

### USE OF NON-GAAP FINANCIAL MEASURES

#### *Executive Summary*

On January 22, 2003, the SEC issued new Regulation G, governing public disclosures or releases of material information that include a non-GAAP financial measure. Regulation G requires an issuer to reconcile non-GAAP financial measures, such as EBITDA and certain pro forma financial information, to the most directly comparable GAAP financial measure and present the most directly comparable financial measure calculated in accordance with GAAP.

At the same time, the SEC released amendments to several of its existing rules to mandate certain disclosures concerning non-GAAP financial measures contained in SEC filings. In addition to the reconciliation and most directly comparable financial measure presentation required under Regulation G, these amendments require disclosure concerning the purpose for presenting a non-GAAP financial measure and the reasons why the information is useful to investors.

Both Regulation G and the amendments were adopted pursuant to Section 401(b) of the Sarbanes-Oxley Act of 2002. Regulation G will apply to all subject disclosures made on or after March 28, 2003. The amendments will apply to any annual or quarterly report filed with respect to a fiscal period ending after March 28, 2003.

- *Companies will need to identify all non-GAAP financial measures intended to be used in SEC filings and public disclosures. It is important to identify non-GAAP financial measures in the early stages of preparing filings and disclosures in order to permit adequate time for the required reconciliation and other disclosures to be prepared.*

#### *To whom do these new regulations apply?*

Regulation G and the amendments to existing regulations apply to any entity, other than an investment company, that has securities registered under Section 12 of the Securities Exchange Act of 1934, as amended, or that is required to file reports under Sections 13(a) or 15(d) of the Exchange Act.

#### *What is a non-GAAP financial measure?*

The term "non-GAAP financial measure" is defined as a numerical measure of 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 comparable measure calculated and presented in accordance with GAAP in a 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 comparable measure calculated and presented in accordance with GAAP.

#### *Examples of non-GAAP financial measures include:*

- pro forma financial information, other than pro forma financial information pursuant to Article 11 of Regulation S-X;
- a measure of operating income that excludes "non-recurring" expense or revenue items;
- EBITDA;
- 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; and

- all measures that have the effect of depicting either (i) 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 (ii) a measure of liquidity that is different from cash flow or cash flow from operations computed in accordance with GAAP.

*The SEC has excluded the following from its definition of non-GAAP financial measures:*

- operating and statistical measures (such as unit sales, numbers of employees, numbers of subscribers or numbers of advertisers);
- ratios or measures that are calculated using only (i) financial measures calculated in accordance with GAAP (such as sales per square foot or same store sales, assuming sales were calculated in accordance with GAAP) and (ii) operating measures or other measures that are not non-GAAP financial measures;
- amounts of expected indebtedness or debt repayments;
- estimated revenues or expenses of a new product line, so long as such estimates were made in accordance with GAAP;
- measures of profit or loss and total assets for business segments required to be disclosed in accordance with GAAP; and
- any financial measures that are required to be disclosed by GAAP, SEC rules or an applicable system of registration.

***What specific disclosures are required by Regulation G when publicly disclosing or releasing non-GAAP financial information?***

Companies that choose to publicly disclose non-GAAP financial measures must provide:

- a presentation of the most directly comparable financial measure calculated and presented in accordance with GAAP with equal or greater prominence to the non-GAAP financial measure; and
- for historic measures, a quantitative reconciliation (by schedule or other clearly understandable method) of the differences between the non-GAAP financial measure disclosed and the most directly comparable GAAP financial measure calculated and presented in accordance with GAAP, and to the extent available without unreasonable effort the same for prospective measures.

***How should the required disclosures be made if the non-GAAP financial measures are released orally, telephonically, in a webcast or other broadcast?***

When a non-GAAP financial measure is released orally, telephonically, in a webcast or by broadcast or similar means, the disclosure requirements of Regulation G can be satisfied by website posting of the required information contemporaneously with the release. The location of the website must be provided in the same presentation in which the non-GAAP financial measure is made public.

***What disclosures are required when non-GAAP financial information is contained in an SEC filing?***

A company that intends to include a non-GAAP financial measure in any filing with the SEC would be required to disclose, in addition to the most directly comparable financial measure presentation and quantitative reconciliation required by Regulation G as described above, the following information:

- the reasons why management believes the presentation of the non-GAAP financial measure provides useful information to investors; and
- to the extent material, the additional purposes, if any, for which management uses the non-GAAP financial measure.

