

July 10, 2003

Regulation G and Item 12 of Form 8-K: A “How To” Guide

The SEC has adopted new Regulation G under the Securities Exchange Act of 1934 and amendments to Regulation S-K and Form 20-F that have significantly impacted the ways in which all SEC reporting companies (both U.S. and non-U.S.) disclose or otherwise release non-GAAP financial measures (whether such disclosure is made in writing, such as an SEC filing or a press release; made orally, such as during an investor conference call; or made electronically, such as a posting on a website). The SEC has also amended Form 8-K to require that earnings releases or similar announcements by domestic U.S. reporting companies containing financial information for completed fiscal periods be furnished to the SEC. You should consult our memorandum entitled “Use of Non-GAAP Financial Measures and Filing Of Earnings Releases” dated July 10, 2003 for more detailed information on these recent changes.

These new requirements were applicable for the first time during the most recent earnings season. It is apparent from recent public disclosures that reporting companies are taking a variety of approaches to the new requirements. Compliance with the new requirements has been complicated by the fact that different requirements apply depending on the type of public disclosure.

Set forth below are suggestions that are intended to provide reporting companies with useful guidance on how best to comply with these new requirements. In addition to the rules discussed below, reporting companies should remember that additional requirements apply to the presentation of non-GAAP financial measures in periodic reports and registration statements filed with the SEC. In addition, these rules do not supersede the disclosure requirements of Regulation FD.

I. Brief Overview

Regulation G has two requirements triggered by the use of a non-GAAP financial measure:

- a presentation of the comparable GAAP financial measure; and
- a reconciliation to the comparable GAAP financial measure.

Item 12 of Form 8-K has the following requirements triggered by disclosure of financial information for any completed period:

- the announcement or release must be filed with the SEC; and

1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

1615 L Street, NW
Washington, DC 20036-5694
(202) 223-7300

Alder Castle, 10 Noble Street
London EC2V 7JU England
(44-20) 7367 1600

2, rue du Faubourg Saint-Honoré
75008 Paris, France
(33-1) 53.43.14.14

Fukoku Seimei Building 2nd Floor
2-2, Uchisawaicho 2-chome
Chiyoda-ku, Tokyo 100, Japan
(81-3) 3597-8120

Oriental Plaza, Tower E3, Ste.1205
No. 1, East Chang An Avenue
Beijing 100738, People's Republic of China
(86-10) 8518-2766

12th Fl., Hong Kong Club Building
3A Chater Road, Central
Hong Kong
(852) 2536-9933

- use of a non-GAAP financial measure also requires:
 - a presentation of the comparable GAAP financial measure;
 - a reconciliation to the comparable GAAP financial measure;
 - equal or greater prominence of the comparable GAAP financial measure;
 - statement as to why management believes providing the non-GAAP financial measure is useful to investors; and
 - if material, the additional purposes, if any, for which management uses the non-GAAP financial measure.

Attached as Annex A is a summary of the applicable requirements.

II. Earnings Releases

New Item 12(a) of Form 8-K requires U.S. reporting companies to furnish a Form 8-K within five business days of any public announcement or release disclosing material non-public information regarding a registrant's results of operations or financial condition for an annual or quarterly fiscal period that has ended.

U.S. reporting companies should remember that:

- The requirements of Item 12 apply regardless of whether the release or the announcement includes disclosure of a non-GAAP financial measure (only Regulation G is limited to non-GAAP financial measures).
- If a non-GAAP financial measure is included in the earnings release, you must include the required reconciliation to the most comparable GAAP financial measure in the earnings release itself (by reason of Regulation G). It is not sufficient only to include such reconciliation in the Form 8-K.
- You are not required to disclose in the earnings release (since it is not a Regulation G requirement) the reasons why management believes the non-GAAP measures provide useful information to investors or any additional reasons management uses the non-GAAP financial measures. However, if this disclosure is not included in the earnings release, it must be included in the Form 8-K.
- If the earnings release contains any "guidance" or other forward-looking information and such information is in a non-GAAP format, Regulation G applies and the appropriate reconciliations are required to be included in the earnings release itself. However, if certain of the forward-looking information is unknown, then Regulation G provides that you may disclose that fact and provide reconciling

information that is available without an unreasonable effort. In addition, you must identify the information that is unavailable and disclose its probable significance.

