

in the Form 8-K or in the release or announcement that is included as an exhibit to the Form 8-K. As indicated above, registrants also may satisfy the requirement to provide these additional two statements by including the disclosure in their 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 the Form 8-K is furnished to the Commission. The other amendments to Item 10 of Regulation S-K and Item 10 of Regulation S-B would not apply.

### 3. Relationship of Item 12 to Regulation FD

Earnings releases and similar disclosures that trigger the requirements of Item 12 are also subject to Regulation FD. The application of Item 12 would differ from Regulation FD, however, in that the requirements of Item 12 would always implicate Form 8-K for those disclosures, while Regulation FD provides that Form 8-K is an alternative means of satisfying its requirements. Further, a Form 8-K furnished to the Commission pursuant to Item 9 would satisfy an issuer's obligation under Regulation FD only if the Form 8-K were furnished to the Commission within the time frame required by Regulation FD. Regulation FD could, of course, be satisfied by public disclosure other than through the filing of a Form 8-K meeting Regulation FD's requirements; in that case, Item 12 would require that a Form 8-K be furnished to the Commission within the five business day timeframe of Item 12. A Form 8-K furnished within the timeframe required by Regulation FD and otherwise satisfying the requirements of both Item 9 and Item 12 could be furnished to the Commission once, indicating that it is being furnished under both Item 9 and Item 12, and satisfy both requirements.

### III. Paperwork Reduction Act

Regulation G and related amendments to Regulation S-K, Regulation S-B, Form 8-K and Form 20-F contain "collections of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA"),<sup>66</sup> and the Commission has submitted the proposals to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The titles for the information collections are: Regulation G, Regulation S-K, Regulation S-B, Form 8-K and Form 20-F. The Commission did not receive

any comments on the paperwork burden. OMB has approved all but one of the collections of information. OMB has not yet approved the changes to Form 8-K. We will announce the approval by separate release.

The Commission is adopting Regulation G pursuant to Section 401 of the Sarbanes-Oxley Act. Regulation G will require registrants that publicly disclose material information that includes non-GAAP financial measures to provide a reconciliation to the most directly comparable GAAP financial measures. Regulation G is intended to implement the requirements of the Sarbanes-Oxley Act. Specifically, Regulation G is intended to provide investors with balanced financial disclosure when non-GAAP financial measures are presented. Regulation G defines a non-GAAP financial measure as a numerical measure of an issuer's historical or future financial performance, financial position or cash flow that:

- Excludes amounts, or is subject to adjustments that have the effect of excluding amounts, that are included in the most directly comparable measure calculated and presented in accordance with GAAP in the statement of income, balance sheet or statement of cash flows (or equivalent statements) of the issuer; or
- Includes amounts, or is subject to adjustments that have the effect of including amounts, that are excluded from the most directly comparable measure calculated and presented in accordance with GAAP.

Accordingly, by definition, a non-GAAP financial measure that triggers the application of Regulation G would have been derived from a GAAP measure. We continue to expect the cost of obtaining the additional disclosure required by Regulation G to be minimal.

Accordingly, we have estimated for purposes of the PRA that it will take .5 burden hour for each time a respondent complies with Regulation G. We anticipate that on average a company will have to comply with Regulation G roughly six times a year. Since there are approximately 14,000 public companies that would be subject to Regulation G we have estimated that there will be 84,000 disclosures made in accordance with Regulation G for a total of 42,000 burden hours. We would expect that an in-house junior accountant would prepare the actual reconciliation.

Regulation S-K (OMB Control No. 3235-0071) and Regulation S-B (OMB Control No. 3235-0417) prescribe disclosure requirements that registrants must follow when filing registration statements, reports and schedules with the Commission. Our amendments to Item 10 of Regulation S-K and Item 10

of Regulation S-B incorporate the requirements of Regulation G and codify existing staff interpretations. Because the collection of information regarding the reconciliation is already being accounted for in Regulation G, we do not believe that adding the same requirement to Item 10 of Regulation S-K and Item 10 of Regulation S-B creates an additional collection of information within the meaning of the PRA. To account for the reconciliation in both Regulation G and Item 10 of Regulation S-K and Item 10 of Regulation S-B would result in double counting. Additionally, companies already, usually and customarily, disclose the purposes for which the registrant's management uses the non-GAAP financial measure and why it believes that its presentation of the non-GAAP financial measure provides useful information to investors. Accordingly, we continue to believe that our amendments to Item 10 of Regulation S-K and Item 10 of Regulation S-B do not contain a new "collection of information" or alter the existing burden of these collections of information within the meaning of the PRA.

Form 8-K (OMB Control No. 3235-0060) prescribes information, such as material events or corporate changes that a registrant must disclose. Item 12 of Form 8-K requires a company that publicly discloses material information regarding its actual or expected quarterly or annual results of operations or financial condition for a completed fiscal period to furnish the text of the public disclosure and any accompanying analysis. Item 12 of Form 8-K does not require companies to actually issue an earnings announcement or release but only requires that it be furnished if they choose to issue an earnings announcement or release. Item 12 will bring earnings announcements and releases into the formal disclosure system although they would not be deemed filed or, absent additional action by the registrant, incorporated into registration statements or proxy statements filed with the Commission. The Forms 8-K would be available to investors on a widespread basis on our Internet Web site.

Item 12 of Form 8-K was modified from our proposing release in that the Form 8-K is no longer considered to be filed with the Commission but, rather, it would be considered furnished to the Commission. This change does not, however, alter the paperwork burden. We estimate, for purposes of the PRA, the burden associated with actually furnishing the Form 8-K to be minimal.

<sup>66</sup> 44 U.S.C. § 3501 *et seq.*