

b. Reconciliation Requirement ²⁴

Whenever a company that is subject to Regulation G, or a person acting on its behalf, publicly discloses any material information that includes a non-GAAP financial measure, Regulation G requires the registrant to provide the following information as part of the disclosure or release of the non-GAAP financial measure:²⁵

- A presentation of the most directly comparable financial measure calculated and presented in accordance with GAAP;²⁶ 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-GAAP financial measure presented and the most directly comparable financial measure or measures calculated and presented in accordance with GAAP.²⁷

If a non-GAAP financial measure is released orally, telephonically, by webcast, by broadcast, or by similar means, the registrant may provide the accompanying information required by Regulation G by: (1) Posting that information on the registrant's web site; and (2) disclosing the location and availability of the required accompanying information during its presentation.²⁸

²⁴ 17 CFR 244.100(a).

²⁵ A registrant's failure to include all of the information required to be included in a public disclosure or release by Regulation G would not affect that registrant's form eligibility under the Securities Act or whether there is adequate current public information regarding the registrant for purposes of Securities Act Rule 144(c) (17 CFR 230.144(c)).

²⁶ Examples of financial measures calculated and presented in accordance with GAAP would include, but not be limited to, earnings or cash flows as reported in the GAAP financial statements. We believe that it is most appropriate to provide registrants with the flexibility to best make the determination as to which is the "most directly comparable financial measure calculated and presented in accordance with GAAP." We, therefore, do not believe that it is appropriate to provide a specific definition of that term. As general guidance, however, we note that our staff has been, and continues to be, of the view that (1) non-GAAP financial measures that measure cash or "funds" generated from operations (liquidity) should be balanced with disclosure of amounts from the statement of cash flows (cash flows from operating, investing and financing activities); and (2) non-GAAP financial measures that depict performance should be balanced with net income, or income from continuing operations, taken from the statement of operations.

²⁷ In the case of ratios or measures where a non-GAAP financial measure is the numerator and/or the denominator in the calculation of that ratio or measure, the registrant must provide a reconciliation with regard to each non-GAAP financial measure used in the calculation. The registrant must also show the ratio or measure as calculated using the most directly comparable GAAP financial measure(s).

²⁸ Note 1 to Rule 100 of Regulation G [17 CFR 244.100]. While Note 1 to Regulation G does not

With regard to the quantitative reconciliation of non-GAAP financial measures that are forward-looking, Regulation G requires a schedule or other presentation detailing the differences between the forward-looking non-GAAP financial measure and the appropriate forward-looking GAAP financial measure. If the GAAP financial measure is not accessible on a forward-looking basis, the registrant must disclose that fact and provide reconciling information that is available without an unreasonable effort. Furthermore, the registrant must identify information that is unavailable and disclose its probable significance.

Some commenters suggested that we define "public" disclosure and persons acting "on behalf of" a registrant.²⁹ In both cases, the commenters made reference to Regulation FD³⁰ as a precedent. We believe that the precedent of Regulation FD is largely inapposite in this regard and, therefore, have not added these definitions. Under Regulation FD, broad "public" disclosure is the requirement, not the triggering event. The perceived need for exclusions from the triggering disclosures and the specified list of company officials that are acting for the company under Regulation FD was the concern that any disclosure—private or otherwise—would trigger a public disclosure requirement. There should be no such concerns with Regulation G. Only "public" disclosure triggers Regulation G, and an issuer is properly responsible for any person making "public" disclosures on its behalf.³¹

We understand, and indeed intend, that Regulation FD and Regulation G will operate in tandem. A "private" communication of material, non-public information to, for example, an analyst or a shareholder triggers a requirement for broad public disclosure under Regulation FD. If that public disclosure is of material information containing a

state how long a company must keep this information available on its web site, we encourage companies to provide ongoing web site access to this information. At a minimum, we suggest that companies provide web site access to this information for at least a 12-month period.

²⁹ See, for example, the comment letter of the American Bar Association Committee on Federal Regulation of Securities and the American Bar Association Committee on Law and Accounting.

³⁰ 17 CFR 243.100–243.103.

³¹ Whether disclosure is "public" will, of course, depend on all of the facts and circumstances surrounding that disclosure. Whether disclosure is "on behalf of" the registrant also will depend on all of the facts surrounding that disclosure. However, consistent with Regulation FD, we intend that a person who discloses material non-public information in breach of a duty of trust or confidence to the registrant should not be considered to be acting "on behalf of" the registrant.

non-GAAP financial measure, Regulation G will apply to that disclosure.

4. Liability Matters

Rule 102 of Regulation G³² expressly provides that neither the requirements of Regulation G nor a person's compliance or non-compliance with the requirements of Regulation G shall in itself affect any person's liability under Exchange Act Section 10(b)³³ or Rule 10b–5 thereunder.³⁴ Disclosure pursuant to Regulation G that is materially deficient may, in addition to violating Regulation G, give rise to a violation of Section 10(b) or Rule 10b–5 thereunder if all the elements for such a violation are present. In this regard, we reminded companies in December 2001 that, under certain circumstances, non-GAAP financial measures could mislead investors if they obscure the company's GAAP results.³⁵ We continue to be of the view that some disclosures of non-GAAP financial measures could give rise to actions under Rule 10b–5.³⁶

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. Additionally, if the facts and circumstances warrant, we could bring an action under both Regulation G and Rule 10b–5.

B. Non-GAAP Financial Measures in Filings With the Commission—Amendments to Item 10 of Regulation S–K, Item 10 of Regulation S–B and Form 20–F

1. Application

a. General Standard

We are amending Item 10 of Regulation S–K and Item 10 of Regulation S–B to include a statement concerning the use of non-GAAP financial measures in filings with the Commission. The amendments do not apply to registered investment

³² 17 CFR 244.102

³³ 15 U.S.C. § 78j.

³⁴ 17 CFR 240.10b–5.

³⁵ See Release No. 33–8039 (Dec. 4, 2001) [59 FR 63731].

³⁶ See Release No. 33–8039 (Dec. 4, 2001) [59 FR 63731] and *In the Matter of Trump Hotels & Casino, Inc.*, Release No. 34–45287 (Jan. 16, 2002).