that does not in effect provide numerical measures that differ from the comparable GAAP measure. Examples include:

— amounts of expected indebtedness, including contracted and anticipated amounts;
— amounts of repayments that have been planned or decided on but not yet made;
— estimated revenues or expenses of a new product line, if those amounts were estimated in the same manner as would be computed under GAAP; and
— measures of profitability and total assets for each segment required for disclosure under the accounting for segment information (see section 4.2). [FR-65 II.A(2)(b)]

Example 1.1
Revenue per available room

ABC Corp., a hotel REIT, includes a measure in its earnings release that provides revenue per available room (RevPar). RevPar is calculated by dividing room sales for comparable properties by room nights available for the period. Room sales were determined based on GAAP.

In this example, ABC's presentation of RevPar is not a non-GAAP financial measure because it is calculated using a GAAP measure (i.e. room sales determined based on GAAP) and an operating measure (i.e. room nights available). If the room sales were adjusted in any manner that would differ from GAAP, the presentation would be considered a non-GAAP financial measure.

1.4.30 Regulatory and statutory measures

Financial measures required by SEC rules (i.e. an SEC-required financial measure) or a system of regulation of a government or governmental authority or self-regulatory organization that applies to the registrant (i.e. a statutory measure) are not non-GAAP financial measures.

— Examples of SEC-required financial measures include disclosures required by any of the SEC's industry guides and disclosure of taxable income required for real estate partnerships.
— Examples of statutory measures include statutory capital or reserves for financial institutions and statutory losses or premiums for insurance companies. [S-K.10(e)(5), FR-65 II.A(2)(b)]

A company should present the financial measures outside of the financial statements unless those measures are required or expressly permitted by the standard setter responsible for establishing the GAAP used in the financial statements – e.g. segment information required or expressly permitted under Topic 280. [S-K.10(e)(5)]

If a company adjusts an SEC-required financial measure or statutory measure to include or exclude amounts otherwise excluded or included in the measure, it considers that adjusted measure to be a non-GAAP financial measure.

Additionally, a financial measure prepared under guidance published by a government or governmental authority or self-regulatory organization that is *not* a required disclosure by the respective government or governmental authority or self-regulatory organization is a non-GAAP financial measure. A financial measure must be a *required* disclosure by a system of regulation that applies to the company to be considered a regulatory or statutory measure not subject to the SEC's non-GAAP financial measure rules. [C&DI 102.12]

1.4.40 Segment information

The SEC's definition of non-GAAP financial measures excludes the disclosures of segment profit or loss and total assets required by Topic 280. In addition, Topic 280 requires or expressly permits disclosure in GAAP financial statements of additional financial information for each segment beyond its measure of profit and loss and total assets; that additional information for each segment is also excluded from the definition of non-GAAP financial measures. A Topic 280 measure of profit and loss reported to the CODM for each segment used to allocate resources to the segments and assessing their performance is not subject to the provisions of the SEC's non-GAAP financial measure rules. For further discussion, see section 4.2. [C&DI 104.01, ASC 280-10-50-1, 50-3 – 50-10]

2. The rules

Detailed contents

2.1 SEC developments over time

2003

The SEC issued and adopted FR-65 (the final rules) related to use of non-GAAP financial measures as mandated by the Sarbanes-Oxley Act. [FR-65]

The final rules:

- created Regulation G, which includes the basic requirements and applies to publicly disclosed or released material information containing a non-GAAP financial measure;
- amended Item 10 of Regulation S-K (S-K Item 10(e)), Form 20-F and other regulations, which impose requirements in addition to those in Regulation G for filed non-GAAP financial measures, including specific prohibitions; and
- revised Form 8-K to require registrants to 'furnish' the SEC with earnings releases and similar announcements of financial information for completed annual and interim periods. Instruction 2 to Item 2.02 of Form 8-K requires disclosures incremental to Regulation G about furnished non-GAAP financial measures.

The SEC staff also issued *Frequently Asked Questions Regarding the Use of Non-GAAP Financial Measures* (2003 FAQs) to assist in implementing the requirements adopted in the final rules.

2010

The SEC staff determined that the 2003 FAQs created an environment where meaningful information was being excluded from periodic reports and other SEC filings. The SEC staff was concerned that the interpretive guidance was more restrictive than what Regulation G and S-K Item 10(e) intended. Thus, the SEC staff issued C&DIs, which updated and replaced the 2003 FAQs.

Dec 2015

The SEC Chair and SEC staff began publicly warning that enforcement action would be taken against companies that fail to comply with guidance outlining how to present non-GAAP financial measures. The SEC's renewed focus was driven by the increased use of non-GAAP financial measures, and the widening disparity between GAAP and non-GAAP results.

May 2016

The SEC staff significantly updated the C&DIs to provide additional guidance about how companies are allowed to use non-GAAP financial measures, and specifically listed prohibited practices.

Oct 2017 & Apr 2018

The SEC staff updated the C&DIs to clarify its views on how the non-GAAP financial measure rules apply to certain aspects of business combination transactions.

Jan 2020

The SEC staff published guidance on the disclosure of 'key performance indicators and metrics' in MD&A to remind companies of the expected accompanying disclosures and consideration of the applicability of the non-GAAP requirements (see section 7.4). [FR-87]

Dec 2022

At the 2022 AICPA & CIMA Conference on Current SEC and PCAOB Developments (2022 AICPA Conference), staff from the SEC's Division of Corporation Finance noted that presentation of non-GAAP financial measures continues to be one of the most frequent topics of comment letters issued to companies.

The SEC published new and updated C&DIs to provide additional guidance and examples of its views on the use and presentation of non-GAAP financial measures, and specifically listed prohibited practices. The staff has communicated an expectation that registrants revisit and review their non-GAAP financial measures in the context of these updates, noting that while the updates reflect existing positions, they also represent common areas of continued comments.

The above timeline illustrates how the SEC remains focused on the importance of following the non-GAAP financial measure rules. Its views continue to be well-characterized by the following comments from a past SEC Chair.

> "While your chief financial officer and investor relations team may be quite enamored of non-GAAP measures as useful market communication devices, your finance and legal teams, along with your audit committees, should carefully attend to the use of these measures and consider questions such as:
> — Why are you using the non-GAAP measure, and how does it provide investors with useful information?
> — Are you giving non-GAAP measures no greater prominence than the GAAP measures, as required under the rules?
> — Are your explanations of how you are using the non-GAAP measures – and why they are useful for your investors – accurate and complete, drafted without boilerplate?
> — Are there appropriate controls over the calculation of non-GAAP measures?"
>
> Chair Mary Jo White, Keynote Address at the 2015

2.2 Summary of rules

The rules on non-GAAP financial measures apply as follows.

Public disclosures	Regulation G provides general requirements for the use of non-GAAP financial measures in all public disclosures of material information, whether or not included in SEC filings.
Filings	In a filing with the SEC, the use of non-GAAP financial measures is generally subject to the requirements in S-K Item 10(e). This is in addition to the Regulation G requirements.
Earnings releases and similar announcements	Earnings releases and similar announcements are discussed in chapter 5. In general: — when an Item 2.02 Form 8-K is *filed* with the SEC by a domestic registrant, all of S-K Item 10(e) applies; — when an Item 2.02 Form 8-K is *furnished* to the SEC by a domestic registrant, certain disclosures included in Item 10(e) about non-GAAP financial measures are required. This is in addition to the Regulation G requirements because an earnings release is a public disclosure.
Compliance & Disclosure Interpretations	The C&DIs addressing non-GAAP financial measures reflect the Division of Corporation Finance staff's (SEC staff) interpretations and views of Regulation G, S-K Item 10(e), Instruction 2 to Item 2.02, and other SEC regulations.
Foreign private issuers	The application of Regulation G and S-K Item 10(e) to foreign private issuers is discussed in chapter 6.

2.2.10 Regulation G applies to public disclosures

Regulation G applies to all public disclosures that include non-GAAP financial measures made by a registrant that is required to file reports pursuant to, or has a class of securities registered under, the Exchange Act – i.e. an 'issuer' as defined by the Exchange Act. Regulation G also applies when a person, acting on the registrant's behalf, discloses publicly or releases publicly material information that includes a non-GAAP financial measure.

Regulation G does not apply to registered investment companies or certain disclosures related to proposed business combinations (see section 2.3.10).

The term 'public disclosure' is not defined. Instead, the SEC has stated that whether a disclosure is public depends on all of the facts and circumstances surrounding that disclosure. [FR-65 FN31]

Public disclosures include information that is disclosed publicly (e.g. in a filing with the SEC) and information released publicly (e.g. press releases, earnings releases and investor presentations). Public disclosures are not just written communications. Regulation G applies to all types of nonwritten communications, including those made orally, by webcast or broadcast, or through social media. A registrant should consult its legal counsel to determine when a disclosure is public and subject to the provisions of Regulation G.

Regulation G is reproduced in Appendix 1.

2.2.20 S-K Item 10(e) applies to filings with the SEC

S-K Item 10(e) applies to all filings under the Securities Act and the Exchange Act that include non-GAAP financial measures (e.g. annual reports on Form 10-K, current reports on Form 8-K, quarterly reports on Form 10-Q, registration statements, proxy statements).

S-K Item 10(e) prohibits the presentation of non-GAAP financial measures on the face of a company's financial statements or in the accompanying notes. S-K Item 10(e) also prohibits 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. Due to these prohibitions, S-K Item 10(e) generally only applies to other sections of a filing under the Securities Act and/or the Exchange Act that include non-GAAP financial measures – e.g. MD&A, summary financial information in a registration statement.

S-K Item 10(e) does not apply to:

- registered investment companies (see section 2.3.10);
- certain disclosures related to proposed business combinations (see section 2.3.20);
- certain compensation discussion and analysis (CD&A) disclosures (see section 2.3.30);
- free writing prospectuses, unless they are included in or incorporated by reference into a filing under the Securities Act and/or the Exchange Act (see section 2.3.40); and
- webcasts and other nonwritten communications (see section 2.3.50).

Whether or not scope limitations apply is a legal determination and depends on a company's specific facts and circumstances. Management should consult with their securities counsel about interpreting these scope limitations to ensure compliance with the rules. The guidance in this publication is not a substitute for the legal services or advice that is required to interpret these scope limitations.

S-K Item 10(e) is reproduced in Appendix 2.

2.2.30 Instruction 2 to Item 2.02 applies to filed and furnished Form 8-Ks

Item 2.02 of Form 8-K requires that a domestic registrant *furnish* to the SEC all releases or announcements disclosing material nonpublic financial information about completed annual or quarterly periods that it has not previously disclosed. A domestic registrant may decide to *file* the Item 2.02 Form 8-K, which has other implications and disclosure requirements.

When a registrant presents non-GAAP financial measures in an Item 2.02 Form 8-K, Regulation G applies to that information, regardless of whether the Form 8-K is filed or furnished. The additional application of S-K Item 10(e) depends on whether the Form 8-K is filed or furnished.

— If a Form 8-K that includes non-GAAP financial measures is *filed* with the SEC, all of the provisions of S-K Item 10(e) apply.
— If a Form 8-K that includes non-GAAP financial measures is *furnished* to the SEC, Instruction 2 of Item 2.02 requires certain disclosures in addition to the Regulation G requirements but does not include the same prohibitions as S-K Item 10(e) (see section 5.3).

Instruction 2 to Item 2.02 is reproduced in Appendix 3.

2.2.40 C&DIs provide guidance

The C&DIs addressing non-GAAP financial measures reflect the Division of Corporation Finance staff's (SEC staff) interpretations and views of Regulation G, S-K Item 10(e), Instruction 2 to Item 2.02, and other SEC regulations. The C&DIs are presented in question and answer (Q&A) format and provide examples of what the SEC staff believes to be the appropriate or inappropriate use and/or presentation of a non-GAAP financial measure.

The C&DIs are not in themselves rules, regulations or statements of the SEC. The SEC has neither approved nor disapproved of these interpretations. The C&DIs do not necessarily discuss all material considerations necessary to reach the conclusions stated, and they are not binding because of their informal nature; they are intended as general guidance and should not be considered definitive. However, the SEC staff will often refer a company directly to a particular C&DI when it believes the presentation of a non-GAAP measure does not comply with the rules.

The C&DIs are reproduced in Appendix 4 and the specific views and examples are discussed in the relevant topics in chapters 3 through 5 of this publication.

2.3 Scope of requirements

This section explains special considerations for certain circumstances in which non-GAAP financial measures are provided.

2.3.10 Registered investment companies

A registered investment company is an entity registered under Section 8 of the Investment Company Act of 1940 (1940 Act). The 1940 Act provides special reporting requirements that are specific to registered investment companies. For example, registered investment companies are not required to provide executive compensation disclosures or MD&A, or to comply with Section 404 of the Sarbanes-Oxley Act. Registered investment companies are excluded from the definition of 'registrant' for purposes of Regulation G and S-K Item 10(e); this is because the Sarbanes-Oxley Act exempts registered investment companies from any rules adopted by the SEC under the Sarbanes-Oxley Act. [FR-75 FN24]

However, an investment company that does not qualify as a registered investment company under the 1940 Act (e.g. business development companies, certain real estate investment funds) must comply with Regulation G and S-K Item 10(e). [Reg S-X Article 6]

2.3.20 Exemption for proposed business combinations

Companies contemplating a business combination are often required to file their public communications under SEC communications rules that apply to business combination transactions. These may include projections or forecasts of results and brief statements about the potential benefits to be achieved by the business combination – e.g. synergies, valuations, dividend amounts.

The rules do not apply to a non-GAAP financial measure included in a disclosure related to a proposed business combination if the disclosure is included in a communication that is subject to the SEC communications rules applicable to business combination transactions. However, this exemption does not extend to the same non-GAAP financial measure if it is also disclosed in a Securities Act registration statement, proxy statement or tender offer statement. [FR-65 I, C&DI 101.01, 101.02, 101.03, 101.04]

The following table summarizes the specific exemptions for proposed business combinations, making it clear that not all non-GAAP financial measures are outside the scope of the rules discussed in this publication. [G.100(d), S-K 10(e)(6), C&DI 101.01, 101.02, 101.03, 101.04, FR-65 II.A(1)(c)]

Exempt	Not exempt
Non-GAAP financial measures included in communications subject to the SEC's communication rules that apply to a proposed business combination made under Rule 425 of the Securities Act, or	The exemption does not apply if the same non-GAAP financial measure that is included in a communication under one of proposed business combination rules (see left) is also disclosed in a registration

Exempt	Not exempt
Rules 14a-12, 14d-2(b)(2) or 14d-9(a)(2) of the Exchange Act. The exemption applies to the company resulting from the combination and the parties to the transaction.	statement, a proxy statement or a tender offer statement.
Non-GAAP financial measures included in forecasts provided to a financial advisor – included in registration statements, proxy materials and tender offer statements – to the extent that: - the financial measures are included in forecasts provided to the financial advisor for the purpose of rendering an opinion that is materially related to the business combination transaction; and - the forecasts are being disclosed in order to comply with Item 1015 of Regulation M-A. This includes information disclosed in a Form S-4 to register shares to be issued in a business combination or in a proxy statement to comply with Item 1015 of Regulation M-A – e.g. information provided in a report, opinion or appraisal used to support the fairness of the consideration issued in the transaction.	Non-GAAP financial measures included in forecasts disclosed in a registration statement or proxy statement related to a business combination that are not required by Item 1015 of Regulation M-A.
Non-GAAP financial measures included in forecasts provided to parties (e.g. bidders) involved in a business combination transaction – determined by the company to be material to the users and required to be disclosed to comply with anti-fraud and other liability provisions of the applicable federal securities laws. Companies consult with securities counsel to determine whether forecasts need to be provided to external parties to comply with the anti-fraud and other liability provisions of the applicable federal securities laws.	The exemption does not apply if the same non-GAAP financial measure that is included in a communication under the applicable federal securities laws (see left) is also disclosed in a registration statement, a proxy statement or a tender offer statement.

Pro forma – management’s adjustments

In May 2020, the SEC amended the disclosure requirements regarding acquired and disposed entities to provide investors with more meaningful information. Pro forma disclosures were also amended at that time. Among other things, the amendments allow companies an option (if certain conditions are met) to disclose **management’s adjustments** if management believes such adjustments would enhance an investor’s understanding of the pro forma effects of the transaction. [Rel. 34-88914]

As contemplated by the amendment, management's adjustments: [Rel. 34-88914]

— are intended to provide additional insight to investors into the potential effects of the transaction; and
— include forward-looking information that depicts management's view of the synergies and dis-synergies it expects from consummating the transaction and executing its post-transaction plans.

If presented, management's adjustments must be presented in the explanatory notes to the pro forma financial information in the form of reconciliations of pro forma net income from continuing operations attributable to the controlling interest and the related pro forma earnings per share data to such amounts after giving effect to management's adjustments. [Rel. 34-88914]

The amendments do not change the business combination exemption to non-GAAP financial measures discussed above.

2.3.30 Compensation Discussion and Analysis

As part of the CD&A in its annual proxy statement, a registrant is required to disclose the criteria used in reaching decisions for the compensation paid to its chief executive officer, chief financial officer and the three other most highly compensated executive officers. These criteria often include the registrant's use of corporate and individual performance targets (target levels), which may constitute non-GAAP financial measures. [CFR 229.402(b)]

A target level that is a non-GAAP financial measure provided under this requirement is not subject to Regulation G and S-K Item 10(e). However, a registrant must disclose how the target level non-GAAP financial measure is calculated from its audited financial statements. [CFR 229.402(b) Instr. 5]

This exception does not extend to non-GAAP financial measures that do not relate to the disclosure of target levels, but are nevertheless included in CD&A or other parts of the proxy statement. Non-GAAP financial measures presented for any other purpose are subject to the requirements of Regulation G and S-K Item 10(e). [C&DI 108.01]

The SEC staff will not object if a registrant presents a non-GAAP financial measure in the CD&A to explain the relationship between pay and performance or to justify certain amounts of pay if the registrant includes a prominent reference to either:

— an annex to the proxy statement containing the GAAP reconciliation and other information required by the rules; or
— the pages in the Form 10-K containing the required GAAP reconciliation and other information, provided the Form 10-K is incorporating by reference the proxy statement's Item 402 disclosure as part of its Part III information. [C&DI 108.01]

Pay vs performance disclosures

In August 2022, the SEC issued a final rule adding Item 402(v) to Regulation S-K, requiring listed companies to disclose the relationship between executive compensation and certain measures of financial performance of the company for the five most recent fiscal years, including a **company-selected measure**.

The required company-selected measure is defined as the most important financial performance measure that is used to link compensation actually paid to executives to company performance for the most recently completed fiscal year. [Reg S-K Item 402(v)(2)(vi)]

This company-selected measure may represent a non-GAAP financial measure. However, the rules clarify that a non-GAAP financial measure presented for this purpose is not subject to the requirements of Regulation G and Item 10(e) of Regulation S-K (i.e. the general rules regarding disclosure of non-GAAP financial measures) because it is required to be disclosed under Item 402(v). However, Item 402(v) requires that the company-selected measure be accompanied by disclosure of how it is calculated from the company's audited financial statements. [Reg S-K Item 402(v)(2)(vi)]

2.3.40 Free writing prospectus

A free writing prospectus is a type of communication that:

— represents an offer to sell or a solicitation of an offer to buy securities that is or will be the subject of a registration statement; and
— does not otherwise satisfy the statutory prospectus requirements under the securities laws. [FR-75, C&DI 102.08]

How Regulation G applies to a free writing prospectus depends on the Exchange Act reporting status of the company. It does not depend on the nature of the communication in which a non-GAAP financial measure is included. Therefore, if the company is not required to file Exchange Act reports, Regulation G does not apply to that company's free writing prospectus.