- Any reconciliation required to be provided (by reason of Regulation G) can be included in the notes to the financial information contained in the earnings release, in a separate set of tables identified as a reconciliation or in a schedule to the earnings release.
- If your release only addresses guidance in respect of periods not yet completed, Item 12 does not apply (however, Regulation G will). Item 12 does apply, however, to press releases that address guidance as to completed fiscal periods. For example, a press release issued on April 3, 2003 announcing that the company will not meet its earnings estimates for the fiscal period ended March 31, 2003 would be subject to Item 12 requirements, including those applicable to non-GAAP financial measures to the extent that any such measures are presented in the release.

III. Earnings Calls

The requirements of Item 12(a) of Form 8-K not only apply to earnings releases, but they also apply to any “public announcement or release” of material non-public information, which would include earnings conference calls. Disclosures made on earnings conference calls are also subject to Regulation G (as Regulation G is not limited to written statements).

With respect to Item 12 of Form 8-K, reporting companies should remember that:

- If you disclose any material information that is not included in your earnings release which you previously furnished on Form 8-K, an additional Item 12 Form 8-K will be required to be furnished to the SEC unless you comply with Item 12(b) of Form 8-K (discussed below).
- If you have been unable to furnish your earnings release on a Form 8-K before your conference call, you will be required to furnish all material information disclosed on the call as an exhibit to a Form 8-K. The Item 12(b) of Form 8-K exception discussed below will not apply.
- If you disclose any material information that is not included in your earnings release, the SEC has taken the position that furnishing a transcript of the portion of the conference call or slides or a similar presentation including all of the material information disclosed on the call, including that provided in connection with any questions and answers, as an attachment to Form 8-K will satisfy your Item 12 obligation.
- You can avoid having to furnish an additional Item 12 Form 8-K if you comply with Item 12(b) of Form 8-K. You will comply with Item 12(b) of Form 8-K if:

- the earnings release has been furnished to the SEC pursuant to Item 12 of Form 8-K prior to the earnings call;
 - the earnings call occurs within 48 hours after the earnings release has been furnished to the SEC on Form 8-K;
 - the earnings call is broadly accessible to the public by dial-in conference call, webcast or similar technology;
 - the financial and statistical information discussed on the earnings call is disclosed on your website, together with any information that would be required under Regulation G; and
 - the earnings call was announced by a widely disseminated press release that included instructions as to when and how to access the call and the location on your website where the information would be available.
- You can still rely on the above Item 12 exemption if the earnings release was filed with the SEC within 48 hours prior to the call as an exhibit to your Form 10-Q or Form 10-K, assuming that all of the other conditions are met.
 - If you comply with requirements described above prior to your earnings call, but disclose additional material non-public information about the results of a completed annual or quarterly period during the Q&A portion of your earnings call, the SEC has indicated that the additional information should be posted on the website "promptly."
 - The SEC has suggested that an efficient manner to assure prompt availability for 12(b) purposes is to make the audio file of the earnings call available on your website. The audio file should remain available on your website for at least 12 months. The audio file must contain all material financial and other statistical information included in the presentation, including information provided during the Q&A, that was not previously disclosed and investors must be able to access it and replay it through the company's website.
 - As an alternative to using an audio file, you may post slides or similar presentation materials on your website at the time of the presentation. The presentation must contain all material financial and other statistical information included in the presentation, including information provided during the Q&A, that was not previously disclosed and investors must be able to access it and replay it through the company's website.

If you disclose non-GAAP financial measures during your earnings call:

- The presenter should refer to the location on your website where the listener can find the reconciliation, or the presenter can provide the reconciliation orally. If the earnings release is on your website and it contains the necessary reconciliation, then the presenter can refer to the location of the earnings release on your website.

