

companies.³⁷ The non-GAAP financial measures provisions in amended Item 10 of Regulation S-K and Item 10 of Regulation S-B apply to the same categories of non-GAAP financial measures as are covered by Regulation G.³⁸

b. Foreign Private Issuers

We are amending Exchange Act Form 20-F to incorporate Item 10 of Regulation S-K. Accordingly, foreign private issuers will be subject to the same requirements as domestic issuers with respect to the use of non-GAAP financial measures in filings with the Commission on Form 20-F.³⁹ Consistent with the proposal, filers on Form 40-F under the Multi-Jurisdictional Disclosure System are not subject to those requirements.⁴⁰

As noted above, the definition of “non-GAAP financial measure” is the same for purposes of these amendments as for Regulation G. However, a non-GAAP financial measure that would otherwise be prohibited will be permitted in a Form 20-F filing of a foreign private issuer if the measure is (1) required or expressly permitted by the standard-setter that establishes the generally accepted accounting principles used in the foreign private issuer’s primary financial statements and (2) included in the foreign private issuer’s annual report or financial statements used in its home country jurisdiction or market.⁴¹ We have modified the language of this provision

to clarify its application. We intended, however, that this exception cover only situations where the foreign organization affirmatively acts to require or permit the measure, and not situations where the measure was merely not prohibited. We have, therefore, maintained the requirement of “express” permission, notwithstanding certain comments we received.⁴²

2. Requirements of Amended Item 10 of Regulation S-K and Item 10 of Regulation S-B

The amendments to Item 10 of Regulation S-K and Item 10 of Regulation S-B require registrants using non-GAAP financial measures in filings with the Commission to provide:⁴³

- A presentation, with equal or greater prominence, of the most directly comparable financial measure calculated and presented in accordance with GAAP;
- A reconciliation (by schedule or other clearly understandable method), which shall be quantitative for historical non-GAAP measures presented, and quantitative, to the extent available without unreasonable efforts, for forward-looking information, of the differences between the non-GAAP financial measure disclosed or released with the most directly comparable financial measure or measures calculated and presented in accordance with GAAP;
- A statement disclosing the reasons why the registrant’s management believes that presentation of the non-GAAP financial measure provides useful information to investors regarding the registrant’s financial condition and results of operations;⁴⁴ and
- To the extent material, a statement disclosing the additional purposes, if any, for which the registrant’s management uses the non-GAAP financial measure that are not otherwise disclosed.

In addition to these mandated disclosure requirements, amended Item 10 of Regulation S-K and Item 10 of Regulation S-B prohibit the following:

⁴² See, for example, the comment letters of the American Institute of Certified Public Accountants; Deloitte & Touche, LLP; and Cleary, Gottlieb, Steen & Hamilton.

⁴³ As with Regulation G, the requirements of Item 10 of Regulation S-K and Item 10 of Regulation S-B will not apply to 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.

⁴⁴ With regard to the issuer’s statement as to why management believes the non-GAAP financial measure provides useful information to investors, the fact that the non-GAAP financial measure is used by or useful to analysts cannot be the sole support for presenting the non-GAAP financial measure. Rather, the justification for the use of the measure must be substantive; it can, of course, be a substantive justification that causes a measure to be used by or useful to analysts.

- 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, other than the measures EBIT and EBITDA;

- Adjusting a non-GAAP performance measure to eliminate or smooth items identified as non-recurring, infrequent or unusual, when (1) the nature of the charge or gain is such that it is reasonably likely to recur within two years, or (2) there was a similar charge or gain within the prior two years;⁴⁵

- Presenting non-GAAP financial measures on the face of the registrant’s 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; and

- Using titles or descriptions of non-GAAP financial measures that are the same as, or confusingly similar to, titles or descriptions used for GAAP financial measures.

The requirements and prohibitions for filed information are more extensive and detailed than those of Regulation G. The additional requirements and prohibitions are generally consistent with the staff’s historical practice in situations where it has reviewed filings containing non-GAAP financial measures.

Commenters expressed the concern that the prohibition on excluding from non-GAAP liquidity measures charges or liabilities that required, or will require, cash settlement, or would have required cash settlement absent an ability to settle in another manner, would prohibit the use of the non-GAAP financial measure EBITDA.⁴⁶ We are exempting EBIT and EBITDA from this provision because of their wide and recognized existing use. However, registrants must reconcile these measures to their most directly comparable GAAP financial measure. Also, in the discussion of why the measure is useful to investors, registrants must discuss why investors would find it valuable in the context in which it is presented, given the excluded items.

We had proposed that the requirements for a reconciliation to the most directly comparable GAAP financial measure be slightly more stringent than those set forth under Regulation G. In particular, in filings

⁴⁵ Permitted adjustments (including those permitted because they satisfy the two-year condition) would, of course, be subject to the reconciliation requirement.

⁴⁶ See, for example, the comment letters of Latham & Watkins; Intel Corporation; the Association of the Bar of the City of New York, Committee on Securities Regulation; BDO Seidman, LLP; and Ernst & Young LLP.

³⁷ Regulation S-B does not apply to registered investment companies, as they are excluded from the definition of “small business issuer” [17 CFR 228.10(a)(1)(iii)]. The amendments to Regulation S-K include a specific exemption for registered investment companies [17 CFR 229.10(e)(7)].

³⁸ These amendments apply only to non-GAAP financial measures in filings with the Commission. Regulation G applies to any public disclosure of material information that includes a non-GAAP financial measure, regardless of whether it is in a filing with the Commission. Accordingly, the requirement of Regulation G that the presentation of a non-GAAP financial measure, taken together with the information accompanying the measure and any other accompanying discussion, not contain a material misstatement or material omission necessary in order to make the presentation not misleading, in light of the circumstances in which the presentation is made, also applies to disclosures in documents filed with the Commission.

³⁹ Item 10 of Regulation S-K will not apply to materials submitted to the Commission on Form 6-K. However, if the information in the Form 6-K is incorporated by reference into a registration statement, prospectus or annual report, Item 10 of Regulation S-K would then apply to that information.

⁴⁰ Any public disclosure by these issuers that is not covered by the exclusion for foreign private issuers would, however, be subject to Regulation G.

⁴¹ While such a non-GAAP financial measure would not be prohibited in a Form 20-F, the remaining requirements of Item 10 of Regulation S-K would, of course, continue to apply.