

July 10, 2003

Use of Non-GAAP Financial Measures and Filing of Earnings Releases

New Regulation G under the Securities Exchange Act of 1934 and amendments to Regulation S-K and Form 20-F that significantly impact 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).

- Regulation G generally requires that the public disclosure of a non-GAAP financial measure must also include a presentation of the most directly comparable GAAP financial measure and a quantitative reconciliation of the disclosed non-GAAP financial measure to the most directly comparable GAAP financial measure.
- Additional disclosure rules apply to the inclusion of non-GAAP financial measures in SEC filings.

In addition, Form 8-K requires that earnings releases or similar announcements by domestic U.S. reporting companies containing financial information for completed fiscal periods be furnished to the SEC.

This memorandum updates our previous summary of the new rules to reflect SEC guidance issued subsequent to the promulgation of the rules.

I. Regulation G

A. Required Disclosure When Non-GAAP Measures Are Presented

Regulation G provides that whenever a reporting company, or person acting on its behalf, *publicly discloses* material information that includes a non-GAAP financial measure, the company must accompany that non-GAAP financial measure with:

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

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most directly comparable financial measure or measures calculated and presented in accordance with GAAP.

In the case of ratios or measures where a non-GAAP financial measure is the numerator and/or the denominator in the calculation of that ratio or measure, the registrant must provide a reconciliation with regard to each non-GAAP financial measure used in the calculation. The registrant must also show the ratio or measure as calculated using the most directly comparable GAAP financial measure(s).

A determination of whether disclosure is “public” will depend on all of the facts and circumstances surrounding that disclosure, and a determination of whether disclosure is “on behalf of” the registrant will also depend on all of the facts surrounding that disclosure. However, consistent with Regulation FD, the SEC intends that a person who discloses material non-public information in breach of a duty of trust or confidence to the registrant should not be considered to be acting “on behalf of” the registrant.

If a non-GAAP financial measure is released orally, telephonically, by webcast or broadcast or by similar means, the required accompanying GAAP information and reconciliation may be provided on the registrant’s website. The information must be posted by the time the non-GAAP financial measure is made public and the location of the website must be made public in the same presentation in which the non-GAAP financial measure is made public. The SEC encourages reporting companies to provide ongoing website access to this information. At a minimum, it is suggested that reporting companies provide website access to this information for at least a 12-month period.

With regard to the quantitative reconciliation of non-GAAP financial measures that are forward-looking, a schedule or other presentation detailing the differences between the forward-looking non-GAAP financial measure and the appropriate forward-looking GAAP financial measure is required. If the GAAP financial measure is not available on a forward-looking basis, the company must disclose that fact, explain why it is not available on a forward-looking basis and provide any reconciling information that is available without an unreasonable effort. The company must also identify any information that is unavailable and disclose its probable significance.

The SEC has cautioned that reporting companies should consider whether a change in the method of calculating or presenting a non-GAAP financial measure from one period to another, without a complete description of the change in that methodology, complies with the general anti-fraud provision of Regulation G, as further described below.

B. General Anti-Fraud Provision

Regulation G also provides that a reporting company, 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. "GAAP" versus "Non-GAAP" Financial Measures

For purposes of Regulation G, a 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); 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.

Examples of financial measures calculated and presented in accordance with GAAP would include, but not be limited to, earnings or cash flows as reported in the GAAP financial statements. The SEC believes that it is most appropriate to provide registrants with the flexibility to best make the determination as to which is the "most directly comparable financial measure calculated and presented in accordance with GAAP." The SEC, therefore, does not believe that it is appropriate to provide a specific definition of that term. As general guidance, the SEC is of the view that (1) non-GAAP financial measures that measure cash or "funds" generated from operations (liquidity) should be balanced with disclosure of amounts from the statement of cash flows (cash flows from operating, investing and financing activities); 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.

The definition of a non-GAAP financial measure is meant to capture 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 computed in accordance with GAAP.