- If a slide show or other presentation materials on the website accompany an earnings call and contain non-GAAP information, then you should include the reconciliation in the slide show or other presentation materials. In addition, if you print or distribute the slide shows or other presentation materials containing non-GAAP information, they should also include the reconciliation.

IV. Form 8-K

When filing an Item 12 Form 8-K, reporting companies should remember that:

- EDGAR has not yet been updated to accept filings under Item 12, so you should make the filing under Item 9 (Regulation FD).
- Filings under Item 9 Form 8-Ks are considered by the SEC to be “furnished” not filed. You should include a reference to the fact that you are making the disclosure under Item 12 in the disclosure under the Item 9 caption.
- Your earnings release should be included as an exhibit to the Form 8-K.
- If the earnings release contains non-GAAP financial measures, and if you have not disclosed the reasons why management believes that the presentation of the non-GAAP financial measures provides useful information to investors (since Regulation G does not require such disclosure to be included in a press release), then you must disclose such reasons in the Form 8-K (by reason of the Item 12 requirements). You should note that if you include the reasons/purposes disclosure in your most recent Form 10-K and the disclosure continues to satisfy the rules, then you do not have to disclose the reasons/purposes disclosure in the Form 8-K or in the earnings release.
- Although Regulation G does not require the GAAP financial measure to be disclosed as “prominently” as the non-GAAP measure, Form 8-K requires this standard of disclosure for earnings releases. For this reason, reporting companies are moving away from presenting non-GAAP financial measures in the headlines.

V. Presentations

If a reporting company is presenting at an investor or analyst conference, reporting companies should be aware that:

- The 8-K rules will apply to the presentation if it includes information not previously covered in the earnings release filed on Form 8-K. However, given Regulation FD, chances are that the presentation will not be covering new material information.
- Regulation G will apply to the presentation.
- You do not have to include a reconciliation in slide shows or other presentation materials containing non-GAAP information that are displayed on a screen during a presentation. The SEC has indicated that the presenter can reference the location on your website where the audience can find the reconciliation, or the presenter can provide the reconciliation

orally. However, the SEC encourages companies to include the reconciliation when and where the non-GAAP information is disclosed.

- If you distribute the slide shows or other presentation materials containing non-GAAP information, they should include the reconciliation. In addition, the SEC has indicated that if you post the slide show or other presentation material on your website, you should include the reconciliation in the slide show or other presentation material.

VI. Websites

Reporting companies should remember that:

- Information that you post on the website to comply with Regulation G or Item 12 of Form 8-K should be on the website for at least 12 months.
- You should locate information that you post on the website to comply with Regulation G or Item 12 of Form 8-K on the website page that you normally use for investor relations functions.
- The press release announcing your earnings call should contain instructions as to when and how to access the webcast (and/or other means of broadcasting the earnings call) and specifically state where the viewer can find material non-public information about the completed annual or quarterly period on the website (even if it is the same place as the webcast, i.e., the investor relations section).
- The SEC has indicated that a reference to the website or page must be specific enough so that it is relatively easy to find the location of the material non-public information about the results of completed annual or quarterly period from that website or page. If the location of the information is readily and reasonably accessible from the website or page you normally use for investor relations functions, it should be sufficient if you refer to that website or page.

VII. Transition

Any registration statement filed after March 28, 2003 must comply with Regulation G if it includes non-GAAP financial measures. A registration statement filed after March 28, 2003 that incorporates by reference any non-GAAP financial measures must comply with Regulation G with respect to those non-GAAP financial measures. In cases where a reconciliation is required in a Securities Act registration statement because that registration statement has incorporated by reference a non-GAAP financial measure, the company may provide the required reconciliation in one or more of the following ways:

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

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

The SEC will not object if the use of a non-GAAP financial measure does not comply with Regulation G but is included (either directly or through incorporation by reference) in a registration statement that was filed before March 28, 2003 and an amendment to the registration statement is filed after March 28, 2003, even where a pre-effective or post-effective amendment to the registration statement was made after March 28, 2003. Also, the SEC will not object where a registration statement on Form S-8 filed after March 28, 2003 does not include the required reconciliation of non-GAAP financial measures included in a document filed before March 28, 2003 and incorporated by reference into that registration statement on Form S-8. In addition, companies do not have to remove documents containing a non-GAAP financial measure that were posted on their websites prior to March 28, 2003.

