

or (2) there was a similar charge or gain within the prior two years; and

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

- *Definition of non-GAAP financial measures*—

- “Non-GAAP financial measures” will not include financial measures that are required to be disclosed by GAAP, Commission rules or a system of regulation that is applicable to a registrant.

- *Form 8-K*—

- The Form 8-K requirement with respect to earnings releases and similar announcements will require that those materials be “furnished to,” rather than “filed with,” the Commission.

II. The Rules and Amendments

A. Regulation G

We are adopting new Regulation G substantially as proposed. Regulation G will apply whenever a company publicly discloses or releases material information that includes a non-GAAP financial measure.¹²

1. Application

a. General Standard

Regulation G 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.¹³ Regulation G applies whenever such a registrant, or a person acting on its behalf, discloses publicly or releases publicly any material information that includes a non-GAAP financial measure.

b. Foreign Private Issuers

Regulation G applies to registrants that are foreign private issuers,¹⁴ subject to a limited exception. Specifically, Regulation G does not apply to public disclosure of a non-GAAP financial

measure by, or on behalf of, a registrant that is a foreign private issuer if:

- 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 generally accepted accounting principles in the United States; 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.

These conditions focus on whether the financial measure relates to U.S. GAAP and whether the disclosure is made by or on behalf of the foreign private issuer outside of the United States. We believe these conditions appropriately take into account the interests of U.S. investors (including both the interests reflected in the Sarbanes-Oxley Act and the interest of receiving information that is communicated globally) and the interests of foreign private issuers in communicating globally, including in their home markets.

Therefore, we believe that the worldwide availability of information properly disclosed outside the United States and the interests of U.S. investors in information communicated by, or on behalf of, the issuer outside the United States dictate that the exception for foreign private issuers should continue to apply even where any one or more of the following circumstances are present:

- 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 web sites maintained by the registrant, so long as the web sites, 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 Commission made under cover of a Form 6-K.¹⁵

c. Disclosures Relating to Business Combination Transactions

As proposed, Regulation G would have applied to disclosures of non-GAAP financial measures that represent projections or forecasts of results of proposed business combination transactions. We sought comment specifically on this point, and several of the comment letters we received in response to the proposal argued strongly that Regulation G should not apply to these measures.¹⁶ After consideration of the comments regarding the application of Regulation G to these disclosures, we are including in Regulation G an exception for non-GAAP financial measures included in disclosure relating to a proposed business combination transaction, the entity resulting from the business combination transaction, or an entity that is a party to the business combination transaction if the disclosure is contained in a communication that is subject to the Commission's communications rules applicable to business combination transactions.¹⁷

2. Non-GAAP Financial Measures

a. Definition

For purposes of Regulation G, a non-GAAP financial measure is 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) of the issuer; 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.

In this regard, GAAP refers to generally accepted accounting principles in the United States.

The proposed version of Regulation G indicated that, with respect to foreign private issuers whose primary financial statements are prepared in accordance with non-U.S. generally accepted accounting principles, references to

¹² Section 401(b) of the Sarbanes-Oxley Act directs the Commission to adopt rules concerning the public disclosure or release of “pro forma financial information” by a company filing reports under Section 13(a) [15 U.S.C. § 78m(a)] or 15(d) [15 U.S.C. § 780(d)]. Because the Commission's rules and regulations address the use of “pro forma financial information” in other contexts, particularly in Regulation S-X, and use that term differently from its use in the Sarbanes-Oxley Act, we are adopting the term “non-GAAP financial measures” to identify the types of information targeted by Section 401(b) of the Sarbanes-Oxley Act.

¹³ See Rule 101(c) of Regulation G [17 CFR 244.101(c)]. Registered investment companies are excluded from the definition of “registrant” for purposes of Regulation G, as Section 405 of the Sarbanes-Oxley Act exempts investment companies registered under Section 8 of the Investment Company Act of 1940 (15 U.S.C. § 80a-8) from Section 401 of the Sarbanes-Oxley Act and any rules adopted by the Commission under Section 401.

¹⁴ “Foreign private issuer” is defined in Rule 405 [17 CFR 230.405] under the Securities Act 1933 [15 U.S.C. §§ 77a *et seq.*].

¹⁵ 17 CFR 249.306.

¹⁶ See, for example, the comment letters of the Association of the Bar of the City of New York, Special Committee on Mergers, Acquisitions, and Corporate Control Contests; Association of the Bar of the City of New York, Committee on Securities Regulation; Deloitte & Touche, LLP; and Cleary, Gottlieb, Steen & Hamilton.

¹⁷ See Exchange Act Rules 14a-12 (17 CFR 240.14a-12) and 14d-2 (17 CFR 240.14d-2), Securities Act Rules 165 (17 CFR 230.165) and 425 (17 CFR 230.425), and Item 1015 of Regulation M-A (17 CFR 229.1015).