

January 30, 2003

**SEC ADOPTS RULES TO IMPLEMENT SECTION 401(b)
OF THE SARBANES-OXLEY ACT AND TO REQUIRE
FURNISHING OF EARNINGS RELEASES ON FORM 8-K**

The Securities and Exchange Commission (the “Commission”) has adopted rules to implement Section 401(b) of the Sarbanes-Oxley Act.¹ The rules require, with limited exceptions,² that each U.S. and non-U.S. reporting company satisfy specific conditions in connection with the use of “non-GAAP financial measures” in filings with the Commission. New Regulation G will require that each U.S. and, subject to a significant exception, non-U.S. reporting company satisfy specific, but less burdensome, conditions in connection with the use of “non-GAAP financial measures” in other public disclosures. The Commission also has adopted rules that, with limited exceptions, require a U.S. domestic issuer to “furnish” to the Commission on Form 8-K any earnings release it issues for a completed annual or quarterly financial period.³

Regulation G will apply to all subject disclosures as of March 28, 2003. The requirement to furnish earnings releases to the Commission on Form 8-K will apply to earnings releases made after March 28, 2003. The amendments to Item 10 of Regulation S-K and Form 20-F will apply to any annual or quarterly report filed with respect to a fiscal period ending after March 28, 2003.⁴

I. Conditions for Use of Non-GAAP Financial Measures

Pursuant to Section 401(b) of the Sarbanes-Oxley Act, the Commission has adopted:

¹ SEC Release Nos. 33-8176 and 34-47226; FR-65 (January 22, 2003). This release is available on the Commission’s website at <http://www.sec.gov/rules/final.shtml>.

² None of the rules relating to non-GAAP financial measures will apply to registered investment companies, which are exempt from Section 401 of the Sarbanes-Oxley Act. In addition, as discussed below, the new rules will not apply to documents filed with the Commission by eligible Canadian issuers under the U.S. - Canadian multijurisdictional disclosure system (the “MJDS”).

³ This requirement also applies to foreign private issuers that have elected to file the periodic and current reports (Forms 10-K, 10-Q and 8-K) that are required of U.S. domestic issuers.

⁴ Because filings made with the Commission are “public disclosures” within the meaning of Regulation G, any non-GAAP financial measure included in a filing made on or after March 28, 2003 would be subject to the requirements of Regulation G (i.e., would have to be accompanied by the most directly comparable GAAP financial measure and generally also by a quantitative reconciliation of the non-GAAP measure to the GAAP measure). The requirements of Regulation G are described in greater detail below.

- new Regulation G, which imposes a number of conditions on the public disclosure of any material information that includes a “non-GAAP financial measure” by any U.S. reporting company (other than registered investment companies) or, subject to a significant exception, any reporting foreign private issuer; and
- amendments to Item 10 of Regulation S-K and to Form 20-F that impose stricter conditions on the use of non-GAAP financial measures in documents filed with the Commission by any reporting company (other than registered investment companies and Canadian companies that file annual reports with the Commission on Form 40-F).⁵

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

Under the new rules, the term “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. GAAP, the term “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 new rules to the disclosure of that measure.⁶

In the final rules, in response to commenters’ concerns, the Commission adopted an exclusion from the definition of “non-GAAP financial measure” for any financial measure that an issuer is required to disclose by GAAP, Commission rules or a system of regulation of a government or governmental agency or self-regulatory organization that is applicable to the

⁵ The Commission reasoned that requiring the additional disclosures in filings made by eligible Canadian companies under the MJDS is not expressly required by the Sarbanes-Oxley Act and would violate the general policy underlying the MJDS, which is that the content of those companies’ filings with the Commission generally should be determined by Canadian home-country requirements.

