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**A Roadmap to Non-GAAP
Financial Measures**

2016

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Preface

September 6, 2016

To the clients, friends, and people of Deloitte:

We are pleased to present *A Roadmap to Non-GAAP Financial Measures*, our first [Roadmap](#) devoted exclusively to a discussion of non-GAAP measures.

The recent explosion of press coverage and SEC scrutiny of non-GAAP measures has resulted from concerns about the increased use and prominence of such measures, their potential to be misleading, and the progressively larger difference between the amounts reported for them and GAAP measures. These concerns led the SEC staff to issue new and updated Compliance & Disclosure Interpretations in May 2016 that clarify the SEC's guidance on non-GAAP measures. The C&DIs do not prohibit companies from using non-GAAP measures that comply with the SEC's existing rules; in fact, the SEC staff has acknowledged that in certain circumstances, non-GAAP measures may be useful. However, the updated guidance was intended to change certain practices about which the SEC has expressed concern. In remarks after the issuance of the C&DIs, the SEC strongly encouraged registrants to "self-correct" before the staff considers any further rulemaking or enforcement action related to non-GAAP measures.

For the 12 months ended June 30, 2016, non-GAAP measures ranked third in the top-ten list of topics frequently commented on by the SEC's Division of Corporation Finance as part of its filing review process, moving up from fourth place for the comparable prior year. For the three months ended June 30, 2016, non-GAAP measures rose to second place, after all sections of MD&A combined. Over the next year, we expect the number of SEC comments to continue to remain high and even increase until the guidance in the updated C&DIs has been fully incorporated into practice. The SEC staff's most recent comment letters have particularly focused on the use and prominence of non-GAAP measures in press releases. Comments on press releases and filed documents have also centered on disclosures, including reconciliation requirements and the purpose and use of such measures. In addition, we expect to see more comments about the use of misleading measures, including measures that use individually tailored accounting principles, and the tax impact of non-GAAP adjustments.

The guidance in this Roadmap is intended to help registrants assess the appropriateness of their non-GAAP measures. The body of the publication combines the SEC's guidance on non-GAAP measures with Deloitte's interpretation and examples in a comprehensive, reader-friendly format. The appendixes include questions for registrants to consider when disclosing such measures, highlights from recent remarks by SEC officials, and examples of comments on non-GAAP measures from completed SEC staff reviews.

We hope that you will find this publication a valuable resource when considering the guidance on non-GAAP measures.

Sincerely,

Deloitte & Touche LLP

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Chapter 1 — Background

1.1 Overview and History of the SEC’s Guidance on Non-GAAP Measures

The SEC’s written guidance on non-GAAP financial measures has been in existence for many years. During this time, the SEC staff has periodically issued new and updated guidance on the use and disclosure of such measures or informally communicated its views in speeches and comments at various forums. The chronology below provides details about these events.

In December 2001, the SEC issued [cautionary advice](#)¹ to registrants about including “pro forma” non-GAAP financial information in their press releases. The SEC reminded registrants that the antifraud provisions of the federal securities laws apply when pro forma information is contained in earnings releases.

The SEC’s cautionary advice was followed by its adoption in 2003, pursuant to a mandate under the Sarbanes-Oxley Act of 2002, of the following rules (the “Rules”) as outlined in its release (the “Release”) of a [final rule](#)² on the conditions for use of non-GAAP financial information:

- [Regulation G](#), which contains general rules requiring registrants to provide certain information whenever they disclose or release non-GAAP financial measures. Regulation G did not affect the applicability of the general antifraud standards to non-GAAP disclosure, and it established a separate basis in securities law for SEC enforcement actions.³
- Amendments to Regulation S-K, Item 10, and Exchange Act⁴ Form 20-F, which provide guidance on non-GAAP measures included in SEC filings.
- Amendments that require registrants to furnish to the SEC, on Exchange Act Form 8-K, earnings releases or similar announcements, with furnished press releases also having to comply with Item 10(e)(1)(i).

The Rules and the Release are referred to frequently throughout this Roadmap. For guidance on how the Rules apply in specific circumstances, see [Appendix D](#).

Also in 2003, the SEC staff published 33 FAQs⁵ interpreting certain aspects of the Rules in an attempt to help registrants and others comply with and understand them.

¹ SEC Release No. 33-8039, *Cautionary Advice Regarding the Use of “Pro Forma” Financial Information in Earnings Releases*.

² SEC Release No. 33-8176, *Conditions for Use of Non-GAAP Financial Measures*.

³ Regulation G indicates that “[a] registrant . . . shall not make public a non-GAAP financial measure that, taken together with the information accompanying that measure and any other accompanying discussion of 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.”

⁴ Securities Exchange Act of 1934.

⁵ *Frequently Asked Questions Regarding the Use of Non-GAAP Measures* (superseded).

Several years later, the SEC staff announced at the 2009 AICPA Conference on Current SEC and PCAOB Developments (the “AICPA Conference”) that it was revisiting its rules and FAQs to ensure that registrants were not omitting key information from their filings. While registrants frequently included non-GAAP measures in their press releases, the SEC staff was concerned that many had been reluctant to use them in filed documents because of restrictions specified in the FAQs. Although the SEC staff did not amend the Rules, in 2010, it replaced the interpretive guidance in the FAQs with the Compliance and Disclosure Interpretations (C&DIs)⁶ that exist (as updated) today.⁷

The C&DIs were intended to give registrants more flexibility to disclose such measures in filings with the SEC. For example, one notable change was that the prohibition in Regulation S-K, Item 10(e), against adjustments to a non-GAAP performance measure for nonrecurring, infrequent, and unusual items would now be based on the description and labeling of the charge or gain rather than on the underlying nature of the amount.

After the issuance of the C&DIs, the SEC staff continued to question registrants about non-GAAP measures; however, the staff focused on clear labeling and descriptions of the measures and adjustments, nonboilerplate discussions of how management uses the measures, their usefulness to investors, and similar disclosures.

Beginning in late 2015, SEC officials started discussing non-GAAP measures at various public venues, prompted in part by concerns about companies’ extensive use of these measures. Press coverage increased as well, sometimes focusing on a specific registrant’s use of non-GAAP measures and other times concentrating more broadly on the propriety and usefulness of non-GAAP measures for a wide variety of industries.

The SEC renewed its focus on non-GAAP measures as a result of several factors, including (1) the increased use and prominence of such measures, (2) the nature of the adjustments, and (3) the increasingly large difference between the amounts reported for GAAP and non-GAAP measures. In a comment about the sharp rise in the use of non-GAAP measures, SEC Chief Accountant James Schnurr recently [stated](#)⁸ that the SEC staff has observed a “significant and, in some respects, troubling increase over the past few years in the use of, and nature of adjustments within, non-GAAP measures” as well as their prominence.

In response to increasing concerns about the use of such measures, in May 2016, the SEC updated its C&DIs to provide additional guidance on what it expects from registrants when using these measures. The SEC staff noted its expectation that the updated C&DIs would promote changes in the use of non-GAAP measures, particularly related to potentially misleading measures and undue prominence placed on such measures, as well compliance with other presentation and disclosure requirements.

⁶ C&DIs are not rules, regulations, or statements of the SEC; instead, they provide general guidance on the views of the SEC staff on a variety of issues.

⁷ Topic 8, “Non-GAAP Measures of Financial Performance, Liquidity, and Net Worth,” of the SEC’s [Financial Reporting Manual](#) (FRM) also discusses such measures.

⁸ See [Appendix B](#) for more information on Mr. Schnurr’s remarks and other remarks by SEC officials.

1.2 Prevalence of Non-GAAP Information

1.2.1 Who Uses Non-GAAP Measures?

Non-GAAP financial measures are used commonly not only by registrants but also by companies seeking to gain access to the U.S. capital markets through an initial public offering (IPO). Several recent studies provide insight into the prevalence of non-GAAP measures and how they differ from comparable GAAP measures.

A study published by Audit Analytics noted the following from data gathered from earnings releases during the third quarter of 2015:

- Approximately 88 percent of S&P 500 component companies use non-GAAP measures.
- Non-GAAP performance measures were greater than the nearest GAAP equivalent for about 82 percent of the S&P 500 companies that reported a non-GAAP adjusted net income metric.⁹

In addition, a study¹⁰ published by FactSet determined that for 2015, 67 percent of the companies in the Dow Jones Industrial Average reported non-GAAP earnings per share and, on average, the difference between the GAAP and non-GAAP earnings per share was approximately 30 percent, representing a significant increase from approximately 12 percent in 2014.

Moreover, over two-thirds of registration statements related to IPOs that were declared effective in 2015 included disclosure of non-GAAP information.¹¹

A recent report¹² of the earnings releases of over 800 companies that use non-GAAP measures further supported the disparity between GAAP and non-GAAP net income amounts. In addition, the report analyzed the types of adjustments made to GAAP net income, noting that the most common adjustments were restructuring charges, acquisition-related items, stock compensation costs, and, to a lesser extent, debt costs and legal costs.

Although these studies are based on different subsets of registrants, the message is clear — non-GAAP measures are prevalent, and they generally present a more positive financial picture than their GAAP counterparts.

1.2.2 Why Do Registrants Use Non-GAAP Measures?

Many registrants assert that non-GAAP measures are meaningful and provide valuable insight into the information management considers important in running the business. Registrants may believe that GAAP numbers do not provide a full picture of their business or their results of operations and liquidity unless they are supplemented with non-GAAP measures that they believe are useful. While the SEC staff allows registrants to use non-GAAP measures “to tell their story,” registrants must apply the appropriate SEC guidance and provide disclosures.

⁹ Audit Analytics, “Trends in Non-GAAP Disclosures” (December 2015).

¹⁰ “Did DJIA Companies Report Higher Non-GAAP EPS in FY 2015?” FactSet *Insight* (March 11, 2016).

¹¹ Based on data from *Intelligize*. Research included all IPOs in excess of \$5 million filed on Forms S-1, S-11, and F-1 with an offering of equity instruments that resulted in a capital increase to the registrant.

¹² “Measuring Non-GAAP Metrics: A Look at Adjusted Net Income,” Calcbench and Radical Compliance (June 2016).

Reasons why registrants may use non-GAAP measures include the following:

- Management compensation and incentive plans may be based on non-GAAP measures.
- Debt covenants or other requirements may be based on non-GAAP measures.
- Investors, analysts, and others may find non-GAAP information useful for a variety of reasons; for example, the information may provide meaningful insight into items affecting a company's performance and comparability of results.
- Certain non-GAAP measures, such as EBITDA, may be used for assessing business valuations in analyses of either earnings multiples or comparable transactions.

1.3 Where Is Non-GAAP Information Generally Presented?

Registrants often provide non-GAAP financial information in an earnings press release in a Form 8-K. In these cases, the information is generally considered furnished, but a registrant may also elect to file such information. Non-GAAP measures may also be released orally, telephonically, by webcast or broadcast, or by similar means, including earnings calls or investor presentations. Further, non-GAAP disclosures may be included on a registrant's Web site or other electronic medium.

Non-GAAP measures may also be included in a periodic filing (e.g., Form 10-K, 10-Q, or 20-F), registration statement (e.g., Form S-1, S-4, F-1, or 10), proxy statement, or other SEC filing. The sections of a filing in which a registrant would generally include such information are the Business, Selected Financial Data, and MD&A sections. However, a registrant should not include such information in the financial statements or notes thereto.¹³

See [Chapter 3](#) for information about required disclosures for non-GAAP measures.

1.4 To Whom Do the Rules Apply?

1.4.1 Domestic Issuers

The Rules apply to a registrant other than a registered investment company. Item 10(e) applies to domestic (U.S.) registrants that include non-GAAP financial measures "in a filing with the Commission." The Release states that Regulation G applies "whenever a company publicly discloses or releases material information that includes a non-GAAP financial measure."

¹³ See Regulation S-K, Item 10(e)(1)(ii)(C), which notes that non-GAAP measures should not be presented "on the face of the registrant's financial statements prepared in accordance with GAAP or in the accompanying notes."

1.4.2 Voluntary Filers

The SEC addressed the Rules' application to voluntary filers in C&DI Question 107.01.

C&DIs — Non-GAAP Financial Measures

Question 107.01

Question: Section 15(d) of the Exchange Act suspends automatically its application to any company that would be subject to the filing requirements of that section where, if other conditions are met, on the first day of the company's fiscal year it has fewer than 300 holders of record of the class of securities that created the Section 15(d) obligation. This suspension, which relates to the fiscal year in which the fewer than 300 record holders determination is made on the first day thereof, is automatic and does not require any filing with the Commission. The Commission adopted Rule 15d-6 under the Exchange Act to require the filing of a Form 15 as a notice of the suspension of a company's reporting obligation under Section 15(d). Such a filing, however, is not a condition to the suspension. A number of companies whose Section 15(d) reporting obligation is suspended automatically by the statute choose not to file the notice required by Rule 15d-6 and continue to file Exchange Act reports as though they continue to be required. Must a company whose reporting obligation is suspended automatically by Section 15(d) but continues to file periodic reports as though it were required to file periodic reports comply with Regulation G and the requirements of Item 10(e) of Regulation S-K?