S-K Item 10(e) applies to registration statements under the Securities Act and to registration statements and other documents filed under the Exchange Act. A company is not required to file a free writing prospectus as part of its registration statement or otherwise include or incorporate it by reference into a registration statement. Therefore, S-K Item 10(e) does not apply to a free writing prospectus that a company does not file or include or incorporate by reference into a registration statement, or does not include in an Exchange Act report (e.g. Form 8-K). If the free writing prospectus is included or incorporated in a registration statement or in an Exchange Act report, it is subject to the provisions of S-K Item 10(e). [C&DI 102.08]

2.3.50 Webcasts and other nonwritten communications

Many registrants conduct quarterly earnings calls, mostly by webcast, to announce earnings and communicate performance to the public. Using a webcast or other nonwritten communication method (i.e. orally, telephonically, by broadcast, social media or other similar means) might present some difficulty in meeting the disclosure requirements in Regulation G. Therefore, the SEC has stated that the disclosure provisions of Regulation G are met if:

- the required information is provided on the registrant's website at the time the non-GAAP financial measure is made public; and
- the website location (i.e. address) is made public in the same presentation in which the non-GAAP financial measure is made public. [Reg G Rule 100 Note 1]

The SEC encourages registrants to provide ongoing access to this information, and suggests that the information be available for at least 12 months. [FR-65 FN28]

In most instances, an earnings call is held in the form of a webcast or other nonwritten communication shortly after a registrant announces its earnings for the most recent completed quarter or annual fiscal year. While the earnings release is typically furnished in a Form 8-K, Item 2.02 of Form 8-K provides an exemption from its requirement to furnish a Form 8-K for the information that is discussed on the earnings call. For webcasts or other nonwritten communication, the SEC staff has stated that an audio file, slides or similar presentation materials may satisfy the exemption requirements if the file or materials:

- are provided as part of a presentation that is complementary to, and initially occurs within 48 hours of, a related written announcement or release that has been furnished on an Item 2.02 Form 8-K;
- contain all material financial and other statistical information included in the presentation that was not previously disclosed;
- provide any information that would be required by Regulation G; and
- provide investors access to the file or materials through the registrant's web site. [C&DI 105.01]

Illustrative SEC comment: In your Q3 earnings call, management indicates that 'free cash burn' for the quarter was about $10 million, which appears to be a discussion of non-GAAP measures. In the future, where non-GAAP financial measures are made public orally, telephonically, by webcast, broadcast or similar means, please ensure that you include the most directly comparable GAAP financial measure as required by Item 100(a)(1) of Regulation G and provide a cross reference to the location on your website where the reconciliation for such measures can be found. We refer you to Note 1 to Item 100 of Regulation G and Question 105.02 of the C&DIs on Non-GAAP Financial Measures.

Additionally, the SEC staff has indicated that the filing of a quarterly earnings release as an exhibit to the Form 10-Q, rather than in an Item 2.02 Form 8-K, would not preclude reliance on the exemption for the webcast or other nonwritten communication. [C&DI 105.05]

Management may unexpectedly disclose a non-GAAP financial measure during an unscripted Q&A session that had not been posted along with the required Regulation G disclosures in the presentation or on the registrant's website in advance. If that occurs, the required information must be posted on the registrant's website promptly after it is disclosed. A webcast of the oral presentation would be sufficient to meet this requirement provided it includes the required information. [C&DI 105.02]

The SEC staff has stated that they listen to earnings and analyst calls to learn about a registrant and will issue comments to the registrant if they hear inappropriate non-GAAP financial measures being discussed.

2.3.60 Voluntary filers

A company may voluntarily file for a number of reasons – e.g. it may have once had Section 15(d) reporting obligation, but that obligation was suspended due to there being fewer than 300 holders of the related securities. A voluntary filer is not technically subject to Regulation G because it has no reporting responsibility under Sections 13(a) or 15(d) of the Exchange Act. However, the SEC staff has indicated that a voluntary filer faces significant anti-fraud issues under the federal securities laws if it does not comply with Regulation G in presenting non-GAAP financial measures in public disclosures. [C&DI 107.01]

Voluntary filings are still subject to the provisions of S-K Item 10(e), because the periodic or annual report (e.g. Form 10-K and Form 20-K) filed by the voluntary filer must comply with Regulation S-K. [C&DI 107.01]

2.4 Legal considerations

Neither the requirements of Regulation G nor the compliance or noncompliance with those requirements, in itself, affects any person's liability under the anti-fraud provisions of the securities laws. The SEC has indicated that a disclosure under Regulation G that is materially deficient may, in addition to violating Regulation G, give rise to a violation of the anti-fraud provisions of the securities laws. The SEC has specifically noted that a non-GAAP financial measure that obscures a registrant's GAAP results may be misleading. [G.102, FR-65 II.A(4)]

A registrant may furnish to the SEC an earnings release on Item 2.02 Form 8-K rather than file that information with the SEC. Furnishing information to the SEC rather than filing the information with the SEC has legal and other implications for a registrant. Broadly speaking, an earnings release that is furnished is not considered filed for purposes of the liability provisions in Section 18 of the Exchange Act and is not automatically incorporated by reference into a registration statement.

A registrant should consult its legal counsel to understand the legal implications of presenting non-GAAP financial measures in public disclosures and filings with the SEC, the requirements for furnishing earnings releases in Item 2.02 Form-8-K, and the legal implications of furnishing or filing information with the SEC.

A registrant's failure to include all information required by Regulation G does not affect its Form S-3 eligibility under the Securities Act or whether adequate current public information exists about the registrant for purposes of Rule 144(c) of the Securities Act. However, a registrant should consult its legal counsel to determine the implications of a failure to include all of the information required by Regulation G. [FR-65 FN25, C&DI 105.03]

Illustrative enforcement action: The SEC's Division of Enforcement (Enforcement Division) announced a settlement with a registrant for the inconsistent presentation over prior periods of a non-GAAP financial measure called 'organic revenue growth'. Organic revenue growth represented the company's growth in revenue excluding the effects of two reconciling items: acquisitions and foreign exchange effects. However, in a prior period, the company began incorporating a third reconciling item into its calculation without informing investors of the change, which resulted in higher organic revenue growth results. The company also failed to give GAAP metrics equal or greater prominence to non-GAAP metrics in its earnings releases. The company ultimately agreed to pay a penalty to settle charges for violating the rules.

Illustrative enforcement action: The Enforcement Division announced a settlement with a registrant for false and misleading disclosures concerning how it calculated a key non-GAAP financial measure. The calculation of the non-GAAP financial measure excluded certain expenses while including the related tax benefit on those expenses, resulting in an inflation of the non-GAAP financial measure of up to 30% in one of the impacted periods. The company ultimately agreed to pay a penalty to settle charges for violating the rules.

3. The general requirements

Detailed contents

3.1 Overview

In December 2022, the SEC staff published updates to the C&DIs to provide additional guidance about how companies are allowed to use non-GAAP financial measures, and specifically listed prohibited practices. This chapter has been updated from the previous edition to reflect those revisions.

Regulation G states that a publicly disclosed non-GAAP financial measure must not be misleading and requires the presentation of, and a reconciliation from, the non-GAAP financial measure's most directly comparable GAAP measure. While Regulation G has fewer provisions than S-K Item 10(e) and Instruction 2 to Item 2.02, it is wider in scope because it applies to all public disclosures. S-K Item 10(e) applies to all filings with the SEC (other than the exceptions discussed in section 2.3).

In addition to the requirements of Regulation G, S-K Item 10(e) and Instruction 2 to Item 2.02 (via reference to S-K Item 10(e)(1)(i)) require:

— the comparable GAAP measure be presented with equal or greater prominence than the non-GAAP measures;
— disclosure of the reasons why the company's management believes the presentation of the non-GAAP financial measure is useful to investors; and
— to the extent material, a statement of the purpose (if any) for which management uses the non-GAAP financial measure.

In addition to these requirements, S-K Item 10(e) also specifically prohibits presenting certain non-GAAP financial measures – e.g. non-GAAP financial measures in the financial statements (including the accompanying notes). Instruction 2 to Item 2.02 has no similar prohibitions.

While S-K Item 10(e) does not specifically prohibit per share non-GAAP financial measures of liquidity, the SEC staff has stated that per share prohibitions provided under GAAP (e.g. cash flow per share) or SEC rules also apply to non-GAAP financial measures. The per-share prohibition depends on whether the per-share non-GAAP financial measure can be viewed as a liquidity measure. Per-share measures of liquidity are expressly prohibited under Topic 230 and SEC rules. [FR-65 FN11]

The SEC staff has consistently emphasized that evaluating the appropriateness of a non-GAAP financial measure requires careful consideration of the specific facts and circumstances. In addition, use of a non-GAAP financial measure by one company does not necessarily mean it is appropriate for all companies to make similar disclosures because the focus should be on why the measure is useful for a particular registrant's investors.

3.2 Summary of requirements

The following table summarizes the requirements related to the use of non-GAAP financial measures.

Disclosure requirements/ prohibitions	Public disclosures: Regulation G	Filings: Regulation S-K Item 10(e)	In an Item 2.02 Form 8-K	
			furnished **to the SEC**	***filed*** **with the SEC**
Non-GAAP financial measure cannot be misleading (see section 3.3)	✔	✔	✔	✔
Presentation of most directly comparable GAAP measure (see section 3.4)	✔	✔	✔	✔
Reconciliation from most directly comparable GAAP measure (see section 3.5)	✔	✔	✔	✔
Presentation not more prominent than the most directly comparable GAAP measure (see section 3.6)		✔	✔	✔
Statement disclosing reasons management believes the measure is useful to investors (see section 3.7)		✔	✔	✔
Statement disclosing any additional purpose, to the extent material, for which management uses the measure (see section 3.7)		✔	✔	✔
Prohibition on excluding items that require cash settlement from liquidity measure (see section 3.8.10)		✔		✔
Prohibition on adjustments to GAAP earnings for nonrecurring, infrequent or unusual items (see section 3.8.20)		✔		✔
Prohibitions related to placement of non-GAAP financial measures (see section 3.8.30)		✔		✔
Prohibitions related to use of misleading titles or descriptions (see section 3.8.40)		✔		✔

3.3 Not misleading

Disclosure requirements/ prohibitions	Public disclosures: Regulation G	Filings: Regulation S-K Item 10(e)	In an Item 2.02 Form 8-K	
			furnished **to the SEC**	***filed*** **with the SEC**
Non-GAAP financial measure cannot be misleading	✔	✔	✔	✔

The overarching principle under both Regulation G and S-K Item 10(e) is that a non-GAAP financial measure cannot be misleading. A non-GAAP financial measure is considered to be misleading when, taken together with the information or discussion accompanying that measure, and in light of the circumstances under which it is presented, it contains an untrue statement of a material fact or omits to state a material fact. [G.100(b), FR-65 FN38]

At the 2019 AICPA Conference on Current SEC and PCAOB Developments, the SEC Chair, Jay Clayton, made comments making it clear that non-GAAP financial measures need to be unbiased, transparent and consistent with full disclosure of how they are calculated and how they reconcile to the GAAP measure.

The SEC staff has continued to communicate its focus on misleading non-GAAP financial measures and related disclosures at conferences and in other forums. This focus has been reinforced by a continued high volume of comment letters issued to companies regarding the potentially misleading nature of their non-GAAP financial measures and disclosures. This focus has also extended to the staff of the Enforcement Division, who have also referenced this topic in recent years.

The SEC staff has provided specific examples of non-GAAP financial measures that may be misleading. Those examples relate to the following:

1. **Excluding normal, recurring, cash operating expenses necessary to operate a company's business.**

   While not specifically prohibited, presenting a performance measure that excludes *normal*, *recurring* cash operating expenses necessary to operate a business may be considered misleading.

   What are 'normal' and 'recurring'?

   The SEC staff's view is that what constitutes a normal recurring operating expense may vary based on a company's unique facts and circumstances. [C&DI 100.01]

Normal	Consider the nature and effect of the non-GAAP adjustment within the context of the registrant's individual operations, revenue generating activities, business strategy, industry and regulatory environment.
Recurring	An expense that occurs repeatedly or occasionally, including at irregular or infrequent intervals.

For example, adding back rent expense to a performance measure like operating income or EBITDA (e.g. EBITDAR) by a company in the retail industry may be considered misleading because rent expense may be considered to be a normal, recurring, cash operating expense necessary to operate the company's business.

Illustrative SEC comment: You disclose 'operating income, excluding certain items', which excludes store closing and other costs; and disclose 'adjusted operating income' in your 'return on invested capital' calculation, which adds back rent expense. It appears that store closing and other costs and rent expense may be normal, recurring, cash operating expenses necessary to operate your business; therefore, your disclosures may be inconsistent with Question 100.01 of the updated C&DIs on Non-GAAP Financial Measures.

Illustrative SEC comment: We note that you exclude non-recurring restructuring program costs, integration of acquisitions costs, and legal settlement costs from your adjusted non-GAAP income measure. Please explain to us why these are not normal, recurring, cash operating expenses necessary to operate your business. In your response, please tell us the significant components of each of the expenses for each of the last three years and the latest interim period with comparable amounts for the 20X1 interim period.

Adjusted income (and adjusted R&D expense) – pharmaceutical industry

The following is a recent example of the SEC staff's view that the determination of whether an adjustment relates to a normal, recurring expense should be in the context of the company's operations, business strategy, and industry environment.

The SEC staff observed that when determining non-GAAP R&D expenses, certain companies in the pharmaceutical industry excluded significant upfront payments and premiums paid in connection with entering into collaboration and licensing arrangements. These arrangements, in many cases, were made to a collaboration partner or investee that had performed research and development activities prior to the arrangement.

Illustrative SEC comment: We note that you have excluded upfront payments and premiums paid for the acquisition of related common stock to arrive at non-GAAP R&D expense and non-GAAP net income. In this regard, you state in Note X that in connection with your business strategy, you enter into these collaboration agreements, which are detailed as part of your key business developments on page X of your Form 10-K. We believe that your adjustments to exclude the upfront and premium payments made for collaboration agreements from R&D expense and net income are inconsistent with the guidance in Question 100.01 of the Non-GAAP Financial Measures Compliance and Disclosure Interpretations.

As described in the illustrative comment above, although companies may have incurred such expenses infrequently or at less predictable intervals, and management may view the payments as distinct from other research and development expenses, the SEC staff ultimately objected to these adjustments and required companies with similar fact patterns to no longer make such adjustments to arrive at their non-GAAP financial measures.

2. Inconsistent presentation between periods without disclosing effect and reason for change.

Non-GAAP financial measures may be misleading if not presented consistently between periods. A non-GAAP financial measure that adjusts a specific charge or gain in the current period but did not adjust other, similar charges or gains in prior periods could violate SEC rules unless (1) the change is disclosed, and (2) the reasons for the change are stated.

For example, a company reclassifies an asset between inventory and PPE in the current period and does not adjust (or disclose the effect of) the reclassification on EBITDA, a non-GAAP financial measure. Because current period EBITDA does not include the periodic depreciation expenses related to the asset's revenues, the non-GAAP financial measures are not comparable to the prior period; this may be considered misleading if the effect of and reason for the change are not disclosed.

Depending on the significance, a company may need to recast prior measures to conform to the current presentation and to place the disclosure in the appropriate context. [C&DI 100.02]

Illustrative SEC comment: We note that you disclose non-GAAP financial measures that adjust your cost of material sales, operating expenses, operating income, income before income taxes, net income and net income per common share information to remove the impact of an inventory writedown during 20X2. From your disclosures we note that you had inventory writedowns in both 20X2 and 20X1 but you chose to remove the impact of the inventory writedown and related tax effect in the non-GAAP measures for 20X2 only and did not include similar non-GAAP disclosures that reflected the impact of inventory writedowns in 20X1. Accordingly, your 20X2 non-GAAP measures may be inconsistent with the updated CD&Is on Non-GAAP Financial Measures.

3. Excluding charges, but not similar gains.

Non-GAAP financial measures may be misleading if they exclude only losses or expenses, but not similar gains or income.

For example, a company adds back losses associated with litigation settlements to net income and does not remove gains associated with litigation claims. This may be considered misleading because the litigation claims could be considered similar in nature to the litigation settlements. [C&DI 100.03]

> **Illustrative SEC comment**: We note that nearly all adjustments made to reconcile EBITDA to Adjusted EBITDA represent increases to EBITDA. It also appears that you adjust for all noncash items presented on your statements of cash flows except for gains and losses on disposals of fixed assets and amortization of deferred gains on sale-leasebacks, which, if included, would have decreased Adjusted EBITDA for the periods presented. Please address how your presentation complies with the updated CD&Is on Non-GAAP Financial Measures.

4. Individually tailored accounting principles to calculate non-GAAP earnings.

Non-GAAP financial measures that substitute individually tailored recognition and measurement principle for GAAP could violate Regulation G.

For example, a company uses a non-GAAP performance measure to adjust revenue to recognize it as billed rather than recognizing it over time as it is earned under GAAP; this may be considered misleading. The same principle applies to other individually tailored recognition and measurement methods. [C&DI 100.04]

In recent years, the SEC staff has noted it continues to observe adjustments to GAAP amounts that result in non-GAAP financial measures that include individually tailored accounting principles. The staff believes many companies misinterpreted the prohibition on such adjustments to apply only to tailored revenue recognition policies. [Regs Comm 09/2019, 2022 AICPA Conf]

In December 2022, the SEC staff revised C&DI 100.04 to be clear that it applies to *any* tailored accounting principle and to provide additional examples of what would be considered prohibited. These examples include:

- changing the pattern of recognition, such as including an adjustment in a non-GAAP performance measure to accelerate revenue recognized ratably over time in accordance with GAAP as though revenue was earned when customers were billed;
- presenting a non-GAAP measure of revenue that deducts transaction costs as if the company acted as an agent in the transaction, when gross presentation as a principal is required by GAAP, or the inverse, presenting a measure of revenue on a gross basis when net presentation is required by GAAP; and

- changing the basis of accounting for expenses (or revenue) in a non-GAAP performance measure to a cash basis, when an accrual basis is required by GAAP.

Another area of frequent SEC staff comment is presentation of non-GAAP financial performance measures that exclude amortization of acquired intangible assets without adjusting for the revenue related to those intangible assets. The SEC staff frequently requests that companies disclose that the associated revenue has not been adjusted.

The SEC staff has observed that the adoption of new accounting standards can raise questions about the potential for new non-GAAP measures (e.g. to adjust for the impact of the newly effective accounting standard). Most recently, the SEC staff has commented that companies should not adjust non-GAAP performance measures for the impact of Topic 326 (credit losses) (also known as the CECL accounting standard). [Regs Comm 09/2019]

Illustrative SEC comment: We note that you adjust your non-GAAP financial measures to add back the deferred revenue and related costs for products sold with resale value guarantees and where you collected the purchase price in cash, which substitutes an individually tailored measurement method for those of GAAP. Please describe the changes you expect to make to your presentation in light of the new guidance in Question 100.04 of the updated C&DIs on Non-GAAP Financial Measures.