⁶ Commenters had expressed the concern that the definition of “GAAP” in the rules as originally proposed would have required foreign private issuers to reconcile non-GAAP financial measures derived from non-U.S. GAAP to a comparable measure under both U.S. and non-U.S. GAAP. The definition of “GAAP” as adopted addresses this concern.

registrant. The adopting release indicates that measures of capital or reserves calculated for regulatory purposes would fall within this exclusion.⁷

The adopting release indicates that, in general, the term “non-GAAP financial measure” is intended to include all measures that have the effect of depicting either a measure of performance that is different from that presented in the financial statements (such as income or loss before taxes or net income or loss as calculated in accordance with GAAP) or a measure of liquidity that is different from cash flow or cash flow from operations calculated in accordance with GAAP. The adopting release also provides, as did the proposing release, clarification as to what items are intended to be excluded from the definition of “non-GAAP financial measure.” For example, “non-GAAP financial measure” would not include:

- ratios or measures calculated using only (i) financial measures calculated in accordance with GAAP and (ii) operating measures or other measures that are not non-GAAP financial measures; or
- operating and other statistical measures (such as unit sales, “same store sales,” numbers of employees, numbers of subscribers or numbers of advertisers).

In addition, the adopting release confirms, as did the proposing release, that, notwithstanding the use of the term “pro forma financial information” in Section 401(b) of the Sarbanes-Oxley Act, pro forma financial information presented pursuant to Article 11 of Regulation S-X (*e.g.*, required disclosures relating to certain acquisitions or divestitures) is not subject to the new rules

Non-GAAP Financial Measures in Press Releases and Other Public Disclosures

Whenever a company subject to Regulation G publicly discloses material information that includes a non-GAAP financial measure (other than in Commission filings, which are addressed separately below), it will be required to accompany that disclosure with:

- a presentation of the most directly comparable financial measure⁸ calculated and presented in accordance with GAAP; and

⁷ These financial measures remain subject to Section 10(b) of the Securities Exchange Act of 1934 (the “Exchange Act”), Rule 10b-5 thereunder and the Commission’s existing guidance on non-GAAP financial measures. *See, e.g.*, Accounting Series Release No. 142, Release No. 33-5337 (March 15, 1973); Cautionary Advice Regarding the Use of Pro Forma Financial Information, Release No. 33-8039 (December 4, 2001); and *In the Matter of Trump Hotels & Casino Resorts, Inc.*, Release No. 34-45287 (January 16, 2002).

⁸ In the adopting release, the Commission states that it does not believe it is appropriate to provide a specific definition of the term “most directly comparable financial measure.” As “general guidance,” however, the adopting release states that “(1) non-GAAP financial measures that measure ‘funds’ generated from operations (liquidity) should be balanced with disclosure of amounts from the statement of cash flows . . . and (2) non-GAAP financial measures that depict performance should be balanced with net income, or income from continuing operations, taken from the statement of operations.” This guidance creates uncertainty regarding the appropriate reconciliation of EBITDA. Depending on the purposes for which it is presented, EBITDA may have to be reconciled either to net income or to cash flow from operations.

- a reconciliation (by schedule or other clearly understandable method), which must (with an exception applicable to forward-looking information) be quantitative, of the differences between the non-GAAP financial measure disclosed with the most directly comparable financial measure or measures calculated and presented in accordance with GAAP.⁹

Regulation G permits the public presentation of non-GAAP financial measures orally, telephonically, by webcast or broadcast or by similar means without requiring the additional disclosures, provided that the most directly comparable GAAP financial measure and the required reconciliation are provided on the registrant's website at the same time, and the location of the website is also included in the public presentation.¹⁰

Regulation G contains an antifraud provision prohibiting the publication of any non-GAAP financial measure that, taken together with the information accompanying that measure and any other accompanying discussion, 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.¹¹ The final rules also specify that compliance or non-compliance with Regulation G will not in itself affect any person's liability under the antifraud provisions of Exchange Act Section 10(b) or Rule 10b-5 thereunder. The adopting release indicates that any issuer that fails to comply with Regulation G could be subject to a Commission enforcement action under Regulation G and, if warranted by the facts and circumstances, an enforcement action under Exchange Act Section 10(b) and Rule 10b-5.

Regulation G does not apply to non-GAAP financial measures contained in disclosures specifically subject to the Commission's rules regarding communications in connection with

⁹ Under the rules, the required reconciliation must be quantitative for historical non-GAAP measures presented and quantitative, *to the extent available without unreasonable efforts*, for forward-looking information. Where the exception for forward-looking non-GAAP financial measures applies, however, the adopting release indicates that the Commission expects the issuer to (i) disclose the fact that the most directly comparable GAAP measure is unavailable, (ii) provide reconciling information that is available without unreasonable effort and (iii) identify information that is unavailable and disclose its probable significance.

