

SEC Staff Answers to Frequently Asked Questions About non-GAAP Financial Measures

SEC STAFF ISSUES ANSWERS TO FREQUENTLY ASKED QUESTIONS ABOUT NON-GAAP FINANCIAL MEASURES

On June 13, 2003, the staff of the Securities and Exchange Commission issued answers to frequently asked questions about the use of "non-GAAP financial measures" in documents filed with the Commission (which are generally subject to the requirements and prohibitions of new Item 10(e) of Regulation S-K) and in other public disclosures (which are generally subject to the requirements of new Regulation G).

The following discussion briefly summarizes the more significant issues addressed by the staff in the release in eight specified categories; the full text of the release and our original memorandum of January 30, 2003 concerning the Commission's rules on non-GAAP financial measures are also attached for your reference.

1. Transition Issues

Registration statements filed after March 28, 2003 must comply with Regulation G. If any such registration statement incorporates by reference an annual report filed prior to March 28, 2003 that contains a non-GAAP financial measure and does not comply with Regulation G, the registrant must:

Amend the annual report to include the information required by Regulation G;

Include the non-GAAP financial measure in the registration statement, together with the information required by Regulation G; or

File and incorporate by reference into the registration statement a report on Form 8-K (or, in the case of a foreign private issuer, Form 6-K) that contains the information required by Regulation G.

The staff will not object, however, if companies do not comply with this position for registration statements on Form S-8.

Item 10(e) applies only to non-GAAP financial measures calculated for periods ending on or after March 28, 2003. If a registration statement filed after March 28,

2003 incorporates by reference an annual report or quarterly report filed prior to March 28, 2003 that contains a non-GAAP financial measure, Item 10(e) does not apply to that non-GAAP financial measure unless it relates to a period ending on or after March 28, 2003 (e.g., a projection).

The staff cautions, however, that Item 10(e) generally codifies pre-existing staff guidance, and that the annual or quarterly report already should have complied with that guidance.

If after March 28, 2003 an issuer files an amendment to a Form 10-K originally filed before March 28, 2003, Regulation G applies to any non-GAAP financial measures included in the amendment as actually filed.

A non-GAAP financial measure posted on an issuer's website prior to March 28, 2003 that did not, at the time of posting, comply with Regulation G need not be removed from the issuer's website but must be brought into compliance with Regulation G if it is revised or updated and posted on the website after March 28, 2003.

2. Business Combination Transactions

The exemption from Regulation G for certain communications in connection with business combinations does not apply to non-GAAP financial measures disclosed in Securities Act registration statements or in proxy or tender offer statements. By contrast, the exemption from Regulation G for non-GAAP financial measures disclosed pursuant to Item 1015 of Regulation M-A applies even to Securities Act registration statements and to proxy and tender offer statements.

Where reconciliation of a non-GAAP financial measure is required and the most directly comparable measure is a *pro forma* measure prepared and presented in accordance with Article 11 of Regulation S-X, companies may reconcile the non-GAAP financial measure to that measure.

3. Item 10(e) of Regulation S-K

If a non-GAAP financial measure reflects an adjustment for an item identified as recurring, the staff cautions that the measure may be misleading absent disclosure regarding, among other things:

The manner in which management uses the non-GAAP financial measure to conduct or evaluate its business;

The economic substance behind management's decision to use the non-GAAP financial measure;

The material limitations associated with the use of the non-GAAP financial measure as compared to the use of the most directly comparable GAAP financial measure; and

The manner in which management compensates for these limitations when using the non-GAAP financial measure.

If there is a pattern of past restructuring charges, the staff cautions that it may be difficult for a company to meet the burden of disclosing why a non-GAAP measure that excludes the effect of restructuring charges is useful to investors.

If "Adjusted EBITDA" is a term in a company's credit agreement, and if information about Adjusted EBITDA therefore is material to investors' understanding of the company's liquidity or capital resources, disclosure concerning that measure may be required in the company's MD&A. The staff cautions, however, that such disclosure could be misleading unless certain criteria set forth in the release are satisfied.

While non-GAAP earnings per share measures are not specifically prohibited by Item 10(e), the staff notes in the release disclosures viewed as "critical" accompanying items and that cash flow per share or other per share measures of liquidity continue to be prohibited.

"Free cash flow," defined as cash flow from operations minus cash flow for capital expenditures, ordinarily would not violate the prohibitions of Item 10(e). The staff cautions, however, that additional disclosure may be required to prevent readers from drawing the inference that free cash flow represents residual cash flow available for discretionary expenditures.

4. EBIT and EBITDA

When presenting a non-GAAP financial measure titled "EBIT" or "EBITDA," companies must start from GAAP net income. Measures that are calculated differently should not be characterized as "EBIT" or "EBITDA."

When EBIT and EBITDA are presented as performance measures, they should be reconciled to GAAP net income, not to operating income.

5. Segment Information

No non-GAAP financial measure is deemed to be presented if an issuer includes in its MD&A a table that separately presents (i) segment information for international operations excluding the effect of changes in foreign exchange rates and (ii) the effect of exchange rates, where the purpose of the presentation is to show changes in revenue derived from increases in sales volumes, prices and exchange rates as part of the MD&A discussion, so long as the information presented sums to the revenue amount presented in the issuer's financial statements. If the issuer presents the foreign exchange adjusted measure by itself, however, it has presented a non-GAAP financial measure under Regulation G and Item 10(e) of Regulation S-K.