An example of a non-GAAP financial measure would be a measure of operating income that excludes one or more expense or revenue items that are identified as "non-recurring." Another example would be EBITDA (earnings before interest, taxes, depreciation and amortization), which could be calculated using elements derived from GAAP financial presentations but, in any event, is not presented in accordance with GAAP.

However, non-GAAP financial measures do not include (and Regulation G would therefore permit without further disclosure):

- operating and other statistical measures (such as unit sales, numbers of employees, numbers of subscribers, or numbers of advertisers); and
- ratios or measures that are calculated using exclusively one or both of:
 - financial measures calculated in accordance with GAAP; and
 - operating measures or other measures that are not non-GAAP financial measures.

Non-GAAP financial measures also do not include financial information that does not have the effect of providing numerical measures that are different from the comparable GAAP measure. Examples of measures to which Regulation G would not apply include:

- amounts of expected indebtedness, including contracted and anticipated amounts;
- amounts of repayments that have been planned or decided upon but not yet made;
- estimated revenues or expenses of a new product line, so long as such amounts were estimated as GAAP figures; and
- measures of profit or loss and total assets for each segment required to be disclosed in accordance with GAAP.

Examples of ratios and measures that would not be non-GAAP financial measures would include sales per square foot (assuming that the sales figure was calculated in accordance with GAAP) or same store sales (again assuming the sales figures for the stores were calculated in accordance with GAAP). An example of a ratio that would be a non-GAAP financial measure would be a measure of operating margin where either the revenue component or the operating income component of the calculation, or both, were not calculated in accordance with GAAP.

Regulation G would also permit a tabular presentation of a breakdown of revenues by product. The table would not be considered a non-GAAP financial measure as long as the aggregate revenues presented for each product add up to the revenue amount presented on the financial statements. Similarly, a table that presents a breakdown of revenues by geographic location, adjusted to exclude the effects of changes in foreign exchange rates, would not be considered a non-GAAP financial measure to the extent that the table also presents the related foreign currency adjustment for each region and that the aggregate revenues presented for each geographic location sum to the revenue amount presented on the consolidated financial statements. Foreign exchange-adjusted amounts presented separately, however, would be considered non-GAAP financial measures.

The final rules also state that non-GAAP financial measures do not include financial measures required to be disclosed by GAAP, SEC rules, or an applicable system of regulation of a

government or governmental authority or self-regulatory organization, such as measures of capital or reserves calculated for regulatory purposes. An example would be “measures of profit or loss and total assets for each segment required to be disclosed in accordance with GAAP.”

Segment information presented in conformity with FASB Statement No. 131 is not a non-GAAP financial measure and is therefore permitted under Regulation G. The measure of segment profit or loss and segment total assets under FASB Statement No. 131 is the measure reported to the chief operating decision maker for purposes of making decisions about allocating resources to the segment and assessing its performance. Measures of segment profit/loss or liquidity that are adjusted to include amounts excluded from, or to exclude amounts included in, the measure reported to the chief operating decision maker for decision-making purposes, do not comply with FASB Statement No. 131 and would therefore be considered non-GAAP financial measures. Such measures are subject to all of the provisions of Regulation G. The SEC has stated that it believes that it would be difficult to demonstrate that segment measures that are not reported to or used by the chief operating decision maker, or otherwise are not in conformity with FASB Statement No. 131, are useful for investors. The presentation of some FASB Statement No. 131-compliant measures outside of the appropriate context may also give rise to Regulation G concerns. For example, although a company is permitted to total the profit or loss for individual segments in the footnote that reconciles the segment measures to the consolidated financial measures under FASB Statement No. 131, the SEC has stated that the presentation of such a “consolidated” segment profit or loss measure outside of the FASB Statement No. 131-required reconciliation would be deemed the presentation of a non-GAAP financial measure.