¹⁰ The adopting release states that the Commission encourages registrants to provide website access to this information for at least a 12-month period; issuers should thus review their website archive procedures. The adopting release also suggests that the Commission expects that this information will appear on the website or page that the issuer normally uses for its investor relations function. We believe that a hyperlink to a list of a company's reports on the Commission's EDGAR website will satisfy this requirement, provided that a document filed with or furnished to the Commission and appearing on the EDGAR website contains the required information.

¹¹ Significantly, the Commission indicates in the adopting release that issuers should consider whether a change in the methodology for calculating or presenting a non-GAAP financial measure from one period to another, without a complete description of the change in methodology, complies with this antifraud provision.

business combinations,¹² although related communications not specifically captured by the business combination communications rules would be subject to Regulation G.¹³

Regulation G also does not apply to disclosures of non-GAAP financial measures by foreign private issuers if the following conditions are satisfied:

- the securities of the issuer are listed or quoted on a securities exchange or inter-dealer quotation system outside the United States;
- the non-GAAP financial measure is not derived from or based on a measure calculated and presented in accordance with U.S. GAAP;¹⁴ and
- the disclosure is made by or on behalf of the issuer outside the United States, or is included in a written communication that is released by or on behalf of the issuer outside the United States.

Provided that these conditions are satisfied, the exception for disclosures of non-GAAP financial measures by foreign private issuers is available notwithstanding the existence of one or more of the following circumstances:

- 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.¹⁵
- U.S. journalists have access to the information;

¹² The rules specifically relating to communications in connection with business combinations are Rule 425 under the Securities Act (communications in connection with a business combination in which stock consideration is being registered under the Securities Act), Rules 14a-12 (solicitations before furnishing a proxy statement) and 14d-2(b)(2) (communications relating to a tender offer) under the Exchange Act and Item 1015 of Regulation M-A (disclosure relating to fairness opinions and the underlying analyses).

¹³ For example, this exemption will not apply (i) in communications to shareholders generally after the meeting of target company shareholders that approves a business combination or after the completion of a tender offer, (ii) to communications about an all-cash business combination if made by an acquiror to its shareholders who are not voting or (iii) where the acquisition is of a closely held target and therefore implicates neither the tender offer or proxy rules under the Exchange Act nor the registration requirements of the Securities Act.

¹⁴ By its terms, therefore, this exception is not available to a foreign private issuer that reports under U.S. GAAP and discloses non-GAAP financial measures derived from U.S. GAAP.

¹⁵ This provision of the rules as adopted represents an accommodation to foreign private issuers in response to comments received by the Commission on the proposed rules, which would have “embargoed” from the United States any press release or annual or interim report of a foreign private issuer that complied with the issuer’s home country laws and practices but not with Regulation G.

- the information appears on one or more websites maintained by the registrant, so long as the websites, taken together, are not available exclusively to, or targeted at, persons located in the United States;¹⁶ and/or
- following the disclosure or release of the information outside the United States, the information is included in a submission by the issuer to the Commission made under cover of a Form 6-K.

Non-GAAP Financial Measures in Commission Filings

The new rules include amendments to Item 10 of Regulation S-K and Form 20-F that impose more stringent conditions on the use of non-GAAP financial measures in Commission filings.

Under the new rules, all filings under the Securities Act and the Exchange Act, other than documents filed by eligible Canadian issuers under the MJDS, that include a non-GAAP financial measure must also include:

- a presentation, with equal or greater prominence, of the most directly comparable financial measure or measures calculated and presented in accordance with GAAP;
- a reconciliation (by schedule or other clearly understandable method), which must be quantitative (subject to the same exception for forward-looking information described above),¹⁷ of the differences between the non-GAAP financial measure disclosed and the most directly comparable financial measure or measures calculated and presented in accordance with GAAP;
- a statement disclosing the reasons why the registrant’s management believes that presentation of the non-GAAP financial measure provides useful information to investors regarding the registrant’s financial condition and results of operations;¹⁸ and

¹⁶ Although the point was not expressly addressed in the adopting release, it would appear that, insofar as website disclosure would not vitiate this exception, U.S. residents could also participate in a webcast of the issuer’s earnings announcement in which a non-GAAP measure was discussed, so long as the webcast was not exclusively available to, or targeted at, persons located in the United States.

