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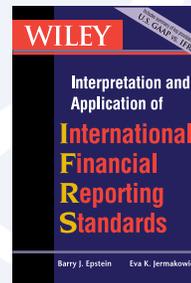
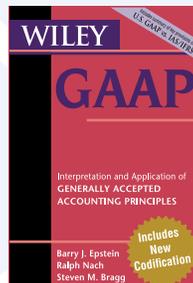
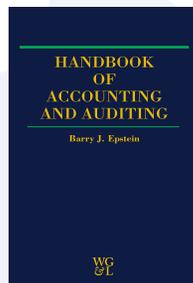
Non-GAAP Measures of Performance and SEC Regulation G

A White Paper

By Dr. Barry Jay Epstein, CPA, CFF

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Litigation Support and Financial Consulting Services By the Book



White Paper: Non-GAAP Measures of Performance and SEC Regulation G

Barry Jay Epstein, Ph.D., CPA, CFF

[Epstein + Nach LLC](#)

Chicago, IL

bepstein@epsteinnach.com

The *Wall Street Journal* has reported (*Tailored Accounting by IPOs Raises Flags*, January 8, 2015) that a surprisingly large fraction of companies that engaged in initial public offerings in 2014 incorporated non-GAAP measures of performance in their filings with the SEC,¹ and that many of these drew comments from the SEC, which in some instances resulted in modifications being made prior to acceptance. Although the use of such alternative measures is not new, it is probably timely that this practice be subjected to revived scrutiny.

In general, if the SEC's rules are complied with, registrants have flexibility in reporting non-GAAP measures of their own choosing. The key requirement is that each such measure be reconciled to the closest GAAP measure, so that users can fully appreciate what the non-GAAP measure actually communicates, and, if warranted (e.g., if the reconciling items appear inappropriate or excessive), to reject management's efforts to provide its alternative view of its performance.

GAAP defines the set of financial reporting principles and practices that may be appropriately employed by domestic entities submitting financial statements to the SEC, and constitute the recognition, measurement, presentation and disclosure rules most commonly employed even by privately-held enterprises in the U.S. Although publicly-held companies must use GAAP for financial reporting purposes, for a range of reasons some have objected that more meaningful measures of their performances are produced by alternative measures, and those so-called non-GAAP measures may be included (to supplement, but not to replace GAAP) in filings, if certain criteria are met.

The relevant constraints on the use of non-GAAP measures are set forth by the SEC's Regulation G. This was one of many consequences of the spate of financial reporting frauds reported in the early 2000s, the most significant of which of course was the passage of the Sarbanes-Oxley Act of 2002.

In early 2003 the SEC promulgated its final rules on the use of what are now called *non-GAAP measures* of financial performance. (The terms formerly in common usage were variations on *pro forma measures*, but the SEC decided to utilize a new, unambiguous way to identify the types of information targeted by Section 401(b) of the Sarbanes-Oxley Act because, under the Sarbanes-Oxley Act the term "pro-forma" was used in a slightly different way than it had been under the Commission's rules and regulations in other contexts, particularly in Regulation S-X.² The Sarbanes-Oxley Act sought to eliminate the manipulative or misleading

¹ WSJ cited a study by Audit Analytics that reported that 18% of IPOs included non-GAAP measures, including nine of the ten largest offerings.

² Section 401(b) of the Sarbanes-Oxley Act directed the Commission to adopt rules requiring that any public disclosure or release of non-GAAP financial measures by a company filing reports under Section 13(a)14 or 15(d)15 of the Exchange Act be presented in a manner that:

use of non-GAAP financial measures and, at the same time, enhance the comparability associated with the use of that information.