VIII. Voluntary Filers

In addition, companies that continue to file periodic reports despite the suspension of their reporting obligations under Section 15(d) of the Exchange Act must comply with Item 10. Although such voluntary filers are technically not required to comply with Regulation G, failing to do so could raise anti-fraud concerns under the new rules.

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Attached as Annex B is summary of the relevant alternatives for press releases and earnings calls.

The recommendations set forth herein are intended to be general in nature. This memorandum is not intended to provide legal advice with respect to any particular situation and no legal or business decision should be based solely on its content. Questions concerning issues addressed in this memorandum should be directed to any member of the Paul Weiss Securities Group, including:

Mark S. Bergman	(44 20) 7367-1601	John C. Kennedy	(212) 373-3025
Richard S. Borisoff	(212) 373-3153	Edwin S. Maynard	(212) 373-3034
Andrew J. Foley	(212) 373-3078	Raphael M. Russo	(212) 373-3309
Paul D. Ginsberg	(212) 373-3131	Ian G. Putnam	(44 20) 7367-1605

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Annex A

Regulation G: Any public statement containing NGFMs	8-K filing requirements: Any release or announcement of historical earnings	SEC filings containing NGFMs
<ul style="list-style-type: none"> • Comparable GAAP measure • Reconciliation to the comparable GAAP measure 	<p>File an 8-K within 5 days, and if contains a NGFM, add:</p> <ul style="list-style-type: none"> • Comparable GAAP measure of equal or greater prominence • Reconciliation to the comparable GAAP measure • Statement as to reasons why management believes NGFM is useful • Statement as to additional uses of NGFM, if any (together with the prior item, the "Statements") <p>Safe Harbor for additional info:</p> <ul style="list-style-type: none"> • Earnings released furnished on an 8-K before the call • Call occurs with 48 hours after 8-K is furnished • Call broadly accessible • Information discussed on the call, plus Regulation G disclosure, is posted on web site • Call announced in a press release with information as to how to access call and location of web site posting of information described in preceding item 	<ul style="list-style-type: none"> • Comparable GAAP measure of equal or greater prominence • Reconciliation to the comparable GAAP measure • Statement as to reasons why management believes NGFM is useful • Statement as to additional uses of NGFM, if any • Prohibitions: <ul style="list-style-type: none"> • Excluding charges or liabilities that are cash settled from a liquidity measure • Adjusting a performance measure for a nonrecurring measure that is reasonably likely to recur • Presenting NGFM on face of financials • Presenting NGFM on face of pro formas • Misleading titles or descriptions of NGFMs

Annex B

Press release without NGFMs	If historical earnings are addressed	File on an 8-K within 5 days after release
Press release with NGFMs	If historical earnings are addressed	<p>Comply with Regulation G (though this is superseded by the items covered in the next sentence)</p> <p>File release on an 8-K, and comply with rules for NGFMs with reconciliations in the release (required by Regulation G) and the other items (the Statements) addressed in the release or in the body of the 8-K</p>
Earnings call	If any material information will be covered that is not addressed in the earnings release	<p>Choice:</p> <p>File transcript on an 8-K within 5 days after the call</p> <p>Before the call, file the earnings release on an 8-K and post the NGFM and any other new information (not in the release) on the web site (assuming other elements of the Safe Harbor are met). If a NGFM is addressed inadvertently, post on the web site immediately after call</p>
Earnings call	If nothing new will be covered and the earnings release was filed before the call	Nothing more needs to be done. If a NGFM or other material information is addressed inadvertently, file an 8-K with the information. At this point it is too late to rely on the Safe Harbor
Press release without NGFM	If future guidance	Do nothing
Press release with NGFM	If future guidance	Comply with Regulation G (no need to file it on an 8-K)