D. Application to Business Combination Disclosure

In a change from the proposed rules, Regulation G does 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 the communications rules applicable to business combination transactions (*e.g.* Rule 14a-12 or 14d-2(b)(2) under the Exchange Act and Rule 425 under the Securities Act). The SEC has noted that the exemption is also intended to apply to Rule 14d-9(a)(2). However, the exemption does not extend beyond communications subject to these specific rules. If the same non-GAAP financial measure is included in a communication filed under one of those rules but is also disclosed in a registration statement filed under the Securities Act or a proxy statement or tender offer statement filed under the Exchange Act, the exemption would not apply to that disclosure.

There is also an exemption from Regulation G and the amendment to Item 10 of Regulation S-K for disclosure of non-GAAP financial measures made in any disclosure that is subject to Item 1015 (Reports, Opinions, Appraisals and Negotiations) of Regulation M-A. In contrast to the exemption discussed in the previous paragraph, the exemption for disclosure of non-GAAP financial measures subject to Item 1015 of Regulation M-A is not limited to pre-commencement communications and, accordingly, the exemption would also be available for Item 1015 disclosure found in registration statements, proxy statements and tender offer

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

E. Application to Foreign Private Issuers

For foreign private issuers whose primary financial statements are prepared in accordance with generally accepted accounting principles of a country other than the United States, references to “GAAP” in Regulation G mean the principles under which those primary financial statements are prepared. The final rules clarify that for foreign private issuers that disclose a non-GAAP financial measure derived from a measure calculated in accordance with local GAAP, “GAAP” refers to that local GAAP, and for those that disclose a non-GAAP financial measure derived from a measure calculated in accordance with U.S. GAAP, “GAAP” refers to U.S. GAAP, for purposes of the application of the requirements of Regulation G to the disclosure of that measure.

Regulation G applies to foreign private issuers, subject to limited exceptions. Regulation G does not apply to disclosure of non-GAAP financial measures that are made by or on behalf of a foreign private issuer in circumstances similar to the existing exemptions for offshore press activities. The exception applies if the following conditions are satisfied:

- the securities of the foreign private 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; and
- the disclosure is made by or on behalf of the foreign private issuer outside the United States, or is included in a written communication that is released by or on behalf of the foreign private issuer outside the United States.

This exception applies notwithstanding the existence of one or all 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;
- foreign journalists, U.S. journalists or other third parties have access to the information;
- the information appears on one or more websites maintained by the foreign private issuer, so long as 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 in a submission to the SEC made under cover of a Form 6-K.

F. Consequences for Violations of Regulation G

A registrant's failure to include all of the information required to be included in a public announcement by Regulation G does not affect that registrant's form eligibility under the Securities Act or whether there is adequate current public information regarding the registrant for purposes of Securities Act Rule 144(c).

Section 3(b) of the Sarbanes-Oxley Act provides that a violation of the Sarbanes-Oxley Act or the SEC's rules thereunder shall be treated for all purposes as a violation of the Exchange Act. Therefore, if an issuer, or any person acting on its behalf, fails to comply with Regulation G, the issuer and/or the person acting on its behalf could be subject to a SEC enforcement action alleging a violation of Regulation G.

Regulation G expressly provides that nothing in Regulation G shall affect any person's liability under Exchange Act Section 10(b) or Rule 10b-5 thereunder. Regulation G also states that a person's compliance or non-compliance with the requirements of Regulation G does not affect that person's liability under Section 10(b) or Rule 10b-5. Nevertheless, the facts and circumstances surrounding a violation of Regulation G may give rise to a Rule 10b-5 violation if all the elements for a 10b-5 violation are present. In a prior release regarding the use of non-GAAP financial information, the SEC reminded companies that, under certain circumstances, non-GAAP financial measures could mislead investors if they obscure the company's GAAP results. Following that warning, the SEC brought an enforcement action against Trump Hotels & Casino Resorts, Inc., where it found the use of non-GAAP financial information to be materially misleading in violation of Section 10(b) and Rule 10b-5.