Concerns over the use of pro forma (non-GAAP) performance measures had grown apace with the popularity of such measures among analysts and reporting entities. Originally, the relatively few users of such measures tended to employ EBITDA (earnings before interest, taxes, depreciation and amortization) as an approximation of "funds (or cash) generated from operations," and in the case of certain specialized industries (such as real estate operations) tailored, well-standardized and understood variants such as *funds from operations* ("FFO") were commonly employed. Over time, however, increasingly diverse measures began to be used, with even fairly well known terms such as EBITDA becoming subject to varying interpretations.³

The SEC became concerned, and with good reason. As early as 1973 the SEC had warned of the confusion that might result from such measures.⁴ In 2001 the SEC again issued an alert on this topic, stating:

" . . . "pro forma" financial information, under certain circumstances, can mislead investors if it obscures GAAP results. Because this "pro forma" financial information by its very nature departs from traditional accounting conventions, its use can make it hard for investors to compare an issuer's financial information with other reporting periods and with other companies."⁵

A "non-GAAP financial measure" is defined as a numerical measure of an issuer's historical or future financial performance, financial position or cash flows that:⁶

- excludes amounts, or is subject to adjustments that have the effect of excluding amounts, that are included in the 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 comparable measure so calculated and presented.

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- does not contain an untrue statement of a material fact or omit to state a material fact necessary in order to make the non-GAAP financial measure, in light of the circumstances under which it is presented, not misleading; and
 - reconciles the non-GAAP financial measure presented with the financial condition and results of operations of the registrant under GAAP.

Regulation G was subsequently adopted by the SEC, which has fulfilled this charge under the Act.

³ In the author's own experience in litigation settings, EBITDA has been functionally defined -- improperly -- as operating earnings or other income statement sub-total captions, such as income before extraordinary items. This is clearly wrong, since the acronym EBITDA stands for earnings before interest, taxes, depreciation and amortization. No other add-backs to (or deductions from) net income are contemplated. This position has been upheld in litigation arising from contractual disputes (e.g., regarding earn-out provisions of business purchases).

⁴ In SEC Accounting Series Release No. 142, issued in 1973.

⁵ In SEC Release No. 33-8039 .

⁶ In SEC Release No. 33-8176.

To implement the requirements under the Act, the SEC has imposed a new Regulation G, which applies to any entity that is required to file reports pursuant to Sections 13(a) or 15(d) of the Exchange Act, other than a registered investment company. It applies whenever such registrant, or a person acting on its behalf, discloses publicly or releases publicly any material information that includes a non-GAAP financial measure. This regulation imposes specific requirements in connection with the public communication of non-GAAP financial measures and, without affecting the existing anti-fraud regime, prohibits material misstatements or omissions that would make the presentation of the material non-GAAP financial measure, under the circumstances in which it is made, misleading.⁷

In addition, the SEC amended Item 10 of Regulation S-K⁸ and Item 10 of Regulation S-B⁹ to address specifically the use of non-GAAP financial measures in filings with the Commission. These amendments apply to the same categories of non-GAAP financial measures as are covered by new Regulation G, but contain somewhat more detailed requirements than Regulation G does.

In addition to these changes -- and very importantly, in order to bring earnings information within the SEC's current reporting system -- the SEC amended Form 8-K to require the filing with the Commission of releases or announcements disclosing material non-public financial information about completed annual or quarterly fiscal periods.¹⁰ This requirement does not mandate the issuance of earnings releases or similar announcements by registrants.¹¹ However, such releases and announcements do trigger the new filing requirement, which applies regardless of whether the release or announcement includes disclosure of a non-GAAP financial measure.¹² Public disclosure of financial information for a completed fiscal period in a presentation that is made orally, telephonically, by web cast, broadcast or similar means does not require such a filing, if the presentation:

- occurs within 48 hours of a related release or announcement that is filed under proposed Item 1.04 of Form 8-K; and
- is accessible to the public.¹³

Regulation G requires that the registrant provide the following information as part of the disclosure or release of the non-GAAP financial measure:

- a presentation of the most 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 historic measures and quantitative, to the extent available without unreasonable efforts, for prospective measures, of the differences between the non-

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

GAAP financial measure presented and the comparable financial measure or measures calculated and presented in accordance with GAAP.¹⁴

The SEC observed that in many cases, and increasingly over time, disclosures of pro-forma measures were occurring in other than a written communication, which raised the specter of extremely awkward attempts to convey reconciling information.¹⁵ Accordingly, the SEC stipulated that, if a non-GAAP financial measure is released orally, telephonically, in a web cast or broadcast or by similar means, a registrant would be permitted to provide the required accompanying information by posting it on its web site.¹⁶ In such an event, the registrant is required to disclose the location and availability of the required accompanying information during its presentation.¹⁷ In the decade-plus since this rule was promulgated, dissemination of financial and other information via company web sites has expanded substantially.