Illustrative SEC comment: We note you include adjustments in arriving at net operating profit after taxes that appear to remove your operating lease rent expense under GAAP and replace it with estimated depreciation and include lease adjustments in arriving at average invested capital. As this appears to be an individually tailored revenue recognition measurement method, please remove from your filing or advise. Refer to Question 100.04 of the Non-GAAP Financial Measures Compliance and Disclosure Interpretations.

Illustrative SEC comment: We note your non-GAAP measures exclude the results of the divested ABC business. As these divested operations did not meet the criteria for being presented as discontinued operations pursuant to ASC 205-20, your non-GAAP measures appear to substitute individually tailored recognition and measurement methods for those of GAAP. Please revise to remove these adjustments from each measure. Refer to Question 100.04 of the Non-GAAP C&DIs.

Example 3.1
Timing of expense recognition

ABC Corp., a franchisor of retail outlets, manages and consolidates a cooperative advertising fund. As part of the franchise agreement, the franchisees remit 3% of their franchise locations' revenues to the advertising fund (the advertising contributions). ABC is required to spend 100% of the advertising contributions on advertising for the franchise system. The arrangement is such that the franchisor does not earn any margin on this activity; instead, the entire amount committed is contractually required to be spent on advertising costs.

ABC records advertising contributions as advertising revenues under Topic 606 and records advertising expense under Subtopic 720-35 resulting in the following accounting.

Plan funding status	GAAP expense recognition
Over-funded - cumulative advertising contributions exceed cumulative advertising expense	ABC recognizes advertising expense when the related revenues are recognized
Under-funded - cumulative advertising contributions are less than cumulative advertising expense	ABC recognizes advertising expense as incurred

Because the advertising fund operates in an under-funded status in some periods, the timing of recognizing the advertising revenues and expenses does not always match, which results in variability in net income from one period to another.

ABC is considering presenting an adjustment in its non-GAAP measure of income to align this timing of recognition (i.e. matching the revenues and expenses regardless of the plan funding status) and eliminate the impact on net income in any given period.

In this example, the proposed non-GAAP financial measure would not be appropriate because the adjusted timing of recognition of advertising expense would be represent a tailored accounting principle and could be misleading to investors.

5. Extensive disclosure may not prevent a measure from being misleading

Certain non-GAAP financial measures may be misleading to such an extent that even the inclusion of detailed disclosures about the nature and effect of the non-GAAP financial measure and/or the underlying adjustments would not prevent the measure from being materially misleading and in violation of Regulation G. [C&DI 100.06]

Individual facts and circumstances should be considered when determining whether a non-GAAP financial measure may be considered misleading. A company should evaluate its non-GAAP financial measures in light of the updated C&DIs, public comment letters on non-GAAP financial measures, and SEC speeches to determine whether they may be interpreted as being misleading when evaluating historical and future financial performance, financial position and/or cash flows.

For example, a non-GAAP performance measure that has the effect of presenting non-GAAP net income when the company incurred a GAAP net loss may be misleading to investors. As shown in the illustrative enforcement actions in section 2.4, the SEC's Division of Enforcement identifies companies it believes are circumventing the non-GAAP rules to inflate non-GAAP earnings over GAAP earnings. Companies should also be cautious of circumstances in which non-GAAP earnings are greater than GAAP earnings even if they believe they are following the letter of the non-GAAP rules – i.e. even in those situations, it is possible that investors may be misled depending on the facts and circumstances.

3.4 Presentation of directly comparable GAAP measure

Disclosure requirements/ prohibitions	Public disclosures: Regulation G	Filings: Regulation S-K Item 10(e)	In an Item 2.02 Form 8-K	
			furnished **to the SEC**	***filed*** **with the SEC**
Presentation of most directly comparable GAAP measure	✔	✔	✔	✔

For each non-GAAP financial measure, Regulation G requires the presentation of the most directly comparable financial measure calculated and presented in accordance with GAAP. The requirement applies to both historical and forward-looking non-GAAP financial measures.

In principle, the SEC believes that companies should have flexibility in determining which GAAP measure is most directly comparable to the non-GAAP financial measure. However, the SEC staff has stated its expectations related to the GAAP measures against which non-GAAP financial measures should be balanced. [FR-65 FN26]

3.4.10 Differences between liquidity and performance measures

To identify the most directly comparable GAAP measure, a company should first determine the purpose of the non-GAAP financial measure and whether it is intended to be used as a measure of the company's liquidity or performance. Determining whether a non-GAAP financial measure is viewed as a liquidity measure or performance measure will indicate where the directly comparable GAAP measure is located in the financial statements – i.e. income statement or statement of cash flows.

For GAAP purposes, investors of the financial statements will rely on the income statement for information about the company's performance and the statement of cash flows for information about the company's liquidity. Therefore, a non-GAAP financial measure that is a performance measure should generally be reconciled to a line item in the company's income statement while a non-GAAP financial measure that is a liquidity measure should generally be reconciled to a line item in the company's statement of cash flows.

The SEC has expressed the following views on the most directly comparable GAAP measure for each type of non-GAAP financial measure.

Non-GAAP financial measure	The most directly comparable GAAP measure
Liquidity measures – i.e. that measure cash or funds generated from operations	Amounts from the statement of cash flows – i.e. cash flows from operating, investing or financing activities
Performance measures	Net income, or income from continuing operations – taken from the income statement [FR-65 FN26]

In addition, as required for the presentation of all liquidity non-GAAP financial measures, **all** three major categories of the statement of cash flows should be presented with equal or greater prominence than the liquidity measure. [FR-65 S II.B.2, C&DI 102.06]

Management should base its evaluation of whether a non-GAAP financial measure is a liquidity measure or a performance measure on the substance and context of the reconciling adjustments to the directly comparable GAAP measure. For example, the SEC may challenge a non-GAAP financial measure that is reconciled to net income as being a performance measure if a majority of the reconciling adjustments are derived from the statement of cash flows.

Illustrative SEC comment: You present the non-GAAP measure Cash Available for Dividends, which is reconciled to net income. However, Cash Available for Dividends is defined in your Form 10-K as cash from operating activities plus cash distributions received from your interests in LP A and LP B, less cash interest expense, cash paid for income taxes, maintenance capital expenditures, and any cash reserves established by management. As Cash Available for Dividends appears to be a liquidity measure, explain why you believe it is appropriate to reconcile it to net income.

Companies should also be alert to where and how a measure is disclosed and described and whether it is consistent with classifying the non-GAAP financial measure as a liquidity or performance measure. For example, a company that describes a non-GAAP financial measure as a measure of the company's ability to generate cash to pay down debt may have its classification as a performance measure challenged because a company's ability to generate cash is generally considered to be a measure of liquidity.

Management may determine that a non-GAAP financial measure should be classified as both a liquidity measure and a performance measure. In that case, the most directly comparable GAAP measure to the non-GAAP financial measure as both a liquidity measure and performance measure should be disclosed. Additionally, management should describe why they believe use of the non-GAAP financial measure as both a liquidity measure and performance measure is necessary to investors.

3.4.20 Corresponding prior year information

Although Regulation G requires disclosure of the most directly comparable GAAP measure, it does not specify whether a company must present corresponding prior year information for comparison purposes; it also does not state whether or how long a company must continue to present a particular non-GAAP financial measure.

However, we believe that management should consider whether excluding a comparable prior period non-GAAP financial measure complies with the guidance in Question 100.02 of the C&DIs about inconsistent presentation between periods. The SEC staff's view on the need to recast a prior period non-GAAP financial measure for a change in the current period depends on the significance of the change. This view suggests that management should consider whether it needs to include the same non-GAAP financial measure for the prior period to avoid misleading investors, and to place the disclosure in the appropriate context.

3.5 Reconciliation from directly comparable GAAP measure

Disclosure requirements/ prohibitions	Public disclosures: Regulation G	Filings: Regulation S-K Item 10(e)	In an Item 2.02 Form 8-K	
			furnished **to the SEC**	***filed*** **with the SEC**
Reconciliation from most directly comparable GAAP measure	✔	✔	✔	✔

Regulation G requires the reconciliation of each non-GAAP financial measure from its most directly comparable GAAP measure calculated and presented in accordance with GAAP. The reconciliation should generally be presented in schedule format, beginning with the most directly comparable GAAP measure, with quantitative adjustments reconciling to the non-GAAP financial measure. Other reconciliation methods are allowed if they are clearly understandable, quantitative in nature, and begin with the directly comparable GAAP measure. The SEC staff has stated that the format of this required reconciliation can itself result in undue prominence of the non-GAAP financial measure (see section 3.6.15).

The reconciliation requirement applies to both historical and forward-looking non-GAAP financial measures. However, for forward-looking non-GAAP financial measures, an exception to the reconciliation requirement is allowed if the information needed to prepare the reconciliation is not available without unreasonable effort (see section 3.5.10). [G.100(a)(2), S-K.10(e)(i)(B)]

'Margin-type' non-GAAP financial measures

The SEC staff has observed an increase in the number of non-GAAP 'margin-type' financial measures (e.g. contribution margin). It has emphasized that, depending on the facts and circumstances, the presentation of such measures is only acceptable if the company also discloses a reconciliation from gross margin (the most directly comparable GAAP financial measure), as defined in GAAP, to the non-GAAP financial measure, even if gross margin is not separately presented as a line item in the financial statements. [Regs Comm 09/2019, 2019 AICPA Conf]

Illustrative SEC comment: Please reconcile the non-GAAP measure 'contribution' from the most directly comparable GAAP measure, which is gross margin, even if not otherwise presented on your consolidated statement of operations.

PV-10 as a non-GAAP financial measure (upstream oil and gas industry)

A publicly traded company engaged in significant oil and gas producing activities must disclose, among other matters, a standardized measure of discounted future net cash flows relating to proved oil and gas reserve quantities within supplementary information accompanying its annual financial statements. [932-235-50-2]

Commonly, companies engaged in oil and gas producing activities also present PV-10[3] within MD&A as a non-GAAP financial measure. When presenting PV-10 as a non-GAAP financial measure, the SEC staff has commented that it should be reconciled to the standardized measure of discounted future net cash flows included within the required supplemental information as the most directly comparable non-GAAP measure.

Illustrative SEC comment: Please revise your reconciliation of the non-GAAP measure PV-10 beginning on page 9 to begin with the Standardized Measure of Discounted Future Net Cash Flows, the most directly comparable GAAP measure. Your current presentation places greater prominence on the non-GAAP measure and is inconsistent with Question 102.10 of the Compliance and Disclosure Interpretations.

3 PV-10 represents the present value of future net cash flows relating to proved oil and gas reserve quantities, without the effect of income taxes, discounted at 10%.

3.5.10 Unreasonable efforts exception for forward-looking non-GAAP financial measures

A company that presents a forward-looking non-GAAP financial measure, and no reconciliation under the 'unreasonable efforts' exception, should disclose in a location of equal or greater prominence than the forward-looking non-GAAP financial measure: [C&DI 102.10(b), FR-65 II.B.2t, S-K Rule 10(e)(1)(i)(B)]

— the fact that it is relying on the exception;
— the reconciling information that is available without an unreasonable effort;
— the specific information that is unavailable; and
— the probable significance of the unavailable information.

Example 3.2

Example disclosure of unreasonable efforts exception for forward-looking non-GAAP financial measures

In reliance on the 'unreasonable efforts' exception in Item 10(e)(1)(i)(B) of SEC Regulation S-K, a quantitative reconciliation from the most comparable GAAP measure is not provided for Adjusted EBITDA to Income from operations.

The Company cannot, without unreasonable effort, forecast certain items required to develop meaningful comparable GAAP financial measures. These items include business optimization, restructuring and stock compensation costs, foreign exchange rate changes, as well as other non-cash and unusual items and other adjustments as defined under the Company's debt agreements that are difficult to predict in advance to include in a GAAP estimate. This is due to the unpredictable and uncontrollable nature of these reconciling items, which would require an unreasonable effort to forecast, and we believe would result in a range of projected values so broad as to be meaningless to investors.

For these reasons, we believe that the probable significance of such information is low.

3.5.20 Labeling reconciling items

The items in the reconciliation of a non-GAAP financial measure from its directly comparable GAAP measure should be labeled using terminology that clearly describes the nature and basis of the adjustment. Reconciling items should not be non-GAAP financial measures. Additional disclosure may be necessary to provide context for the reconciling item.

However, as discussed in section 3.3, certain non-GAAP financial measures may be misleading to such an extent detailed disclosures about the nature and effect of the measures and/or the underlying adjustments would not prevent the measures from being materially misleading and in violation of Regulation G. [C&DI 100.06]

For instance, a reconciling item may be improperly labeled if it implies the adjustment is broader or narrower than the actual adjustment. For example, commonly labeled reconciling items like 'acquisition-related' or 'restructuring-related' items may be interpreted broadly and generally require additional disclosure, such as the significant components making up the reconciling item and/or additional commentary stating the reconciling item's nature and purpose.

A reconciling item may also be improperly labeled if it has a general non-descript label such as 'other adjustments' with insufficient disclosure as to what comprises the adjustment.

Additionally, the SEC prohibits a non-GAAP performance measure from eliminating or smoothing items identified (i.e. labeled) 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 in the prior two years. This two-year look-forward and look-back prohibition only applies to those reconciling items that are labeled as non-recurring, infrequent or unusual (see section 3.8.20). [Reg S-K Item 10(e)(1)(ii)(B)]

Additionally, as described in section 3.3, the SEC staff has provided expanded clarification that an expense that occurs repeatedly, including at irregular or infrequent intervals, is considered recurring. [C&DI 100.01]

The SEC staff has discussed the quality of reconciling items and its process for evaluating the transparency and relevance of adjustments made. This includes evaluating whether descriptions may be misleading (e.g. items labeled as non-recurring that may be in fact recurring) or do not provide an investor with a clear understanding of the nature and basis for adjustment. [2016 AICPA Conf]

Illustrative SEC comment: We note your non-GAAP measures Adjusted EBITDA and Management EBITDA both include an adjustment for 'other', which includes a number of items. Please address the following:

— provide us with further description and quantification for the adjustments underlying these amounts; and
— revise your disclosure to break out individually significant adjustments.

Illustrative SEC comment: Please tell us what the 'Other' adjustments were for the periods ended December 31, 20X1 and December 31, 20X0 and explain why material items were not separately presented.

3.5.30 Most directly comparable GAAP measure is a pro forma measure

The most directly comparable measure may be a pro forma measure prepared and presented under Article 11 (or Rule 8-05 of Regulation S-X for a smaller reporting company).

For example, a company may present a pro forma statement of operations to reflect the pre-acquisition historical results of an acquired business on a combined basis along with the presentation of an adjusted combined EBITDA non-GAAP financial measure. In that case, a company may use the combined pro forma net income for reconciliation purposes, instead of net income. [C&DI 101.05]

Use of the term 'pro forma' in a non-GAAP financial measure in any context other than a measure that is prepared pursuant to Article 11 of Regulation S-X would be inappropriate (see section 3.8.40).

Illustrative SEC comment: We note that in May, you sold your European subsidiary. We also note that on page 10 you present unaudited non-GAAP condensed consolidated statements of operations on a pro forma basis excluding the European subsidiary for prior periods. In future filings, please revise the presentation to include an explanation of what the pro forma information represents and include columns to show both the historical GAAP financial information and the pro forma adjustments used to derive the pro forma amounts.

3.6 Equal or greater prominence requirement

Disclosure requirements/ prohibitions	Public disclosures: Regulation G	Filings: Regulation S-K Item 10(e)	In an Item 2.02 Form 8-K	
			***furnished* to the SEC**	***filed* with the SEC**
Presentation not more prominent than the most directly comparable GAAP measure		✔	✔	✔

S-K Item 10(e) requires the presentation of a non-GAAP financial measure's most directly comparable GAAP measure to be given equal or greater prominence than the non-GAAP financial measure itself.

Given the widening disparity between GAAP and non-GAAP results, the lack of formal guidance, and continued observations on the topic, the SEC staff reorganized Question 102.10 of the C&DIs into three subparts, each with specific issues and examples. These examples clearly illustrate the types of non-GAAP financial measure disclosures the SEC staff believes would fail to meet the equal or greater prominence requirement.

Scope [C&DI 102.10(a)]	Addresses types of presentation schemes that can constitute undue prominence and provides specific examples. See section 3.6.10.
Reconciliation [C&DI 102.10(b)]	Provides examples of disclosures that would cause the non-GAAP reconciliation itself to give undue prominence to non-GAAP financial measures. See section 3.6.15.

Non-GAAP income statement	Explains the staff view that presentation of a non-GAAP income statement would give undue prominence to non-GAAP financial measures
[C&DI 102.10(b)]	See section 3.6.20.

3.6.10 Prominence – scope

The SEC staff has observed a variety of ways in which non-GAAP financial measures violate the prominence requirements.

The staff has clarified that the prominence requirements apply to the presentation *and* any related discussion and analysis of the non-GAAP financial measure(s). The tables below include examples that the staff considers to result in undue prominence.

Order of presentation

The GAAP measure must appear before the non-GAAP measure in all instances – e.g. headlines or captions, press releases, investor presentations.
Situation that would result in undue prominence: - presenting a non-GAAP financial measure before the most directly comparable GAAP measure or omitting the comparable GAAP measure.

Illustrative SEC comment: It appears that management has given your non-GAAP measure, Adjusted EBITDA, greater prominence than the comparable GAAP measure as you are discussing Adjusted EBITDA before reported net income in both the Management Summary section and the First Quarter 20X2 discussion of your earnings release. Refer to Instruction 2 of Item 2.02 of Form 8-K, Item 10(e)(1)(i)(A) of Regulation S-K and Question 102.10 of the Division of Corporation Finance C&DIs on Non-GAAP Financial Measures.

Style of presentation

The style of presentation should not give the impression that the non-GAAP measure is emphasized over the comparable GAAP measure.
Situations that would result in undue prominence: - using a style of presentation (e.g. bold, larger font) that emphasizes the non-GAAP financial measure over the comparable GAAP measure; - describing a non-GAAP financial measure using phrases such as 'record performance' or 'exceptional' without at least an equally prominent descriptive characterization of the comparable GAAP measure.

Illustrative SEC comment: We note you disclose the margin for Adjusted EBITDA. Please present with greater or equal prominence the comparable margin, net income/ (loss) margin, computed on a GAAP basis wherever this non-GAAP margin is presented. Refer to Item 10(e)(1)(i)(A) of Regulation S-K and Question 102.10(a) of the staff's Compliance and Disclosure Interpretations 'Non-GAAP Financial Measures'.

Illustrative SEC comment: You present, discuss, and analyze certain non-GAAP measures in the bullet points presented in bold font in the headlines to your earnings release and as part of the disclosure therein without providing equally prominent presentation, discussion, or analysis of comparable GAAP measures. In addition, equally prominent descriptive characterizations of the comparable GAAP measures are not provided. This presentation appears inconsistent with the Compliance and Disclosure Interpretations, specifically Question 102.10.

Degree of discussion and analysis

Companies should present at least a similar degree of discussion and analysis of the most directly comparable GAAP measure than for corresponding non-GAAP financial measure.