¹⁷ Unlike the originally proposed amendments to Item 10 of Regulation S-K and to Form 20-F, but similar to Regulation G as originally proposed and as adopted, the final amendments to Regulation S-K and Form 20-F provide an exception from the quantitative reconciliation requirement with respect to forward-looking non-GAAP financial measures in situations where a quantitative reconciliation is not available without unreasonable effort. The new amendments to Regulation S-K and Form 20-F thus are now consistent on this point with Regulation G; that is, where this exception applies, the Commission expects the issuer to (i) disclose the fact that the most directly comparable GAAP measure is unavailable, (ii) provide reconciling information that is available without unreasonable effort and (iii) identify information that is unavailable and disclose its probable significance.

¹⁸ The adopting release states that “the fact that the non-GAAP financial measure is used by or is useful to analysts cannot be the sole support for presenting the non-GAAP measure. Rather, the justification for use of the measure must be substantive[, although] it can, of course, be a justification that causes a measure to

- to the extent material,¹⁹ a statement disclosing the additional purposes, if any, for which the registrant’s management uses the non-GAAP financial measure that are not disclosed under the preceding bullet point.²⁰

Subject to a limited exception for foreign private issuers, filings may not:

- 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 EBIT (earnings before interest and taxes) and EBITDA;²¹
- 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 where there was a similar charge or gain within the prior two years;²²

be used by or useful to analysts.” Significantly, the Commission also makes clear in the adopting release that the required statement of the utility of the information to investors:

- should not be boilerplate;
- must in certain instances discuss why investors would find the non-GAAP financial measure valuable in the context in which it is presented, given the excluded items; and
- is intended to “be clear and understandable [and] . . . specific to the non-GAAP financial measure used, the registrant, the nature of the registrant’s business and industry and the manner in which management assesses the non-GAAP financial measure and applies it to management decisions.”

¹⁹ The phrase “to the extent material,” which did not appear in the proposed rules, was added in the final rules to make clear that issuers need not separately disclose the utility of the non-GAAP measure to investors and management’s purpose for using the measure if the latter disclosure would add nothing important to investors.

²⁰ In the case of filings other than annual reports on Form 10-K or Form 20-F, the final rules do not require a registrant to include information regarding the purpose for which the non-GAAP financial measure is used and the reasons why that financial measure is believed to be useful to investors, so long as (i) that information was included in the registrant’s most recent annual report on Form 10-K or Form 20-F or a more recent filing and (ii) that information is updated to the extent necessary to meet the applicable requirements at the time of the current filing. The adopting release confirms that the reference to filings does not include reports on Form 6-K, which are “furnished” to the Commission, except insofar as they are incorporated by reference into a Securities Act registration statement or prospectus or an Exchange Act report filed with the Commission.

²¹ The adopting release indicates that the exception from this prohibition for EBIT and EBITDA, which was not contained in the proposing release, was adopted in light of the “wide and recognized existing use” of these measures. Presentation of “adjusted EBITDA” may nevertheless continue to be prohibited in filings made with the Commission, if adjustments that effect prohibited exclusions are made.

²² The two-year window period was added to the final rules in response to concerns expressed by commenters on the proposed rules that this requirement otherwise was too vague. The proposing and adopting releases did not, however, provide any guidance or examples to elaborate on the words “nature” and “similar,” which may give rise to difficult interpretive issues. This consideration only arises if the reason for the adjustment made in calculating the non-GAAP financial measure is the infrequency of the item for which the adjustment is made.