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 now required.¹⁸ If the GAAP financial measure is not accessible on a forward-looking basis, the registrant must disclose that fact, explain why it is not accessible on a forward-looking basis and provide any reconciling information that is available without an unreasonable effort.¹⁹ Furthermore, the registrant is required to identify any information that is unavailable and disclose its probable significance.²⁰

Regulation G also provides that a non-GAAP financial measure, taken together with the accompanying information, may not misstate a material fact or omit to state a material fact necessary to make the presentation of the non-GAAP financial measure not misleading, in light of the circumstances under which it is presented.²¹ This is a key requirement – and obviously involves subjective assessments, and thus may become grist for disputes between investors and other stakeholders.

GAAP refers to generally accepted accounting principles in the United States, except that, in the case of foreign private issuers whose primary financial statements are prepared in accordance with other generally accepted accounting principles, references to GAAP also include the principles under which those primary financial statements are prepared. The SEC did not intend to capture measures of operating performance or financial measures that fall outside the scope of this definition. Therefore, non-GAAP financial measures, as defined, do *not* include:

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

- operating and other statistical measures (such as unit sales, numbers of employees, numbers of subscribers, or numbers of advertisers);²² and
- ratios or measures that are calculated using *only*:
 - financial measures calculated in accordance with GAAP;²³ and
 - operating measures or other measures that are not non-GAAP financial measures.²⁴

As the term is used by Regulation G, non-GAAP financial measures do *not* include financial information that do not provide numerical measures that are different from the comparable GAAP measure. For example, the following measures are *not* impacted by Regulation G:

- disclosure of amounts of expected indebtedness, including contracted and anticipated amounts;²⁵
- disclosures or amounts of repayments that have been planned or decided upon but not yet made;²⁶
- disclosures of estimated revenues or expenses of a new product line, so long as such amounts were estimated as GAAP figures;²⁷ and
- measures of profit or loss and total assets for each segment required to be disclosed in accordance with GAAP.²⁸

The SEC has stated that the definition of non-GAAP financial measures was not intended 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;²⁹ or
- a measure of liquidity that is different from cash flow or cash flow from operations computed in accordance with GAAP.³⁰

The most common use of non-GAAP measures occurs when operating income is presented, but as reported it excludes one or more expense or revenue items, which are identified as "non-recurring."³¹ Since the term "non-recurring" is open to some interpretation and there is no rule

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

regarding how many consecutive periods incidence of an item prevent it being deemed non-recurring (for example, many reporting entities have reported non-recurring items several years in succession), there is the obvious risk that pro-forma earnings are, as one research report referred to it, “earnings before the bad stuff.”³²

Another example of a non-GAAP measure is EBITDA, which could be calculated using elements derived from GAAP financial presentations but, in any event, is not presented in accordance with GAAP.³³ Over recent decades, EBITDA has become a widely used statistic, and for the most part it is computed precisely as the name suggests it should be.³⁴ However, there is nothing prescribed under GAAP to suggest that a sub-total corresponding to EBITDA is to be set forth in the income statement, and in fact most income statements presenting results of operations in accordance with GAAP could not readily present such a measure.³⁵

Various ratios and other statistical data either may or may not be within the definition of non-GAAP measures, depending upon whether or not they are based on GAAP-defined data. If derived from GAAP-defined items, these will not be deemed non-GAAP measures and accordingly will not be subject to the requirements of Regulation G. Examples 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).³⁶