G. Application to Voluntary Filers

Any company that continues to file periodic reports despite the suspension of its reporting obligation under Section 15(d) of the Exchange Act must comply with Item 10 of Regulation S-K. Although such voluntary filers are technically not required to comply with Regulation G (since they are not required to file SEC reports), failing to do so could raise anti-fraud questions under the rules.

II. Changes to Regulation S-K and Form 20-F

A. Overview

The SEC has also adopted an amendment to Item 10 of Regulation S-K that adds a statement concerning the use of non-GAAP financial measures in filings made with the SEC. In addition, amendments to Form 20-F incorporate Item 10 of Regulation S-K (as amended). These amendments require registrants using non-GAAP financial measures *in filings with the SEC* to provide:

- a presentation, with equal or greater prominence, of the most directly comparable financial measure calculated and presented in accordance with GAAP;
- a reconciliation (by schedule or other clearly understandable method), which shall be quantitative for historical non-GAAP measures presented, and (based on a change made in the final rule) 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 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; and
- 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 otherwise disclosed.

In addition to these mandated disclosure requirements, Item 10 prohibits the following:

- 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 (earnings before interest and taxes) and EBITDA (earnings before interest, taxes, depreciation and amortization) (the exceptions for EBIT and EBITDA having been added in the final rule);
- adjusting a non-GAAP performance measure to eliminate or smooth items identified as non-recurring, infrequent or unusual, when (1) the nature of the charge or gain is such that it is reasonably likely to recur within two years, or (2) there was a similar charge or gain within the prior two years (the two year periods having been added in the final rule)¹;
- presenting non-GAAP financial measures on the face of the registrant's financial statements prepared in accordance with 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; and
- 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.

For the purposes of EBIT and EBITDA, the SEC intends "earnings" to mean net income as presented in the statement of operations under GAAP. If a company is able to justify the use of EBIT or EBITDA, it should be reconciled to net income as presented in the statement of operations

¹ Management should be aware, however, that an item's status as "recurring" or "non-recurring" depends on the substantive nature of the item. Non-GAAP financial measures that eliminate items, particularly restructuring charges, identified as "non-recurring" despite a past pattern of such charges and a failure to demonstrate that such charges are unusual or will not continue would not be permitted under Item 10.

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.

The SEC has noted that, although there is no prohibition against removing a recurring item from a GAAP measure, companies must meet the burden of demonstrating the usefulness of any measure that excludes recurring items, especially if the non-GAAP financial measure is used to evaluate performance. Whether a non-GAAP financial measure that eliminates a recurring item or items from the most directly comparable GAAP financial measure is acceptable depends on all of the facts and circumstances. Such measures more likely would be permissible if management reasonably believes it is probable that the financial impact of the item will disappear or become immaterial within a near-term finite period.

Although the rules exempt EBITDA from the prohibition of Item 10, the prohibitions on excluding cash charges and adjusting non-GAAP performance measures to eliminate or smooth non-recurring items limit the presentation of Adjusted EBITDA in filings with the SEC. The SEC has noted that a company may be required to disclose, as part of its MD&A, Adjusted EBITDA as the measure calculated as a material covenant of its credit agreement if management believes that:

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

Disclosure regarding such debt covenant may be misleading without a discussion of the following:

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

A discussion of Adjusted EBITDA for other purposes would not be permitted unless otherwise allowable under Item 10 of Regulation S-K.

The requirement of Regulation G that the presentation of a non-GAAP financial measure, taken together with the information accompanying the measure and any other accompanying discussion, not contain a material misstatement or material omission necessary in order to make the presentation not misleading, in light of the circumstances in which the presentation is made, also applies to disclosures in documents filed with the SEC.