Answer: Yes. Regulation S-K relates to filings with the Commission. Accordingly, a company that is making filings as described in this question must comply with Regulation S-K or Form 20-F, as applicable, in its filings.

As to other public communications, any company "that has a class of securities registered under Section 12 of the Securities Exchange Act of 1934, or is required to file reports under Section 15(d) of the Securities Exchange Act of 1934" must comply with Regulation G. The application of this standard to those companies that no longer are "required" to report under Section 15(d) but choose to continue to report presents a difficult dilemma, as those companies technically are not subject to Regulation G but their continued filing is intended to and does give the appearance that they are a public company whose disclosure is subject to the Commission's regulations. It is reasonable that this appearance would cause shareholders and other market participants to expect and rely on a company's required compliance with the requirements of the federal securities laws applicable to companies reporting under Section 15(d). Accordingly, while Regulation G technically does not apply to a company such as the one described in this question, the failure of such a company to comply with all requirements (including Regulation G) applicable to a Section 15(d)-reporting company can raise significant issues regarding that company's compliance with the anti-fraud provisions of the federal securities laws. [Jan. 11, 2010]

In short, Item 10(e) applies to a "voluntary filer" (i.e., a company that continues to file periodic reports even though its periodic reporting obligations under the Exchange Act are suspended). Regulation G's guidance on other public communications does not technically apply to a voluntary filer; however, the SEC staff noted that "the failure of such a company to comply with all requirements (including Regulation G) applicable to a Section 15(d)-reporting company can raise significant issues regarding that company's compliance with the anti-fraud provisions of the federal securities laws."

1.4.3 Foreign Private Issuers

While foreign private issuers (FPIs) are subject to Regulation G other than in the limited exceptions outlined below and to Item 10(e) if they file Form 20-F or registration statements under the Securities Act of 1933, the Rules do not apply to filers that use Form 40-F under the Multi-Jurisdictional Disclosure System (which applies to eligible Canadian issuers).

Regulation G states that its requirements do not apply to FPIs that include non-GAAP measures in publicly disclosed information when all three of the following three conditions are met:

- “[T]he securities of the [FPI] are listed or quoted on a securities exchange or inter-dealer quotation system outside the United States” (e.g., the London Stock Exchange Group).
- “[T]he non-GAAP financial measure is not derived from or based on a measure calculated and presented in accordance with [U.S. GAAP]” (e.g., IFRS information).
- “[T]he disclosure is made by or on behalf of the [FPI] outside the United States, or is included in a written communication that is released by or on behalf of the [FPI] outside the United States.”

In addition, the Release states that “[t]hese conditions focus on whether the financial measure relates to U.S. GAAP and whether the disclosure is made . . . outside of the United States.” In addition, the conditions “take into account the interests of [FPIs] . . . in communicating globally, including in their home markets.”

Regulation G further states that the exception for FPIs applies even under any of the following circumstances:

- “[A] written communication is released in the United States as well as outside the United States, so long as the communication is released in the United States contemporaneously with or after the release outside the United States and is not otherwise targeted at persons located in the United States.”
- “[F]oreign, U.S. journalists or other third parties have access to the information.”
- “[T]he information appears on one or more web sites maintained by the [FPI], so long as the web sites, taken together, are not available exclusively to, or targeted at, persons located in the United States.”
- The information is included in a Form 6-K after the “disclosure or release of the information outside the United States.”

For more information about the applicability of the Rules to FPIs, see [Section 8140](#) of the FRM and [Section 106](#) of the C&DIs. See also [Section 2.1.2](#).

Chapter 2 — What Is a Non-GAAP Measure?

This chapter provides some examples of common non-GAAP financial measures. In addition, it discusses measures that do **not** meet the definition of a non-GAAP measure and provides examples of measures that are outside the scope of the Rules.

2.1 Definition of a Non-GAAP Measure

2.1.1 General Requirements

Regulation G and Item 10(e) define a non-GAAP financial measure the same way. That is, as “a numerical measure of a registrant’s *historical or future* financial performance, financial position or cash flows that:

- (i) *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
- (ii) *Includes* amounts, or is subject to adjustments that have the effect of including amounts, that are *excluded* from the most directly comparable measure so calculated and presented” (emphasis added).

In addition, the Release states that the definition of a non-GAAP financial measure is intended to “capture all measures that have the effect of depicting either:

- [A] measure of performance that is different from that presented in the financial statements, such as income or loss before taxes or net income or loss, as calculated in accordance with GAAP; or
- [A] measure of liquidity that is different from cash flow or cash flow from operations computed in accordance with GAAP.”

If a registrant takes a commonly understood or defined GAAP amount and removes a component of that amount that is also presented in the financial statements, the resulting amount is generally considered a non-GAAP measure. As a simplified example, if a registrant discloses net income less restructuring charges and loss on debt extinguishment (having determined all amounts in accordance with GAAP), the resulting performance amount, which may be labeled “Adjusted Net Income,” is a non-GAAP measure subject to the Rules. Adjusted Net Income “excludes amounts . . . that are included in the . . . measure calculated and presented in accordance with GAAP in the statement of income” and would be considered a “measure of performance that is different from that presented in the financial statements.”

A registrant may present a table in MD&A that lists, in a balanced manner, the significant income and expense items that have affected comparability for the periods presented. The amounts in the table

would not be considered non-GAAP measures unless they were used to derive an adjusted income non-GAAP measure. For example, the registrant in the example above may want to separately disclose the impact that certain significant expense items, such as a \$6 million restructuring charge and a \$4 million loss on debt extinguishment, had on the current fiscal year's net income of \$50 million compared with the prior year. If the registrant includes a table that lists the restructuring charge and loss on debt extinguishment amounts, and discusses narratively that net income excluding the impact of the restructuring charge and loss on debt extinguishment is \$40 million, the resulting \$40 million amount is a non-GAAP measure. If the registrant discloses that net income of \$50 million includes a restructuring charge of \$6 million and loss on debt extinguishment of \$4 million and does not "do the math," these amounts are not considered non-GAAP measures.

2.1.2 Considerations for FPIs

The reference to "GAAP" in the above definition is to U.S. GAAP. However, for an FPI whose primary financial statements are prepared in accordance with non-U.S. GAAP (e.g., IFRSs or home-country GAAP), GAAP refers to the principles under which those primary financial statements are prepared. Nevertheless, when an FPI discloses a non-GAAP measure that is derived from or based on a measure calculated in accordance with U.S. GAAP, "GAAP" refers to U.S. GAAP.

Note that the Release states a non-GAAP measure that would otherwise be prohibited will be permitted in an FPI's filing "if the measure is (1) required or expressly permitted by the standard-setter that establishes the generally accepted accounting principles used in the [FPI's] primary financial statements and (2) included in the [FPI's] annual report or financial statements used in its home country jurisdiction or market."

This exception applies only to situations in which the foreign organization affirmatively acts to require or permit the measure; it is not intended to apply to circumstances in which the measure was merely not prohibited. Further, while such measures are not prohibited, footnote 41 of the Release confirms that Item 10's disclosure and other requirements apply to such measures.

See [Section 1.4.3](#) for more considerations related to FPIs.

2.2 Common Non-GAAP Measures

The following are examples of common non-GAAP financial measures:

- Operating income that excludes one or more expense items.
- Adjusted revenues, adjusted earnings, and adjusted earnings per share.
- EBIT and EBITDA, and adjusted EBIT and EBITDA (see [Sections 3.6](#) and [4.6](#)).
- Core earnings.
- Free cash flow (see [Section 4.11](#)).
- FFO (see [Section 4.12](#)).
- Net debt, which could be calculated as borrowings less cash and cash equivalent or borrowings less derivative assets used to hedge the borrowings.
- Measures presented on a constant-currency basis, such as revenues and operating expenses (see [Section 4.13](#)).
- System-wide sales (see [Section 4.15](#)).

Certain measures not listed above may be common in specific industries, such as broadcast cash flows in the radio, television and cable industry and NOI used in the real estate industry.¹

2.3 Financial and Other Measures That Are Not Subject to the Rules

This section discusses financial and other measures (e.g., metrics) that do **not** meet the definition of a non-GAAP measure under the Rules. As indicated in the Release, such measures include:

- Certain financial, operating, or statistical metrics (operating measures or other measures such as dollar revenue per square foot; same-store sales; revenues from slot machines for casinos provided that the sales figures were computed under GAAP; or unit sales, numbers of employees, numbers of subscribers, or numbers of advertisers).
- Financial measures required by GAAP, such as segment measures of profit or loss and total assets required by the guidance in ASC 280 on segment reporting.
- “[R]atios or statistical measures that are calculated using exclusively . . . financial measures calculated in accordance with GAAP.”
- “[M]easures required to be disclosed by GAAP, Commission rules, or a system of regulation of a government or governmental authority or self-regulatory organization.”
- Measures used in certain business combination transactions.
- “[D]isclosure of amounts of expected indebtedness, including contracted and anticipated amounts.”
- “[D]isclosure of amounts of repayments that have been planned or decided upon but not yet made.”
- “[D]isclosure of estimated revenues or expenses of a new product line, so long as such amounts were estimated in the same manner as would be computed under GAAP” (e.g., projected revenue using GAAP principles).

Several of these items are discussed in the sections below.

2.4 Certain Financial or Operating Metrics

2.4.1 What Is a Metric?

A registrant may include certain ratios or statistical measures (i.e., metrics) in its SEC filings to illustrate the size and growth of its business, such as “same-store sales,” “number of likes,” “occupancy rates,” and “average room rates.” Such measures are not included in the financial statements or the notes, nor are they necessarily derived from any underlying financial statement amounts. While these customized metrics are generally not considered non-GAAP measures, the SEC staff has indicated that a registrant should provide certain disclosures about them, many of which are similar to those the registrant would provide for non-GAAP measures under the Rules.

¹ For more information about non-GAAP measures used in the real estate industry, see the Real Estate subsection in the Financial Services section of the Industry-Specific Topics discussion in Deloitte’s *SEC Comment Letters — Including Industry Insights: What “Edgar” Told Us*.

2.4.2 How Is a Metric Different From a Non-GAAP Measure?

As discussed in [Section 2.1](#) above, a registrant may calculate a non-GAAP measure by adding or subtracting items (that were also determined under GAAP) from the GAAP amount presented to arrive at an “adjusted GAAP” amount. A metric may be derived from data that is outside the GAAP financial statements, such as number of stores, quantity of customers, or Web site hits. Further, a metric may be derived from the division of a GAAP number by this data or from the presentation of a GAAP number as percentage of it. Given the amount of diversity inherent in the presentation of metrics, the SEC staff expects registrants to provide transparent disclosures about them, even if the metrics are not subject to the Rules.

2.4.3 Presentation and Disclosure Considerations for Metrics

The SEC staff noted at the “SEC Speaks in 2015” Conference that metrics should be discussed informatively since not all investors may be familiar with the registrant’s use of them. Accordingly, a registrant should (1) clearly define the metrics used and how they are calculated, (2) describe any key assumptions and limitations (e.g., whether the metric is a “hard” amount or an estimate), (3) present a metric within a balanced discussion, and (4) clearly describe how a metric is related to current or future results of operations. A registrant should also consider disclosing how management uses the metrics and why they are important to investors. In addition, because metrics may evolve over time, registrants should disclose any changes and the reasons for the new metric (e.g., comparability with a measure used by peers).

Although metrics may help registrants “tell their story” in MD&A, management must use judgment when determining whether to include them in filings and should consider the following questions in making this determination:

- Is the metric integral to the registrant’s story?
- Does the metric help investors understand changes quickly and effectively?
- Is the metric discussed outside of periodic filings (e.g., in earnings calls)?

The following table summarizes the SEC staff's observations from the "SEC Speaks in 2015" Conference related to certain industry metrics:

Industry	Metric	SEC Staff Observations
Technology and Internet	Online users	If subsets of online users are material to an investor's understanding of a registrant's results of operations and financial position, the registrant should consider disclosing the subsets and explaining any differences between them. For example, the monetization of (1) U.S. users often differs from that of international users and (2) mobile users often differs from that of desktop users.
Retail	Number of visitors to Web site	A registrant should disclose how metrics are clearly and directly related to its results of operations and financial position. For example, a registrant may disclose the number of individuals who visited its Web site but fail to note how this number differs from the number of visitors who actually purchase goods.
	Number of catalogs mailed	A registrant may disclose the number of catalogs mailed but fail to note sales made through mailed catalogs.
Retail and other industries	Same-store sales	<p>The definition of this metric frequently varies by registrant or particular industry. The SEC staff has recommended clearly defining this metric and providing additional information about it, including how it is calculated, relevant assumptions, and limitations. For example, the staff has suggested that:</p> <ul style="list-style-type: none"> • Retail companies with brick-and-mortar stores disclose how renovated stores are treated as part of this metric. • Brick-and-mortar retail companies that also offer online sales consider providing disclosures, when material, by either separately quantifying the change in the metric that is attributable to online sales or quantifying the change both "with and without" online sales.
Real estate	Occupancy and average rental rates	Registrants often do not explain the reasons for period-to-period changes.
E-commerce	Gross merchandise volume	E-commerce retailers sometimes disclose this metric when they do not own the merchandise sold on their Web sites and record revenue on a net basis. Such disclosures often fail to discuss why this metric is important or how it is linked to the registrant's results.