On the other hand, if the ratio or other statistic is *not* derived from a GAAP-defined item, it would be a non-GAAP financial measure and thus trigger the provisions of Regulation G. For example, a ratio purporting to be a measure of operating margin, where either the revenue component or the operating income component of the calculation, or both, is not calculated in accordance with GAAP, would require reconciliation to the nearest equivalent GAAP measure.³⁷

As it was finally enacted, Regulation G excluded from the definition of "non-GAAP financial measure" those financial measures required to be disclosed by GAAP, Commission rules, or a system of regulation of a government or governmental authority or self-regulatory organization

³² Merrill Lynch, *Quality of Earnings: Towards a 360° View of Reality* (Merrill Lynch Global Securities Research & Economics Group, 2002). This research found that, although “most of the adjustments made to determine pro-forma in any one year seem reasonable, it is the frequency of similar adjustments year to year that is disconcerting.” It found that, (d)uring the two-year period . . . 2000 & 2001, only 4.5% of cases ever resulted in pro-forma being lower than GAAP (but) 63% of companies had numbers adjusted upwards.”

³³ SEC Release No. 33-8176.

³⁴ EBITDA means net earnings (in common parlance, the “bottom line” on the income statement) with interest, taxes, depreciation and amortization added back. Many entities have no amortization charges, but the term EBITDA is used nonetheless.

³⁵ The reason is that, particularly for entities involved in the production of goods, part of the periodic depreciation and amortization will be capitalized into inventory, and thus will not be incorporated into the period’s expenses (possibly offset in part or in whole by the expensing of previously capitalized depreciation and amortization costs relating to goods sold during the reporting period).

³⁶ SEC Release No. 33-8176.

³⁷ Ibid.

that is applicable to the registrant. For example, measures of capital or reserves calculated for a regulatory purpose would not require reconciliation to a GAAP measure.³⁸

It should be noted that the epidemic in the use of pro forma (or non-GAAP) performance measures was not limited to the U.S. The SEC itself noted that the concern with disclosures of non-GAAP performance measures extended beyond the U.S. In May 2002, the Technical Committee of the International Organization of Securities Commissions (IOSCO) published its *Cautionary Statement Regarding Non-GAAP Results Measures* that urged issuers, investors and other users of financial information to use care when presenting and interpreting such information.³⁹ This IOSCO *Cautionary Statement* noted the universal concerns that regulators have about the potential misuse of non-GAAP earnings measures⁴⁰ and provides examples of statements of cautionary advice regarding the appropriate use of non-GAAP information that have been issued in various countries.⁴¹

Section 3(b) of the Sarbanes-Oxley Act provides that a violation of that Act or the Commission'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 Commission enforcement action alleging violations of Regulation G.⁴² Furthermore, if the facts and circumstances warrant, the SEC can bring an action under both Regulation G and Rule 10b-5.⁴³

Requirements of Regulation G

Regulation G amended Item 10 of Regulation S-K and Item 10 of Regulation S-B to require that registrants using non-GAAP financial measures in filings with the Commission provide:

- a presentation, with equal or greater prominence, of the *most directly comparable financial measure* calculated and presented in accordance with GAAP;⁴⁴
- a reconciliation 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. This may be done either by schedule or other clearly understandable method, and is to be quantitative for historical non-GAAP measures presented, and quantitative, to the extent available without unreasonable efforts, for forward-looking information;⁴⁵

³⁸ Ibid.

³⁹ International Organization of Securities Commissions, *Cautionary Statement Regarding Non-GAAP Results Measures* (19 May 2002).

⁴⁰ SEC Release No. 33-8176.

⁴¹ Ibid.

⁴² Public Company Accounting Reform and Investor Protection Act of 2002, at Sec. 3.

⁴³ Ibid.

⁴⁴ SEC Release No. 33-8176.

⁴⁵ Ibid.