- present non-GAAP financial measures on the face of the registrant’s financial statements prepared in accordance with GAAP or in the accompanying notes;²³
- 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; or
- 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.²⁴

These prohibitions will not, however, apply to a non-GAAP financial measure included in a filing of a foreign private issuer, provided that the non-GAAP financial measure:

- relates to the GAAP used in the issuer’s primary financial statements included in its filings with the Commission;
- is required or *expressly* permitted by the standard-setter that is responsible for establishing the GAAP used in such financial statements; and
- is included in the annual report prepared by the issuer for use in its home jurisdiction or for distribution to its securityholders.²⁵

²³ Under the new rules, this prohibition generally applies even to items that are excluded from the definition of “non-GAAP financial measure” by virtue of the fact that they are 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 issuer. While such items are not subject to the other affirmative requirements or prohibitions created by new Item 10(e) of Regulation S-K, they may not, under the new rules, be presented in the GAAP financial statements or the notes thereto unless they are required or expressly permitted by the standard-setter responsible for establishing the GAAP used in the financial statements.

²⁴ While the rules as originally proposed would have prohibited the presentation of per share non-GAAP measures in Commission filings, the final rules omit this prohibition. The adopting release states, however, 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.” (The phrase “materials furnished to the Commission” includes Reports on Form 6-K furnished by foreign private issuers and earnings releases required to be furnished to the Commission under new Item 12 of Form 8-K, as more fully discussed below.) As an example, the Commission cites Statement of Financial Accounting Standards No. 95, *Statement of Cash Flows*, paragraph 33 of which provides that “financial statements shall not report an amount of cash flow per share. Neither cash flow nor any component of it is an alternative to net income as an indicator of an enterprise’s performance, as reporting per share amounts might imply.” While not expressly cited in the adopting release, the Commission’s Accounting Series Release No. 142, Release No. 33-5337 (March 15, 1973), states that the presentation of cash flow per share “run[s] a high risk of materially misleading investors.”

The adopting release for the new rules also encourages registrants to consider whether the presentation of per share measures other than on a fully diluted basis complies with the antifraud provision contained in Regulation G and with GAAP.

²⁵ The final rules did not provide any accommodation in response to the concern expressed by commenters that this exception may be of very limited practical utility, given that no non-U.S. GAAP is likely to “require or expressly permit” non-GAAP financial measures, as defined.

The amendments to Regulation S-K and Form 20-F, like Regulation G, do not apply to non-GAAP financial measures contained in disclosures subject to the Commission's rules regarding communications in connection with business combinations.²⁶

II. Requirement to Furnish Earnings Releases on Form 8-K

Pursuant to Section 409 of the Sarbanes-Oxley Act, the Commission has adopted new Item 12²⁷ of Form 8-K to require that covered companies furnish to the Commission any earnings release that they may issue within five business days after it is issued.²⁸ This item applies to any public announcement or release (including any update of an earlier announcement or release) disclosing material non-public information regarding the company's results of operations or financial condition for a completed quarterly or annual fiscal period. Under Item 12, the Form 8-K must briefly identify the announcement and attach the text of that announcement or release as an exhibit. The rule does not require the issuance of quarterly or annual earnings releases.

The requirement that issued earnings releases be "furnished" represents a significant departure from the proposed rules, which would have required "filing." Unlike information filed with the Commission, information "furnished" to the SEC is not subject to liability under Section 18 of the Exchange Act or automatically incorporated by reference into shelf registration statements and thereby made subject to the liability provisions of Sections 11 and 12(a)(2) of the Securities Act. Such information remains subject to liability under Exchange Act Section 10(b) and Rule 10b-5 thereunder and to the general antifraud provision of Regulation G. In addition, information furnished to the Commission is not subject to the prohibitions described above that apply to non-GAAP financial measures included in documents filed with the Commission.

Under the final rules, however, a non-GAAP financial measure furnished under Item 12 of Form 8-K is subject to the affirmative requirements applicable to documents filed with the Commission, namely to present (i) the most directly comparable GAAP measure with equal or greater prominence, (ii) a quantitative reconciliation, (iii) a statement of the reasons why management believes that the measure is useful to investors and (iv) if material, a statement of additional purposes for which management uses the measure. As discussed above, the Commission makes clear in the adopting release that companies' explanations as to why non-GAAP measures are believed to be useful to investors should not be boilerplate and should address a number of matters specific to the registrant. The adopting release also indicated, however, that registrants may satisfy this requirement by including the required supplemental disclosure in the Form 8-K, in the release or announcement attached as an exhibit to the Form 8-

²⁶ See *infra* note 12 and accompanying text.