2.5 Financial Measures Required by GAAP — Segment Information

Financial measures that a registrant is required to disclose under GAAP are not considered non-GAAP measures under the Rules. The most common examples of such measures are related to segment financial information such as revenue, profit or loss, and total assets for each reportable segment.

2.5.1 Segment Information Presented in Conformity With ASC 280

Since ASC 280 requires disclosure of the segment information noted above, financial measures for each segment are not non-GAAP measures under the Rules even when presented outside the footnotes, such as in MD&A.²

C&DIs — Non-GAAP Financial Measures

Question 104.01

Question: Is segment information that is presented in conformity with Accounting Standards Codification 280, pursuant to which a company may determine segment profitability on a basis that differs from the amounts in the consolidated financial statements determined in accordance with GAAP, considered to be a non-GAAP financial measure under Regulation G and Item 10(e) of Regulation S-K?

Answer: No. Non-GAAP financial measures do not include financial measures that are required to be disclosed by GAAP. Exchange Act Release No. 47226 lists “measures of profit or loss and total assets for each segment required to be disclosed in accordance with GAAP” as examples of such measures. The measure of segment profit or loss and segment total assets under Accounting Standards Codification 280 is the measure reported to the chief operating decision maker for purposes of making decisions about allocating resources to the segment and assessing its performance.

The list of examples in Exchange Act Release No. 47226 is not exclusive. As an additional example, because Accounting Standards Codification 280 requires or expressly permits the footnotes to the company's consolidated financial statements to include specific additional financial information for each segment, that information also would be excluded from the definition of non-GAAP financial measures. [Jan. 11, 2010]

Question 104.02

Question: Does Item 10(e)(1)(ii) of Regulation S-K prohibit the discussion in MD&A of segment information determined in conformity with Accounting Standards Codification 280?

Answer: No. Where a company includes in its MD&A a discussion of segment profitability determined consistent with Accounting Standards Codification 280, which also requires that a footnote to the company's consolidated financial statements provide a reconciliation, the company also should include in the segment discussion in the MD&A a complete discussion of the reconciling items that apply to the particular segment being discussed. In this regard, see Financial Reporting Codification Section 501.06.a, footnote 28. [Jan. 11, 2010]

² See also footnote 19 of the Release, which states that ASC 280 “requires that companies report a measure of profit or loss and total assets for each reportable segment. This tabular information is presented in a note to the audited financial statements and is required to be reconciled to the GAAP measures, with all significant reconciling items separately identified and described. A registrant is required to provide a Management's Discussion & Analysis of segment information if such a discussion is necessary to an understanding of the business. Such discussion would generally include the measures reported under [ASC 280].”

2.5.2 Segment Profit or Loss or Segment Liquidity *Not* in Conformity With ASC 280

A measure of segment profit or loss, or segment liquidity that is *not* consistent with the requirements of ASC 280 is a non-GAAP measure and subject to the requirements of the Rules.

C&DIs — Non-GAAP Financial Measures

Question 104.03

Question: Is a measure of segment profit/loss or liquidity that is not in conformity with Accounting Standards Codification 280 a non-GAAP financial measure under Regulation G and Item 10(e) of Regulation S-K?

Answer: Yes. Segment measures that are adjusted to include amounts excluded from, or to exclude amounts included in, the measure reported to the chief operating decision maker for purposes of making decisions about allocating resources to the segment and assessing its performance do not comply with Accounting Standards Codification 280. Such measures are, therefore, non-GAAP financial measures and subject to all of the provisions of Regulation G and Item 10(e) of Regulation S-K. [Jan. 11, 2010]

Example

Assume that Company X's segment earnings measure for resource allocation and performance assessment purposes is "adjusted EBITDA." Such amount is disclosed in the notes to the financial statements under ASC 280 and is therefore not subject to the Rules. If, however, X further adjusts each segment's adjusted EBITDA in its MD&A by excluding additional items such as restructuring costs, these amounts do not comply with ASC 280, and the "as further revised" adjusted EBITDA is subject to the Rules.

2.5.3 Total Segment Profit or Loss Measures Outside the Footnotes

The presentation of the *total* segment profit or loss measure, revenues, or assets on a consolidated basis outside the footnotes (e.g., MD&A) is considered a non-GAAP measure unless such total equals a measure presented under GAAP.

C&DIs — Non-GAAP Financial Measures

Question 104.04

Question: In the footnote that reconciles the segment measures to the consolidated financial statements, a company may total the profit or loss for the individual segments as part of the Accounting Standards Codification 280 required reconciliation. Would the presentation of the total segment profit or loss measure in any context other than the Accounting Standards Codification 280 required reconciliation in the footnote be the presentation of a non-GAAP financial measure?

Answer: Yes. The presentation of the total segment profit or loss measure in any context other than the Accounting Standards Codification 280 required reconciliation in the footnote would be the presentation of a non-GAAP financial measure because it has no authoritative meaning outside of the Accounting Standards Codification 280 required reconciliation in the footnotes to the company's consolidated financial statements. [Jan. 11, 2010]

Example

Assume that Company X has three reportable segments and includes the appropriate segment disclosures in its notes to the financial statements in accordance with ASC 280. Company X's measure of segment profitability is adjusted EBITDA. The following is an excerpt from X's segment footnote, which shows its segment measure of profitability (i.e., adjusted EBITDA) reconciled to income before income taxes:

Segment A	\$	XX
Segment B		XX
Segment C	\$	XX
Total segment-adjusted EBITDA	\$	XX
Depreciation		XX
Interest		XX
Impairments		XX
Loss on sale of assets	\$	XX
Income before income taxes	\$	XX

Adjusted EBITDA at the segment level (i.e., separately for segments A, B, and C) is not considered a non-GAAP measure under the Rules when discussed in MD&A, whereas the total segment-adjusted EBITDA at the consolidated level is considered a non-GAAP measure and is subject to the Rules if presented in MD&A or elsewhere outside the financial statements. In this example, if total segment-adjusted EBITDA is presented in MD&A, it would be subject to the non-GAAP rules.

ASC 280 also requires registrants to disclose in the notes to the financial statements revenues for “each product and service or each group of similar products and services unless it is impracticable to do so.” In MD&A, registrants often include similar disclosures about revenues on a disaggregated basis by products and services. These are not considered non-GAAP measures as further explained below.

2.6 Other Measures That Are Not Non-GAAP Measures

2.6.1 GAAP Operating and Other Statistical Measures

Financial measures (e.g., ratios or other measures) calculated exclusively from amounts presented in accordance with GAAP are not non-GAAP financial measures. Generally, a GAAP amount may be divided by another GAAP amount in the calculation of a specific ratio, and the resulting amount is not considered a non-GAAP measure. For example, disclosure of operating margin that is calculated by dividing GAAP operating income by GAAP revenues is not a non-GAAP measure.

2.6.2 Financial Measures Required by Commission Rules or a System of Regulation of a Government or Government Authority or Self-Regulatory Organization

Financial measures required by SEC rules (e.g., information required pursuant to an SEC industry guide) are not non-GAAP measures.

In addition, financial measures *required* by a regulatory organization that apply to the registrant (e.g., measures of capital or reserves calculated for such regulatory purpose) are not non-GAAP measures. The Release specifies that disclosure of such measures should be presented outside the financial statements “unless the financial measure is required or expressly permitted by the standard setter that is responsible for establishing the GAAP.” However, if the above organizations do not *require* the information, but a registrant elects to present it, the information *is* considered a non-GAAP measure and thus subject to the appropriate non-GAAP disclosures required by the Rules.

C&DIs — Non-GAAP Financial Measures

Question 102.12

Question: A registrant discloses a financial measure or information that is not in accordance with GAAP or calculated exclusively from amounts presented in accordance with GAAP. In some circumstances, this financial information may have been prepared in accordance with guidance published by a government, governmental authority or self-regulatory organization that is applicable to the registrant, although the information is not required disclosure by the government, governmental authority or self-regulatory organization. Is this information considered to be a “non-GAAP financial measure” for purposes of Regulation G and Item 10 of Regulation S-K?

Answer: Yes. Unless this information is *required* to be disclosed by a system of regulation that is applicable to the registrant, it is considered to be a “non-GAAP financial measure” under Regulation G and Item 10 of Regulation S-K. Registrants that disclose such information must provide the disclosures required by Regulation G or Item 10 of Regulation S-K, if applicable, including the quantitative reconciliation from the non-GAAP financial measure to the most comparable measure calculated in accordance with GAAP. This reconciliation should be in sufficient detail to allow a reader to understand the nature of the reconciling items. [Apr. 24, 2009]

2.6.3 Business Combination Transactions

The Rules provide limited exceptions to the use and disclosure of non-GAAP financial measures related to business combination transactions. Accordingly, they do not apply to non-GAAP measures (e.g., projections or forecasts of results of operations based on the business combination) used in the communications described in C&DI Question 101.01.³

³ See applicable rules under the Exchange Act; the Securities Act of 1933; and Regulation M-A, Item 1015, “Reports, Opinions, Appraisals and Negotiations.”

C&DIs — Non-GAAP Financial Measures

Question 101.01

Question: Does the exemption from Regulation G and Item 10(e) of Regulation S-K for non-GAAP financial measures disclosed in communications relating to a business combination transaction extend to the same non-GAAP financial measures disclosed in registration statements, proxy statements and tender offer materials?

Answer: No. There is an exemption from Regulation G and Item 10(e) of Regulation S-K for non-GAAP financial measures disclosed in communications subject to Securities Act Rule 425 and Exchange Act Rules 14a-12 and 14d-2(b)(2); it is also intended to apply to communications subject to Exchange Act Rule 14d-9(a)(2). This exemption does not extend beyond such communications. Consequently, if the same non-GAAP financial measure that was included in a communication filed under one of those rules is also disclosed in a Securities Act registration statement or a proxy statement or tender offer statement, no exemption from Regulation G and Item 10(e) of Regulation S-K would be available for that non-GAAP financial measure.

In addition, there is an exemption from Regulation G and Item 10(e) of Regulation S-K for non-GAAP financial measures disclosed pursuant to Item 1015 of Regulation M-A, which applies even if such non-GAAP financial measures are included in Securities Act registration statements, proxy statements and tender offer statements. [Jan. 11, 2010]

The exemption in C&DI Question 101.01 does not extend beyond communications that are subject to the rules specified in the C&DI.

2.6.4 Presentation of Revenue by Product Line

C&DI Question 104.05 describes a situation in which a registrant presents a table that breaks down revenues by certain products but does not sum these amounts to the revenue amount presented in its financial statements. If the product revenue amounts are calculated in accordance with GAAP and are not adjusted, the information presented in the table is not considered a non-GAAP financial measure.

C&DIs — Non-GAAP Financial Measures

Question 104.05

Question: Company X presents a table illustrating a breakdown of revenues by certain products, but does not sum this to the revenue amount presented on Company X's financial statements. Is the information in the table considered a non-GAAP financial measure under Regulation G and Item 10(e) of Regulation S-K?

Answer: No, assuming the product revenue amounts are calculated in accordance with GAAP. The presentation would be considered a non-GAAP financial measure, however, if the revenue amounts are adjusted in any manner. [Jan. 11, 2010]

Example

Assume that in accordance with ASC 280-10-50-40, Company X includes in its notes to the financial statements product revenues from external customers for three different types of products as part of its segment disclosures. In addition, X discusses in MD&A its revenue by products in accordance with the presentation in its segment notes but also presents product revenue by type of customer served, as reflected in the following table:

	Wholesale Customers		Retail Customers	
Product A	\$	XX	\$	XX
Product B		XX		XX
Product C		XX		XX
Total revenues	\$	XXX	\$	XXX

Company X uses GAAP to calculate revenues for products A, B, and C. When discussed in MD&A, these revenue amounts are not considered non-GAAP measures even if X does not sum the total of these products to the revenue amount presented in its financial statements. However, revenues from products A, B, and C that are adjusted from the amounts presented above are considered a non-GAAP measure if they are presented in MD&A or elsewhere outside the financial statements.

Chapter 3 — Disclosures About Non-GAAP Measures

This chapter discusses the disclosure requirements related to non-GAAP measures under Regulation G and SEC Regulation S-K, Item 10(e).

3.1 Overview and General Requirements of Regulation G and Item 10(e)

Regulation G applies to all public releases or disclosure of non-GAAP measures, even if such information is not part of a registrant's SEC filing (e.g., conference calls, investor presentations, and webcasts) and regardless of whether the information is furnished or filed with the SEC.

