

SECURITIES AND EXCHANGE COMMISSION

17 CFR PARTS 228, 229, 244 and 249

[RELEASE NO. 33-8176; 34-47226; FR-65; FILE NO. S7-43-02]

RIN 3235-A169

Conditions for Use of Non-GAAP Financial Measures

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: As directed by the Sarbanes-Oxley Act of 2002, we are adopting new rules and amendments to address public companies' disclosure or release of certain financial information that is calculated and presented on the basis of methodologies other than in accordance with generally accepted accounting principles (GAAP). We are adopting a new disclosure regulation, Regulation G, which will require public companies that disclose or release such non-GAAP financial measures to include, in that disclosure or release, a presentation of the most directly comparable GAAP financial measure and a reconciliation of the disclosed non-GAAP financial measure to the most directly comparable GAAP financial measure. We also are adopting amendments to Item 10 of Regulation S-K and Item 10 of Regulation S-B to provide additional guidance to those registrants that include non-GAAP financial measures in Commission filings. Additionally, we are adopting amendments to Form 20-F to incorporate into that form the amendments to Item 10 of Regulation S-K. Finally, we are adopting amendments that require registrants to furnish to the Commission, on Form 8-K, earnings releases or similar announcements.

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

FOR FURTHER INFORMATION CONTACT: Joseph P. Babits or Craig Olinger, at (202) 942-2910, Division of Corporation Finance, U.S. Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0402.

SUPPLEMENTARY INFORMATION: We are adopting new Regulation G.¹ We also are adopting amendments to Item 10 of Regulation S-K,² Item 10 of Regulation S-B,³ and Securities Exchange Act of 1934⁴ Forms 8-K⁵ and 20-F.⁶

I. Background

On July 30, 2002, President Bush signed into law the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley Act).⁷ As directed by Section 401(b) of the Sarbanes-Oxley Act, we published for comment a number of new rules and amendments to address the use of "non-GAAP financial measures" on November 4, 2002.⁸ As discussed in that proposing release, the Commission has expressed concerns regarding the improper use of non-GAAP financial measures during the past 30 years.⁹ The rules we adopt today reflect the letter and spirit of the Sarbanes-Oxley Act, our history in regulating non-GAAP financial measures, and the comments we received on the proposals.

We are adopting the proposals relating to the use of non-GAAP financial measures substantially as proposed.¹⁰ The rules we adopt today, however, reflect the following changes from those proposals:

- *Regulation G*—
- Regulation G will not apply to a non-GAAP financial measure included in disclosure relating to a proposed business

¹ 17 CFR 244.100-244.102.

² 17 CFR 229.10.

³ 17 CFR 228.10.

⁴ 15 U.S.C. §§ 78a *et seq.*

⁵ 17 CFR 249.308.

⁶ 17 CFR 249.220.

⁷ Pub. L. No. 107-204, 116 Stat. 745 (2002).

⁸ See Release No. 33-8145 (Nov. 4, 2002) [67 FR 68490].

⁹ See *Accounting Series Release No. 142*, Release No. 33-5337 (Mar. 15, 1973); *Cautionary Advice Regarding the Use of "Pro Forma" Financial Information*, Release No. 33-8039 (Dec. 4, 2001); and *In the Matter of Trump Hotels & Casino Resorts, Inc.*, Release No. 34-45287 (Jan. 16, 2002). We also note that the Financial Accounting Standards Board (FASB) has initiated a project called Financial Performance Reporting by Business Enterprises. The objective of the project is to ensure that users of financial statements have sufficient quality information in order to evaluate a company's performance. The project's focus includes the presentation of key performance measures, or information necessary to permit calculation of key financial measures, used by investors and creditors. However, it will not address non-GAAP measures in press releases or other communications outside financial statements.

¹⁰ Regulation G and the amendments to our rules are intended to ensure that investors receive adequate information in evaluating a company's use of non-GAAP financial measures. In addition, having earnings announcements furnished on Form 8-K would provide the public a source of reference for obtaining a company's most recent statements regarding its financial condition. Therefore, we believe that the new rules and amendments are in the public interest and consistent with the protection of investors.

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;

- The safe harbor from the application of Regulation G for disclosure of non-GAAP financial measures by foreign private issuers outside of the United States will make clearer that Regulation G does not apply to written communications 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 its release outside the United States and is not otherwise targeted at persons located in the United States;

- The reference to "comparable [GAAP] financial measure or measures" will read "most directly comparable [GAAP] financial measure or measures"; and

- The definition of GAAP for purposes of financial measures prepared by foreign private issuers will be further clarified.

- *Item 10 of Regulation S-K and Item 10 of Regulation S-B*—

- These items will not include a prohibition on "non-GAAP per share measures" in documents filed with the Commission;¹¹

- These items will 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;

- The reference to "comparable [GAAP] financial measure or measures" will read "most directly comparable [GAAP] financial measure or measures";

- The required quantitative reconciliation will include the same exception for forward-looking non-GAAP financial measures as in Regulation G;

- The measures EBIT (earnings before interest and taxes) and EBITDA (earnings before interest, taxes, depreciation, and amortization) will be exempted specifically from the prohibition on 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;

- The prohibition on 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 will make clear that such an adjustment is prohibited only when (1) the nature of the charge or gain is such that it is reasonably likely to recur within two years,

¹¹ While we have not included a prohibition on per share non-GAAP financial measures in Item 10 of Regulation S-K or Item 10 of Regulation S-B, per share measures that are prohibited specifically under GAAP or Commission rules continue to be prohibited in materials filed with or furnished to the Commission. See, for example, the prohibition on cash flow per share in paragraph 33 of FASB Statement No. 95, Statement of Cash Flows.