Situations that would result in undue prominence:

- presenting a ratio in which a non-GAAP financial measure is the numerator and/or denominator without also presenting the ratio calculated using the most directly comparable GAAP measure(s) with equal or greater prominence;
- presenting charts, tables or graphs of a non-GAAP financial measures without presenting charts, tables or graphs of the comparable GAAP measures with equal or greater prominence or omitting the comparable GAAP measures;
- providing discussion and analysis of a non-GAAP financial measure without a similar discussion and analysis of the comparable GAAP measure in a location with equal or greater prominence;
- presenting a non-GAAP income statement (see section 3.6.20)

Illustrative SEC comment: We note that you disclose several ratios that are calculated using non-GAAP numbers, such as Net Debt / EBITDA. However, it does not appear you have provided reconciliations for each non-GAAP financial measure used in the calculations, nor shown the measures or ratios as calculated using the most directly comparable GAAP financial measures. In future filings please ensure all non-GAAP numbers are provided in accordance with the requirements of Item 10(e) of Regulation S-K.

Illustrative SEC comment: We note you disclose Adjusted EBITDA over time in charts. Please revise the charts on page 3 and page 76 to present bar graphs for Net Income with equal or greater prominence. Refer to

Question 102.10 of the Non-GAAP Compliance and Disclosure Interpretations.

Illustrative SEC comment: We note you disclose the margin for Adjusted EBITDA. Please present with greater or equal prominence the comparable margin, net income/ (loss) margin, computed on a GAAP basis wherever this non-GAAP margin is presented. Refer to Item 10(e)(1)(i)(A) of Regulation S-K and Question 102.10(a) of the staff's Compliance and Disclosure Interpretations 'Non-GAAP Financial Measures'.

Illustrative SEC comment: We note you present Adjusted EBITDA margin on a consolidated and segment basis. Please present the most directly comparable GAAP margin with equal or greater prominence to comply with Item 10(e)(1)(i)(A) of Regulation S-K. Refer to Question 102.10 of the Compliance and Disclosure Interpretations for Non-GAAP Measures.

The SEC staff has continued to focus and comment on instances related to noncompliance with the equal or greater prominence requirement. Question 102.10 of the C&DIs continues to be one of the most frequently referenced items noted in comment letters issued by the Division of Corporation Finance related to non-GAAP financial measures.

3.6.15 Prominence – presentation of reconciliation

A key aspect of the SEC's non-GAAP requirements is the reconciliation of each non-GAAP financial measure from its most directly comparable measure calculated and presented in accordance with GAAP. However, the SEC staff has cautioned that the presentation of this reconciliation can itself result in undue prominence being given to the non-GAAP financial measure.

The following are examples of matters related to the reconciliation that the SEC staff has observed result in the non-GAAP financial measure being more prominent than the comparable GAAP measure: [C&DI 102.10(b)]

- starting the reconciliation with a non-GAAP financial measure;
- presenting a non-GAAP income statement as part of the reconciliation (see section 3.6.20); and
- not including the required disclosures when excluding the reconciliation for a forward-looking non-GAAP financial measure.

Illustrative SEC comment: Your reconciliation of non-GAAP adjusted revenue margin to gross profit disclosed in your earnings release presents the non-GAAP measure more prominently than the comparable GAAP measure. Please revise the reconciliation to begin with the GAAP gross profit for equal or greater prominence.

Refer to Item 10(e)(1)(i)(A) of Regulation S- K and Question 102.10 of the Non-GAAP Financial Measures Compliance and Disclosure Interpretations.

3.6.20 Non-GAAP income statement

The SEC staff commonly objects to the presentation of a non-GAAP income statement. Presentation of a non-GAAP income statement is generally prohibited because it would place undue prominence on the individual non-GAAP financial measures included therein.

The staff has stated that a non-GAAP income statement does not necessarily have to include all of the line items presented in the GAAP income statement to result in undue prominence. Presentation of non-GAAP financial measures in a format that includes most of the line items or subtotals found in a GAAP income statement would also be considered to give undue prominence to the non-GAAP information. [C&DI 102.10(c)]

Illustrative SEC comment: We note that you present the reconciliations of your non-GAAP measures from the most directly comparable GAAP measures in the form of a non-GAAP income statement, a presentation that gives greater prominence to the non-GAAP measures and is inconsistent with Question 102.10 of the updated C&DIs on Non-GAAP Financial Measures.

3.6.30 Repeated disclosure

The SEC staff has informally indicated that a company need not repeat the required reconciliation and disclosure information everywhere in a document that it presents a non-GAAP financial measure. However, at least a cross-reference to the location of that information may be required to avoid presenting a non-GAAP financial measure more prominently than a GAAP measure.

Illustrative SEC comment: We note your tabular presentation of Segment EBITDA also includes a line item for total Segment EBITDA which is the consolidated segment amount. We also note you present and characterize it as a non-GAAP 'EBITDA' in the Non-GAAP Financial Measures section on page 43. Please provide a cross reference to the EBITDA to net income reconciliation as you are referring to the same non-GAAP measure. Please revise to provide such disclosures as required by Item 10(e)(i)(C) of Regulation S-K.

3.7 Required statements

Disclosure requirements/ prohibitions	Public disclosures: Regulation G	Filings: Regulation S-K Item 10(e)	In an Item 2.02 Form 8-K	
			furnished to the SEC	*filed* with the SEC
Statement disclosing reasons management believes the measure is useful to investors		✔	✔	✔
Statement disclosing any additional purpose, to the extent material, for which management uses the measure		✔	✔	✔

S-K Item 10(e) requires (1) a statement disclosing the reasons why management believes the presentation of the non-GAAP financial measure provides useful information to investors about the company's financial condition and results of operations, and (2) a statement disclosing any additional purpose, to the extent material, for which the company's management uses the non-GAAP financial measure.

Those statements should not be boilerplate; they should be substantive and specific to the:

- measure used;
- nature of the company;
- company's business and industry; and
- manner in which management assesses and applies the measure, if any. [C&DI 102.04]

The SEC staff has indicated that it is not sufficient to only say that the non-GAAP financial measure is useful to analysts, because on its own this is not a substantive reason. There have been many instances in which the SEC staff has questioned the adequacy of a company's disclosure related to the usefulness of the non-GAAP financial measure to investors.

These disclosure requirements may be met by including those statements in the most recent annual report filed with the SEC (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 measures. Therefore, if the SEC filing that contains non-GAAP financial measures is not an annual report on Form 10-K or Form 20-F, the filing need not include all required statements if the omitted disclosures:

- were included in the company's most recent annual report or a more recent filing; and
- are updated for any changes in facts or circumstances. [S-K.10(e)(1)(iii)]

Illustrative SEC comment: For each non-GAAP financial measure presented in future fillings, please provide a statement disclosing the reasons why your 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. Please note that each measure should be discussed separately, and that boilerplate disclosure alone, e.g. measure is useful to analysts, is not sufficient.

3.8 Prohibitions

Disclosure requirements/ prohibitions	Public disclosures: Regulation G	Filings: Regulation S-K Item 10(e)	In an Item 2.02 Form 8-K	
			furnished **to the SEC**	***filed*** **with the SEC**
Prohibition on excluding items that require cash settlement from liquidity measure		✔		✔
Prohibition on adjustments to GAAP earnings for nonrecurring, infrequent or unusual items		✔		✔
Prohibitions related to placement of non-GAAP financial measures		✔		✔
Prohibitions related to use of titles or descriptions		✔		✔
Prohibitions on per share measures		✔	✔	✔

S-K Item 10(e) includes specific prohibitions in addition to the general prohibition in Regulation G – i.e. material misstatements or omissions that would make the presentation of the non-GAAP financial measure misleading.

S-K Item 10(e) prohibits the following for information *filed* with the SEC:

- 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 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;
- presenting non-GAAP financial measures on the face of the registrant's financial statements prepared under 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; or

— 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.

Presenting per-share measures of liquidity is not permitted, whether furnished or filed with the SEC. This prohibition applies to any SEC form and is not limited to non-GAAP financial measures. [FR-65 FN11]

3.8.10 Excluding items that require cash settlement from liquidity measure

A company may not present in an SEC filing a non-GAAP liquidity measure that excludes charges or liabilities that require (or will require) cash settlement, or would have required cash settlement absent an ability to settle in another manner.

There are several exceptions to this prohibition, two of which are discussed in chapter 4:

— EBIT and EBITDA (see section 4.1.10).
— disclosures in MD&A that may be required for material agreements (see section 4.1.40).

As discussed in section 3.4.10, the liquidity measure prohibition emphasizes the importance of management's initial classification of a non-GAAP financial measure as either a liquidity or performance measure. If a non-GAAP financial measure is described and treated as a performance measure, the company would be able to exclude charges or liabilities that require (or will require) cash settlement from that measure, subject to the prohibitions discussed in section 3.8.20.

Illustrative SEC comment: We note that your non-GAAP measure of Adjusted Free Cash Flow excludes the cash flow effect of restructuring and other costs, litigation settlement, other litigation costs and management fees. Tell us what consideration you gave to the prohibition in Item 10(e)(ii)(A) of Regulation S-K from excluding charges or liabilities that required, or will require, cash settlement from non-GAAP liquidity measures.

3.8.20 Adjustments to GAAP earnings for nonrecurring, infrequent or unusual items

A company may not present in an SEC filing a non-GAAP performance measure that eliminates or smooths items identified as nonrecurring, infrequent or unusual:

- when the nature of the charge or gain makes it reasonably likely to recur within two years; or
- there was a similar charge or gain within the prior two years. [S-K.10(e)(ii)(B)]

This specific prohibition is based on the description of the charge or gain being labeled as nonrecurring, infrequent or unusual. Whether the company uses such a label or not, the requirements of Regulation G and the other requirements of S-K Item 10(e) apply in the usual way, as described in this publication. [C&DI 102.03]

For example, the SEC staff has provided examples in which the exclusion of normal, recurring, cash operating expenses may result in a non-GAAP measure that is misleading. This includes the SEC staff's views of what they consider to constitute 'normal' and 'recurring'. See section 3.3.

Determining whether a charge will recur within the two years is a matter of judgment. The SEC has stated that it views 'reasonably likely' as a threshold lower than 'more likely than not'. [FR-83]

The SEC staff has informally indicated that they will apply a broad definition of the term 'similar' in assessing whether similar items have occurred or will occur in the future. For example, if a single restructuring plan generates a charge that includes several distinct components (e.g. employee severance, lease termination costs and asset impairments), the SEC staff would view all components of the restructuring plan as similar.

The magnitude of the charge does not affect the assessment of a 'similar' charge. For example, if a property and casualty insurance company recognizes an unusually large amount of casualty losses in any given period, the item would not be dissimilar in nature to other casualty losses.

Illustrative SEC comment: We note that you exclude merger, acquisition, integration costs and other charges, settlement, litigation and other related charges and restructuring charges which are identified as non-recurring, infrequent or unusual in arriving at Adjusted EBITDA. We understand that you have incurred these charges in each of the last three annual reporting periods. Please note that Item 10(e)(1)(ii)(B) of Regulation S-K prohibits you from 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 within two years or there was a similar charge or gain within the prior two years. Please review the C&DIs on Non-GAAP Financial Measures and revise accordingly.

Example 3.3
Reasonably likely

ABC Corp. presents a non-GAAP financial measure that removes certain acquisition related expenses (merger-related expenses and severance costs). ABC completed multiple acquisitions in the past two years and acquisitions will continue to be a key growth strategy of ABC going forward.

As long as the adjustments are not labeled or described as non-recurring, infrequent or unusual, management may continue to adjust the non-GAAP financial measure for the same types of acquisition-related expenses.

3.8.30 Placement of non-GAAP financial measures

In a filing with the SEC, a company may not present a non-GAAP financial measure:

- on the face of financial statements prepared in accordance with GAAP or in the accompanying notes; or
- on the face of any pro forma financial information provided to comply with Article 11 of Regulation S-X (or Rule 8-05 of Regulation S-X for a smaller reporting company). [S-K.10(e)(1)(ii)(C)–(D)]

Illustrative SEC comment: Please revise your consolidated statements of cash flows as follows to remove the subtotals in the operating section since these represent non-GAAP measures, which are not permitted to be presented on the face of the financial statements.

Illustrative SEC comment: Non-GAAP financial measures are not permitted on the face of any pro forma financial information that is required by Article 11 of Regulation S-X. Please revise your filing accordingly. See Item 10(e)(1)(ii)(D) of Regulation S-K.

3.8.40 Use of titles or descriptions

In a filing with the SEC, a company may not 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. The SEC staff has also noted without clear labels and descriptions, non-GAAP measures may be misleading and violate Regulation G. [S-K.10(e)(1)(ii)(E); C&DI 100.05]

The SEC has provided numerous comments requesting companies to clearly and consistently identify and label their non-GAAP financial measures to differentiate them from GAAP measures. It would be inappropriate to label a non-GAAP financial measure with a name that could be interpreted as a GAAP measure. Additionally, it would be inappropriate to label a non-GAAP financial measure with a name that may convey a measure that it does not actually represent.

For example, using labels like 'Free Cash Flow' or 'EBITDA' for a non-GAAP financial measure that has been adjusted for anything beyond the customary calculation would be inappropriately labeled. The SEC has frequently requested that such non-GAAP financial measure be updated to include the term 'adjusted'.

Illustrative SEC comment: Your labeling of the measure as 'normalized' and the disclosure that inclusion or exclusion of certain items is necessary to "provide the most accurate measure of core operating results" implies the non-GAAP measure is more meaningful or accurate than the comparable GAAP measure. Please revise accordingly.

Illustrative SEC comment: We note that you present a non-GAAP measure entitled Operating Earnings. 'Earnings from operations,' 'operating income,' 'operating earnings' and 'profit from operations' are terms used in US GAAP to refer to income that is generated by the ordinary and usual activity of a reporting entity. Please tell us how your presentation complies with Item 10(e)(1)(ii)(E) which prohibits you from using titles for non-GAAP measures that are the same as, or confusingly similar to, titles or descriptions used for GAAP financial measures.

Given the continued observations in this area, the staff issued a new C&DI in December 2022, reiterating that without the appropriate labels and description, non-GAAP measures and/or adjustments that are a part of those measures could be misleading to investors. The following items are specific examples cited by the staff. [C&DI 100.05]

— Company fails to identify and describe a measure as non-GAAP.

  This view does not mean that the title of the measure must include 'non-GAAP', but an understanding that a measure is non-GAAP and what the comparable GAAP measure is should be clear to investors.

— Company uses labels that do not reflect the nature of the non-GAAP measure, such as:

  – labeling a contribution margin measure calculated as GAAP revenue less certain expenses as 'net revenue';

    Illustrative SEC comment: You present the non-GAAP measure 'net service revenue', which you define as revenue, net of subcontractor and other direct costs. Please explain to us (i) why it is appropriate to deduct costs from revenue to arrive at a revenue amount, (ii) what this measure is intended to represent and (iii) how this measure achieves your assertion that it provides investors with a better understanding of your operational performance.

  – labeling a non-GAAP financial measure the same as a GAAP measure (line item or subtotal) even though calculated differently, e.g. 'gross profit' or 'sales'; and

    Illustrative SEC comment: We note you currently reconcile both historical and pro forma Revenue to a Gross Profit measure, that excludes depreciation and amortization. As such, this appears to

> be a non-GAAP measure as it excludes depreciation and amortization. Please revise your presentation to label this reconciliation as non-GAAP and reconcile it to GAAP gross profit.

– labeling a non-GAAP measure with 'pro forma' in the title when it is not calculated consistent with Article 11 of Regulation S-X.

For example, companies have labeled a non-GAAP financial measure as 'pro forma' to demonstrate the effect of an acquisition on their historical financial statements. The SEC staff has commented that labeling these measures under this context would be inappropriate as it would imply that their titles were prepared pursuant to Article 11 of Regulation S-X.

> **Illustrative SEC comment**: The non-GAAP financial measures described as 'pro-forma' in the Form 8-K do not appear to be presented in accordance with Article 11 of Regulation S-X in light of the nature of the adjustments made. Please change the labeling of these measures by removing the wording 'pro forma' to properly reflect their nature.

3.8.50 Per-share measures

Per-share measures of liquidity (e.g. cash flow per share) are expressly prohibited under both Topic 230 and SEC rules. This specific prohibition applies to all filings with the SEC and any Form 8-K that is furnished to the SEC (see section 1.2). [C&DI 102.05, FR-65 FN 11, ASC 230-10-45-3]

A per-share measure of performance is prohibited in a filing with the SEC if that measure is a prohibited non-GAAP financial measure under the general principles described in section 3.8 – e.g. the per-share performance measure includes adjustments to GAAP earnings for items labeled as nonrecurring, infrequent or unusual items, when the nature of the adjustment 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.

Other per-share measures of performance are not prohibited, but the company must reconcile any per-share measure from GAAP earnings per share (EPS). In addition, the statements outlined in section 3.7 are required. [C&DI 102.05]

The per-share measure should be determined using a GAAP method of calculation – e.g. EPS under Topic 260. In addition, the SEC staff has stipulated that companies should present per-share non-GAAP financial measures on a diluted basis. [FR-65 FN49]

> **Illustrative SEC comment:** You disclose that you believe the non-GAAP measures presented, including Adjusted EPS, allow investors to gain a better understanding of the factors and trends affecting the ongoing cash

earnings capabilities of your business for which capital investments are made and debt is serviced. From this it appears the non-GAAP measures are intended to be measures of liquidity. Presenting non-GAAP liquidity measures on a per share basis is not consistent with 102.05 of the updated C&DIs on Non-GAAP Financial Measures. Please review this guidance when preparing your next earnings release.

Illustrative SEC comment: In determining the non-GAAP number of shares used in your non-GAAP diluted earnings per share calculations, you include the effect of call options even though they are anti-dilutive and pursuant to the no anti-dilution principle outlined in ASC 260-10-45-17 to 45-20 should be excluded from earnings per share calculations. Your use of an individually tailored principle in measuring non-GAAP earnings per share is inconsistent with Question 100.04 of the updated C&DIs on Non-GAAP Financial Measures. Please review this guidance when preparing your next earnings release. We remind you that the company and its management are responsible for the accuracy and adequacy of their disclosures, notwithstanding any review, comments, action or absence of action by the staff.

4. Specific considerations

Detailed contents

4.1 EBIT and EBITDA

EBIT and EBITDA are non-GAAP financial measures and are subject to all required disclosures. The calculation of EBIT and EBITDA should include only the specific components in the acronym. Therefore:

— EBIT may only start with net income as presented in the GAAP statement of operations and only include adjustments for interest and taxes; and
— EBITDA may only start with net income as presented in the GAAP statement of operations and only include adjustments for interest, taxes, depreciation and amortization. [C&DI 103.01]

If some other measure of earnings is used, or if items other than interest, taxes, depreciation and amortization are deducted from GAAP earnings, that measure is not exempt from the prohibitions described in section 3.8, and the titles should be distinguished from EBIT or EBITDA, such as Adjusted EBIT or Adjusted EBITDA. Additionally, the description or title should clearly indicate what is calculated differently than EBIT or EBITDA. [C&DI 103.01]

Taxes in both EBIT and EBITDA should only include income taxes as presented on the statement of operations – i.e. no excise, payroll or other taxes should be included in the adjustments.

Identification of the most directly comparable GAAP measure for EBIT and EBITDA will depend on whether the non-GAAP financial measure is considered a liquidity measure or a performance measure.