Regulation G states that:

- Non-GAAP financial measures must not be misleading.
- The most directly comparable GAAP measure must be presented.
- A quantitative reconciliation of the non-GAAP financial measure to the most comparable GAAP measure must be presented for (1) a historical non-GAAP measure and (2) forward-looking information (to the extent available without unreasonable effort).

Item 10(e) applies to all SEC filings, such as registration statements, proxy statements,¹ and Forms 10-K and 10-Q. Item 10(e) expands on Regulation G to require the following in addition to the three items above:

- That the prominence of the most directly comparable GAAP measure presented be **equal to or greater than** that of the non-GAAP measure.
- A statement indicating the reasons why the registrant believes that the non-GAAP measure provides useful information to investors about the registrant's financial condition and results of operations.
- To the extent material, a statement disclosing the additional purposes, if any, for which the registrant uses the non-GAAP measure.

The disclosure requirements for press releases furnished on Form 8-K are the same as those in Item 10(e).

The non-GAAP disclosure requirements are discussed in greater detail below. Factors for registrants to consider when determining what constitutes a misleading non-GAAP measure are outlined in [Section 4.3](#).

¹ See [C&DI Question 108.01](#), which discusses an exception for disclosures of target levels that are non-GAAP measures in Compensation Discussion & Analysis or other parts of the proxy statement.

The following table summarizes the disclosure requirements that apply to domestic² registrants under the Rules:

Disclosure Requirements Applicable to Domestic Registrants

Disclosure Requirements	All Disclosure of Non-GAAP Financial Measures (Regulation G ^{3, 4})	SEC Filings (Item 10(e) of Regulation S-K ^{5, 6})	Press Releases Furnished to the SEC (Item 2.02 of Form 8-K ⁷)
<ul style="list-style-type: none"> Presentation of the most directly comparable GAAP financial measure 	X		
<ul style="list-style-type: none"> Presentation, with equal or greater prominence, of the most directly comparable GAAP financial measure 		X	X
<ul style="list-style-type: none"> Quantitative reconciliation of the non-GAAP financial measure to the most directly comparable GAAP financial measure 	X	X	X
<ul style="list-style-type: none"> Statement disclosing the reasons why management believes the non-GAAP financial measure provides useful information to investors 		X	X
<ul style="list-style-type: none"> To the extent material, a statement disclosing the additional purposes for which management uses the non-GAAP financial measure 		X	X

3.1.1 Multiple Presentations of the Same Non-GAAP Measure

The SEC's rules regarding conditions for use of non-GAAP measures do not address situations in which a registrant presents the same non-GAAP measure in multiple sections of a filing (e.g., description of business, selected financial data, and MD&A) or multiple times within the same section of a filing. Although a registrant may repeat the disclosure each time the measure is used, repetitive disclosures may not be beneficial to users. One alternative is to provide the Item 10(e) disclosures for all non-GAAP measures in one section of the filing and a cross-reference to that section each time a non-GAAP measure is presented.

3.2 Reconciliation Requirement

A registrant must reconcile a non-GAAP measure to the most directly comparable GAAP measure. Such reconciliation should be quantitative and is generally presented as a table, although it may be disclosed in another clearly understandable format. Reconciling adjustments from the GAAP measure to the non-GAAP measure should be separately quantified and appropriately labeled.

² For guidance on FPIs, see Regulation G; Regulation S-K, Item 10(e); [Section 106](#) of the C&DIs; and [Section 8140](#) of the FRM.

³ Regulation G applies whenever a registrant, or person acting on its behalf, publicly discloses or releases material information that includes a non-GAAP financial measure, whether that information is furnished to, or filed with, the SEC.

⁴ In certain situations, Regulation G and Item 10(e) do not apply. For example, they do not apply to non-GAAP measures related to a proposed business combination or measures required to be disclosed by a governmental authority. See [Section 2.3](#) for a discussion of measures that do not meet the definition of a non-GAAP measure under the Rules.

⁵ Item 10(e) applies to all SEC filings that include non-GAAP financial measures.

⁶ See footnote 4.

⁷ Form 8-K, Item 2.02, requires registrants to furnish to the SEC all releases or announcements disclosing material nonpublic financial information about completed annual or quarterly fiscal periods, regardless of whether the release or announcement includes disclosure of a non-GAAP financial measure.

3.2.1 Most Directly Comparable Measure

Whenever registrants disclose or release a non-GAAP measure, they must also disclose the most directly comparable financial measure calculated and presented in accordance with GAAP. In certain limited circumstances, the SEC staff has provided guidance on what is the most directly comparable GAAP measure. For example, C&DI Question 103.02 indicates that EBIT and EBITDA, if presented as a performance measure, should be reconciled to net income and not operating income (see [Section 3.6](#)). In other circumstances, registrants should use judgment in determining the most directly comparable GAAP measure.

3.2.2 Performance Versus Liquidity Measures

A registrant will need to determine whether a non-GAAP measure's purpose is to assess the registrant's performance or its liquidity or, in some cases, both. This determination will affect (1) which GAAP measure is most directly comparable to the non-GAAP measure and (2) any prohibitions against presentation, such as per-share amounts or adjustments (see [Chapter 4](#) for a discussion of prohibitions).

For example, a performance measure should generally be reconciled to a line item from the statement of operations such as net income or income from continuing operations or, if a per-share performance measure is presented, to GAAP earnings per share. A liquidity measure should be reconciled to an amount from the statement of cash flows, such as cash provided by operating activities. The SEC's general view is that the presentation of non-GAAP liquidity measures "should be balanced with disclosure of amounts from the statement of cash flows (cash flows from operating, investing and financing activities)"; and the presentation of non-GAAP performance measures "should be balanced with net income, or income from continuing operations, taken from the [income] statement."⁸

Historically, the SEC staff has generally accepted management's determination of whether a measure is a performance measure or a liquidity measure. However, as indicated in C&DI Question 102.05 (see [Section 4.4](#)), the SEC staff may challenge a measure designated as a performance measure that appears to be more like a liquidity measure.

Registrants should consider whether the classification of a non-GAAP measure as a performance measure is appropriate if the non-GAAP measure is, in substance, a liquidity measure. The context of the non-GAAP disclosure may be an important consideration. For example, the SEC staff may comment if a non-GAAP measure is located in the registrant's discussion of financial condition and liquidity even though the registrant considers the measure to be a performance measure and reconciles it to net income. In addition, the SEC staff may question a non-GAAP measure that a registrant purports to be a performance measure if, for example, it includes several adjustments (many of which are noncash amounts) to reconcile it to the most comparable GAAP income measure and only one adjustment would be needed to reconcile it to a GAAP measure from the statement of cash flows, such as operating cash flow.

If the measure could be used as a liquidity measure and is ultimately determined to be a liquidity measure, a registrant would be prohibited from disclosing a per-share amount (e.g., free cash flow is a liquidity measure, and per-share presentation is expressly prohibited⁹). Given the prohibition against per-share liquidity measures, registrants that disclose a per-share measure should ensure that (1) they

⁸ See footnote 26 of the Release.

⁹ See [C&DI Question 102.07](#).

have appropriately characterized the measure and (2) if they consider it a performance measure, they are able to articulate specifically why.

3.2.3 Additional Disclosures About Liquidity Measures

Specific disclosure requirements apply to the presentation of a non-GAAP liquidity measure. In addition to those in Item 10(e), the SEC has historically required the “prominent presentation of amounts for the three major categories of the statement of cash flows” (i.e., cash flows from operating, investing, and financing activities).

C&DIs — Non-GAAP Financial Measures

Question 102.06

Question: Is Item 10(e)(1)(i) of Regulation S-K, which requires the prominent presentation of, and reconciliation to, the most directly comparable GAAP financial measure or measures, intended to change the staff’s practice of requiring the prominent presentation of amounts for the three major categories of the statement of cash flows when a non-GAAP liquidity measure is presented?

Answer: No. The requirements in Item 10(e)(1)(i) are consistent with the staff’s practice. The three major categories of the statement of cash flows should be presented when a non-GAAP liquidity measure is presented. [Jan. 11, 2010]

3.2.4 Same Non-GAAP Measure Is Used as Both a Performance Measure and a Liquidity Measure

A registrant may use a specific non-GAAP financial measure to assess both performance and liquidity. In this situation, the registrant should disclose all the information required under Item 10(e), such as the reasons why management believes the measure is useful from a performance and a liquidity standpoint, as well as a reconciliation of the non-GAAP measure to the closest GAAP measures for both performance and liquidity. For example, if a registrant uses EBITDA as both a performance measure and a liquidity measure, it should present a reconciliation of EBITDA to (1) net income for the performance measure and (2) cash flows from operations for the liquidity measure.

3.2.5 Reconciliation of Non-GAAP “Per-Share” Measures

In some situations, a registrant may present a non-GAAP financial measure on a “per-share” basis (e.g., adjusted earnings per share).

As noted in C&DI Question 102.05 (see [Section 4.4](#) and also discussion above), a registrant is prohibited from disclosing a non-GAAP per-share amount as a liquidity measure such as cash flow per-share data and other per-share measures of liquidity (since they are prohibited under GAAP (ASC 230) and SEC rules (ASR 142)); however, a non-GAAP per-share measure may be disclosed if it is a performance measure (subject to the other requirements of the guidance). The C&DI indicates that, if presented, a non-GAAP per-share performance measure should be reconciled to GAAP earnings per share.

When disclosing a non-GAAP per-share performance measure, a registrant is required to reconcile both the numerator and the denominator of the non-GAAP per-share measure to the most directly comparable GAAP measure.¹⁰ However, if the denominator represents diluted shares calculated in accordance with the guidance on earnings per share in ASC 260, a reconciliation of the denominator is

¹⁰ See footnote 27 of the Release.

not necessary. As noted in footnote 49 of the Release, a registrant should carefully consider (1) whether it is appropriate to use any denominator other than diluted shares calculated in accordance with ASC 260 and (2) whether the resulting measure could potentially be misleading.

3.3 Presentation of Equal or Greater Prominence

Under Item 10(e), if a registrant presents a non-GAAP measure, it should present the most directly comparable GAAP measure with “equal or greater prominence.” Before the SEC staff’s May 2016 updates to the C&DIs, there was no formal guidance interpreting this requirement and, as a result, diversity developed in practice. C&DI Question 102.10 now provides examples illustrating when the presentation of a non-GAAP measure may fail to meet the requirement. As noted elsewhere in this Roadmap, the SEC staff has been focused on this topic and has commented when a registrant presents its non-GAAP measures more prominently than its GAAP measures.

C&DIs — Non-GAAP Financial Measures

Question 102.10

Question: Item 10(e)(1)(i)(A) of Regulation S-K requires that when a registrant presents a non-GAAP measure it must present the most directly comparable GAAP measure with equal or greater prominence. This requirement applies to non-GAAP measures presented in documents filed with the Commission and also earnings releases furnished under Item 2.02 of Form 8-K. Are there examples of disclosures that would cause a non-GAAP measure to be more prominent?

Answer: Yes. Although whether a non-GAAP measure is more prominent than the comparable GAAP measure generally depends on the facts and circumstances in which the disclosure is made, the staff would consider the following examples of disclosure of non-GAAP measures as more prominent:

- Presenting a full income statement of non-GAAP measures or presenting a full non-GAAP income statement when reconciling non-GAAP measures to the most directly comparable GAAP measures;
- Omitting comparable GAAP measures from an earnings release headline or caption that includes non-GAAP measures;
- Presenting a non-GAAP measure using a style of presentation (e.g., bold, larger font) that emphasizes the non-GAAP measure over the comparable GAAP measure;
- A non-GAAP measure that precedes the most directly comparable GAAP measure (including in an earnings release headline or caption);
- Describing a non-GAAP measure as, for example, “record performance” or “exceptional” without at least an equally prominent descriptive characterization of the comparable GAAP measure;
- Providing tabular disclosure of non-GAAP financial measures without preceding it with an equally prominent tabular disclosure of the comparable GAAP measures or including the comparable GAAP measures in the same table;
- Excluding a quantitative reconciliation with respect to a forward-looking non-GAAP measure in reliance on the “unreasonable efforts” exception in Item 10(e)(1)(i)(B) without disclosing that fact and identifying the information that is unavailable and its probable significance in a location of equal or greater prominence; and
- Providing discussion and analysis of a non-GAAP measure without a similar discussion and analysis of the comparable GAAP measure in a location with equal or greater prominence. [May 17, 2016]

In assessing prominence, a registrant should consider, among other items, the order of presentation, degree of emphasis, style of presentation, and volume of disclosures in a filing. For example, in general, the registrant should present GAAP measures first followed by the non-GAAP measures. Further, to avoid creating an impression that the non-GAAP measure is more important than the GAAP measure, the registrant should not present the non-GAAP measure in more detail, or emphasize it more, than the comparable GAAP measure, or otherwise imply that it is superior to the comparable GAAP measure. Certain presentations that give undue prominence to non-GAAP information, such as a full non-GAAP income statement, are prohibited (see the separate discussion below).

