

GAAP would “also include” the principles under which those primary financial statements are prepared. Commenters expressed the concern that the words “also include” meant that foreign private issuers would have to reconcile the non-GAAP financial measure to both GAAP in their home country and U.S. GAAP.<sup>18</sup> As adopted, Regulation G clarifies this issue. First, in the case of foreign private issuers whose primary financial statements are prepared in accordance with non-U.S. generally accepted accounting principles, Regulation G makes clear that GAAP refers to the principles under which those primary financial statements are prepared. Second, in the case of foreign private issuers that include a non-GAAP financial measure derived from or based on a measure calculated in accordance with U.S. generally accepted accounting principles, Regulation G makes clear that GAAP refers to U.S. generally accepted accounting principles for purposes of the application of the requirements of Regulation G to the disclosure of that measure.

#### b. Discussion of the Definition

We do not intend the definition of “non-GAAP financial measures” to capture measures of operating performance or statistical measures that fall outside the scope of the definition set forth above. As such, non-GAAP financial measures do not include:

- Operating and other statistical measures (such as unit sales, numbers of employees, numbers of subscribers, or numbers of advertisers); and
- Ratios or statistical 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 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 does not apply include the following:

- Disclosure of amounts of expected indebtedness, including contracted and anticipated amounts;
- Disclosure of amounts of repayments that have been planned or decided upon but not yet made;

<sup>18</sup> See, for example, the comment letters of Deloitte & Touche, LLP and the Association of Private French Enterprises-Association of Large French Enterprises.

- Disclosure of estimated revenues or expenses of a new product line, so long as such amounts were estimated in the same manner as would be computed under GAAP; and

- Measures of profit or loss and total assets for each segment required to be disclosed in accordance with GAAP.<sup>19</sup>

We do intend that the definition of non-GAAP financial measure 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<sup>20</sup> that excludes one or more expense or revenue items that are identified as “non-recurring.” Another example would be EBITDA, which could be calculated using elements derived from GAAP financial presentations but, in any event, is not presented 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 not be a non-GAAP financial measure would be a measure of operating margin that is calculated by dividing revenues into operating income, where both revenue and operating income are calculated in accordance with GAAP. Conversely, an example of a ratio that would be a non-GAAP financial measure would be a measure of operating margin that is calculated by dividing revenues into operating

income, where either revenue or operating income, or both, were not calculated in accordance with GAAP.

We received comment regarding the exclusion of financial measures used for regulatory purposes from the definition.<sup>21</sup> In response to these comments, we have provided an exclusion from the definition of “non-GAAP financial measure” for 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 that is applicable to the registrant. Examples of such financial measures would include measures of capital or reserves calculated for such a regulatory purpose.

#### 3. Requirements of Regulation G

Regulation G contains a general disclosure requirement and a specific requirement of a reconciliation of the non-GAAP financial measure to the most directly comparable GAAP financial measure.

##### a. General Disclosure Requirement<sup>22</sup>

Regulation G includes the general disclosure requirement that a registrant, 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, 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.<sup>23</sup>

<sup>21</sup> See, for example, the comment letters of America's Community Bankers and the American Bankers Association.

<sup>22</sup> 17 CFR 244.100(b).

<sup>23</sup> In its comment letter, the Association for Investment Management and Research expressed concern regarding the presentation of non-GAAP financial measures that appear to have been calculated and presented in a manner consistent with prior presentations of that measure when, in fact, the method of calculating or presenting the measure has changed since prior periods. We agree with this concern. As such, registrants 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 requirement of Regulation G that a registrant, 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, 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.

<sup>19</sup> FASB Statement No. 131, Disclosures About Segments of an Enterprise and Related Information, requires that companies report a measure of profit or loss and total assets for each reportable segment. This tabular information is presented in a note to the audited financial statements and is required to be reconciled to the GAAP measures, with all significant reconciling items separately identified and described. A registrant is required to provide a Management's Discussion & Analysis of segment information if such a discussion is necessary to an understanding of the business. Such discussion would generally include the measures reported under FASB Statement No. 131.

<sup>20</sup> Rule 5-03(b)(1) through Rule 503(b)(7) of Regulation S-X [17 CFR 210.5-03(b)(1) through 17 CFR 210.5-03(b)(7)] includes guidance on the components of operating income (loss).