4.1.10 EBIT/EBITDA as a liquidity measure

The presentation of a properly determined EBIT or EBITDA is expressly allowed, notwithstanding the prohibition on filings with the SEC for a non-GAAP liquidity measure that excludes cash related items (see section 3.8.10). If a company presents EBIT and EBITDA as a liquidity measure, reconciliation is required to an amount from the statement of cash flows – e.g. cash from operating activities.

In addition, as required for the presentation of all liquidity non-GAAP financial measures, the three major categories of the statement of cash flows should be presented with equal or greater prominence with the liquidity measure. [FR-65 S II.B.2, C&DI 102.06]

If a company presents EBIT or EBITDA as a liquidity measure, it may *not* present this liquidity measure on a per-share basis (see section 3.8.50). [C&DI 102.05]

4.1.20 EBIT/EBITDA as a performance measure

A company may present EBIT or EBITDA as a performance measure, which requires reconciling the measure to net income in the statement of operations. The SEC staff has said that operating income would not be considered the most directly comparable GAAP financial measure because EBIT and EBITDA include adjustments for items that are not included in operating income. [C&DI 103.02]

If a company presents EBIT or EBITDA as a performance measure, it may also present the measure on a per-share basis. In that case, the disclosure requirements noted in section 3.8.50 apply.

4.1.30 EBITDA and the adoption of leasing standards

Topic 842 and IFRS 16 (leases) both require lessees to capitalize right of use assets on the balance sheet. However, they have multiple differences relevant to the calculation of EBITDA.

- IFRS 16 requires lessees to amortize the capitalized right of use asset through depreciation expense for all leases. Topic 842 also requires lessees to amortize the right of use asset through depreciation expense but only for finance leases; lessees amortize the right of use assets through lease expense for operating leases.
- IFRS 16 requires lessees to record interest expense on all leases; Topic 842 requires interest expense to be recorded on finance leases only.

When presenting EBITDA, the SEC staff has objected to the following as individually tailored accounting principles: [Regs Comm 03/2019]

- US GAAP registrants adjusting EBITDA for any leasing related operating expense, such as the amortization of right of use assets as 'depreciation expense' because it is not recorded as such under Topic 842.
- IFRS registrants adjusting EBITDA for interest and depreciation solely related to leases.

As an alternative, registrants may separately identify the differences between IFRS and GAAP in their filings. The SEC staff noted this disclosure could include for a US GAAP registrant separately disclosing lease expense recognized during a period attributable to operating leases consistent with Topic 842, or an IFRS registrant separately disclosing the amount of interest and depreciation expenses under IFRS 16. [Regs Comm 03/2019]

4.1.40 Disclosures related to material agreements

Companies are prohibited from presenting non-GAAP liquidity measures 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 EBIT and EBITDA in filings with the SEC (see section 3.8.10).

However, in certain circumstances, it may be appropriate for a company to disclose in MD&A a non-GAAP liquidity measure that is prohibited (e.g. adjusted EBITDA) to discuss items material to liquidity.

If a company's credit agreement includes a material covenant for the non-GAAP financial measure, such as Adjusted EBIT or EBITDA where EBIT or EBITDA have been adjusted to exclude charges or liabilities that must be cash settled, the company may still need to disclose the financial measure as part of its MD&A. MD&A requires disclosure of material items affecting liquidity. Therefore, a registrant may disclose the non-GAAP financial measure in MD&A if the:

— debt agreement is a material agreement;
— covenant is a material term of the debt agreement; and
— information about the covenant is material to an investor's understanding of the financial condition and/or liquidity.

A company should also consider disclosure of the:

— material terms of the debt agreement, including the covenant;
— amount or limit required for compliance with the covenants; and
— actual or reasonably likely effects of compliance or noncompliance with the covenant on financial condition and liquidity. [C&DI 102.09]

4.2 Segment information

4.2.10 Disclosures under Topic 280

Under Topic 280, a company is required to report a measure of profit or loss and total assets for each reportable segment. Often companies with multiple reportable segments disclose a segment measure for each reportable segment that differs from GAAP net income because corporate overhead and certain costs are not allocated to each segment. [ASC 280-10-50-22]

The definition of non-GAAP financial measures excludes the disclosures of segment profit or loss and total assets required by Topic 280 (i.e. they are required by GAAP). In addition, Topic 280 requires or expressly permits disclosure in the GAAP financial statements of additional financial information for each segment beyond its measure of profit and loss and total assets. That additional information for each segment is also excluded from the definition of non-GAAP financial measures. A Topic 280 measure of profit and loss reported to the CODM for each segment used to allocate resources to the segments and assess their performance is not subject to the provisions of Regulation G and S-K Item 10(e). [C&DI 104.01, ASC 280-10-50-1, 50-3 – 50-10]

The SEC staff has noted that voluntarily expanding the segment disclosure to include non-GAAP financial measures that the CODM reviews does not provide 'protection' or otherwise exempt the disclosure from the SEC's rules and regulations addressing non-GAAP measures. [2016 AICPA Conf]

For example, the SEC staff has objected when a company that is organized and operates as a single operating segment discloses in its segment note to the financial statements a segment measure of profitability for the consolidated entity. The SEC staff believes that if a company does not have multiple operating segments there would be no performance assessment or resource allocations made that would necessitate the need for that disclosure under Topic 280 (and therefore it is not contemplated by the SEC's exclusion for GAAP-required information). Similarly, presenting a non-GAAP performance measure that supplements the measure reported to comply with Topic 280 is outside of the scope of the SEC's exclusion. A consolidated or supplemental non-GAAP financial measure may be presented outside of the financial statements, subject to the requirements of Regulation G and S-K Item 10(e).

Illustrative SEC comment: We note your presentation of Total Adjusted Segment EBITDA and Total Segment Profit in the table on page 28 and 30, respectively. Please be advised that the presentation of total segment profit or loss measure in any context other than ASC 280 required reconciliation in the footnote would be considered a presentation of a non-GAAP financial measure. In this regard, please comply with the disclosure requirements outlined in Item 10(e)(1)(i) of Regulation S-K with respect to Total Adjusted Segment EBITDA and Total Segment Profit. Further, your presentation of Total Adjusted Segment EBITDA in the table on page 30, including the reconciliation of Adjusted Segment EBITDA to income from continuing operation before income taxes, should be revised to present the most directly comparable GAAP measure with equal or greater prominence. Refer to Questions 102.10 and 104.04 of the SEC's Division of Corporation Finance C&DIs on Non-GAAP Financial Measures.

Future developments

In October 2022, the FASB issued proposed Accounting Standards Update (ASU), Segment Reporting (Topic 280): Improvements to Reportable Segment Disclosures. The proposed ASU would enhance segment reporting by expanding the breadth and frequency of existing segment disclosures. (Read more here.)

The proposed ASU would permit multiple measures of a segment's profit or loss to be reported, as long as one is the measure most consistent with how corresponding amounts in the consolidated financial statements are measured.

This would result in GAAP allowing for the disclosure of multiple measures of profit/loss (that could be non-GAAP financial measures). As a result, questions have been raised as to how this permission within GAAP to disclose multiple measures would align with (or change) the SEC staff's current view that only a single measure for each reportable segment should be provided. A final ASU is expected in 2023 and we will continue to monitor how the SEC staff's views on the requirements develop.

Example 4.1

Presentation of segment profit or loss in the notes of the financial statements

NOTE XX: SEGMENT INFORMATION

ABC Corp. has five reportable segments. Apples, Blueberries, Cherries, Dragon Fruit and Elderberry. Segment financial information is shown below. Asset information by segment is not disclosed as this information is not separately identified and reported to the CODM.

ABC's segment measure of profit and loss is an adjusted earnings before interest, taxes, depreciation and amortization (Operational EBITDA). As demonstrated in the table below, operational EBITDA represents the earnings (loss) from continuing operations excluding interest expense, income taxes, depreciation and amortization, restructuring costs, stock-based compensation, and loss on early extinguishment of debt.[1]

OPERATIONAL EBITDA	
Apples segment	150
Blueberries segment	75
Cherries segment	200
Dragon Fruit segment	120
Elderberry segment	40
Total of reportable segments	**585**
Interest expense[2]	(5)
Income taxes[2]	(75)
Depreciation and amortization[2]	(110)
Restructuring costs[2]	(10)
Stock-based compensation[2]	(15)
Loss on early extinguishment of debt[2]	(5)
Consolidated earnings (loss) from continuing operations before income taxes	**365**

Notes:

1. Individual segment Operational EBITDA for Applies, Blueberries Cherries, Dragon Fruit and Elderberry are **not** considered non-GAAP financial measures because the amounts are disclosed under Topic 280. Any financial measures not required or expressly permitted by Topic 280 may not be presented in the footnotes to the financial statements.
2. Items below total reportable segment are reconciling items required by GAAP and are not non-GAAP adjustments.

4.2.20 Presentation outside of the financial statements

As discussed in section 4.2.10, only the specific financial information required or expressly permitted by Topic 280 qualifies for exclusion from the definition of non-GAAP financial measures. Companies commonly present and discuss non-GAAP financial measures outside of the financial statements – e.g. in MD&A, Business section of Form 10-K, or an earnings release. Any adjustments to Topic 280 measures to eliminate or add items create new non-GAAP financial measures subject to the provisions of Regulation G and S-K Item 10(e).
[C&DI 104.03]

A company may discuss segments or other subdivisions of its business in MD&A, and may be required to do so if this discussion is necessary to an understanding of the business. The discussion generally includes segment measures reported in the GAAP financial statements under Topic 280. If the disclosures conform to Topic 280, the segment disclosures in MD&A are not subject to the prohibitions discussed in section 3.8. Disclosure in the notes to the financial statements requires reconciliation to the company's consolidated financial statements. When a company discusses segment profitability on the basis disclosed in the notes, it should also discuss the reconciling items that apply to the particular segments being discussed. [FR-65 FN19, C&DI 104.02]

Presenting a totaled segment profit and loss measure (summation of segment results before any reconciling items) not required by Topic 280 is considered a non-GAAP financial measure subject to the conditions for use under Regulation G and S-K Item 10(e). The SEC staff believes that presenting a total segment profit/loss measure in any context other than the Topic 280 required reconciliation would be considered as presenting a non-GAAP financial measure; this is because this total segment profit or loss measure has no authoritative meaning outside Topic 280. [C&DI 104.04]

Illustrative SEC comment: We note you present and discuss segment gross margin for each of your reportable segments in addition to segment operating income (loss) in both your Form 10-K and in the press release included in your Form 8-K. Please revise to label segment gross margin as a non-GAAP financial measure and provide the required disclosures pursuant to Item 10(e) of Regulation S-K or tell us why you believe segment gross margin is not a non-GAAP financial measure.

Example 4.2
Presentation of consolidated segment profit or loss in MD&A

Given the segment information presented in Example 4.1 above, if ABC Corp. presented and discussed **consolidated** Operational EBITDA of $585 in MD&A, the measure would be considered a non-GAAP financial measure in M&DA subject to the provisions of Regulation G and S-K Item 10(e).

The presentation and discussion of **individual segment** Operational EBITDA in MD&A does not create new non-GAAP financial measures subject to Regulation G and S-K Item 10(e) because they are required disclosures under Topic 280. However, if ABC were to adjust each segment's Operational EBITDA (e.g. removing additional items such as acquisition-related costs and impairment), each adjusted measure would no longer be considered a Topic 280 measure and would become subject to the provisions of Regulation G and S-K Item 10(e).

Topic 280 requires a company to disclose revenues by geographic location or product line on an entity-wide basis. Companies may present this information within MD&A or other locations. When included in the MD&A or other locations, if the amounts presented are calculated in accordance with GAAP (i.e.

Topic 280), they are not considered non-GAAP financial measures. However, if the amounts presented in MD&A or other locations are adjusted to eliminate the effects of certain items, such as changes in foreign currency exchange rates (i.e. amounts do not equal revenues under GAAP), they are considered non-GAAP financial measures subject to the requirements of Regulation G and S-K Item 10(e). [C&DI 104.05, 104.06]

Example 4.3
Presentation of product revenue in MD&A

ABC Corp. discloses the following in MD&A as part of its discussion of revenues from its two product lines – conventional and organic.

	Conventional	Organic
Apples segment	90	60
Blueberries segment	10	65
Cherries segment	160	40
Dragon Fruit segment	110	10
Elderberry segment	40	0

Individual segment revenues for Applies, Blueberries, Cherries, Dragon Fruit and Elderberry are **not** considered non-GAAP financial measures if the amounts are determined under GAAP – even if the total amount of segment revenue presented in MD&A does not equal total revenue as presented in ABC's financial statements.

4.3 Free cash flow

Free cash flow is a commonly used non-GAAP financial measure used by companies to relay information on liquidity. The SEC staff has urged caution when presenting free cash flow because its definition has not been officially codified. However, the SEC staff has commented that free cash flow is typically calculated as cash flows from operating activities as presented in the statement of cash flows under GAAP, less capital expenditures. Historically, when companies have added other adjustments that go beyond the 'typical' calculation of free cash flow, the SEC staff has commented, asking companies to relabel the measure, for example, as 'adjusted free cash flow'.

When presenting free cash flow as a non-GAAP financial measure, a company should provide: [C&DI 102.07]

- a clear description of how this measure is calculated;
- all material limitations of the measure (if any); and
- a reconciliation from GAAP.

Companies should avoid inappropriate or potentially misleading implications about the usefulness of free cash flow as a non-GAAP financial measure. For example, a company should not use free cash flow in a manner that inappropriately implies that the measure represented residual cash flow available for discretionary spending, because the company may have mandatory debt service expenditures or other nondiscretionary expenditures not deducted in arriving at the measure of free cash flow. [C&DI 102.07]

Additionally, because free cash flow is a liquidity measure, it must not be presented on a per-share basis (see section 3.8.50). [C&DI 102.07]

Illustrative SEC comment: Your computation of free cash flow differs from the typical calculation (cash flows from operating activities as presented in the statement of cash flows under GAAP, less capital expenditures). Therefore, please revise the title of this non-GAAP measure so it is not confused with free cash flow as typically calculated. See Question 102.07 of the updated C&DIs on Non-GAAP Financial Measures. We remind you that the company and its management are responsible for the accuracy and adequacy of their disclosures, notwithstanding any review, comments, action or absence of action by the staff.

4.4 Treatment of tax adjustments

A company should provide income tax effects on its non-GAAP financial measures depending on the nature of the measures.

— If a measure is a liquidity measure that includes income taxes, it might be acceptable to adjust GAAP taxes to show taxes paid in cash.

— If a measure is a performance measure, the company should include current and deferred income tax expense commensurate with the non-GAAP measure of profitability. [C&DI 102.11]

While there is no specific method required for determining the tax effects of non-GAAP adjustments, it is our view that a company's non-GAAP disclosure should clearly explain how it determined the current and deferred tax effects.

Adjustments to arrive at a non-GAAP financial measure should be shown gross of tax with the tax effect presented as a separate adjustment and clearly explained. A company may present the tax effects of all adjustments in a single line or separately present the tax effect for each individual adjustment. [C&DI 102.11]

Illustrative SEC comment: You present the tax effects of the reconciling adjustments combined with your one-time tax expense (benefit) items. In light of the material one-time tax expense (benefit) items reported in each period, please revise your presentation in future filings to clearly identify and describe the significant components of this caption.

Illustrative SEC comment: Consider presenting the one-time tax expense (benefit) items in a separate caption. Refer to Question 102.11 of the updated C&DIs on Non-GAAP Financial Measures.

Example 4.4
Presentation of tax effect of adjustments

A company may present the tax effects of all adjustments in a single line.

Net income (GAAP)	1,000
Asset impairment	100
Inventory write-down	50
Tax effect of adjustments[1]	(32)
One-time tax expense (benefit) items[2]	(150)
Adjusted earnings (non-GAAP)	**968**

Notes:

1. Tax effect was calculated using the Company's statutory rate of 21%.
2. Represents the release of a significant unrecognized tax benefit liability.

Alternatively, a company may present the tax effect for each individual adjustment.

	Gross	Tax	Net
Net income (GAAP)	1,000		1,000
Asset impairment	100	21[1]	79
Inventory write-down	50	11[1]	39
One-time tax expense (benefit) items	0	(150)[2]	(150)
Adjusted earnings (non-GAAP)	**1,150**		**968**

Notes:

1. Tax effect was calculated using the Company's statutory rate of 21%.
   Represents the release of a significant unrecognized tax benefit liability

Either presentation may be appropriate providing the gross amount of the individual adjustments and tax effect are disclosed. Additionally, given that the non-GAAP financial measure of adjusted net income is considered a performance measure, the company must clearly explain how it determined the current and deferred tax effects.

4.5 Treatment of pension adjustments

Given the complex nature and number of components in pension accounting, the SEC staff has stressed the importance of clearly labeling and disclosing non-GAAP financial measures that reflect adjustments for pension benefits.

An adjustment to a non-GAAP financial measure labeled as a 'pension adjustment' is considered inadequate without describing:

— what the adjustment represents; and
— what its basis is in the GAAP financial statements.

The SEC staff has expressed concern that a non-GAAP adjustment (e.g. 'noncash pension expense') might be confusing. This is because noncash pension expense does not accurately describe pension costs, and pensions generally settle in cash.

Non-GAAP adjustments that eliminate actuarial gains or losses should be clearly labeled and disclosed. The SEC staff has expressed concern that companies may adjust the non-GAAP amount to include the expected return instead of the actual return, even though these returns may be significantly different. If a company presents these non-GAAP disclosures, the SEC staff expects a statement that the GAAP amounts reflect:

— the immediate recognition of all actuarial gains and losses in the income statement while the non-GAAP amount does not; and
— the actual return of $X and X% along with the corresponding non-GAAP measures.

The SEC staff has provided an example of a company that immediately recognized actuarial gains and losses and presented a non-GAAP financial measure that eliminated the actual return on plan assets from operating income. Although the company's actual return on plan assets was a loss of 3% and the expected return was a gain of 8%, the company adjusted its GAAP operating income by 11% – i.e. the difference between the expected return and the actual return. The SEC staff observed that this type of non-GAAP measure can be confusing and encouraged disclosure that the GAAP measure reflected an actual loss on return on plan assets of 3% (and dollar amount), and that the non-GAAP measure reflected the expected return of 8% (and $ amount). [2013 AICPA Conf]

Illustrative SEC comment: We note that your non-GAAP measures include an adjustment for the noncash actuarial loss (gain) on benefit plans, which represent mark-to-market adjustments recorded in the fourth quarter of each respective year. For any future presentation of a non-GAAP measure that includes this adjustment, please expand your disclosures to address the following: Expand your disclosures to clearly state what the adjustment represents in the context of your pension accounting policy. For example, you should clarify how you account for these actuarial losses in your historical financial statements; Provide quantitative context for the actual and expected plan asset returns.

Specifically, please disclose the actual return on plan assets amount and corresponding percentage that has been removed in arriving at the non-GAAP financial measure as well as the expected return on plan assets amount and related percentage that is now reflected in the non-GAAP financial measure; and expand your disclosures to comprehensively address why providing non-GAAP financial measures which adjust for these actuarial gains and losses provides useful information to investors.

4.6 Constant currency presentation

Constant currency is the method used to eliminate the effects of exchange rate fluctuations when calculating financial performance of a company's international operations.