Finally, as noted above, if a registrant presents forward-looking non-GAAP financial measures, it should provide a quantitative reconciliation unless it qualifies for the “unreasonable efforts” exception in Regulation G and Item 10(e). A registrant that qualifies for the exception should disclose that fact in a prominent location, identify the information that is not available, and indicate the probable significance of this information.

3.3.1 Full Non-GAAP Income Statement

As noted in C&DI Question 102.10 (see [Section 3.3](#)), the SEC generally prohibits the presentation of a full non-GAAP income statement in documents filed with or furnished to the SEC, including quarterly and annual earnings press releases furnished on Form 8-K.

In certain circumstances, a registrant may present a full non-GAAP income statement, which includes all of the GAAP line items and sub-total amounts in a columnar form that adjusts many (or all) of the line items from the GAAP comparable amounts. For example, such a presentation may occur in a reconciliation of non-GAAP measures or in a constant-currency income statement. A registrant should consider whether this presentation would give the appearance of a full non-GAAP income statement. The SEC staff believes that a full non-GAAP income statement creates multiple non-GAAP measures and may result in the inappropriate impression that the non-GAAP income statement is being presented on a comprehensive basis of accounting. A registrant may present and disclose various individual non-GAAP measures as an alternative to presenting a full non-GAAP income statement, but it should consider separately presenting and reconciling each individual measure. Further, a registrant should disclose, for each measure, the reasons why the measure is useful to an investor as well as any other appropriate non-GAAP information.

It is important for a registrant to balance (1) its need to provide a clear, understandable reconciliation of non-GAAP measures to the most directly comparable GAAP measures with (2) its consideration of whether its reconciliation appears to be a full non-GAAP income statement that is based on its GAAP financial statements.

Example

Company X presented a summary of its statement of operations in its first quarter 20X6 earnings release. To arrive at its “ongoing” operations, X presented its line items on a GAAP as-reported basis as well as adjustments to various expense items that it believes should be excluded. Although not all line items from the historical statement of operations in the “as-reported” column have been adjusted, such presentation may represent a full non-GAAP income statement and could be prohibited:

	As Reported	Adjustments	Ongoing
Sales	\$ 300	\$ —	\$ 300
Cost of goods sold	<u>100</u>	<u>(20)</u>	<u>80</u>
Gross profit	200	(20)	220
Operating expenses	<u>75</u>	<u>(25)</u>	<u>50</u>
Operating income	125	45	170
Interest expense	10		10
Other nonoperating expense	<u>10</u>	<u>(5)</u>	<u>5</u>
Pretax income	105	50	155
Taxes	<u>25</u>	<u>10</u>	<u>35</u>
Net income	<u>\$ 80</u>	<u>\$ 40</u>	<u>\$ 120</u>

3.4 Disclosure of the Use and Purpose of Non-GAAP Measures

A registrant’s quantitative reconciliation should be accompanied by transparent disclosures that clearly demonstrate (1) the usefulness of the non-GAAP measure to investors and (2) the additional purposes for which management uses such measure (e.g., for incentive compensation arrangements, to manage its business, to allocate resources, or as a debt covenant). The registrant should avoid providing boilerplate disclosures related to the purpose of the measure. Rather, the disclosures should be specific to the measure used, to the registrant and the nature of its business and industry, and to the manner in which management assesses the non-GAAP measure. If the purpose of the non-GAAP measure is not disclosed, investors and analysts may not understand its relevance. Footnote 44 of the Release states, in part:

[T]he 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.

While the Rules require disclosure of additional purposes for which management uses a non-GAAP financial measure, a registrant is not prohibited from disclosing a measure that it believes would be useful to investors, even though the registrant does not use the measure for any other purpose.

C&DIs — Non-GAAP Financial Measures

Question 102.04

Question: Is the registrant required to use the non-GAAP measure in managing its business or for other purposes in order to be able to disclose it?

Answer: No. Item 10(e)(1)(i)(D) of Regulation S-K states only that, “[t]o the extent material,” there should be a statement disclosing the additional purposes, “if any,” for which the registrant’s management uses the non-GAAP financial measure. There is no prohibition against disclosing a non-GAAP financial measure that is not used by management in managing its business. [Jan. 11, 2010]

Item 10(e)(1)(iii) indicates that for filings other than a Form 10-K or Form 20-F, a registrant need not disclose the reasons why a non-GAAP measure is useful to investors and the purpose for which management uses it if that information was included in its most recent annual report filed with the SEC (or a more recent filing) as long as the disclosure is updated to the extent necessary at the time of the current filing.

3.5 Labeling Non-GAAP Measures and Reconciling Items

The SEC staff has noted that it focuses on whether registrants have (1) clearly labeled and described non-GAAP measures and adjustments, (2) used appropriate conventional accounting terminology, and (3) provided context for their presentation of non-GAAP measures. Clear, transparent labeling is important for all items in the reconciliation. For example, a registrant should not use a reconciling item labeled “other” that includes numerous significant items without clear disclosure of the nature of the items used along with the related amounts for each adjustment. In addition, when labeling a non-GAAP financial measure, a registrant may not use titles or descriptions that are the same as, or are confusingly similar to, titles or descriptions used for GAAP financial measures. See [Section 4.9](#) for more information about considerations related to labeling non-GAAP measures.

3.6 EBIT and EBITDA, and Adjusted EBIT and EBITDA

EBIT and EBITDA are two of the most commonly used non-GAAP measures. C&DI Question 103.02 provides guidance on the most directly comparable GAAP measure for EBIT and EBITDA if they are used as a performance measure and notes that they should not be reconciled to operating income.

C&DIs — Non-GAAP Financial Measures

Question 103.02

Question: If EBIT or EBITDA is presented as a performance measure, to which GAAP financial measure should it be reconciled?

Answer: If a company presents EBIT or EBITDA as a performance measure, such measures should be reconciled to net income as presented in the statement of operations under GAAP. Operating income would not be considered the most directly comparable GAAP financial measure because EBIT and EBITDA make adjustments for items that are not included in operating income. In addition, these measures must not be presented on a per share basis. See Question 102.05. [May 17, 2016]

Registrants often make additional adjustments to EBITDA for items such as restructuring activities or impairments, which they disclose as “adjusted EBITDA” or in a similar manner. Any adjustments to net income beyond those described in the traditional definition of EBIT or EBITDA create an “adjusted” non-GAAP measure. In a manner consistent with the concepts discussed in [Section 3.5](#), a registrant

should not characterize or label the non-GAAP measure as EBIT or EBITDA if the measure does not meet these traditional definitions. Instead, the registrant should distinguish the measure from EBIT or EBITDA by using a title such as “adjusted EBITDA.”

C&DIs — Non-GAAP Financial Measures

Question 103.01

Question: Exchange Act Release No. 47226 describes EBIT as “earnings before interest and taxes” and EBITDA as “earnings before interest, taxes, depreciation and amortization.” What GAAP measure is intended by the term “earnings”? May measures other than those described in the release be characterized as “EBIT” or “EBITDA”? Does the exception for EBIT and EBITDA from the prohibition in Item 10(e)(1)(ii)(A) of Regulation S-K apply to these other measures?

Answer: “Earnings” means net income as presented in the statement of operations under GAAP. Measures that are calculated differently than those described as EBIT and EBITDA in Exchange Act Release No. 47226 should not be characterized as “EBIT” or “EBITDA” and their titles should be distinguished from “EBIT” or “EBITDA,” such as “Adjusted EBITDA.” These measures are not exempt from the prohibition in Item 10(e)(1)(ii)(A) of Regulation S-K, with the exception of measures addressed in Question 102.09. [Jan. 11, 2010]

Note that if EBIT or EBITDA are presented as liquidity measures, they are exempt from the liquidity measure prohibitions¹¹ under GAAP (see [Section 4.5](#)); however, they are still considered non-GAAP measures and are subject to all required disclosures. Further, for presentations of per-share amounts, the SEC staff considers EBIT and EBITDA to be liquidity measures; therefore, a registrant may not disclose them on a per-share basis regardless of whether the registrant considers them to be performance measures or liquidity measures.

The C&DIs do not expressly prohibit the presentation of earnings per share on adjusted EBIT and adjusted EBITDA. However, a registrant’s determination of whether it is acceptable to present these measures on a per-share basis may depend on the nature of the adjustments and on whether the measures are, in substance, performance or liquidity measures. If the measures are, in substance, liquidity measures, presentation on a per-share basis would be prohibited. See [Section 4.4](#) for additional information.

3.7 Consistency of Non-GAAP Measures

3.7.1 Consistency in Communications

A registrant should consider whether its various forms of communications with investors, including both filed and furnished documents, include non-GAAP measures and, if so, whether those non-GAAP measures are consistently determined and presented in the various forms of communications. For example, a registrant should be aware of inconsistencies or contradictions in (1) the non-GAAP measures disclosed outside its SEC filings, such as on its Web site and in its press releases and earnings calls, and (2) the non-GAAP measures disclosed in its filings. Although the SEC staff does not require a registrant to include non-GAAP measures in its filings, it may comment if, for example, the non-GAAP disclosures in the registrant’s press release or other communications appear to be inconsistent with those in its periodic or other filings.

¹¹ As noted in [Section 4.1](#), Item 10(e) prohibits a registrant from 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 [EBIT and EBITDA]” (emphasis added), referred to as the “liquidity measure prohibition.”

3.7.2 Consistent Use of Non-GAAP Measures

Registrants should consider establishing a formal policy for disclosing and calculating non-GAAP measures that defines and describes the adjustments (see [Section 5.1.1](#)). Non-GAAP financial measures should generally be calculated and presented consistently from period to period and, if there are any changes in the measures, such changes should be clearly disclosed (see [Section 3.7.3](#)). It may therefore be helpful for registrants to consider the following when they present non-GAAP measures:

- *Consistent presentation* — Generally registrants should consistently prepare and present non-GAAP measures from period to period in accordance with a defined policy, and they should use that policy to compute the measure for all periods presented.
- *Consistent types of adjustments* — A registrant should be cognizant of eliminating certain unfavorable charges in one year if it does not expect to eliminate them in a subsequent period if the charges happen to reverse, such as an accrual for a litigation contingency that it is ultimately settled in a later period for a favorable amount. Further, C&DI Question 100.03 (see [Section 4.3](#)) discusses a scenario in which a registrant excludes certain nonrecurring charges from a non-GAAP measure but fails to exclude nonrecurring gains (i.e., the registrant cherry-picks).
- *Consistent with non-GAAP measures used in the industry* — A registrant may want to consider whether its non-GAAP measures are consistent with standard measures used in its industry or by its peers and, if they are not, how the differences may affect comparability with other companies. A registrant's non-GAAP measures may differ from those used in its industry or of its peer companies. However, the registrant should consider whether any differences should be explained.

3.7.3 Changes in Non-GAAP Measures

As noted above, non-GAAP measures should generally be calculated and presented consistently for all periods presented. However, a registrant can change an existing non-GAAP measure for various reasons, such as changes that occur in the company's business. For example, a registrant may want to change a non-GAAP performance measure to add back significant restructuring costs in the current period related to a new streamlining initiative to be implemented over the next two years if it does not believe that such costs reflect its ongoing operations. In such a case, management, the audit committee, and others as appropriate should evaluate the appropriateness of the change, and the registrant should provide full and transparent disclosure about the change. As indicated in C&DI Question 100.02 (see [Section 4.3](#)), a non-GAAP measure may be considered misleading if a registrant adjusts an item in the current reporting period but does not adjust for a similar item in the prior period without appropriately disclosing the change and explaining the reasons for it.

In addition, as emphasized in 2015 at the AICPA Conference, if a non-GAAP measure used in the current period is calculated differently from one used in a prior period, the registrant should provide effective disclosures that permit comparability with the prior period. Further, footnote 23 of the Release states, in part:

[R]egistrants should consider whether a change in the method of calculating or presenting a non-GAAP financial measure from one period to another, without a complete description of the change in that methodology, complies with the requirement of Regulation G that a registrant, or a person acting on its behalf, shall not make public 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.

Among other items, registrants should consider the following when changing an existing non-GAAP measure:

- *Transparent disclosure* — Registrants should clearly disclose (1) the nature of the change (e.g., specific details regarding the components that have changed), (2) the reason for the change, and (3) an updated discussion of how the new measure is used by management and why it is useful to investors. Registrants must also comply with all of the disclosure requirements in Regulation G and Item 10(e).
- *Recasting considerations* — C&DI Question 100.02 (see [Section 4.3](#)) indicates that a registrant may need to recast prior periods to conform to the current presentation if the change is significant.

Chapter 4 — Non-GAAP Measures That May Be Misleading or Prohibited and Other Considerations Related to Common Non-GAAP Measures

This chapter discusses potentially misleading and prohibited non-GAAP measures as well as other considerations related to common non-GAAP measures, including the treatment of tax adjustments and disclosures about free cash flow, funds from operations, constant currency, and system-wide sales.