- a statement disclosing the reasons why 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;⁴⁶ and

- if material, a statement disclosing the additional purposes, if any, for which management uses the non-GAAP financial measure that are not otherwise disclosed.⁴⁷

These requirements have presumably curtailed or eliminated the gratuitous use of non-GAAP measures, inasmuch as a reconciliation to the most directly comparable GAAP measure will clearly reveal the nature of the adjustments made in deriving the pro-forma item. Were these adjustments to not be justified in the eyes of the users of the information, the credibility of management's financial reporting practices would suffer. Concern over this potential loss of credibility should be a powerful incentive to limit the use of non-GAAP measures to those that truly offer insights into the reporting entity's economic performance. In effect, these expanded disclosures will hold up a mirror to management's financial reporting integrity, thereby motivating more principled communications with various stakeholders.

In addition to the foregoing disclosure requirements, Regulation G amended Item 10 of Regulation S-K and Item 10 of Regulation S-B to *prohibit*:

- 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, with the exceptions of the measures EBIT and EBITDA;⁴⁸

- adjusting a non-GAAP performance measure to eliminate or smooth items identified as non-recurring, infrequent or unusual, when (1) the nature of the loss 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;⁴⁹

- presenting non-GAAP financial measures on the face of the registrant's financial statements prepared in accordance with GAAP or in the accompanying notes;⁵⁰

- 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;⁵¹ 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.⁵²

The implications of the foregoing prohibitions are profound. By banning the too-often capricious use of the "non-recurring" descriptor, users of financial statements can be comforted

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid. As with hundred-year storms and other natural phenomena that somehow occur much more frequently, many companies were found to have non-recurring events (albeit often of varying natures) every few years, making this classification particularly suspect.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid.

that the former apparent correspondence between “pro-forma earnings” and “earnings before the bad stuff” will not recur. By also barring non-GAAP measures from the GAAP-basis financial statements, the implicit suggestion that those alternative measures might be, in some sense, superior to the GAAP measures is also eliminated. Another common source for misleading inferences -- namely, the use of confusingly similar captions (e.g., cash earnings) -- is also now prohibited.

As it originally was proposed, Item 10 of Regulation S-K and Item 10 of Regulation S-B would have included a prohibition on the use of *non-GAAP per share financial measures*.⁵³ The SEC received significant comment expressing concern with this part of the proposal, particularly that such a prohibition would deprive investors of useful information and that the other requirements of Regulation G and Item 10 would provide adequate protections with regard to the use of such financial measures.⁵⁴ After considering those comments, the SEC chose to not include a prohibition on non-GAAP per share financial measures in the amendments to Item 10 of Regulation S-K or Item 10 of Regulation S-B.⁵⁵ Accordingly, such measures may be presented.⁵⁶

The SEC reported also that some commentators were of the view that the proposed requirements of (1) a statement regarding the purposes for which management uses the non-GAAP financial measure⁵⁷ and (2) a statement of the utility of the non-GAAP financial measure to investors would likely result in duplicative disclosure.⁵⁸ In response to these comments, the SEC revised the draft requirement of a statement of the purposes for which management uses the non-GAAP financial measure to apply only to the extent that the information is material and is not presented in the statement of the utility of the non-GAAP financial measure to investors.⁵⁹ Consistent with the proposal, the requirement for these statements may be satisfied by including the statements in the most recent annual report filed with the Commission (or a more recent filing) and by updating those statements, as necessary, no later than the time of the filing containing the non-GAAP financial measure.⁶⁰

The SEC has cautioned that the required statements of the purposes for which management uses the non-GAAP financial measure and the utility of the information to investors should not be so-called “boilerplate.”⁶¹ That is, the commentary must not only be clear and understandable, but also be 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-

⁵³ SEC Release No. 33-8039 .

⁵⁴ SEC Release No. 33-8176.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid.

GAAP financial measure and applies it to management decisions.⁶² In other words, it must give the users insight into how management decisions are actually being made and how the proffered non-GAAP measures constitute a useful management tool. This requirement, if complied with in practice, should contribute to a reduction in the usage of ad-hoc non-GAAP measures intended to mislead investors regarding the entity's performance while not serving substantive management purposes.