Amounts presented in constant currency are considered non-GAAP financial measures and should be accompanied by:

— disclosure of the historical amounts and the amounts in constant currency; and
— a description of the process for calculating the constant currency amounts and the basis of presentation. [C&DI 104.06]

For example, a company may include in its Form 10-K a table that breaks down its revenues by geographic locations, under the requirements of Item 1 of Form 10-K. In this tabular disclosure, the company presents the amount in constant currency by adjusting its GAAP revenue measure for its international operations to exclude the effects of changes in foreign exchange rates associated with the current fiscal year. The table includes the related foreign currency effect for the period. The company also uses this tabular disclosure of revenue by location to show changes in revenue derived from increases in sales volume, prices and exchange rates from period to period as part of its MD&A disclosures. In this instance, the company's presentation of revenues by location, as adjusted for foreign exchange, is a non-GAAP financial measure subject to the provisions of Regulation G and S-K Item 10(e).

The company would need to comply with the reconciliation requirements of Regulation G and S-K Item 10(e) by including the historical amounts and the amounts in constant currency, accompanied by a clear disclosure of the method used to calculate the constant currency amounts.

4.7 Normalized market prices

Certain non-GAAP financial measures may include a normalized market price measure with the purpose of eliminating the effect of commodity price volatility.

The SEC staff stated that it objects to the use of a non-GAAP financial measure adjusting sales to eliminate 'drastic' declines (or increases) in commodity prices. Underlying volatility in commodity prices in the industry makes it challenging to identify what constitutes a 'normal price', and therefore the amount of the adjustment. The SEC staff noted that the measure is typically included only when commodity prices moved in a direction that negatively affected reported results. [2015 AICPA Conf]

Illustrative SEC comment: We note disclosure in which you state your non-GAAP price cash margin is normalized for changes in commodity prices across time periods. Utilization of 20X1 as the base year could be interpreted to suggest that you expect commodity prices to recover in the near future. Tell us how you determined calculating your measure utilizing 20X1 commodity prices is useful, and why you believe 20X1 is the appropriate base year as opposed to other prior periods. In addition, indicate in your response your expectation for determining the base year in future presentations of this non-GAAP measurement.

4.8 System-wide revenues

System-wide revenues is a non-GAAP financial measure used by some companies when there is similar economic activity that may be reflected in the financial statements in different ways.

For example, a restaurant franchisor that also owns its own restaurants and receives fees from its franchisees may wish to present the revenues of the franchisees and its owned restaurant operations as a measure generally referred to as system-wide revenues.

The SEC staff allows registrants to disclose system-wide non-GAAP financial measures when all other non-GAAP requirements are met and the measure is accompanied by appropriate disclosure (see chapter 3). In some circumstances, investors find this measure useful in evaluating trends in the strength of a brand.

A company may present system-wide sales or sales growth as a non-GAAP financial measure in a tabular disclosure. The tabular disclosure would be presented in addition to the disclosures noted in chapter 3.

Illustrative SEC comment: We note that you disclose that system-wide sales for fiscal 20X1 were $100 million.

Please note that we consider this measure to be a non-GAAP financial measure and in this regard should be accompanied by disclosure that this amount is inclusive of both company-owned and franchised-owned stores, and that your total revenue in the financial statements is limited to those of company-owned restaurants and royalties from your franchises. Please revise accordingly.

Illustrative SEC comment: We note your disclosure of system-wide sales throughout the 10-K. Since system-wide sales include sales by franchisees that are not your revenues and you did not generate such revenues, please provide disclosure that adequately defines system-wide sales and clearly states this is an operating measure not in accordance with GAAP and these sales are not included in your financial statements. Your presentation should be balanced with relevant GAAP information. Form 10-Qs and 8-K earnings releases, as applicable, should be similarly revised.

4.9 REIT reporting

4.9.10 Funds from Operations

FFO is a financial measure widely reported by real estate entities. FFO is an acceptable non-GAAP financial measure (performance measure) if the definition is consistent with the definition used by NAREIT. If a company presents FFO as a performance measure, it may present FFO on a per-share basis (see section 3.8.50). [C&DI 102.01]

While adjustments to the definition used by NAREIT are not prohibited, any adjustments must comply with Regulation G and S-K Item 10(e) and the title must reflect that it is an adjusted form of the non-GAAP financial measure (e.g. Adjusted FFO). Adjustments made to FFO must comply with the requirements for a performance measure or a liquidity measure, depending on the nature of the adjustments, some of which may trigger the prohibition on presenting this measure on a per-share basis. [C&DI 102.02]

4.9.20 Pro rata information

In September 2016, NAREIT released an alert, *Reporting Pro-Rata Information*, which provides guidance on presenting pro rata financial information. The alert was prompted by comments made by a representative of the SEC's Division of Corporation Finance that disclosure of certain pro rata financial information may not comply with the C&DIs. For example, the staff would object to the full presentation of financial statements on a pro rata basis because this could be viewed as applying a tailored accounting principle (see section 3.3). Additionally, including a non-GAAP income statement may violate the equal or greater prominence requirement (see section 3.6.20). NAREIT discussed the matter with the SEC staff and believes the SEC staff would not object to the example presentation provided in the alert.

Example 4.5
REIT reporting of pro rata information

In its alert, *Reporting Pro-Rata Information,* NAREIT understands the SEC staff would not object to the following presentation of elements of pro rata financial statements:

Elements of Pro-Rata Statement of Operations	Noncontrolling Interest Share of Consolidated Ventures	Company Share of Unconsolidated Ventures
Minimum rent	-	-
Overage rent	-	-
Tenant reimbursements	-	-
Other income	-	-
Property operating expenses	-	-
Depreciation and amortization	-	-
Real estate taxes	-	-
Repairs and maintenance	-	-
Advertising and promotion	-	-
Provision for credit losses	-	-
Other	-	-
Interest expense	-	-

Elements of Pro-Rata Balance Sheet	Noncontrolling Interest Share of Consolidated Ventures	Company Share of Unconsolidated Ventures
Investment properties, at cost	-	-
Less – accumulated depreciation	-	-
Cash and cash equivalents	-	-
Tenant receivables and accrued revenue, net	-	-
Investment in unconsolidated entities, at equity	-	-
Deferred costs and other assets	-	-
Mortgage and unsecured indebtedness	-	-
Accounts payable and accrued expenses	-	-
Other liabilities	-	-
Commitments and contingencies	-	-
Limited partners' preferred interest in Operating Partnership	-	-

Additionally, NAREIT notes the following as it pertains to the presentation of pro rata information:

1. The consolidated GAAP financial statements may not be reported on the same table with the pro rata information.
2. The elements shown in this illustration of reporting pro rata information may be different for each registrant's facts and circumstances.
3. No totals or subtotals should be presented.
4. Analysts could deduct the noncontrolling interest share of consolidated ventures from the consolidated amounts.
5. Analysts could add the company share of unconsolidated ventures to the consolidated amounts.

5. Earnings releases and similar announcements

Detailed contents

5.1 General requirements

Item 2.02 of Form 8-K requires that a domestic registrant *furnish* to the SEC all releases or announcements disclosing material nonpublic financial information about completed annual or quarterly periods that it has not previously disclosed. A domestic registrant may decide to *file* the Item 2.02 Form 8-K, which has other implications and disclosure requirements.

When a registrant presents non-GAAP financial measures in an Item 2.02 Form 8-K, Regulation G applies to that information, whether the Form 8-K is furnished or filed. The requirements of Regulation G are discussed in chapter 3.

Item 2.02 Form 8-K does not apply to public disclosure of earnings estimates for future or ongoing fiscal periods, unless those estimates are included in a public announcement or release of material non-public information related to a completed annual or fiscal quarter. For example, a press release announcing results of operations for the just completed fiscal quarter, including expected adjusted earnings (a non-GAAP financial measure) would be subject to Item 2.02 of Form 8-K because it contains material, nonpublic information about its results of operations for a completed fiscal period. The adjusted earnings range, a non-GAAP financial measure, would be subject to the requirements of Instruction 2 of Item 2.02. [FR-65 II.C(1), C&DI 105.06]

5.2 Exemption from requirement to furnish Item 2.02 Form 8-K

As discussed in section 2.3.50, Item 2.02 of Form 8-K provides an exemption from its requirement to furnish a Form 8-K where earnings information is presented by webcast or other nonwritten communication. For webcasts or other nonwritten communications, the SEC staff has stated that an audio file, slides or similar presentation materials may satisfy the exemption requirements if the file or materials:

- are provided as part of a presentation that is complementary to, and initially occurs within 48 hours of, a related written announcement or release that has been furnished on an Item 2.02 Form 8-K,
- contain all material financial and other statistical information included in the presentation that was not previously disclosed;
- provide any information that would be required by Regulation G; and
- provide investors access to the file or materials through the registrant's website. [C&DI 105.01]

Additionally, the SEC staff has indicated that the filing of a quarterly earnings release as an exhibit to the Form 10-Q, rather than in an Item 2.02 Form 8-K, would not preclude reliance on the exemption for the webcast or other nonwritten communication. [C&DI 105.05]

The SEC staff cites an example in which a registrant issued its earnings release after the close of the market and two hours later held a properly noticed conference earnings call that included material, previously undisclosed information. Because the market was closed, the registrant was unable to furnish its earnings release on a Form 8-K before its conference call and therefore could not rely on the exemption from the requirement to furnish the information in the conference call on a Form 8-K. In this example, the registrant must furnish the material, previously nonpublic, financial and other statistical information (including that provided in connection with any questions and answers) as an exhibit to a Form 8-K and satisfy the other requirements of Item 2.02 of Form 8-K. A transcript of the portion of the conference call or slides or a similar presentation including that information satisfies this requirement. [C&DI 105.07]

5.3 Furnished Item 2.02 Form 8-K

Regulation G and Instruction 2 to Item 2.02 apply to non-GAAP financial measures in a furnished Item 2.02 Form 8-K.

Regulation G states that a non-GAAP financial measure must not be misleading and requires the presentation of, and a reconciliation from, the non-GAAP financial measure's most directly comparable GAAP measure. Instruction 2 to Item 2.02 requires a registrant to include certain disclosures when it furnishes non-GAAP financial measures in Item 2.02 information.

The disclosures are the same as those addressed in chapter 3:

— a presentation, with equal or greater prominence, of the most directly comparable financial measure calculated and presented based on GAAP (see sections 3.4 and 3.5);
— a reconciliation of the non-GAAP financial measure from the most directly comparable GAAP financial measure (see section 3.5);
— a statement disclosing the reasons why management believes the non-GAAP financial measure provides useful information to investors about the registrant's financial condition and results of operations (see section 3.7); and
— to the extent material, a statement disclosing the additional purposes, if any, for which management uses the non-GAAP measure (see section 3.7). [Form 8-K Item 2.02 Instr 2]

The registrant should include the release or announcement as an exhibit to the Form 8-K and either add the disclosures to the release or announcement or include them in the Form 8-K.

A registrant is prohibited from presenting a per-share measure of liquidity as a non-GAAP financial measure (see section 3.8.50), but the other prohibitions discussed in section 3.8 do not apply to a furnished Item 2.02 Form 8-K.

5.4 Filed Item 2.02 Form 8-K

A registrant may voluntarily elect to file the Item 2.02 Form 8-K with the SEC. In these instances, Regulation G and S-K Item 10(e) apply. Therefore, all of the guidance in chapter 3 is relevant, including the prohibitions in section 3.8.

6. Foreign private issuers

Detailed contents

6.1 Introduction

Non-GAAP financial measures disclosed by foreign private issuers are subject to the provisions of Regulation G and S-K Item 10(e), unless specifically exempt, as addressed in this chapter. For example, a foreign private issuer may present a non-GAAP financial measure that conflicts with the prohibitions in S-K Item 10(e)(1)(ii) in a filing with the SEC if the measure is required or expressly permitted by the foreign private issuer's home jurisdiction accounting standard setter. See further discussion in section 6.3.30 related to the term 'expressly permitted'.

6.2 Regulation G and a foreign private issuer

The requirements stipulated in Regulation G apply to foreign private issuers (including Canadian registrants that file under the MJDS, except as described in section 6.2.20). However, if the conditions in section 6.2.10 are met, Regulation G would not apply to a public announcement that includes a non-GAAP financial measure, such as in the information furnished in a Form 6-K. [G.100(c)]

6.2.10 Limited exemption from Regulation G

For a foreign private issuer's public announcement that contains non-GAAP financial measures to be exempt from Regulation G:

- the issuer's securities must be listed or quoted on a securities exchange or inter-dealer quotation system outside the United States;
- the non-GAAP financial measure and the most comparable GAAP financial measure must not be calculated and presented based on US GAAP; and
- the disclosure must be made outside the United States, or must be included in a written communication that is released by or on behalf of the foreign private issuer outside the United States. [G.100(c)(1)–(c)(3)]

The conditions for exemption are met even if:

- a written communication is released in the United States, as well as outside the United States, if the US communication is released contemporaneously with or after the outside release and is not otherwise targeted to the US market;
- foreign or US journalists or other third parties have access to the information;
- the information appears on one or more websites maintained by the registrant, if the websites, 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 under cover of a Form 6-K furnished to the SEC. [G.100 N2]

The SEC considers the exemption from the provisions of Regulation G to be met even though the information containing a non-GAAP measure is readily obtainable by US investors, if the information is not specifically targeted at US investors. The exemption applies even when the foreign private issuer furnishes the information to the SEC in a Form 6-K. [G.100 N2]

6.2.20 Canadian registrants

The limited exemption from the provisions of Regulation G applies to any non-GAAP financial measure included in a Form 40-F filed by a Canadian registrant that files under MJDS, even though the Form 40-F may include a US GAAP-based, non-GAAP financial measure. [FR-65 S II.B.1.b, C&DI 106.04]

6.3 S-K Item 10(e) and a foreign private issuer

The provisions of S-K Item 10(e) apply to non-GAAP financial measures included in filings with the SEC by foreign filers that file on Form 20-F, except registered investment companies. By a specific reference to S-K Item 10(e), Form 20-F prescribes conditions for including non-GAAP financial measures in filings presented on that form. Therefore, non-GAAP financial measures presented in a filing with the SEC by a foreign private issuer that files on Form 20-F must comply with the conditions and disclosure provisions in S-K Item 10(e). In addition, unless the limited exemption in paragraph 6.3.20 is met, the prohibitions on presenting non-GAAP financial measures in S-K Item 10(e)(1)(ii) (see section 5.3) also apply to filings with the SEC on Form 20-F.

A Canadian registrant filing on Form 40-F under MJDS is not subject to the provisions of S-K Item 10(e). However, any other public disclosure of a non-GAAP financial measure by a Canadian registrant is subject to the provisions of Regulation G unless the limited exemption discussed in section 6.2.10 is met. [FR-65 S II.B.1.b, FN 40, C&DI 106.04]

6.3.10 Form 6-K

Form 6-K is used by a foreign private issuer when providing information to be made public that is required in the home jurisdiction. The information on Form 6-K is typically furnished rather than filed with the SEC, similar to the furnishing of information under Item 2.02 of Form 8-K. Because the information on Form 6-K is furnished rather than filed, the provisions of S-K Item 10(e) do not apply to any non-GAAP financial measures presented in that Form 6-K. A foreign private issuer may elect to file a Form 6-K.

If a company files its Form 6-K with the SEC and incorporates it by reference into a registration statement, prospectus or annual report, the provisions of S-K Item 10(e) apply to the information filed on Form 6-K. As described in section 6.2.10, Regulation G applies to the information furnished on Form 6-K if certain conditions are not met. [FR-65 FN 39, FN 40, C&DI 106.03]

A foreign private issuer may decide to 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. When a foreign private issuer wishes to incorporate by reference portions of the earnings release provided on Form 6-K, it should either:

— specify in the Form 6-K those portions of the earnings release to be incorporated by reference; or
— furnish two Form 6-K reports - one that contains the full press release and another that contains the portions to be incorporated (indicating its incorporation by reference). [C&DI 106.02]

The SEC staff believes that the second approach (i.e. using two reports on Form 6-K) may provide more clarity for investors in most circumstances, and notes that an entity must consider whether its disclosure becomes misleading if it incorporates only a portion of its press release. [C&DI 106.02]

6.3.20 Exemptions from S-K Item 10(e)

A non-GAAP financial measure otherwise prohibited under S-K Item 10(e)(1)(ii) is permitted in a filing by a foreign private issuer if it:

— relates to GAAP used in the foreign private issuer's primary financial statements included in filings with the SEC (e.g. IFRS);
— is required or expressly permitted by the standard setter responsible for establishing the GAAP used in the foreign private issuer's primary financial statements filed with the SEC; and
— is included in the annual report prepared by the foreign private issuer for use in the jurisdiction in which it is domiciled, incorporated or organized, or for distribution to its security holders. [S-K.10(e) note to paragraph (e)]

We believe the exemption in C&DI 104.01 related to Topic 280 (segment reporting) also applies to disclosures required by IFRS 8 (operating segments).

6.3.30 Expressly permitted

A measure otherwise prohibited by S-K Item 10(e)(1)(ii) is permitted in filings with the SEC if the measure is required or 'expressly permitted' by the standard setter for the issuer's primary financial statements and it is included in the issuer's annual report or financial statements used in its home country. [C&DI 106.01]

A measure is expressly permitted if the standard setter responsible for establishing the GAAP used in the entity's primary financial statements filed with the SEC clearly and specifically identifies it as an acceptable measure. The concept of expressly permitted can also be demonstrated with *explicit acceptance* of a presentation by the primary securities regulator in the foreign private issuer's home country jurisdiction or market. Explicit acceptance by the regulator includes:

— published views of the regulator or members of the regulator's staff; or
— a letter from the regulator or its staff to the foreign private issuer indicating the acceptance of the presentation, which would be provided to the SEC staff on request. [FR-65 S II.B.1.b, C&DI 106.01]

7. Controls and non-GAAP financial measures

Detailed contents

7.1 Introduction

Management is responsible for preparing reliable non-GAAP financial measures. The importance of this responsibility has been augmented by the increased scrutiny and attention that has been placed on non-GAAP measures. While an investor may rely on both GAAP and non-GAAP financial measures provided by a public company to make its decisions, only the GAAP information falls under the public company's ICFR; see KPMG's ICFR reference guide. The preparation of non-GAAP financial measures falls under the public company's DCP.

7.2 Differences between ICFR and DCP

DCPs are broadly defined by the SEC as controls and procedures that are designed to ensure that all required disclosures of information are recorded, processed, summarized and reported within the time periods specified by SEC rules. Management must evaluate DCP on a quarterly basis and disclose in the Form 10-K or Form 10-Q whether their evaluation was effective. [CFR 240.13a-15]

The objective of ICFR is limited to providing reasonable assurance about the reliability of the financial statements and the preparation of the financial statements in accordance with GAAP. The objective of ICFR does not extend to any other forms of financial reporting.

Because of management's responsibilities under DCP to prepare accurate financial information, such as non-GAAP financial measures, management may wish to extend its application of ICFR beyond the financial statements to earnings releases, other parts of Form 10-K or Form 10-Q (e.g. MD&A), and other reports. However, management's assessment of ICFR, and the accompanying external auditor's ICFR report (if applicable) cover only those aspects of internal control that relate to financial statements and the accompanying notes to the financial statements.

Illustrative enforcement action: In March 2023, the SEC's Division of Enforcement (Enforcement Division) announced a settlement order (the Order) with a registrant for disclosing misleading non-GAAP financial measures over multiple periods as well as violating SEC regulations requiring company-wide disclosure controls and procedures.