4.1 Overview

Under Regulation G, Rule 100(b), a registrant is prohibited from presenting a non-GAAP measure that is misleading. Regulation G states that a registrant should not publicly disclose a non-GAAP financial measure “that . . . 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 measure . . . not misleading.” Regulation G applies to all public statements that include or refer to non-GAAP measures. The guidance also applies to any SEC filing or furnished press releases under Form 8-K, Item 2.02 (see discussion in [Chapter 6](#)).

In May 2016, the SEC staff issued several new and updated C&DIs that provide guidance on misleading or prohibited non-GAAP measures. Section 100 of the C&DIs (see discussion below) illustrates various types of disclosures that could be potentially misleading.

Further, the requirements and prohibitions under Item 10(e) are more extensive and detailed than those under Regulation G. In addition to mandating certain disclosures, Item 10(e)(1)(ii) prohibits a registrant from:

- 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 [EBIT and EBITDA]” (the “liquidity measure prohibition”; emphasis added).
- 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 (the “performance measure prohibition”).
- Presenting “non-GAAP financial measures on the face of the registrant’s financial statements prepared in accordance with GAAP or *in the accompanying notes*” (emphasis added).

Chapter 4 — Non-GAAP Measures That May Be Misleading or Prohibited and Other Considerations Related to Common Non-GAAP Measures

- 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.”
- 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.”

A registrant is also prohibited from presenting per-share measures of liquidity in documents filed with and furnished to the SEC. See [Section 4.4](#) below.

The chart below summarizes the prohibitions against certain presentations of non-GAAP measures that apply to domestic¹ registrants under the Rules. Although Regulation G and Form 8-K, Item 2.02, do not refer to the prohibitions in Item 10(e)(1)(ii), registrants should consider the concepts in these and other prohibitions when using non-GAAP measures.

Prohibitions Applicable to Domestic Registrants

Prohibitions	All Disclosure of Non-GAAP Financial Measures (Regulation G ^{2,3})	SEC Filings (Item 10(e) of Regulation S-K ^{4,5})	Press Releases Furnished to the SEC (Item 2.02 of Form 8-K ⁶)
Prohibitions against certain presentations of non-GAAP financial measures: ⁷			
<ul style="list-style-type: none"> • Material misstatements or omissions that would make the presentation of the non-GAAP financial measure misleading⁸ 	X	X	X
<ul style="list-style-type: none"> • Presenting per-share measures of liquidity⁹ 		X	X
<ul style="list-style-type: none"> • Excluding charges or liabilities that require, or will require, cash settlement, or would have required cash settlement in the absence of an ability to settle in another manner, from non-GAAP liquidity measures (other than EBIT and EBITDA) 		X	

¹ For guidance on FPIs, see the following: Regulation G; Regulation S-K, Item 10(e); [Section 106](#) of the C&DIs; and [Section 8140](#) of the FRM.

² Regulation G applies whenever a registrant, or person acting on its behalf, publicly discloses or releases material information that includes a non-GAAP financial measure, whether that information is furnished to, or filed with, the SEC.

³ In certain situations, Regulation G and Item 10(e) do not apply. For example, they do not apply to non-GAAP measures related to a proposed business combination or measures required to be disclosed by a governmental authority. See [Section 2.3](#) for a discussion of measures that do not meet the definition of a non-GAAP measure under the Rules.

⁴ Item 10(e) applies to all SEC filings that include non-GAAP financial measures.

⁵ See footnote 3.

⁶ Form 8-K, Item 2.02, requires registrants to furnish to the SEC all releases or announcements disclosing material nonpublic financial information about completed annual or quarterly fiscal periods, regardless of whether the release or announcement includes disclosure of a non-GAAP financial measure. If a registrant elects to file the release or announcement with the SEC, such disclosure is subject to the requirements of Item 10(e).

⁷ Although Regulation G and Form 8-K, Item 2.02, do not refer to the prohibitions in Item 10(e)(1)(ii), registrants should consider the concepts in these and other prohibitions when using non-GAAP measures.

⁸ See Regulation G, Rule 100(b), and [Section 100](#) of the C&DIs.

⁹ Footnote 11 of the Release notes that certain non-GAAP per-share measures are prohibited under GAAP and SEC rules.

(Table continued)

Prohibitions	All Disclosure of Non-GAAP Financial Measures (Regulation G)	SEC Filings (Item 10(e) of Regulation S-K)	Press Releases Furnished to the SEC (Item 2.02 of Form 8-K)
<ul style="list-style-type: none"> Adjusting a non-GAAP performance measure to eliminate or smooth items identified as nonrecurring, infrequent, or unusual when the nature of the charge or gain is such that is reasonably likely to recur within two years or there was a similar charge or gain within the prior two years. The prohibition is based on the description of the charge or gain that is being adjusted 		X	
<ul style="list-style-type: none"> Presenting non-GAAP financial measures on the face of the GAAP financial statements or in the accompanying notes 		X	
<ul style="list-style-type: none"> Presenting non-GAAP financial measures on the face of any pro forma financial statements required to be disclosed by Article 11 of Regulation S-X 		X	
<ul style="list-style-type: none"> 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 		X	

4.2 MD&A Considerations Related to Prohibited Disclosures

Regulation S-K, Item 303, provides guidance on the information a registrant should consider providing in its MD&A. A registrant is generally required to quantify, discuss, and analyze in its MD&A material items that affect the registrant's results of operations (e.g., material charges regardless of whether they are recurring or nonrecurring items).

As discussed in [Section 2.1](#), depending on the way a registrant discloses material changes, the disclosure may or may not be a non-GAAP measure. For example, a registrant may want to disclose the effect of a large cash legal settlement on operating cash flows. Disclosure of an amount for "operating cash flows before legal settlement" would be a non-GAAP measure, and the registrant would need to consider the prohibition against excluding charges that required cash settlement from non-GAAP liquidity measures. If, however, the registrant disclosed GAAP operating cash flows and noted that the amount was significantly affected by the \$XX payment of the legal settlement, those amounts individually are not considered non-GAAP measures, and the disclosure would therefore not be subject to the prohibition discussed above.

A registrant is also generally permitted to disclose in MD&A the individual effect of otherwise prohibited non-GAAP performance adjustments on GAAP earnings and earnings per share, such as by showing the per-share impact of a significant charge or gain. For example, the interpretative response to Question 3 of SAB Topic 5.P states the following:

Discussions in MD&A and elsewhere which quantify the effects of unusual or infrequent items on net income and earnings per share are beneficial to a reader's understanding of the financial statements and are therefore acceptable.

Such discussions may be necessary and appropriate in MD&A for a registrant to be able to analyze the impact of unusual or infrequent items provided that the registrant maintains the proper context and balance. However, if the registrant “does the math” and presents a total profit measure or related per-share total excluding the unusual or infrequent item, it must consider all the applicable Rules.

4.3 What Is a Misleading Non-GAAP Measure?

An overriding theme of the SEC’s guidance on the use of or references to non-GAAP measures in public statements or disclosures is that they should not be misleading, whether such measures are used in a filing (e.g., Form 10-K) or elsewhere (e.g., press release). As described in Section 100 of the C&DIs, non-GAAP measures that could mislead investors include those that:

- Exclude normal, recurring cash operating expenses necessary for business operations.
- Are presented inconsistently between periods, such as by adjusting an item in the current reporting period, but not a similar item in the prior period, without appropriate disclosure about the change and an explanation of the reasons for it (see [Section 3.7.3](#)).
- Exclude certain nonrecurring charges but do not exclude nonrecurring gains (e.g., “cherry picking” non-GAAP adjustments to achieve the most positive measure; see [Section 3.7.2](#)).
- Are based on individually tailored accounting principles, including certain adjusted revenue measures.

C&DIs — Non-GAAP Financial Measures

Question 100.01

Question: Can certain adjustments, although not explicitly prohibited, result in a non-GAAP measure that is misleading?

Answer: Yes. Certain adjustments may violate Rule 100(b) of Regulation G because they cause the presentation of the non-GAAP measure to be misleading. For example, presenting a performance measure that excludes normal, recurring, cash operating expenses necessary to operate a registrant’s business could be misleading. [May 17, 2016]

Question 100.02

Question: Can a non-GAAP measure be misleading if it is presented inconsistently between periods?

Answer: Yes. For example, a non-GAAP measure that adjusts a particular charge or gain in the current period and for which other, similar charges or gains were not also adjusted in prior periods could violate Rule 100(b) of Regulation G unless the change between periods is disclosed and the reasons for it explained. In addition, depending on the significance of the change, it may be necessary to recast prior measures to conform to the current presentation and place the disclosure in the appropriate context. [May 17, 2016]

Question 100.03

Question: Can a non-GAAP measure be misleading if the measure excludes charges, but does not exclude any gains?

Answer: Yes. For example, a non-GAAP measure that is adjusted only for non-recurring charges when there were non-recurring gains that occurred during the same period could violate Rule 100(b) of Regulation G. [May 17, 2016]

C&DIs — Non-GAAP Financial Measures (continued)

Question 100.04

Question: A registrant presents a non-GAAP performance measure that is adjusted to accelerate revenue recognized ratably over time in accordance with GAAP as though it earned revenue when customers are billed. Can this measure be presented in documents filed or furnished with the Commission or provided elsewhere, such as on company websites?

Answer: No. Non-GAAP measures that substitute individually tailored revenue recognition and measurement methods for those of GAAP could violate Rule 100(b) of Regulation G. Other measures that use individually tailored recognition and measurement methods for financial statement line items other than revenue may also violate Rule 100(b) of Regulation G. [May 17, 2016]

As noted in C&DI Question 100.01, a registrant's non-GAAP performance measure should not eliminate costs necessary to generate revenues or normal, recurring cash charges. The SEC staff has, for example, commented when non-GAAP measures have:

- Excluded certain marketing expenses that were considered normal recurring operating cash expenditures.
- Used a "price normalized cash margin" that included higher oil and commodity prices from earlier periods. See [Section 4.17](#).

In C&DI Question 100.04, the SEC staff provides an example of a prohibited non-GAAP performance measure that reflects revenue recognized over the service period under GAAP on an accelerated basis as if the registrant earned revenue when it billed its customers. The measure is prohibited because it is an individually tailored accounting principle and does not reflect the registrant's required GAAP measurement method. While the example is about revenue recognition, the C&DI indicates that individually tailored accounting principles may also be prohibited when they are applied to other financial statement line items to create a non-GAAP measure.

Further, under ASC 280, a registrant may present segment measures, including segment-adjusted revenues or segment profit, on a basis that is consistent with the manner in which the registrant is managed but different from the basis presented in its consolidated financial statements prepared in accordance with GAAP. While such segment measures are not non-GAAP financial measures under the Rules, as long as they are presented on a separate segment basis, the SEC staff may object to their presentation or discussion on a consolidated basis when they are based on individually tailored accounting principles (see additional discussion in [Section 2.5](#)).

In addition to the examples discussed in the C&DIs, various other presentations could also be considered misleading non-GAAP measures depending on the facts and circumstances.

Registrants should not use non-GAAP measures that could mislead an investor about their results of operations, financial condition, or liquidity. While the SEC staff has primarily used the comment-letter process of the SEC's Division of Corporation Finance (the "Division"), speeches, and the updated C&DIs to indicate its objection to misleading measures, there have also been some enforcement actions. In 2002, the SEC brought an enforcement action against a registrant for disclosure of non-GAAP information in its earnings release that removed a "one-time" charge but did not disclose that one-time gains had not been removed. In another enforcement action in 2009, the registrant used a non-GAAP measure that claimed it excluded certain nonrecurring items when the measure actually removed certain

operating expenses. In addition, SEC Chair Mary Jo White noted at the June 2016 International Corporate Governance Network Annual Conference that the staff would, if necessary, use its filing review process, enforcement, and further rulemaking to ensure that disclosures are optimal (see [Appendix B](#) for more information).

4.4 Non-GAAP Per-Share Measures

Item 10(e) does not specifically prohibit the presentation of non-GAAP per-share financial measures. However, footnote 11¹⁰ of the Release notes that certain non-GAAP per-share measures are specifically prohibited under GAAP and SEC rules. This prohibition applies to disclosure in documents both filed with the SEC and furnished to the SEC (such as press releases).

C&DIs — Non-GAAP Financial Measures

Question 102.05

Question: While Item 10(e)(1)(ii) of Regulation S-K does not prohibit the use of per share non-GAAP financial measures, the adopting release for Item 10(e), Exchange Act Release No. 47226, states that “per share measures that are prohibited specifically under GAAP or Commission rules continue to be prohibited in materials filed with or furnished to the Commission.” In light of Commission guidance, specifically Accounting Series Release No. 142, *Reporting Cash Flow and Other Related Data*, and Accounting Standards Codification 230, are non-GAAP earnings per share numbers prohibited in documents filed or furnished with the Commission?