The SEC also amended Exchange Act Form 20-F to incorporate Item 10 of Regulation S-K. The definition of "non-GAAP financial measure" therein is the same as for Regulation G, discussed above. However, a non-GAAP financial measure that would otherwise be prohibited under Regulation G, as described above, will be permitted in a Form 20-F filing of a foreign private issuer, if the measure was expressly permitted under the generally accepted accounting principles used in the issuer's primary financial statements and was included in the issuer's annual report or financial statements used in its home country jurisdiction or market.⁶³ For example (and this is only a hypothetical), if the foreign registrant's national GAAP, to which its primary financial reporting complies, required or permitted reporting of "cash earnings," then this would be permitted also in the Form 20-F filing, notwithstanding that Regulation G prohibits use of such a potentially confusing term.

Changes in Form 8-K requirements to reflect Regulation G

Concurrent with the promulgation of Regulation G, the SEC created a new item, Item 12 - *Disclosure of Results of Operations and Financial Condition*, to Form 8-K. The impact is to bring all earnings and related announcements within the current reporting requirements, so that a Form 8-K containing the press release or other communication disclosing material non-public financial information about completed annual or quarterly fiscal periods will be required to be filed within five days. This requirement is effective regardless of whether non-GAAP measures are included in the announcement, and it does not mandate that any earnings announcements be made by the registrant.⁶⁴ It requires the registrant to identify briefly the announcement or release and include the announcement or release as an exhibit to the Form 8-K.⁶⁵

The mere repetition of information that was already publicly disclosed or the release of the same information in a different form (for example in an interim or annual report to shareholders) does not trigger a new filing requirement.⁶⁶ Nor does a new filing become necessary if the repeated information is accompanied by information that was not material, whether or not already public.⁶⁷ However, release of additional or updated material non-public information regarding the registrant's results of operations or financial condition for a

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

completed fiscal year or quarter does trigger an additional disclosure obligation.⁶⁸ Issuers that make earnings announcements or other disclosures of material non-public information regarding a completed fiscal quarter or year in an interim or annual report to shareholders are permitted to specify in the Form 8-K which portion of that report contains the information required to be furnished under Item 12.⁶⁹ The requirement to furnish a Form 8-K under Item 12 does not apply to issuers that make these announcements and disclosures *only* in their quarterly reports filed with the Commission on Form 10-Q (or 10-QSB) or in their annual reports filed with the Commission on Form 10-K (or 10-KSB).⁷⁰

Item 12 furthermore includes an exception from its requirements where non-public information is disclosed orally, telephonically, by web cast, by broadcast, or by similar means in a presentation that is complementary to a related, written release or announcement that triggers the requirements of Item 12, when it occurs within 48 hours of the first event.⁷¹ In such a circumstance, the registrant is not required to furnish an additional Form 8-K with regard to the later information if:

- the related, written release or announcement has been furnished to the Commission on Form 8-K pursuant to Item 12 prior to the presentation;⁷²
- the presentation is broadly accessible to the public by dial-in conference call, web cast or similar technology;⁷³
- the financial and statistical information contained in the presentation is provided on the registrant's web site, together with any information (e.g., description of how the information is used by management) that would be required under Regulation G;⁷⁴ 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 web site where the information would be available.⁷⁵

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.⁷⁶ Although such disclosure may also include forward-looking information, it is the material information about the historical fiscal period that triggers Item 12.⁷⁷ Accordingly, Item 12 does not apply to public disclosure of earnings estimates for future or ongoing fiscal periods, unless those estimates are

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid.

included in the public announcement or release of material non-public information regarding an annual or quarterly fiscal period that has ended.⁷⁸

Filing versus furnishing - liability and incorporation by reference. As it had been proposed, Item 12 would have required registrants to "file" a Form 8-K meeting the requirements of Item 12.⁷⁹ This proposal was in contrast to Item 9 of Form 8-K (pertaining to Regulation FD matters), which permits registrants to merely "furnish" a Form 8-K to the Commission.⁸⁰ In general, registrants prefer to "furnish" information to the SEC, rather than "filing" it, because:

- information that is "furnished to the Commission" in a Form 8-K is not subject to Section 18 of the Exchange Act unless the registrant specifically states that the information is to be considered "filed",⁸¹
- information that is "furnished to the Commission" in such a Form 8-K 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;⁸² and
- information that is "furnished to the Commission" in such a Form 8-K is not subject to the requirements of amended Item 10 of Regulation S-K or Item 10 of Regulation S-B, while "filed" information would be subject to those requirements.⁸³

Commentators on the SEC's proposal, prior to the ultimate promulgation of Regulation G, claimed that requiring earnings releases to be "filed" would have a detrimental effect on the level and quality of information that is provided to investors.⁸⁴ They expressed concern that enhanced liability could preclude registrants from making earnings releases or similar disclosures, thus have a perverse effect.⁸⁵ Further, they were afraid that the need to satisfy the more stringent requirements in amended Item 10 of Regulation S-K and Item 10 of Regulation S-B, within the required timeframe of Form 8-K, would cause registrants to limit their publication of earnings releases or similar disclosures.

In response, Item 12 of Form 8-K as adopted requires that earnings releases or similar disclosures be "furnished" to the Commission rather than "filed." In addition, to provide certain of the protections provided by the amendments to Item 10 of Regulation S-K and Item 10 of Regulation S-B to earnings releases -- even if they are not "filed" -- the Commission included in Item 12 of Form 8-K the requirements of paragraph (e)(1)(i) of Item 10 of Regulation S-K and

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Ibid.

paragraph (h)(1)(i) of Item 10 of Regulation S-B. As a result, in addition to the requirements already imposed by Regulation G, registrants are now required to disclose:⁸⁶

- 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;⁸⁷ 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.⁸⁸

Registrants can satisfy this requirement by either including the disclosure in the Form 8-K or in the release or announcement that is included as an exhibit to the Form 8-K.⁸⁹ They also may satisfy this requirement by including the disclosure in their most recent annual report filed with the Commission (or a more recent filing) and by updating those statements, as necessary, no later than the time the Form 8-K is furnished to the Commission. The other amendments to Item 10 of Regulation S-K and Item 10 of Regulation S-B would not apply.⁹⁰

Interrelationship of Item 12 and Regulation FD. Earnings releases and similar disclosures that trigger the requirements of Item 12 are also subject to Regulation FD. The application of Item 12 differs from Regulation FD, however, in that the requirements of Item 12 always implicate Form 8-K for those disclosures, while Regulation FD provides that Form 8-K is only one alternative means of satisfying its requirements.⁹¹ Further, a Form 8-K furnished to the Commission pursuant to Item 9 (which pertains to Regulation FD items) would satisfy an issuer's obligation under Regulation FD only if the Form 8-K were furnished to the Commission within the time frame required by Regulation FD.⁹² Regulation FD could, of course, be satisfied by public disclosure other than through the filing of a Form 8-K meeting Regulation FD's requirements; in that case, Item 12 would require that a Form 8-K be furnished to the Commission within the five business day timeframe of Item 12.⁹³ A Form 8-K furnished within the timeframe required by Regulation FD and otherwise satisfying the requirements of both

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Under Regulation FD, the timing of required public disclosure differs depending on whether the issuer has made an "intentional" or "non-intentional" selective disclosure. If the former, public disclosure of the same information is required to be made simultaneously. When "non-intentional," public disclosure must be made promptly, meaning as soon as reasonably practicable but not after the later of 24 hours or the start of the next day's trading on the New York Stock Exchange, after a senior official learns of the disclosure and knows (or is reckless in not knowing) that the information disclosed was both material and nonpublic.

⁹³ SEC Release No. 33-8176.

Item 9 and Item 12 could be furnished to the Commission once, indicating that it is being furnished under both Item 9 and Item 12, and satisfies both requirements.⁹⁴

*The author, **Barry Jay Epstein, Ph.D., CPA, CFF** is a Chicago-based forensic accountant and recognized expert on financial reporting and auditing matters. He is a principal with Epstein + Nach LLC and can be reached at bepstein@epsteinnach.com or 312-464-3520.*

⁹⁴ Ibid.