Segment financial information required or expressly permitted by Statement of Financial Accounting Standards No. 131 ("SFAS No. 131") is not a non-GAAP financial measure, and such information may be, or may be required to be, discussed in MD&A.

If segment profitability is determined on a basis that differs from GAAP consolidated operating profit, such that SFAS No. 131 requires a reconciliation in the notes to the issuer's financial statements, any discussion of segment profitability in MD&A should include a complete discussion of the reconciling items.

Segment measures that are adjusted to include amounts excluded from, or exclude amounts included in, the segment measure calculated and presented in accordance with SFAS No. 131 are non-GAAP financial measures. The staff cautions that it would be difficult to demonstrate that such segment measures are useful to investors as required by Item 10(e).

A "consolidated" segment profit or loss figure consisting of the sum of individual segment profit or loss figures, while permitted in a limited context in the notes to the financial statements pursuant to SFAS No. 131, would be a non-GAAP financial measure if presented outside that context and therefore subject to Regulation G and Item 10(e).

6. Item 12 of Form 8-K

Item 12 of Form 8-K generally requires that a reporting issuer furnish to the Commission on Form 8-K any material, previously non-public information released by the issuer with respect to a completed fiscal period. Under the exemption from Item 12 of Form 8-K that is available for earnings information presented orally, telephonically, by webcast, by broadcast or by similar means, an audio file of the initial webcast of an earnings conference call generally satisfies the condition that the issuer must provide on its website any financial or other statistical information contained in the presentation.

Under the exemption from Item 12 of Form 8-K that is available for earnings information presented orally, telephonically, by webcast, by broadcast or by similar means, material financial and other statistical information contained in the presentation and not previously disclosed generally must appear on the issuer's website at the time the oral presentation is made. If material information is disclosed unexpectedly in connection with the question and answer session that was part of the oral presentation, the information must be posted on the company's website promptly after it is disclosed.

Failure to furnish a Form 8-K required by Item 12 of the Form in a timely manner does not affect the issuer's eligibility to use Form S-3. The staff cautions, however, that failure to furnish the Form 8-K in a timely manner would constitute a violation of Section 13(a) of the Exchange Act and the rules of the Commission thereunder.

7. Foreign Private Issuers

For purposes of the exception from Item 10(e) for foreign private issuers that permits presentation of otherwise prohibited non-GAAP financial measures that are "expressly permitted" by home-country financial accounting standard setters, "expressly permitted" means specifically identified as an acceptable measure by the standard setter, as more fully described in the release.

Where a foreign private issuer wishes to incorporate by reference into a Securities Act registration statement only that portion of its earnings release that does not contain non-GAAP financial measures, it may do so either by:

Furnishing the entire earnings release on Form 6-K and indicating in the Form 6-K which portion of the release is incorporated by reference; or

Furnishing two Form 6-K reports, one that contains the full earnings release and another that contains the portions that will be incorporated by reference (the staff indicates that the second of these alternatives may provide more clarity for investors).

If a foreign private issuer issues a release containing a non-GAAP financial measure without complying with Regulation G in reliance on an exemption from Regulation G and subsequently furnishes that release on Form 6-K, any registration statement filed subsequent to March 28, 2003 that incorporates the non-GAAP financial measure by reference must comply with Item 10(e) of Regulation S-K to the extent that the non-GAAP financial measure relates to a period ending on or after March 28, 2003.

A non-GAAP financial measure contained in an annual report on Form 40-F filed by an eligible Canadian issuer under the U.S-Canadian multijurisdictional disclosure system need not comply with Regulation G or Item 10(e), even if the annual report is incorporated by reference into a Securities Act registration statement.

8. Voluntary Filers

Item 10(e) applies to companies once subject to a reporting obligation under Section 15(d) of the Exchange Act that continue to file reports with the Commission even though that obligation has been suspended.

While Regulation G technically does not apply to such companies, the staff cautions that failure of such a company to comply with all requirements applicable to a Section 15(d) company (including Regulation G) would raise significant issues under the anti-fraud provisions of the federal securities laws.

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If you have any questions regarding the frequently asked questions, please feel free to contact us.

CLEARY, GOTTLIEB, STEEN & HAMILTON

New York Office - 1 212 225 2000

Allan G. Sperling
Leslie N. Silverman
Craig B. Brod
Nicolas Grabar
Janet L. Fisher

David I. Gottlieb

Washington Office - 1 202 974 1500

Kenneth L. Bachman, Jr.
David M. Becker
Robert W. Cook
Paul D. Marquardt

London Office - 44 20 7614 2200

Edward F. Greene
Daniel A. Braverman
Ashar Qureshi
Pierre-Marie Boury

Paris Office - 33 1 40 74 68 00

Russell H. Pollack
Andrew A. Bernstein
John D. Brinitzer

Brussels Office - 32 2 287 2000

George L. Bustin

Frankfurt Office - 49 69 97103 0

Alan S. Dunning
Ward A. Greenberg
Michael J. Volkovitsch

Rome Office / Milan Office - 39 06 695 22 200

Giuseppe Scassellati
Arturo Carrillo

Moscow Office - 7 501 285 5006

Scott Senecal

Hong Kong Office - 852 2521 4122

Sebastian R. Sperber

Jinduk Han

David W. Hirsch

Tokyo Office - 81 3 3595 3911

Steven L. Wilner