Answer: No. Item 10(e) recognizes that certain non-GAAP per share performance measures may be meaningful from an operating standpoint. Non-GAAP per share performance measures should be reconciled to GAAP earnings per share. On the other hand, non-GAAP liquidity measures that measure cash generated must not be presented on a per share basis in documents filed or furnished with the Commission, consistent with Accounting Series Release No. 142. Whether per share data is prohibited depends on whether the non-GAAP measure can be used as a liquidity measure, even if management presents it solely as a performance measure. When analyzing these questions, the staff will focus on the substance of the non-GAAP measure and not management’s characterization of the measure. [May 17, 2016]

Prohibited per-share measures include:

- *Cash flow per share and other per-share measures of liquidity* — ASC 230 states that “[f]inancial statements shall not report an amount of cash flow per share. Neither cash flow nor any component of it is an alternative to net income as an indicator of an entity’s performance, as reporting per-share amounts might imply.” The SEC’s guidance in ASR 142 contains a similar prohibition. Free cash flow is a liquidity measure and, therefore, per-share presentation is expressly prohibited. In addition, C&DI Question 103.02 notes that EBIT or EBITDA should not be presented on a per-share basis. The C&DI does not discuss the presentation of earnings per share on adjusted EBIT or adjusted EBITDA. The determination of whether they are acceptable may depend on the nature of the adjustment and whether the measure is clearly, in substance, a liquidity measure. See [Section 4.11](#) for a discussion of free cash flow, and see [Sections 3.6 and 4.6](#) for a discussion of EBIT, EBITDA, and adjusted EBIT and EBITDA.
- *Per-share measures derived from prohibited non-GAAP measures* — While there is no explicit restriction on the presentation of non-GAAP per-share measures, other than the restriction described above, registrants are not allowed to disclose a non-GAAP per-share measure that is derived from a prohibited non-GAAP financial measure. That is, the numerator in the non-GAAP per-share measure must be a non-GAAP measure permitted by Item 10(e). See discussion below regarding the denominator.

¹⁰ Footnote 11 states, “While we have not included a prohibition on per share non-GAAP financial measures in Item 10 of Regulation S-K or Item 10 of Regulation S-B, per share measures that are prohibited specifically under GAAP or Commission rules continue to be prohibited in materials filed with or furnished to the Commission. See, for example, the prohibition on cash flow per share in paragraph 33 of FASB Statement No. 95, *Statement of Cash Flows*.”

Registrants may generally disclose other non-GAAP per-share *performance* measures as long as they comply with other SEC requirements for such measures (including the reconciliation to GAAP earnings per share; see [Section 3.2.2](#)). C&DI Question 102.05 (see [Section 4.4](#)) indicates that in a registrant's discussion of its operations, certain non-GAAP per-share performance measures "may be meaningful." However, the C&DI also specifies that the SEC staff may challenge measures designated as performance measures that appear to be more like liquidity measures (i.e., the staff will look at the substance of the disclosure, not necessarily its form of characterization). See [Section 3.2.2](#) for more information.

Registrants are reminded to comply with all disclosure requirements in Item 10(e), including the requirement to reconcile both the numerator and denominator. A reconciliation of the denominator is not necessary, however, if the denominator represents diluted shares in accordance with ASC 260. If the denominator does not represent diluted shares, registrants should use caution in presenting the measure and consider whether the resulting measure could potentially be misleading (see footnote 49 of the Release).¹¹

4.5 Liquidity Measure Prohibitions

Implicit in the reconciliation requirement of Item 10 is that a registrant must characterize any non-GAAP financial measure in a filing as either a liquidity measure or a performance measure. See [Section 3.2.2](#) for a discussion of liquidity and performance measures.

The characterization of a non-GAAP measure is important since it dictates the disclosures required and the nature of the adjustments to the non-GAAP measure that are permitted under Item 10. For example, a registrant is prohibited from excluding cash charges (or charges that will in the future require cash settlement) from a liquidity measure. However, the Rules provide an exception to the liquidity prohibitions specifically for EBIT and EBITDA, which, by definition, would exclude cash charges such as interest and taxes. If the measure is a performance measure, a registrant may be able to exclude cash or noncash charges, but it should appropriately describe the charges excluded. The ability to eliminate recurring items from a non-GAAP performance measure is further discussed in [Section 4.7](#) (see also [Section 4.14](#), which discusses certain exceptions for material credit agreement covenants).

For additional guidance on non-GAAP per-share liquidity measures, see the discussion above.

4.6 EBIT and EBITDA, and Adjusted EBIT and EBITDA

As discussed in [Chapter 3](#), EBIT, EBITDA, and adjusted EBIT and EBITDA may be presented as a performance measure or a liquidity measure. If presented as a liquidity measure, EBIT and EBITDA are, as noted above, specifically exempt from the liquidity measure prohibition; however, they are still considered non-GAAP financial measures and therefore must include all of the required non-GAAP disclosures.

As discussed in [Section 3.6](#), any adjustments to net income beyond those described in the traditional definition of EBIT or EBITDA create an "adjusted" measure, which is also considered a non-GAAP measure. Therefore, to avoid investor confusion, a registrant should not characterize or label the non-GAAP measure as EBIT or EBITDA if the measure does not meet these traditional definitions. Instead, the registrant should distinguish the measure from EBIT or EBITDA by using a title such as "adjusted EBITDA." Any additional adjustments to derive adjusted EBITDA are subject to the non-GAAP

¹¹ Regulation G indicates that a non-GAAP measure should not contain "an untrue statement of a material fact" or omit material facts that would make its presentation misleading.

liquidity and performance measure prohibitions in Item 10 (with the exception of measures regarding material covenants to debt agreements; see [Section 4.14](#) for a discussion of credit agreement covenant disclosures).

Also, C&DI Question 103.02 notes that EBIT or EBITDA should not be presented on a per-share basis. The C&DI does not discuss the presentation of earnings per share on adjusted EBIT or adjusted EBITDA. The determination of whether they are acceptable may depend on the nature of the adjustments and whether the measure is, in substance, a liquidity measure.

See [Section 3.6](#) for additional discussion of EBIT, EBITDA, and adjusted EBIT and EBITDA.

4.7 Performance Measure Prohibitions

A registrant may decide to disclose a non-GAAP performance measure that adjusts for recurring charges that would appear to be necessary to run its business operations. A registrant should be able to support why it believes that this type of measure would be useful to an investor, particularly when the measure removes “normal” types of expenses. See [Section 4.3](#).

Further, many registrants adjust GAAP earnings for items they consider to be one-time, nonrecurring, infrequent, or unusual, such as restructuring charges, asset impairments, and gains and losses on asset sales. Depending on the description of the item, these same items may be a prohibited adjustment for a non-GAAP performance measure. Item 10(e) prohibits registrants from adjusting a non-GAAP performance measure “to eliminate or smooth items identified as non-recurring, infrequent or unusual, when the nature of the charge or gain is such that it is reasonably likely to recur within two years or there was a similar charge or gain within the prior two years.” C&DI Question 102.03 clarifies that a charge or gain may be presented as an adjustment as long as it is not inappropriately labeled or described as nonrecurring, infrequent, or unusual.

C&DIs — Non-GAAP Financial Measures

Question 102.03

Question: Item 10(e) of Regulation S-K prohibits adjusting a non-GAAP financial performance measure to eliminate or smooth items identified as non-recurring, infrequent or unusual, when the nature of the charge or gain is such that it is reasonably likely to recur within two years or there was a similar charge or gain within the prior two years. Is this prohibition based on the description of the charge or gain, or is it based on the nature of the charge or gain?

Answer: The prohibition is based on the description of the charge or gain that is being adjusted. It would not be appropriate to state that a charge or gain is non-recurring, infrequent or unusual unless it meets the specified criteria. The fact that a registrant cannot describe a charge or gain as non-recurring, infrequent or unusual, however, does not mean that the registrant cannot adjust for that charge or gain. Registrants can make adjustments they believe are appropriate, subject to Regulation G and the other requirements of Item 10(e) of Regulation S-K. See Question 100.01. [May 17, 2016]

Thus, if management concludes that an adjustment to a non-GAAP performance measure is appropriate, but that the adjustment is reasonably likely to recur within two years or there was a similar charge in the last two years, it may adjust the non-GAAP performance measure (subject to Regulation G and the other requirements in Item 10(e)) but may not describe the adjustment as nonrecurring, infrequent, or unusual because it does not meet the specified criteria.

Example

A registrant reflects an impairment charge in its 20X6 statement of operations that it believes is an appropriate adjustment to its non-GAAP performance measure. Management believes that it is reasonably likely that an impairment will recur within one of the next two years. Management may adjust the non-GAAP performance measure for the impairment charge but may not label it or describe it in a note as nonrecurring, infrequent, or unusual since it does not meet the criteria in Item 10.

4.8 Non-GAAP Measures on the Face of Financial Statements and Notes

Item 10(e)(1)(ii)(C) expressly prohibits a registrant from presenting non-GAAP measures in financial statements prepared in accordance with GAAP. Accordingly, a registrant may not present non-GAAP measures in either of the following places:

- The face of the financial statements.
- The footnotes accompanying the financial statements.

In some circumstances, a registrant may be required by GAAP to present a measure that might otherwise be considered a non-GAAP measure (e.g., adjusted EBITDA) in the notes to the financial statements, such as segment disclosures presented in accordance with ASC 230. A measure presented in this context is not considered a non-GAAP measure under the Rules and therefore would not be prohibited. For additional discussion, see [Section 2.5](#).

Item 10(e)(1)(ii)(D) also prohibits a registrant from presenting non-GAAP measures on the face of any pro forma financial statements required to be disclosed by Article 11.

4.9 Considerations Related to Labeling Non-GAAP Measures

When labeling a non-GAAP financial measure, a registrant may not use titles or descriptions that are the same as, or are confusingly similar to, titles or descriptions used for GAAP financial measures.

For example:

- A non-GAAP measure identified as “operating earnings” may be considered confusingly similar to the “operating income” GAAP measure.
- A non-GAAP measure should not be identified as “EBITDA” if it excludes any amounts other than interest, taxes, depreciation, and amortization (e.g., impairment charges).

A registrant should also be cautious when using terms that are defined in SEC literature to label non-GAAP items. For instance, a non-GAAP measure with a label that includes the term “pro forma” would generally be expected to be consistent with the concepts in Article 11 and GAAP, as appropriate.

Further, the SEC staff has indicated that in adjusting non-GAAP measures, registrants sometimes use conventional accounting terms differently from the way they are commonly understood by investors. Citing an example of such use in the oil and gas industry, the staff noted that derivative gains and losses may be labeled in a way that suggests that the adjustments are calculated under GAAP even when they exclude net unrealized gains and losses. The SEC staff has reminded registrants to stay true to the meaning of accounting terminology as defined in GAAP.

Note that clear, transparent labeling is important for all items in the reconciliation, including the non-GAAP measure and reconciling items. For a discussion of labeling the reconciling items from the GAAP to the non-GAAP measure, see [Section 3.2](#).

4.10 Treatment of Tax Adjustments

In certain circumstances, a registrant may reflect a non-GAAP measure after taxes and therefore show the tax adjustments when reconciling a non-GAAP measure to the appropriate GAAP measure. C&DI Question 102.11 indicates that the tax expense impact for a performance measure should be consistent with the amount of non-GAAP income since adjusting revenue or income before income tax could affect the tax expense or benefits assumed in the calculation of the tax provision. For example, suppose that a registrant has a \$200 million GAAP loss for the most recent fiscal year, which resulted in a 3 percent tax rate. After making various reconciling adjustments, if the registrant presents a non-GAAP adjusted income measure of \$400 million, the SEC staff may comment if the registrant uses the same 3 percent effective tax rate to compute the tax provision.

If a non-GAAP measure is a liquidity measure, adjusting the GAAP tax amount to present taxes paid in cash may be acceptable.

Registrants should present adjustments gross of tax and should disclose how the tax adjustments were determined.

C&DIs — Non-GAAP Financial Measures

Question 102.11

Question: How should income tax effects related to adjustments to arrive at a non-GAAP measure be calculated and presented?

Answer: A registrant should provide income tax effects on its non-GAAP measures depending on the nature of the measures. If a measure is a liquidity measure that includes income taxes, it might be acceptable to adjust GAAP taxes to show taxes paid in cash. If a measure is a performance measure, the registrant should include current and deferred income tax expense commensurate with the non-GAAP measure of profitability. In addition, adjustments to arrive at a non-GAAP measure should not be presented “net of tax.” Rather, income taxes should be shown as a separate adjustment and clearly explained. [May 17, 2016]

Example

To illustrate the discrete effect of taxes on individual adjustments in the reconciliation, the registrant may present the tax effect of all adjustments as a single line in the reconciliation as follows:

Net income	\$	XYZ
Add: Stock-based compensation		XX
Restructuring charges		YY
Less: Tax effect of adjustments		<u>ZZ</u>
Adjusted net income	\$	<u>UVW</u>

The registrant should clearly disclose how it determined the tax effect. Other alternative presentations may be appropriate as long as the gross amount of adjustments are disclosed. For example, a registrant could disclose the relevant information about the gross amount of the adjustment and the tax amount in parentheses (e.g., stock-based compensation \$10 million less the amount of taxes \$3 million) to arrive at the net amount (e.g., \$7 million) and could provide similar disclosure for the restructuring charges.