The rules with respect to segment information presented in conformity with FASB Statement No. 131 are the same under Item 10 as under Regulation G. In addition, the SEC has

commented that a company may discuss segments or other subdivisions of its business in its MD&A, and may be required to do so if such a discussion is necessary to an understanding of the business. Where such discussion includes the measures reported in the company's consolidated financial statements in accordance with FASB Statement No. 131, the SEC has advised that the company should either: (1) present the FASB Statement No. 131-required information in the MD&A; or (2) include a cross reference in the MD&A to the FASB Statement No. 131-required information in the footnotes to the company's consolidated financial statements. Where a company includes in its MD&A a discussion of segment profitability defined on a basis that differs from consolidated operating profit as defined by GAAP or that excludes the effects of items attributable to that segment, the company should also include a complete discussion of the reconciliation items that apply to that particular segment presented in the footnotes to the consolidated financial statements.

The proposed amendment to Item 10 contained a prohibition against the use of "non-GAAP per share of financial measures." Despite the absence of such prohibition in Item 10, as adopted, registrants should consider whether the use of any per share measure that is not calculated using a share figure that is presented on a diluted basis complies with (1) the general anti-fraud requirement of Regulation G; and (2) generally accepted accounting principles. For example, registrants in the real estate industry may use the "funds from operations per share" measure, defined and clarified by the National Association of Real Estate Investment Trusts, subject to the requirements of Regulation G and amended Item 10. Any modifications of that measure, or a per share amount based on such modified measure, in materials filed with the SEC would be subject to Item 10.

The SEC has noted that certain figures cannot logically be related to common shareholders without adjustment and that certain aggregate financial data, while of importance to analysts and management, are not items that accrue directly to the benefit of the owner of a part of the common equity. Item 10 recognizes, consistent with the view of many commenters regarding the proposal, that certain non-GAAP per share measures may be meaningful from an operating viewpoint. However, the SEC takes the position that the disclosure that explains how these measures are used by management and in what way they provide meaningful information to investors (as the per share measure would not depict the amount that accrues directly to shareholders' benefit) and the reconciliation of these measures to GAAP earnings per share are critical to addressing the concerns that arise regarding the relevance of per share data presented on any basis other than GAAP earnings. Cash flow per share and per share measures of liquidity are prohibited.

The requirements for filed information under amended Item 10 are more extensive and detailed than those of Regulation G. The additional requirements are generally consistent with the SEC staff's historical practice in situations where it has reviewed filings containing non-GAAP financial measures. In addition, the requirements for a GAAP presentation and for a reconciliation are slightly more stringent than those set forth under Regulation G. In particular:

- in filings with the SEC, the presentation of the comparable GAAP financial measure must have equal or greater prominence; and
- any non-GAAP financial measure presented must be accompanied by statements disclosing (1) why management believes the non-GAAP financial measure would be useful to investors regarding the registrant's financial condition and results of operation and (2) to the extent material, additional purposes, if any, for which management uses the non-GAAP financial measure that are not otherwise disclosed.

This last requirement is designed to ensure that companies are using non-GAAP financial measures that provide information that is important in analyzing and understanding the registrant. This requirement can be satisfied by including the 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 current filing. In the proposing release, the SEC indicated that the sole fact that the non-GAAP financial measure is used by or useful to analysts cannot be the sole support for management's statement as to why investors may find the non-GAAP financial measure useful. Rather, the justification for the use of the measure must be substantive, although it can be a justification that causes a measure to be used by or useful to analysts.

The definition of "non-GAAP financial measure" is the same for purposes of Item 10 as for Regulation G. However, when a financial measure is considered not to be a non-GAAP financial measure because its disclosure is required by GAAP, SEC rule or other regulation, 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.

B. Application for Business Combination Disclosure

As with Regulation G, the amendment to Item 10 does 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 the communications rules applicable to business combination transactions (*e.g.* Rule 14a-12 under the Exchange Act and Rule 425 under the Securities Act).