The Order stemmed from the disclosure of non-GAAP financial performance measures which excluded certain expenses related to a specific business combination and related expenses. The Order indicated that over the course of multiple reporting periods, the company negligently misclassified expenses into this adjustment which were unrelated to the transaction, materially inflating the non-GAAP financial performance measures. During this time, the company offered and securities, both through share-based compensation and through a public debt offering.

The Order finds the company:

- had ineffective controls and procedures in place specific to its non-GAAP financial measures;

- had insufficient disclosure controls and procedures concerning the review, approval, and classification of costs used in the adjustment; and
- benefited in the offer or sale of securities by means of an untrue statement of material fact.

The Order specifically sites that both the controllership and the disclosure committee, or equivalent, as at fault.

The company ultimately agreed to pay a penalty to settle charges for violating the rules and was then subject to a 120 day compliance certification period with the Enforcement Division.

7.3 Management's responsibilities related to non-GAAP financial measures

The SEC staff has recommended that management routinely evaluate and document its population of non-GAAP financial measures. Specifically, management should understand and document how the registrant's non-GAAP financial measures are used, and why the non-GAAP financial measures are relevant and important to investors and other users. This information should be communicated to, and discussed with the audit committee and senior management. The SEC staff stated that management should also consider how it fully incorporates the development and review of non-GAAP financial measures into its DCP. The SEC staff also emphasized that audit committee members should seek to understand management's judgments related to the design, preparation and presentation of non-GAAP financial measures and how those measures might differ from other companies. [2016 AICPA Conf]

Management should consider establishing a written policy that ensures non-GAAP financial measures are transparent, consistent and comparable. For example, the policy may address management's consideration of the following questions that are provided in the CAQ's publication, *Questions on Non-GAAP Measures: A Tool for Audit Committees.*

CAQ's *Questions on Non-GAAP Measures: A Tool for Audit Committees*[4]
Transparency
1. What is the purpose of the non-GAAP measure? Would a reasonable investor be misled by the information? 2. Has the non-GAAP measure been given more prominence than the most directly comparable GAAP measure? For example, an earnings release headline or caption that may present a non-GAAP measure without the comparable GAAP measure.

[4] Reproduced with permission from the Center for Audit Quality.

CAQ's *Questions on Non-GAAP Measures: A Tool for Audit Committees*[4]
3. How many non-GAAP measures have been presented? Is this necessary and appropriate for investors to understand performance?
4. Why has management selected this particular non-GAAP measure to supplement GAAP measures that are already established and consistently applied within its industry or across industries?
5. Does the company's disclosure provide substantive detail on the purpose and usefulness of the non-GAAP disclosure for investors?
6. How is the non-GAAP measure calculated? Does the disclosure clearly and adequately describe the calculation, as well as the reconciling items between the GAAP and non-GAAP measure?
7. How does management use the measure, and has that been disclosed? For example, is the measure linked to executive compensation?
8. Is the non-GAAP measure sufficiently defined and clearly labeled as non-GAAP? Could the title or description of the measure be confused with a GAAP measure?
9. Are any of the "per-share" non-GAAP measures in substance per-share non-GAAP liquidity measures, which are prohibited, or could they be used as liquidity measures even if disclosed as a performance measure?
10. What are the tax implications of the non-GAAP measure? Does the calculation align with the tax consequences and the nature of the measure (i.e., performance vs. liquidity)?
11. Does the company have material agreements, like a debt covenant, that require compliance with a non-GAAP measure? Does the company disclose that?
Consistency
1. Are the non-GAAP measures presented by the company balanced? Do the measures eliminate similar items that affect both revenue and expense, or do they only eliminate one or the other?
2. Has the company presented this measure before? Has the company stopped presenting certain measures?
3. Has the method or nature of the inputs to the calculation changed since the last time presented? If so, why and have the comparable periods been revised consistently?
4. If the calculation has changed, are the changes adequately described? Is there a need to revise prior period measures for consistency and to avoid a potentially misleading presentation? Would they have been materially different such that the prior period calculations should be revised?
5. Is there a correlation between what the measure presents, and the company's actual results? For example, if a non-GAAP measure presents positive growth, does that correlate with the GAAP results of the company? If not, have those differences been clearly communicated to investors?
6. Have items characterized as nonrecurring, infrequent, or unusual occurred in the past two years? Are these items not reasonably likely to recur again in the next two years?

CAQ's *Questions on Non-GAAP Measures: A Tool for Audit Committees*[4]
Comparability
1. Do other companies present this measure or similar measures? If not, why is this measure important for this company but not its peers? 2. Is management aware of differences in their calculation compared to other companies? Why are the calculations different? 3. If there are differences from peers, is the disclosure transparent about how the measure is calculated differently than peers? 4. Have any industry groups defined standard calculations that companies within the industry could follow in order to present more comparable measures to investors?
Other Important Questions
1. Who in management is responsible for the oversight of non-GAAP measures? Does management maintain a policy on non-GAAP measures? Does that policy address the calculation, presentation, and disclosure of these measures? 2. Has the disclosure committee reviewed the non-GAAP measures? 3. What is the source of the information used in the calculation? Are there adequate controls and oversight in place over both the calculation and disclosure of the measure? 4. How has management involved legal counsel on presentation and usage of non-GAAP measures and their compliance with SEC regulations? 5. Has management monitored SEC speeches and comment letters regarding non-GAAP measures and considered those in making its own presentation? 6. Is management aware of any others in the industry who have received an SEC comment letter about a particular non-GAAP measure, and, if so, have they considered that in reference to their disclosures as applicable? 7. Has internal audit been involved with non-GAAP measures? What feedback have they given management?

7.4 Key performance indicators and metrics

In January 2020, the SEC issued Guidance on Key Performance Indicators and Metrics to remind registrants of the requirements related to non-GAAP financial measures and the applicability of these requirements to those non-GAAP financial measures presented in MD&A. This section has been updated from the previous edition to reflect those revisions.

Companies often present a variety of financial and nonfinancial information in MD&A that management believes is important to present for a thorough understanding of the company to investors through the eyes of management. The specific measures and metrics considered necessary to disclose will vary by company and industry.

What are KPIs or other metrics?

Key performance indicators and other metrics are quantifiable financial or nonfinancial measures or qualitative factors the company believes are necessary to an understanding of its financial condition and/or results of operations. They include information used in the management of the business that management believes would be decision-useful to an investor and/or enhance a reader's understanding of MD&A. [FR-87]

They can relate to the company's industry or the macro-economic environment; they also can be specific to the company. Additionally, some metrics can be a combination of external and internal information. KPIs and other metrics can be based on GAAP or may be non-GAAP financial measures.

Common examples KPI's or other metrics	
- Same store sales	- Revenue
- Revenue per subscriber	- EBITDA
- Number of stores	- EBITDAX
- Number of subscribers	- Total deposits

Examples of metrics could also include the observed effects of prior environmental or company-specific events on operations.

Disclosures related to KPIs

The SEC staff has commented that it is important for companies that report such KPIs and metrics to be mindful of whether these items meet the SEC's definition of a non-GAAP financial measure and to proactively and thoughtfully address the relevant risks.[5]

Certain key performance and other metrics may be considered operating performance or statistical measures. These measures may fall outside the scope of the SEC's definition of a non-GAAP financial measure (see section 1.4.20). [FR-65 II.A(2)(b)]

The SEC's definition of non-GAAP financial measures also excludes financial information that does not in effect provide numerical measures that differ from the comparable GAAP measure. [FR-65 II.A(2)(b)]

In January 2020 the SEC published guidance on the disclosure of KPIs and other metrics in MD&A. The guidance reminds registrants to first consider whether an existing regulatory disclosure framework for the information applies (e.g. GAAP or the requirements discussed in this publication for non-GAAP financial measures).

However, even when such frameworks do not apply, the SEC would still expect companies to consider whether additional disclosure or information may be necessary to prevent the KPI or other metric from being misleading and to provide adequate context for an investor's understanding.

5 Advancing Our Capital Markets with High-Quality Information, May 2017, then Chief Accountant of the SEC.

Accordingly, the SEC would generally expect the following disclosures to accompany KPIs and other metrics, even when they are not in the scope of the non-GAAP requirements: [FR-87]

— a clear definition of the metric and how it is calculated;
— a statement indicating the reasons why the metric provides useful information to investors; and
— a statement indicating how management uses the metric in managing or monitoring the performance of the business.

Companies should also consider whether there are relevant estimates or assumptions underlying the KPI (or other metric) or its calculation, and whether disclosure of such items is necessary for it not to be materially misleading.

Changes in KPIs or other metrics

Changes in the methods of calculating a KPI or other metric from one period to the next without clear disclosure could be misleading to an investor's understanding. As a result, if such changes are made, the SEC would generally expect companies to disclose the following additional information:

— the differences in the way the metric is calculated or presented compared to prior periods;
— the reasons for such changes;
— the effects of any such changes on the amounts or other information being disclosed and on amounts or other information previously reported; and
— such other differences in methodology and results that would reasonably be expected to be relevant to an understanding of the company's performance or prospects.

Depending on the significance of the change(s) in methodology and results, the company should consider whether it is necessary to recast prior metrics to conform to the current presentation and place the current disclosure in an appropriate context. [FR-87]

Controls and process related to KPIs

Companies should first understand the nature of the key performance indicators or metrics (i.e. are they operating and statistical measure or non-GAAP financial measures?) and ensure that adequate disclosure controls and procedures are in place (see section 7.2). These other reporting processes may require more steps than some GAAP processes, not fewer, because a company's other reporting does not have the benefit of standard-setting due process that solicits stakeholder views on (1) a representationally faithful manner of reporting a particular event or transaction and (2) the types of disclosures needed by investors. A company should look to its own policies, the audit committee, and other stakeholders for input.

7.5 External auditor responsibility related to non-GAAP financial measures

An external auditor's responsibility related to non-GAAP financial measures is governed by AS 2710, *Other Information in Documents Containing Audited*

Financial Statements, which requires the external auditor to read the other information and consider whether it, or the manner in which it is presented, is materially inconsistent with information, or the manner in which it is presented, that appears in the audited financial statements. In addition, certain procedures are required under AS 2710 if the external auditor believes that there is a material misstatement of fact in the non-GAAP financial measure that is not a material inconsistency.

If the external auditor does not believe that the non-GAAP financial measure represents or contains a material misstatement of fact, they are not required to perform other procedures over the non-GAAP financial measure if no material inconsistency is identified. Furthermore, under current PCAOB standards, the external auditor has no responsibility for performing specific procedures related to earnings releases (whether furnished or filed), investor presentations or other communications – e.g. calls with analysts and information on the registrant's website.

AS 4105, *Reviews of Interim Financial Information*, contains guidance similar to AS 2710 about reading other information that accompanies interim financial information and considering whether that information, or the manner in which it is presented, is inconsistent with the interim financial information. [AS 4105.18(f)]

Additionally, a company's preparation and disclosure of non-GAAP financial measures is outside the scope of the external auditor's assessment of internal control over financial reporting.

Appendix 1

Regulation G – Conditions for Use of Non-GAAP Financial Measures

§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 Web cast, 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.

Appendix 2

Regulation S-K Item 10(e) – Use of non-GAAP financial measures in Commission filings

(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 comprehensive 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.

Appendix 3

Instruction 2 to Item 2.02 – The requirements of paragraph (e)(1)(i) of Item 10 of Regulation S-K (17 CFR 229.10(e)(1)(i)) shall apply to disclosures under this Item 2.02

Instructions.

1. […]
2. The requirements of paragraph (e)(1)(i) of Item 10 of Regulation S-K (17 CFR 229.10(e)(1)(i)) (or paragraph (h)(1)(i) of Item 10 of Regulation S-B (17 CFR 228.10(h)(1)(i)) in the case of a small business issuer) shall apply to disclosures under this Item 2.02.

(e)(1)(i) of Item 10 of Regulation S-K:

(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.

Appendix 4

Compliance & Disclosure Interpretations – Non-GAAP Financial Measures

Last Update: December 13, 2022

These Compliance & Disclosure Interpretations ("C&DIs") comprise the Division's interpretations of the rules and regulations on the use of non-GAAP financial measures. The bracketed date following each C&DI is the latest date of publication or revision.

QUESTIONS AND ANSWERS OF GENERAL APPLICABILITY

Section 100. General

Question 100.01

Question: Can certain adjustments, although not explicitly prohibited, result in a non-GAAP measure that is misleading?

Answer: Yes. Certain adjustments may violate Rule 100(b) of Regulation G because they cause the presentation of the non-GAAP measure to be misleading. Whether or not an adjustment results in a misleading non-GAAP measure depends on a company's individual facts and circumstances.

Presenting a non-GAAP performance measure that excludes normal, recurring, cash operating expenses necessary to operate a registrant's business is one example of a measure that could be misleading.

When evaluating what is a normal, operating expense, the staff considers the nature and effect of the non-GAAP adjustment and how it relates to the company's operations, revenue generating activities, business strategy, industry and regulatory environment.

The staff would view an operating expense that occurs repeatedly or occasionally, including at irregular intervals, as recurring. [December 13, 2022]

Question 100.02

Question: Can a non-GAAP measure be misleading if it is presented inconsistently between periods?

Answer: Yes. For example, a non-GAAP measure that adjusts a particular charge or gain in the current period and for which other, similar charges or gains were not also adjusted in prior periods could violate Rule 100(b) of Regulation G unless the change between periods is disclosed and the reasons for it explained. In addition, depending on the significance of the change, it may be necessary to recast prior measures to conform to the current presentation and place the disclosure in the appropriate context. [May 17, 2016]

Question 100.03

Question: Can a non-GAAP measure be misleading if the measure excludes charges, but does not exclude any gains?

Answer: Yes. For example, a non-GAAP measure that is adjusted only for non-recurring charges when there were non-recurring gains that occurred during the same period could violate Rule 100(b) of Regulation G. [May 17, 2016]

Question 100.04

Question: Can a non-GAAP measure violate Rule 100(b) of Regulation G if the recognition and measurement principles used to calculate the measure are inconsistent with GAAP?

Answer: Yes. By definition, a non-GAAP measure excludes or includes amounts from the most directly comparable GAAP measure. However, non-GAAP adjustments that have the effect of changing the recognition and measurement principles required to be applied in accordance with GAAP would be considered individually tailored and may cause the presentation of a non-GAAP measure to be misleading. Examples the staff may consider to be misleading include, but are not limited to:

— changing the pattern of recognition, such as including an adjustment in a non-GAAP performance measure to accelerate revenue recognized ratably over time in accordance with GAAP as though revenue was earned when customers were billed;
— presenting a non-GAAP measure of revenue that deducts transaction costs as if the company acted as an agent in the transaction, when gross presentation as a principal is required by GAAP, or the inverse, presenting a measure of revenue on a gross basis when net presentation is required by GAAP; and
— changing the basis of accounting for revenue or expenses in a non-GAAP performance measure from an accrual basis in accordance with GAAP to a cash basis. [December 13, 2022]

Question 100.05

Question: Can a non-GAAP measure be misleading if it, and/or any adjustment made to the GAAP measure, is not appropriately labeled and clearly described?

Answer: Yes. Non-GAAP measures are not always consistent across, or comparable with, non-GAAP measures disclosed by other companies. Without an appropriate label and clear description, a non-GAAP measure and/or any adjustment made to arrive at that measure could be misleading to investors. The following examples would violate Rule 100(b) of Regulation G:

— Failure to identify and describe a measure as non-GAAP.
— Presenting a non-GAAP measure with a label that does not reflect the nature of the non-GAAP measure, such as:
  - a contribution margin that is calculated as GAAP revenue less certain expenses, labeled "net revenue";
  - non-GAAP measure labeled the same as a GAAP line item or subtotal even though it is calculated differently than the similarly labeled GAAP measure, such as "Gross Profit" or "Sales"; and

- a non-GAAP measure labeled "pro forma" that is not calculated in a manner consistent with the pro forma requirements in Article 11 of Regulation S-X. [December 13, 2022]

Question 100.06

Question: Can a non-GAAP measure be misleading, and violate Rule 100(b) of Regulation G, even if it is accompanied by disclosure about the nature and effect of each adjustment made to the most directly comparable GAAP measure?

Answer: Yes. It is the staff's view that a non-GAAP measure could mislead investors to such a degree that even extensive, detailed disclosure about the nature and effect of each adjustment would not prevent the non-GAAP measure from being materially misleading. [December 13, 2022]

Section 101. Business Combination Transactions

Question 101.01

Question: Are financial measures included in forecasts provided to a financial advisor and used in connection with a business combination transaction non-GAAP financial measures?

Answer: No, if the conditions described below are met.

Item 10(e)(5) of Regulation S-K and Rule 101(a)(3) of Regulation G provide that 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. Accordingly, financial measures provided to a financial advisor would be excluded from the definition of non-GAAP financial measures, and therefore not subject to Item 10(e) of Regulation S-K and Regulation G, if and to the extent:

— the financial measures are included in forecasts provided to the financial advisor for the purpose of rendering an opinion that is materially related to the business combination transaction; and
— the forecasts are being disclosed in order to comply with Item 1015 of Regulation M-A or requirements under state or foreign law, including case law, regarding disclosure of the financial advisor's analyses or substantive work. [Oct. 17, 2017]

Question 101.02

Question: Can the registrant rely on the Answer to Question 101.01 if the same forecasts provided to its financial advisor are also provided to its board of directors or board committee?

Answer: Yes. [April 4, 2018]

Question 101.03

Question: A registrant provides forecasts to bidders in a business combination transaction. To avoid anti-fraud concerns under the federal securities laws or ensure that the other disclosures in the document are not misleading, it determines that such forecasts should be disclosed. Are the financial measures contained in forecasts disclosed for this purpose considered non-GAAP financial measures?

Answer: If a registrant determines that forecasts exchanged between the parties in a business combination transaction are material and that disclosure of such forecasts is required to comply with the anti-fraud and other liability provisions of the federal securities laws, the financial measures included in such forecasts would be excluded from the definition of non-GAAP financial measures and therefore not subject to Item 10(e) of Regulation S-K and Regulation G. [April 4, 2018]

Question 101.04

Question: Does the exemption from Regulation G and Item 10(e) of Regulation S-K for non-GAAP financial measures disclosed in communications relating to a business combination transaction extend to the same non-GAAP financial measures disclosed in registration statements, proxy statements and tender offer statements?

Answer: No. There is an exemption from Regulation G and Item 10(e) of Regulation S-K for non-GAAP financial measures disclosed in communications subject to Securities Act Rule 425 and Exchange Act Rules 14a-12 and 14d-2(b)(2); it is also intended to apply to communications subject to Exchange Act Rule 14d-9(a)(2). This exemption does not extend beyond such communications. Consequently, 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, proxy statement, or tender offer statement, this exemption from Regulation G and Item 10(e) of Regulation S-K would not be available for that non-GAAP financial measure. [Oct. 17, 2017]

Question 101.05

Question: If 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, may companies use that measure for reconciliation purposes, in lieu of a GAAP financial measure?