***What disclosure practices are prohibited in SEC filings?***

The new rules and regulations prohibit certain practices with respect to SEC filings, such as:

- excluding charges or liabilities from non-GAAP liquidity measures that required, will require or would have required (absent an ability to settle in another manner) cash settlement, other than the measures EBIT or EBITDA;

- adjusting a non-GAAP performance measure to eliminate or smooth items identified as non-recurring, infrequent or unusual when the nature of the charge or gain is such that it is reasonably likely to recur within 2 years or where there was a similar change or gain within the prior 2 years;
- presenting non-GAAP financial measures on the face of 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; or
- using titles or descriptions of non-GAAP financial measures that are the same as, or confusingly similar to, titles or descriptions used for GAAP measures.

***Are there any exceptions to the new regulations?***

In response to industry comments, the SEC specifically exempted communications of non-GAAP financial measures made in a disclosure that is already subject to SEC regulations governing mergers, acquisitions or other business combinations.

The SEC has also created a limited exception for non-U.S. companies, as discussed below.

***What are the implications for non-U.S. companies?***

Regulation G applies to the public disclosure of a non-U.S. GAAP financial measure by a non-U.S. company, except in the limited situation where:

- the securities of the non-U.S. company are listed or quoted on a securities exchange or inter-dealer quotation system outside the U.S.;
- 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 U.S. or is included in a written communication released by or on behalf of the foreign private issuer outside the U.S. There is no limited exception for non-U.S. issuers to the requirements for filings on Form 20-F.

A non-GAAP financial measure that would otherwise be prohibited, however, is permitted in a non-U.S. issuer's Form 20-F filing if the measure:

- was required or expressly permitted by the standard-setter that established the GAAP used in issuer's primary financial statements; and
- if the measure was included in the issuer's annual report for use in its home country.

## FILING OF EARNINGS RELEASES ON FORM 8-K

### ***Executive Summary***

On January 22, 2003, the SEC released various amendments that require companies that disclose material nonpublic information regarding results of operations or financial condition for completed annual or quarterly periods to furnish such information to the SEC. This information must be furnished to the SEC on Form 8-K within five business days after any public announcement or release thereof. A Form 8-K filing must be made regardless of whether the subject information contains non-GAAP financial measures.

These amendments were adopted pursuant to Section 401(b) of the Sarbanes-Oxley Act of 2002 and will apply to all subject earnings releases issued after March 28, 2003.

### ***What actions need to be taken as a result of the issuance of public earnings announcements or releases concerning completed periods?***

Companies must identify the announcement or release under Item 12 in a current report on Form 8-K and include the text of the announcement or release as an exhibit to the Form 8-K. This report must be furnished to the SEC within five business days after any public announcement or release of the information.

- *Note that this requirement is separate from the disclosure requirements under Regulation FD.*

### ***What if the earnings release includes forward-looking information in addition to information related to completed annual or quarterly periods?***

Earnings guidance solely on current or future periods need not be furnished on Form 8-K. However, forward-looking information included in a release also containing material non-public information for completed periods would necessitate the furnishing of such information on Form 8-K.

### ***What if the earnings release includes a non-GAAP financial measure?***

If the earnings release includes a non-GAAP financial measure, the company must present the most comparable GAAP financial measure with equal or greater prominence and must reconcile the non-GAAP financial measure to the most directly comparable GAAP measure. In this situation, the company must also include a statement setting forth the reasons why its management believes the non-GAAP measure is useful to investors and any additional purposes management had for using the non-GAAP financial measure.

Companies may satisfy this requirement by either (i) including the mandated disclosure in the Form 8-K or an exhibit thereto or (ii) including the disclosure in its most recent annual report (or more recent filing) filed with the SEC, and by updating those statements, as necessary, prior to furnishing the Form 8-K to the SEC.

### ***Are there any exceptions to the requirements?***

If the disclosure occurs orally, telephonically, by webcast, broadcast or similar means in a presentation that is complementary to and occurs within 48 hours after a related, written release which triggers the Form 8-K furnishing requirement, an additional Form 8-K need not be furnished if:

- the related written release or announcement has been furnished to the SEC on Form 8-K prior to the presentation;
- the presentation is broadly accessible by the public by conference call, webcast or similar means;
- the information contained in the presentation is posted on the website of the company, together with any information that would be required under proposed Regulation G; and
- the presentation was announced by a widely disseminated press release with instructions on when and how to access the presentation and on how to access the website information.

Repetition or release of the same information in a different form need not be furnished, but release of additional or updated material non-public information regarding results of operation or financial condition for a completed fiscal year or quarter would need to be furnished.

***What are the liability implications of filing such earnings disclosures on Form 8-K?***

Similar to certain disclosures made on Form 8-K to satisfy Regulation FD, earnings disclosures furnished under Form 8-K are not considered as "filed" with the SEC for liability purposes. As a result, the information is not subject to incorporation by reference into Securities Act registration statements.

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