²⁷ This item is expected to be renumbered as Item 6.01 of Form 8-K in connection with further amendments to the Form that the Commission has proposed.

²⁸ The Commission has indicated that, in connection with further amendments to Form 8-K currently under consideration, it will consider whether to shorten to two business days the period during which the Form 8-K may be furnished to the Commission. As a practical matter, however, most issuers will need to furnish earnings releases to the Commission contemporaneously with their release in order to take advantage of the exemption from the Form 8-K furnishing requirement for earnings calls, as discussed below.

K or in a previously filed annual report (provided that the required supplemental information contained in the annual report is up to date at the time the Form 8-K is furnished to the Commission). As a practical matter, many issuers can be expected to include the required supplemental disclosure in the earnings release itself. It appears that the emerging best practice with respect to earnings releases is to comply with the requirements of new Item 12 of Form 8-K even prior to the effective date.²⁹

The final rules provide for an exception from the Form 8-K furnishing requirement in the case of disclosure of material non-public information that is disclosed orally, telephonically, by webcast or by similar means if:

- the information is provided as part of a presentation that is complementary to, and initially occurs within 48 hours after, a related, written announcement or release that is furnished on Form 8-K pursuant to Item 12;³⁰
- the presentation is accessible to the public by dial-in conference call, webcast or similar technology;
- the financial and other statistical information contained in the presentation is provided on the company's website,³¹ together with any information that would be required under Regulation G; and
- the presentation was announced by a widely disseminated press release that included instructions as to when and how to access the presentation and the location on the company's website where the information would be available.

This exception would appear to be applicable principally to the earnings conference calls or webcasts that typically accompany earnings releases. The adopting release notes that, to avail itself of this exception, an issuer would have to furnish the initial announcement or release to the Commission before the expiration of the five-day period that otherwise would apply.³² As a practical matter, issuers can be expected to (i) furnish their earnings releases to the Commission

²⁹ As noted above, the requirement to furnish earnings releases to the Commission under Item 12 of Form 8-K will apply to earnings releases made after March 28, 2003.

³⁰ The phrase "is complementary to" was not contained in the proposed rules, and the Commission indicated in the adopting release that the purpose of this phrase is to preclude or limit "changes in practice whereby disclosure is shifted from the written release or announcement to the complementary presentation."

³¹ Again, the adopting release indicates that this information should be made available on the website for at least 12 months, and that the Commission expects issuers to make it available on the page normally used by them for investor relation functions. We believe that, if the information required to be made available on the website under this exception to the furnishing requirement is not already posted on the website at the time it is made public in the oral, telephonic or webcast presentation, it should be posted by open of business on the following day, and in any event within the 48 hour window provided by this exception.

³² The adopting release also points out that, if an issuer wishes to use a Form 8-K to satisfy its obligations under Regulation FD with respect to an earnings release, the release may be furnished under Item 9 of Form 8-K for purposes of, and within the timeframe specified by, Regulation FD and simultaneously under Item 12 of Form 8-K for purposes of that Item.

under Item 12 of Form 8-K contemporaneously with their release and (ii) include in the introductory remarks to their earnings calls a statement about the location of the website where the release and related supplemental disclosures can be found.

Since the final rules amend only Form 8-K, no comparable current disclosure requirement is being imposed on foreign private issuers. Home country or other public reports or announcements, including earnings releases, will, however, continue to trigger a requirement to furnish those reports or announcements to the Commission on Form 6-K.

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Questions regarding the final rules discussed in this memorandum, and requests for copies of the adopting release, may be directed to your regular contacts at the firm or to any of the persons listed on Schedule I to this memorandum.

CLEARY, GOTTlieb, STEEN & HAMILTON

SCHEDULE I

	<u>Questions And Assistance</u>	<u>Copies of the Adopting Release</u>
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