Answer: Yes. [Jan. 11, 2010]

Section 102. Item 10(e) of Regulation S-K

Question 102.01

Question: What measure was contemplated by "funds from operations" in footnote 50 to Exchange Act Release No. 47226, Conditions for Use of Non-GAAP Financial Measures, 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: The reference to "funds from operations" in footnote 50, or "FFO," refers to the measure defined as of January 1, 2000, by the National Association of Real Estate Investment Trusts (NAREIT). NAREIT has revised and clarified the definition since 2000. The staff accepts NAREIT's definition of FFO in effect as of May 17, 2016 as a performance measure and does not object to its presentation on a per share basis. [May 17, 2016]

Question 102.02

Question: May a registrant present FFO on a basis other than as defined by NAREIT as of May 17, 2016?

Answer: Yes, provided that any adjustments made to FFO comply with Item 10(e) of Regulation S-K and the measure does not violate Rule 100(b) of Regulation G. Any adjustments made to FFO must comply with the requirements of Item 10(e) of Regulation S-K for a performance measure or a liquidity measure, depending on the nature of the adjustments, some of which may trigger the prohibition on presenting this measure on a per share basis. See Section 100 and Question 102.05. [May 17, 2016]

Question 102.03

Question: 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 this prohibition based on the description of the charge or gain, or is it based on the nature of the charge or gain?

Answer: The prohibition is based on the description of the charge or gain that is being adjusted. It would not be appropriate to state that a charge or gain is non-recurring, infrequent or unusual unless it meets the specified criteria. The fact that a registrant cannot describe a charge or gain as non-recurring, infrequent or unusual, however, does not mean that the registrant cannot adjust for that charge or gain. Registrants can make adjustments they believe are appropriate, subject to Regulation G and the other requirements of Item 10(e) of Regulation S-K. See Question 100.01. [May 17, 2016]

Question 102.04

Question: Is the registrant required to use the non-GAAP measure in managing its business or for other purposes in order to be able to disclose it?

Answer: No. Item 10(e)(1)(i)(D) of Regulation S-K states only that, "[t]o the extent material," there should be a statement disclosing the additional purposes, "if any," for which the registrant's management uses the non-GAAP financial measure. There is no prohibition against disclosing a non-GAAP financial measure that is not used by management in managing its business. [Jan. 11, 2010]

Question 102.05

Question: While Item 10(e)(1)(ii) of Regulation S-K does not prohibit the use of per share non-GAAP financial measures, the adopting release for Item 10(e), Exchange Act Release No. 47226, 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, *Reporting Cash Flow and Other Related Data*, and Accounting Standards Codification 230, are non-GAAP earnings per share numbers prohibited in documents filed or furnished with the Commission?

Answer: No. Item 10(e) recognizes that certain non-GAAP per share performance measures may be meaningful from an operating standpoint. Non-GAAP per share performance measures should be reconciled to GAAP earnings per share. On the other hand, non-GAAP liquidity measures that measure cash generated must not be presented on a per share basis in documents filed or furnished with the Commission, consistent with Accounting Series Release No. 142. Whether per share data is prohibited depends on whether the non-GAAP measure can be used as a liquidity measure, even if management presents it solely as a performance measure. When analyzing these questions, the staff will focus on the substance of the non-GAAP measure and not management's characterization of the measure.
[May 17, 2016]

Question 102.06

Question: Is Item 10(e)(1)(i) of Regulation S-K, which requires the prominent presentation of, and reconciliation to, the most directly comparable GAAP financial measure or measures, intended to change the staff's practice of requiring the prominent presentation of amounts for the three major categories of the statement of cash flows when a non-GAAP liquidity measure is presented?

Answer: No. The requirements in Item 10(e)(1)(i) are consistent with the staff's practice. The three major categories of the statement of cash flows should be presented when a non-GAAP liquidity measure is presented.
[Jan. 11, 2010]

Question 102.07

Question: Some companies present a measure of "free cash flow," which is 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)(1)(ii) of Regulation S-K prohibit this measure in documents filed with the Commission?

Answer: No. The deduction of capital expenditures from the GAAP financial measure of cash flows from operating activities would not violate the prohibitions in Item 10(e)(1)(ii). However, companies should be aware that this measure does not have a uniform definition and its title does not describe how it is calculated. Accordingly, a clear description of how this measure is calculated, as well as the necessary reconciliation, should accompany the measure where it is used. Companies should also avoid inappropriate or potentially misleading inferences about its usefulness. 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. Also, free cash flow is a liquidity measure that must not be presented on a per share basis. See Question 102.05.
[May 17, 2016]

Question 102.08

Question: Does Item 10(e) of Regulation S-K apply to filed free writing prospectuses?

Answer: Regulation S-K applies to registration statements filed under the Securities Act, as well as registration statements, periodic and current reports and other documents filed under the Exchange Act. A free writing prospectus is not filed as part of the issuer's registration statement, unless the issuer files it on Form 8-K or otherwise includes it or incorporates it by reference into the registration statement. Therefore, Item 10(e) of Regulation S-K does not apply to a filed free writing prospectus unless the free writing prospectus is included in or incorporated by reference into the issuer's registration statement or included in an Exchange Act filing. [Jan. 11, 2010]

Question 102.09

Question: Item 10(e)(1)(ii)(A) 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 disclosed in a filing, the non-GAAP financial measure "Adjusted EBITDA" would violate Item 10(e), as it excludes charges that are required to be cash settled. May a company nonetheless disclose this non-GAAP financial measure?

Answer: Yes. The prohibition in Item 10(e) notwithstanding, because MD&A requires disclosure of material items affecting liquidity, 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, then the company may be required to disclose the measure as calculated by the debt covenant as part of its MD&A. In disclosing the non-GAAP financial measure in this situation, a company should consider also disclosing the following:

- the material terms of the credit agreement including 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. [Jan. 11, 2010]

Question 102.10

Question 102.10(a): Item 10(e)(1)(i)(A) of Regulation S-K requires that when a registrant presents a non-GAAP measure it must present the most directly comparable GAAP measure with equal or greater prominence. This requirement applies to non-GAAP measures presented in documents filed with the Commission and also earnings releases furnished under Item 2.02 of Form 8-K. Are there examples of disclosures that would cause a non-GAAP measure to be more prominent?

Answer: Yes. This requirement applies to the presentation of, and any related discussion and analysis of, a non-GAAP measure. Whether a non-GAAP measure is more prominent than the comparable GAAP measure generally depends on the facts and circumstances in which the disclosure is made. The staff would consider the following to be examples of non-GAAP measures that are more prominent than the comparable GAAP measures:

— Presenting an income statement of non-GAAP measures. See Question 102.10(c).
— Presenting a non-GAAP measure before the most directly comparable GAAP measure or omitting the comparable GAAP measure altogether, including in an earnings release headline or caption that includes a non-GAAP measure.
— Presenting a ratio where a non-GAAP financial measure is the numerator and/or denominator without also presenting the ratio calculated using the most directly comparable GAAP measure(s) with equal or greater prominence.
— Presenting a non-GAAP measure using a style of presentation (e.g., bold, larger font, etc.) that emphasizes the non-GAAP measure over the comparable GAAP measure.
— Describing a non-GAAP measure as, for example, "record performance" or "exceptional" without at least an equally prominent descriptive characterization of the comparable GAAP measure.
— Presenting charts, tables or graphs of a non-GAAP financial measures without presenting charts, tables or graphs of the comparable GAAP measures with equal or greater prominence, or omitting the comparable GAAP measures altogether.
— Providing discussion and analysis of a non-GAAP measure without a similar discussion and analysis of the comparable GAAP measure in a location with equal or greater prominence. [December 13, 2022]

Question 102.10(b): Are there examples of disclosures that would cause the non-GAAP reconciliation required by Item 10(e)(1)(i)(B) of Regulation S-K to give undue prominence to a non-GAAP measure?

Answer: Yes. The staff would consider the following examples of disclosure of non-GAAP measures as more prominent than the comparable GAAP measures:

— Starting the reconciliation with a non-GAAP measure.
— Presenting a non-GAAP income statement when reconciling non-GAAP measures to the most directly comparable GAAP measures. See Question 102.10(c).
— When presenting a forward-looking non-GAAP measure, a registrant may exclude the quantitative reconciliation if it is relying on the exception provided by Item 10(e)(1)(i)(B) of Regulation S-K. A measure would be considered more prominent than the comparable GAAP measure if it is presented without disclosing reliance upon the exception, identifying the information that is unavailable, and its probable significance in a location of equal or greater prominence. [December 13, 2022]

Question 102.10(c): The staff considers the presentation of a non-GAAP income statement, alone or as part of the required non-GAAP reconciliation, as giving undue prominence to non-GAAP measures. What is considered to be a non-GAAP income statement?

Answer: The staff considers a non-GAAP income statement to be one that is comprised of non-GAAP measures and includes all or most of the line items and subtotals found in a GAAP income statement. [December 13, 2022]

Question 102.11

Question: How should income tax effects related to adjustments to arrive at a non-GAAP measure be calculated and presented?

Answer: A registrant should provide income tax effects on its non-GAAP measures depending on the nature of the measures. If a measure is a liquidity measure that includes income taxes, it might be acceptable to adjust GAAP taxes to show taxes paid in cash. If a measure is a performance measure, the registrant should include current and deferred income tax expense commensurate with the non-GAAP measure of profitability. In addition, adjustments to arrive at a non-GAAP measure should not be presented "net of tax." Rather, income taxes should be shown as a separate adjustment and clearly explained. [May 17, 2016]

Question 102.12

Question: A registrant discloses a financial measure or information that is not in accordance with GAAP or calculated exclusively from amounts presented in accordance with GAAP. In some circumstances, this financial information may have been prepared in accordance with guidance published by a government, governmental authority or self-regulatory organization that is applicable to the registrant, although the information is not required disclosure by the government, governmental authority or self-regulatory organization. Is this information considered to be a "non-GAAP financial measure" for purposes of Regulation G and Item 10 of Regulation S-K?

Answer: Yes. Unless this information is *required* to be disclosed by a system of regulation that is applicable to the registrant, it is considered to be a "non-GAAP financial measure" under Regulation G and Item 10 of Regulation S-K. Registrants that disclose such information must provide the disclosures required by Regulation G or Item 10 of Regulation S-K, if applicable, including the quantitative reconciliation from the non-GAAP financial measure to the most comparable measure calculated in accordance with GAAP. This reconciliation should be in sufficient detail to allow a reader to understand the nature of the reconciling items. [Apr. 24, 2009]

Section 103. EBIT and EBITDA

Question 103.01

Question: Exchange Act Release No. 47226 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 described 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: "Earnings" means net income as presented in the statement of operations under GAAP. Measures that are calculated differently than those described as EBIT and EBITDA in Exchange Act Release No. 47226 should not be characterized as "EBIT" or "EBITDA" and their titles should be distinguished from "EBIT" or "EBITDA," such as "Adjusted EBITDA." These measures are not exempt from the prohibition in Item 10(e)(1)(ii)(A) of Regulation S-K, with the exception of measures addressed in

Question 102.09. [Jan. 11, 2010]

Question 103.02

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

Answer: If a company presents EBIT or EBITDA as a performance measure, such measures 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. In addition, these measures must not be presented on a per share basis. See Question 102.05. [May 17, 2016]

Section 104. Segment Information

Question 104.01

Question: Is segment information that is presented in conformity with Accounting Standards Codification 280, pursuant to which a company may determine segment profitability on a basis that differs from the amounts in the consolidated financial statements determined in accordance with GAAP, considered to be a non-GAAP financial measure under Regulation G and Item 10(e) of Regulation S-K?

Answer: No. Non-GAAP financial measures do not include financial measures that are required to be disclosed by GAAP. Exchange Act Release No. 47226 lists "measures of profit or loss and total assets for each segment required to be disclosed in accordance with GAAP" as examples of such measures. The measure of segment profit or loss and segment total assets under Accounting Standards Codification 280 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 list of examples in Exchange Act Release No. 47226 is not exclusive. As an additional example, because Accounting Standards Codification 280 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. [Jan. 11, 2010]

Question 104.02

Question: Does Item 10(e)(1)(ii) of Regulation S-K prohibit the discussion in MD&A of segment information determined in conformity with Accounting Standards Codification 280?

Answer: No. Where a company includes in its MD&A a discussion of segment profitability determined consistent with Accounting Standards Codification 280, which also requires that a footnote to the company's consolidated financial statements provide a reconciliation, 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 501.06.a, footnote 28. [Jan. 11, 2010]

Question 104.03

Question: Is a measure of segment profit/loss or liquidity that is not in conformity with Accounting Standards Codification 280 a non-GAAP financial measure under Regulation G and Item 10(e) of Regulation S-K?

Answer: Yes. 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 Accounting Standards Codification 280. Such measures are, therefore, non-GAAP financial measures and subject to all of the provisions of Regulation G and Item 10(e) of Regulation S-K. [Jan. 11, 2010]

Question 104.04

Question: 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 Accounting Standards Codification 280 required reconciliation. Would the presentation of the total segment profit or loss measure in any context other than the Accounting Standards Codification 280 required reconciliation in the footnote be the presentation of a non-GAAP financial measure?

Answer: Yes. The presentation of the total segment profit or loss measure in any context other than the Accounting Standards Codification 280 required reconciliation in the footnote would be the presentation of a non-GAAP financial measure because it has no authoritative meaning outside of the Accounting Standards Codification 280 required reconciliation in the footnotes to the company's consolidated financial statements. [Jan. 11, 2010]

Question 104.05

Question: Company X presents a table illustrating a breakdown of revenues by certain products, but does not sum this to the revenue amount presented on Company X's financial statements. Is the information in the table considered a non-GAAP financial measure under Regulation G and Item 10(e) of Regulation S-K?

Answer: No, assuming the product revenue amounts are calculated in accordance with GAAP. The presentation would be considered a non-GAAP financial measure, however, if the revenue amounts are adjusted in any manner. [Jan. 11, 2010]

Question 104.06

Question: Company X has operations in various foreign countries where the local currency is used to prepare the financial statements which are translated into the reporting currency under the applicable accounting standards. In preparing its MD&A, Company X will explain the reasons for changes in various financial statement captions. A portion of these changes will be attributable to changes in exchange rates between periods used for translation. Company X wants to isolate the effect of exchange rate differences and will present financial information in a constant currency — e.g., assume a constant exchange rate between periods for translation. Would such a presentation be considered a non-GAAP measure under

Regulation G and Item 10(e) of Regulation S-K?

Answer: Yes. Company X may comply with the reconciliation requirements of Regulation G and Item 10(e) by presenting the historical amounts and the amounts in constant currency and describing the process for calculating the constant currency amounts and the basis of presentation. [Jan. 11, 2010]

Section 105. Item 2.02 of Form 8-K

Question 105.01

Question: Item 2.02 of Form 8-K 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 web site 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: 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 web site. Alternatively, slides or a similar presentation posted on the web site 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. [Jan. 11, 2010]

Question 105.02

Question: Item 2.02 of Form 8-K 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 web site 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 web site?

Answer: The required information must appear on the company's web site 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 web site 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. [Jan. 11, 2010]

Question 105.03

Question: Does a company's failure to furnish to the Commission the Form 8-K required by Item 2.02 in a timely manner affect the company's eligibility to use Form S-3?

Answer: 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 2.02 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 2.02 of Form 8-K would, of course, be a violation of Section 13(a) of the Exchange Act and the rules thereunder. [Jan. 11, 2010]

Question 105.04 [withdrawn]

Question 105.05

Question: Company X files its quarterly earnings release as an exhibit to its Form 10-Q on Wednesday morning, prior to holding its earnings conference call Wednesday afternoon. Assuming that all of the other conditions of Item 2.02(b) are met, may the company rely on the exemption for its conference call even if it does not also furnish the earnings release in an Item 2.02 Form 8-K?

Answer: Yes. Company X's filing of the earnings release as an exhibit to its Form 10-Q, rather than in an Item 2.02 Form 8-K, before the conference call takes place, would not preclude reliance on the exemption for the conference call. [Jan. 11, 2010]

Question 105.06

Question: Company A issues a press release announcing its results of operations for a just-completed fiscal quarter, including its expected adjusted earnings (a non-GAAP financial measure) for the fiscal period. Would this press release be subject to Item 2.02 of Form 8-K?

Answer: Yes, because it contains material, non-public information regarding its results of operations for a completed fiscal period. The adjusted earnings range presented would be subject to the requirements of Item 2.02 applicable to non-GAAP financial measures. [Jan. 11, 2010]

Question 105.07

Question: 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 2.02 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: The company must furnish the material, previously non-public, financial and other statistical information required to be furnished on Item 2.02 of Form 8-K as an exhibit to a Form 8-K and satisfy the other requirements of Item 2.02 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. [Jan. 15, 2010]

Section 106. Foreign Private Issuers

Question 106.01

Question: 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: 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.

The concept of "expressly permitted" can be also be demonstrated with explicit acceptance of a presentation by the primary securities regulator in the foreign private issuer's home country jurisdiction or market. Explicit acceptance by the regulator would include (1) published views of the regulator or members of the regulator's staff or (2) a letter from the regulator or its staff to the foreign private issuer indicating the acceptance of the presentation — which would be provided to the Commission's staff upon request. [Jan. 11, 2010]

Question 106.02

Question: A foreign private issuer furnishes a press release on 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: Yes. 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 submitted 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). Using a separate report on Form 6-K containing the portions that would be incorporated by reference 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. [Jan. 11, 2010]

Question 106.03

Question: 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 filed Securities Act registration statement (other than an MJDS registration statement)?

Answer: Yes, the company must comply with all of the provisions of Item 10(e) of Regulation S-K. [Jan. 11, 2010]

Question 106.04

Question: 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: No. Information included in a Form 40-F is not subject to Regulation G or Item 10(e) of Regulation S-K. [Jan. 11, 2010]

Section 107. Voluntary Filers

Question 107.01

Question: 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 under the Exchange Act 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: Yes. Regulation S-K relates to filings with the Commission. Accordingly, a company that is making filings as described in this question must comply with Regulation S-K or Form 20-F, as applicable, in its 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. [Jan. 11, 2010]

Section 108. Compensation Discussion and Analysis/Proxy Statement

Question 108.01

Question: Instruction 5 to Item 402(b) provides that "[d]isclosure of target levels that are non-GAAP financial measures will not be subject to Regulation G and Item 10(e); however, disclosure must be provided as to how the number is calculated from the registrant's audited financial statements." Does this instruction extend to non-GAAP financial information that does not relate to the disclosure of target levels, but is nevertheless included in Compensation Discussion & Analysis ("CD&A") or other parts of the proxy statement – for example, to explain the relationship between pay and performance?

Answer: No. Instruction 5 to Item 402(b) is limited to CD&A disclosure of target levels that are non-GAAP financial measures. If non-GAAP financial measures are presented in CD&A or in any other part of the proxy statement for any other purpose, such as to explain the relationship between pay and performance or to justify certain levels or amounts of pay, then those non-GAAP financial measures are subject to the requirements of Regulation G and Item 10(e) of Regulation S-K.

In these pay-related circumstances only, the staff will not object if a registrant includes the required GAAP reconciliation and other information in an annex to the proxy statement, provided the registrant includes a prominent cross-reference to such annex. Or, if the non-GAAP financial measures are the same as those included in the Form 10-K that is incorporating by reference the proxy statement's Item 402 disclosure as part of its Part III information, the staff will not object if the registrant complies with Regulation G and Item 10(e) by providing a prominent cross-reference to the pages in the Form 10-K containing the required GAAP reconciliation and other information. [July 8, 2011]

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