C. Application to Foreign Private Issuers

Unlike Regulation G, there is no limited exception for disclosure of non-GAAP measures in SEC filings by foreign private issuers. The requirements apply to filings on Form 20-F. However, a non-GAAP financial measure that would otherwise be prohibited will be permitted in a Form 20-F filing by a foreign private issuer if the measure is required or expressly permitted by the standard setter that establishes the generally accepted accounting principles used in the foreign private issuer's primary financial statements and is included in the foreign private issuer's annual report or financial statements used in its home country jurisdiction or market. The SEC intends this exception to only cover situations where the foreign organization affirmatively acts to require or permit the measure, and not situations where the measure is merely not prohibited. However, the "expressly permitted" condition is not intended to prohibit the inclusion of:

- additional caption detail in cases where non-U.S. GAAP standard setters have specified a minimum level caption detail, but require or permit additional caption detail without specifying the additional captions to be presented;
- subtotals in financial statements that are not calculated consistently with those permitted or required by U.S. GAAP, provided that the subtotal is clearly derived from the appropriately classified financial statement caption that precedes it; or
- earnings per share measures where the numerator of the per share measure is directly derived from an appropriately presented measure in the home country GAAP income statement.

Item 10 requirements do not apply to materials submitted to the SEC on Form 6-K. However, if the information in the Form 6-K is incorporated by reference into a registration statement (for example, to update a shelf registration statement used more than nine months after the end of the fiscal year), prospectus or annual report, Item 10 of Regulation S-K would then apply to that information. Where a foreign private issuer wishes to incorporate by reference a portion or portions of a press release provided on Form 6-K, the foreign private issuer should either:

- specify in the Form 6-K those portions of the press 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 that would be incorporated by reference (and specify that the second Form 6-K is so incorporated).

The SEC has stated that using two reports on Form 6-K may provide more clarity for investors in most circumstances. In addition, companies should consider whether their disclosure is rendered misleading if it incorporates only a portion, or portions, of a press release.

The SEC did not subject filers on Form 40-F under the Multi-Jurisdictional Disclosure System (MJDS) to the Item 10 requirements because, under the philosophy of MJDS, which is currently applicable to certain Canadian issuers, the Canadian disclosure form requirements dictate required disclosure in filings with the SEC. However, *public disclosures* in the United States by these Canadian issuers, including filings with the SEC on Form 40-F, are subject to Regulation G.

III. New Item 12 of Form 8-K

A. Furnishing Obligation

The SEC has also amended Form 8-K to add new Item 12 “Disclosure of Results of Operations and Financial Condition.” New Item 12 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. The requirements of Item 12 will apply regardless of whether the release or announcement includes disclosure of a non-GAAP financial measure.

Foreign private issuers are not required to file 8-Ks and therefore would not be subject to this amendment.

Item 12 requires the registrant to identify briefly the announcement or release and furnish the announcement or release as an exhibit to the Form 8-K. In addition, Item 12 requires that earnings releases or similar disclosures be furnished to the SEC rather than filed. The implications for information that is “furnished” to the SEC, rather than “filed” are as follows:

- the information is not subject to Section 18 of the Exchange Act unless the registrant specifically states that the information is to be considered “filed”;
- the information is not incorporated by reference into a registration statement, proxy statement or other report unless the registrant specifically incorporates that information into those documents by reference;
- the information is not subject to the requirements of amended Item 10 of Regulation S-K, while “filed” information would be subject to those requirements; and
- the failure to furnish in a timely manner would not affect a company’s eligibility to use Form S-3, but would be a violation of Section 13(a) of the Exchange Act and rules thereunder.

Item 12 also requires (by reference to Item 10 of Regulation S-K) registrants who include non-GAAP financial measures in their earnings release to disclose the following (the first, third and fourth of which represent certain protections under Item 10 and the second of which is based on Regulation G):

- a presentation, with equal or greater prominence, of the most directly comparable financial measure calculated and presented in accordance with GAAP;
- 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;
- 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
- to the extent material, the additional purposes, if any, for which the registrant’s management uses the non-GAAP financial measure that are not otherwise disclosed.

