

with the Commission, it was proposed that there not be an "unreasonable effort" exception for forward-looking information to the requirement for a quantitative reconciliation between the non-GAAP financial measure and the comparable GAAP financial measure. Commenters expressed the view that the need for such an exception was present equally in disclosure that was filed with the Commission and disclosure that was not filed.⁴⁷ In response to these comments, we have revised the requirement for filed documents to include the same exception as in Regulation G. Accordingly, with regard to the quantitative reconciliation of non-GAAP financial measures that are forward-looking, Item 10 of Regulation S-K and Item 10 of Regulation S-B require 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.

As proposed, Item 10 of Regulation S-K and Item 10 of Regulation S-B would have included a prohibition on the use of "non-GAAP per share financial measures." We received significant comment expressing concern with this part of the proposal.⁴⁸ The commenters were of the view that the proposed prohibition would deprive investors of useful information and that the other requirements of Regulation G and Item 10 would provide adequate protections with regard to the use of such financial measures.⁴⁹ In response to those

comments, we have not included a prohibition on "non-GAAP per share financial measures" in the amendments to Item 10 of Regulation S-K or Item 10 of Regulation S-B.⁵⁰

Some commenters were of the view that the proposed requirements of (1) a statement regarding the purposes for which management uses the non-GAAP financial measure and (2) a statement of the utility of the non-GAAP financial measure to investors would likely result in duplicative disclosure.⁵¹ In response to these comments, we have revised the requirement of a statement of the purposes for which management uses the non-GAAP financial measure to apply only to the extent that the information is material and is not presented in the statement of the utility of the non-GAAP financial measure to investors. Consistent with the proposal, the requirement for these statements may be satisfied by including the statements in the most recent annual report filed with the Commission (or a more recent filing) and by updating those statements, as necessary, no later than the time of the filing containing the non-GAAP financial measure.

The required statements of the purposes for which management uses the non-GAAP financial measure and the utility of the information to investors should not be boilerplate. We intend these statements to be clear and understandable. We also intend these statements to be specific to the non-GAAP financial measure used, the registrant, the nature of the registrant's business and industry, and the manner in which management assesses the non-GAAP financial measure and applies it to management decisions.

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; and (2) generally accepted accounting principles (see, for example, FASB Statement No. 128, Earnings Per Share).

⁵⁰ A number of commenters in the real estate industry expressed concern regarding the use of the non-GAAP financial measure "funds from operations per share" in earnings releases and materials that are filed with or furnished to the Commission. Because amended Item 10 of Regulation S-K and amended Item 10 of Regulation S-B do not include a prohibition on "non-GAAP per share financial measures," registrants may use the "funds from operations per share" measure, subject to the requirements of Regulation G, amended Item 10 of Regulation S-K and amended Item 10 of Regulation S-B.

⁵¹ 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.

C. New Item 12 of Form 8-K

We are amending Form 8-K to add new Item 12, "Disclosure of Results of Operations and Financial Condition."⁵² The addition of Item 12 to Form 8-K will bring earnings information within our current reporting system by requiring registrants to furnish to the Commission all releases or announcements disclosing material non-public financial information about completed annual or quarterly fiscal periods. New Item 12 does not require that companies issue earnings releases or similar announcements. However, such releases and announcements will trigger the requirements of Item 12.

1. General Requirement

Item 12 requires registrants to furnish to the Commission a Form 8-K within five business days of any public announcement or release disclosing material non-public information regarding a registrant's results of operations or financial condition for an annual or quarterly fiscal period that has ended.⁵³ The requirements of Item 12 will apply regardless of whether the release or announcement includes disclosure of a non-GAAP financial measure. Item 12 requires the registrant to identify briefly the announcement or release and include the announcement or release as an exhibit to the Form 8-K.

Repetition of information that was publicly disclosed previously or the release of the same information in a different form (for example in an interim or annual report to shareholders) would not trigger the Item 12 requirement. This result would not

⁵² In Release No. 33-8106 (June 17, 2002) [67 FR 42913], we proposed significant amendments to Form 8-K. We intend to address those proposals in the near future. As we have not yet revised Form 8-K as proposed in Release No. 33-8106, we have adopted the proposed requirement regarding earnings releases and similar disclosures without using the new numbering system proposed for Form 8-K. At the time we address the proposals in Release No. 33-8106, we will consider the need to renumber all of the items in Form 8-K, including new Item 12.

⁵³ The proposing release would have required a registrant to file the Form 8-K under Item 12 within two business days after the earnings release or similar disclosure. We had proposed this deadline in anticipation of the adoption of our proposal, in Release No. 33-8106, to shorten the filing deadline for all reports on Form 8-K. As we have not yet addressed those proposals, we believe it is appropriate to adopt a temporary deadline for furnishing a report on Form 8-K under Item 12 of five business days, the shorter of the two existing Form 8-K deadlines. When we address the Form 8-K proposals, we may then shorten the Item 12 deadline. At that time, we will consider the comments received in response to the proposing release and our proposal therein to set a two-business day deadline for earnings releases or similar disclosures on Form 8-K.

⁴⁷ See, for example, the comment letters of the Securities Law Committee of the American Society of Corporation Secretaries and Deloitte & Touche, LLP.

⁴⁸ See, for example, the comment letters of Fannie Mae; the Securities Law Committee of the American Society of Corporate Secretaries; the American Council of Life Insurers; the American Institute of Certified Public Accountants; the National Association of Real Estate Investment Trusts; the Real Estate Roundtable; the New York Clearing House Association; and the Committee on Corporate Reporting of Financial Executives International.

⁴⁹ See footnote 11 for additional information regarding the use of "non-GAAP per share financial measures." Further, despite the absence of a prohibition against the use of "non-GAAP per share financial measures" in Item 10 of Regulation S-K and Item 10 of Regulation S-B, registrants should consider whether the use of any per share measure that is not calculated using a share figure that is presented on a diluted basis complies with (1) the requirement of Regulation G that a registrant, or a person acting on its behalf, shall not make public