

change if the repeated information were accompanied by information that was not material, whether or not already public. However, release of additional or updated material non-public information regarding the registrant's results of operations or financial condition for a completed fiscal year or quarter would trigger an additional Item 12 obligation. Issuers that make earnings announcements or other disclosures of material non-public information regarding a completed fiscal quarter or year in an interim or annual report to shareholders would be permitted to specify in the Form 8-K which portion of that report contains the information required to be furnished under Item 12. In addition, the requirement to furnish a Form 8-K under Item 12 would not apply to issuers that make these announcements and disclosures only in their quarterly reports filed with the Commission on Form 10-Q⁵⁴ (or 10-QSB⁵⁵) or their annual reports filed with the Commission on Form 10-K⁵⁶ (or 10-KSB⁵⁷).

Item 12 includes an exception from its requirements where non-public information is disclosed orally, telephonically, by webcast, by broadcast, or by similar means in a presentation that is complementary to, and occurs within 48 hours after, a related, written release or announcement that triggers the requirements of Item 12.⁵⁸ In this situation, Item 12 would not require the registrant to furnish an additional Form 8-K with regard to the information that is disclosed orally, telephonically, by webcast, by broadcast, or by similar means if:⁵⁹

- The related, written release or announcement has been furnished to the Commission on Form 8-K pursuant to Item 12 prior to the presentation;⁶⁰

⁵⁴ 17 CFR 249.308a.

⁵⁵ 17 CFR 249.308b.

⁵⁶ 17 CFR 249.310.

⁵⁷ 17 CFR 249.310b.

⁵⁸ We intend this exception to permit current practices where these presentations include information that, although not already included in the related, written release or announcement, is complementary thereto. We do not intend this exception to foster changes in practice whereby disclosure is shifted from the written release or announcement to the complementary presentation.

⁵⁹ In its comment letter, the American Bar Association Committee on Federal Regulation of Securities asked whether the phrase "similar means" in proposed Item 1.04(b) related to the entire preceding list (as proposed, this list read "orally, telephonically, webcast, or by similar means") or whether it merely related to "webcast." We intend the phrase "similar means" to relate to the entire preceding list. We have revised Item 12 to be clearer in this regard.

⁶⁰ As the deadline for furnishing the Form 8-K to the Commission is five business days, this exception would be available only to registrants

- The presentation is broadly accessible to the public by dial-in conference call, webcast or similar technology;

- The financial and statistical information contained in the presentation is provided on the registrant's web site, together with any information that would be required under Regulation G;⁶¹ and

- The presentation was announced by a widely disseminated press release that included instructions as to when and how to access the presentation and the location on the registrant's web site where the information would be available.

Item 12 of Form 8-K will apply only to publicly disclosed or released material non-public information concerning an annual or quarterly fiscal period that has ended. While such disclosure may also include forward-looking information, it is the material information about the completed fiscal period that triggers Item 12. Accordingly, Item 12 will not apply to public disclosure of earnings estimates for future or ongoing fiscal periods, unless those estimates are included in the public announcement or release of material non-public information regarding an annual or quarterly fiscal period that has ended.⁶²

2. Filing Versus Furnishing—Liability and Incorporation by Reference

As proposed, Item 12 would have required registrants to "file" a Form 8-K meeting the requirements of Item 12. This proposal was in contrast to Item 9 of Form 8-K, which permits registrants to "furnish" a Form 8-K to the Commission. The most significant implications of "furnishing" a Form 8-K to the Commission, rather than "filing" a Form 8-K with the Commission are clear:

- Information that is "furnished to the Commission" in such a Form 8-K is not subject to Section 18⁶³ of the Exchange Act unless the registrant specifically states that the information is to be considered "filed";
- Information that is "furnished to the Commission" in such a Form 8-K is not incorporated by reference into a registration

that furnish that Form 8-K to the Commission in advance of the deadline specified in Item 12.

⁶¹ While Item 12 does not 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. Further, we understand that a company may have multiple web sites that it uses for various purposes, such as investor relations, product information and business-to-business activities. We interpret this requirement to mean that the information is provided on the web site or page that the company normally uses for its investor relations functions.

⁶² Of course, Regulation FD would continue to apply to disclosure of such forward-looking information if it were material.

⁶³ 15 U.S.C. § 78r.

statement, proxy statement or other report unless the registrant specifically incorporates that information into those documents by reference; and

- Information that is "furnished to the Commission" in such a Form 8-K is not subject to the requirements of amended Item 10 of Regulation S-K or Item 10 of Regulation S-B, while "filed" information would be subject to those requirements.

We have considered the views of commenters that requiring earnings releases to be filed would have a detrimental effect on the level and quality of information that is provided to investors.⁶⁴ These commenters expressed the concern that the enhanced liability may preclude registrants from making earnings releases or similar disclosures. Further, the commenters were concerned that the need to satisfy the more stringent requirements in amended Item 10 of Regulation S-K and Item 10 of Regulation S-B within the required timeframe of Form 8-K would cause registrants to limit their publication of earnings releases or similar disclosures.

After consideration of these comments, Item 12 of Form 8-K, as adopted, requires that earnings releases or similar disclosures be furnished to the Commission rather than filed. Regulation G would, of course, apply to these releases and disclosures. In addition, to provide certain of the protections provided by the amendments to Item 10 of Regulation S-K and Item 10 of Regulation S-B to earnings releases, even if they are not filed, we have included in Item 12 of Form 8-K the requirements of paragraph (e)(1)(i) of Item 10 of Regulation S-K and paragraph (h)(1)(i) of Item 10 of Regulation S-B. As a result, in addition to the requirements already imposed by Regulation G, registrants would be required to disclose:

- 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;⁶⁵ and

- to the extent material, the additional purposes, if any, for which the registrant's management uses the non-GAAP financial measure that are not otherwise disclosed.

Registrants may satisfy this requirement by including the disclosure

⁶⁴ See, for example, the comment letters of the American Bar Association Committee on Federal Regulation of Securities; the American Bar Association Committee on Law and Accounting; the American Council of Life Insurers; and the Association of the Bar of the City of New York, Committee on Securities Regulation.

⁶⁵ See footnote 44 and the related discussion of the amendments to Item 10 of Regulation S-K and Item 10 of Regulation S-B for additional information with regard to this requirement.