Registrants may satisfy this requirement by including the disclosure in the Form 8-K or in the release or announcement that is included as an exhibit.

The rule does not require any registrant to issue an earnings release or similar announcement. However, if a registrant issues such a release or announcement containing material non-public information regarding the registrant's results of operations or financial condition for an annual or quarterly fiscal period *that has ended*, it would trigger the new requirement under Item 12.

The requirement to furnish information under Item 12 of Form 8-K would not apply to disclosures in quarterly reports on Form 10-Q or annual reports on Form 10-K.

B. Treatment of Non-Written Disclosures

If non-public information is disclosed orally, telephonically, by webcast, broadcast, or similar means, Item 12 does *not* require the registrant to furnish a Form 8-K 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 has been furnished on Form 8-K pursuant to Item 12 (or filed as an exhibit to Form 10-Q or Form 10-K);
- the presentation is broadly accessible to the public by dial-in conference call, webcast or similar technology;
- the financial and statistical information contained in the presentation is provided on the registrant's website, 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 registrant's website where the information would be available.

C. Temporary Deadline

As proposed, Item 12 would have required a registrant to file the Form 8-K within two business days after the earnings release or similar disclosure. The SEC proposed this deadline in anticipation of its adoption of its proposal to shorten the filing deadline for all reports on Form 8-K. As the SEC has not yet taken final action on that proposal, the SEC felt it was appropriate to adopt a temporary deadline for furnishing a report on Form 8-K under Item 12 of five business days, the shorter of the two existing Form 8-K deadlines. When the Form 8-K proposals are addressed, the SEC may then shorten the Item 12 deadline. At that time, the SEC will consider the comments received in response to the proposing release and its proposal therein to set a two-business day deadline for earnings releases or similar disclosures on Form 8-K.

D. Repetition of Previously Disclosed Information

The furnishing requirement under Item 12 of Form 8-K is triggered by the disclosure of material non-public information regarding a completed fiscal year or quarter. Repetition of previously publicly disclosed information or release of the same information in a different form, for example in an interim or annual report to shareholders, would not trigger the Item 12 requirement. This result would not change if the repeated information were accompanied by information that was not material, whether or not already public. However, release of additional or updated material non-public information regarding the registrant's results of operation or financial condition for a completed fiscal year or quarter triggers an additional furnishing requirement under Item 12.

E. Forward-Looking Statements

Item 12 of Form 8-K applies only to publicly disclosed or released material non-public information concerning an annual or quarterly fiscal period that has ended. While such disclosure may also include forward-looking information, it is the material information about the completed fiscal period that triggers Item 12. Accordingly, Item 12 does not apply to public disclosure of earnings estimates for future or ongoing fiscal periods, unless those estimates are included in the public announcement or release of material non-public information regarding an annual or quarterly fiscal period that has ended. Such disclosure of earnings estimates may trigger a Regulation FD obligation even if Item 12 of Form 8-K does not apply.

F. Relationship with Regulation FD

Currently, announcements and releases disclosing material non-public information regarding results of operations or financial condition are subject to Regulation FD. Regulation FD can, of course, be satisfied by public disclosure other than through the furnishing of a Form 8-K meeting Regulation FD's requirements. Therefore, a Form 8-K pursuant to new Item 12 could satisfy an issuer's obligation under Regulation FD if the Form 8-K were furnished within the time frame required by Regulation FD. It should be noted that the requirements of Item 12 are in addition to the requirements of Regulation FD and information furnished under current Item 9 of Form 8-K for the purpose of Regulation FD does not necessarily satisfy Item 12. An 8-K that satisfies the requirements of both Item 9 and Item 12 can be furnished once, indicating that it is being furnished under both items.

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The summary of the newly adopted SEC rules set forth herein is 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:

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