When calculating a non-GAAP measure, a registrant should be mindful of how the adjustments made to a GAAP measure affect income tax expense. As indicated above, a registrant's adjustment of revenue or income before tax expense could affect the tax expense or benefits assumed in the calculation of the tax provision and therefore could have an impact on the tax computation in the reconciliation.

4.11 Presentation of Free Cash Flow

Free cash flow is a non-GAAP measure, commonly defined as cash flows from operating activities as presented in the statement of cash flows less capital expenditures. According to C&DI Question 102.07, the measure does not violate the liquidity measure prohibition of Item 10(e) even though some of the capital expenditures may have been or will be paid in cash. In addition to capital expenditures, other adjustments may also be used to derive free cash flow. C&DI Question 102.07 notes that the measure is not uniformly defined, and its title does not describe how it is calculated. Therefore, registrants must clearly describe how free cash flow is calculated and disclose the other information required by Item 10(e), including a reconciliation.

C&DIs — Non-GAAP Financial Measures

Question 102.07

Question: Some companies present a measure of “free cash flow,” which is typically calculated as cash flows from operating activities as presented in the statement of cash flows under GAAP, less capital expenditures. Does Item 10(e)(1)(ii) of Regulation S-K prohibit this measure in documents filed with the Commission?

Answer: No. The deduction of capital expenditures from the GAAP financial measure of cash flows from operating activities would not violate the prohibitions in Item 10(e)(1)(ii). However, companies should be aware that this measure does not have a uniform definition and its title does not describe how it is calculated. Accordingly, a clear description of how this measure is calculated, as well as the necessary reconciliation, should accompany the measure where it is used. Companies should also avoid inappropriate or potentially misleading inferences about its usefulness. For example, “free cash flow” should not be used in a manner that inappropriately implies that the measure represents the residual cash flow available for discretionary expenditures, since many companies have mandatory debt service requirements or other non-discretionary expenditures that are not deducted from the measure. Also, free cash flow is a liquidity measure that must not be presented on a per share basis. See Question 102.05. [May 17, 2016]

Since free cash flow is presumed to be a liquidity measure, registrants would be prohibited from disclosing free cash flow per share. See the discussion of non-GAAP per-share measures in [Section 4.4](#).

4.12 Presentation of Funds From Operations

Funds from operations (FFO) is a non-GAAP measure commonly used in the real estate industry. C&DI Questions 102.01 and 102.02 indicate that FFO, as [defined](#) by the NAREIT and in effect as of May 17, 2016, as well as FFO per share will continue to be accepted as a performance measure.

The presentation of any FFO measure in a manner that departs from NAREIT's definition (e.g., adjusted FFO, core FFO), or as a per-share amount based on such a modified measure, is subject to the prohibitions in Item 10(e). Accordingly, that measure must comply with the requirements in Item 10(e) for a performance measure or a liquidity measure. If modified FFO is considered a performance measure, it may be presented on a per-share basis; if a modified FFO per share is, in substance, a liquidity measure, presentation on a per-share basis is prohibited. Acceptability of FFO per-share measures, or modified FFO per share, does not override the prohibition against the presentation of cash flow per-share data and other per-share measures of liquidity.

C&DIs — Non-GAAP Financial Measures

Question 102.01

Question: What measure was contemplated by “funds from operations” in footnote 50 to Exchange Act Release No. 47226, Conditions for Use of Non-GAAP Financial Measures, which indicates that companies may use “funds from operations per share” in earnings releases and materials that are filed or furnished to the Commission, subject to the requirements of Regulation G and Item 10(e) of Regulation S-K?

Answer: The reference to “funds from operations” in footnote 50, or “FFO,” refers to the measure as defined as of January 1, 2000, by the National Association of Real Estate Investment Trusts (NAREIT). NAREIT has revised and clarified the definition since 2000. The staff accepts NAREIT’s definition of FFO in effect as of May 17, 2016 as a performance measure and does not object to its presentation on a per share basis. [May 17, 2016]

Question 102.02

Question: May a registrant present FFO on a basis other than as defined by NAREIT as of May 17, 2016?

Answer: Yes, provided that any adjustments made to FFO comply with Item 10(e) of Regulation S-K and the measure does not violate Rule 100(b) of Regulation G. Any adjustments made to FFO must comply with the requirements of Item 10(e) of Regulation S-K for a performance measure or a liquidity measure, depending on the nature of the adjustments, some of which may trigger the prohibition on presenting this measure on a per share basis. See Section 100 and Question 102.05. [May 17, 2016]

FFO may be reported gross or net of noncontrolling interest adjustments. In situations in which the FFO calculation appears to take into account noncontrolling interest adjustments and is simply labeled “FFO,” the registrant should clearly label the measure to reflect “FFO attributable to common stockholders” or “FFO attributable to the company.”

4.13 Constant Currency Presentations

Constant currency is a method used to eliminate the effects of exchange rate fluctuations of international operations in a registrant’s determination of financial performance. For example, when presenting its MD&A, a registrant with material operations in various countries should disclose the impact of material exchange rates. To do so, the registrant may use a constant exchange rate between periods for translation, which would remove the effect of fluctuations in foreign exchange rates.

The presentation of financial results in a constant currency is considered a non-GAAP measure.

C&DIs — Non-GAAP Financial Measures

Question 104.06

Question: Company X has operations in various foreign countries where the local currency is used to prepare the financial statements which are translated into the reporting currency under the applicable accounting standards. In preparing its MD&A, Company X will explain the reasons for changes in various financial statement captions. A portion of these changes will be attributable to changes in exchange rates between periods used for translation. Company X wants to isolate the effect of exchange rate differences and will present financial information in a constant currency — e.g., assume a constant exchange rate between periods for translation. Would such a presentation be considered a non-GAAP measure under Regulation G and Item 10(e) of Regulation S-K?

Answer: Yes. Company X may comply with the reconciliation requirements of Regulation G and Item 10(e) by presenting the historical amounts and the amounts in constant currency and describing the process for calculating the constant currency amounts and the basis of presentation. [Jan. 11, 2010]

Since constant-currency amounts are non-GAAP measures, the registrant should include the appropriate non-GAAP disclosures to isolate the effects of the exchange rate differences for (1) the historical amounts and (2) the amounts in constant currency. The disclosure of the non-GAAP measure should describe both the basis of presentation and how the constant-currency amounts were computed. Note that if a registrant only discloses the impact of exchange rates as part of its explanation of the period-to-period fluctuation between two GAAP amounts, such disclosure would not constitute a non-GAAP measure (e.g., foreign currency fluctuations resulted in \$XX of the change in net revenue).

4.14 Credit Agreement Covenants

Credit agreements often require registrants to comply with certain financial or non-financial covenants. The financial covenants, which may be based on GAAP or on non-GAAP measures such as EBITDA or adjusted EBITDA, are often material to an investor's understanding of the registrant's financial condition and liquidity. Accordingly, disclosure of information about covenants may be required in the MD&A section of a filing.

C&DIs — Non-GAAP Financial Measures

Question 102.09

Question: Item 10(e)(1)(ii)(A) of Regulation S-K prohibits “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 earnings before interest and taxes (EBIT) and earnings before interest, taxes, depreciation and amortization (EBITDA).” A company's credit agreement contains a material covenant regarding the non-GAAP financial measure “Adjusted EBITDA.” If disclosed in a filing, the non-GAAP financial measure “Adjusted EBITDA” would violate Item 10(e), as it excludes charges that are required to be cash settled. May a company nonetheless disclose this non-GAAP financial measure?

Answer: Yes. The prohibition in Item 10(e) notwithstanding, because MD&A requires disclosure of material items affecting liquidity, if management believes that the credit agreement is a material agreement, that the covenant is a material term of the credit agreement and that information about the covenant is material to an investor's understanding of the company's financial condition and/or liquidity, then the company may be required to disclose the measure as calculated by the debt covenant as part of its MD&A. In disclosing the non-GAAP financial measure in this situation, a company should consider also disclosing the following:

- the material terms of the credit agreement including the covenant;
- the amount or limit required for compliance with the covenant; and
- the actual or reasonably likely effects of compliance or non-compliance with the covenant on the company's financial condition and liquidity. [Jan. 11, 2010]

As indicated in C&DI Question 102.09, a registrant must disclose in its MD&A material items affecting its financial condition or liquidity. The C&DI emphasizes that a registrant should disclose a measure that is calculated in accordance with a credit agreement when (1) the credit agreement is a material agreement, (2) the covenant is a material term of the credit agreement, and (3) information about the covenant is “material to an investor's understanding of [its] financial condition and/or liquidity” (e.g., when the registrant is at risk of violating the covenant). Disclosure of the measure may be required even if the measure would otherwise be prohibited under Item 10(e) (see [Section 4.1](#)).

In addition to providing the non-GAAP disclosures required by Item 10(e), a registrant should consider the other disclosures described in C&DI Question 102.09.

4.15 Presentation of a System-Wide Sales Measure

System-wide sales is a non-GAAP financial measure commonly used by registrants in certain industries (e.g., retail and restaurant). It is generally defined as the combination of sales generated by corporate-owned and franchised locations.

The SEC staff had noted at the April 6, 2010, CAQ SEC Regulations Committee joint meeting with the SEC staff that it objected to the presentation of system-wide sales. However, at the 2015 AICPA Conference, the staff indicated that it did not object to the use of this non-GAAP measure in certain situations (when the registrant has complied with all of the other non-GAAP requirements and disclosures) since the measure is generally understood in the marketplace and used by investors (e.g., to assess the overall strength of a brand).

Example

The following table illustrates how a registrant might disclose system-wide sales in a filing (the accompanying table omits the required disclosures about non-GAAP measures, including the purpose and use of the measure):

Form 10-K MD&A Non-GAAP Sales Table

	20X6	20X5
Company-owned	\$ XX	\$ XX
Franchise	<u>YY</u>	<u>YY</u>
System-wide	<u>\$ ZZ</u>	<u>\$ ZZ</u>

4.16 Treatment of Pension and Other Postemployment Benefits Expense in Non-GAAP Measures

Some registrants present non-GAAP measures that adjust for defined-benefit pension-related items. For example, a registrant may adjust to remove (1) all nonservice-related pension expense, (2) all pension expense in excess of cash contributions, or (3) the amortization of actuarial gains and losses. Some registrants that immediately recognize all actuarial gains and losses in earnings present non-GAAP measures that remove the actual gain or loss attributable to the change in the fair value of plan assets from a performance measure and include an expected return.

The SEC staff has observed that these pension-related adjustments can be confusing without the appropriate context about the nature of the adjustment. For example, the staff has noted that pension adjustment disclosures often:

- Do not clearly describe what the adjustment represents (e.g., the adjustment removes the amount of actuarial gain/loss immediately recognized in earnings or removes all nonservice-related pension costs).
- Refer to “noncash” pension expense even though the pension liability is expected ultimately to be settled in cash.
- Do not provide context about adjustments related to actuarial gains and losses.
- Inconsistently reflect adjustments related to actuarial gains and losses.

At the 2013 AICPA Conference, the SEC staff provided an example of a registrant that immediately recognized its actuarial gains and losses. The adjustment in the non-GAAP measure included the impact of changes in pension plan assumptions (e.g., changes in discount rate) as well as the difference between the actual return on plan assets and the expected return on plan assets. The staff indicated that this presentation might be confusing because the adjusted non-GAAP measure reflected only the expected return, which is always positive no matter how the market actually performs. The staff noted that a registrant should disclose that the non-GAAP measure reflects:

- An expected return on plan assets of X percent or \$XX.
- An actual return of Y percent or \$YY.
- Pension expense of \$ZZ.

Registrants that amortize actuarial gains and losses (rather than immediately recognize their actuarial gains and losses) should disclose similar information. That is, they should (1) quantify the expected return on plan assets reflected in the non-GAAP measure and (2) disclose the amount of pension expense reflected in the non-GAAP measure.

At the 2015 AICPA Conference, the SEC staff expressed some observations regarding a registrant's change in approach when measuring its service cost and interest cost. The SEC staff has also highlighted that it expects registrants to disclose any significant impact of a change in the approach used to measure net periodic benefit cost on any non-GAAP measures. Specifically, registrants should explain how the change in approach affected components of net periodic benefit cost and actuarial gains and losses in the current period and on a prospective basis to the extent that those items are reflected in non-GAAP measures.

4.17 Normalized Market Prices

Because of significant volatility in commodity prices, a registrant may believe that investors would benefit from disclosure of a non-GAAP financial measure that adjusts its results of operations by eliminating the effect of significant changes in commodity prices. At the 2015 AICPA Conference, the SEC staff stated that it objects to the presentation of such a non-GAAP measure because ever-changing market conditions and volatility in commodity prices present a challenge for registrants to ascertain a "normal" market price.

Chapter 5 — Disclosure Controls and Procedures Related to Non-GAAP Measures and Other Considerations

5.1 Disclosure Controls and Procedures Versus Internal Control Over Financial Reporting

It is important to understand whether controls over non-GAAP measures are related to disclosure controls and procedures (DCPs), to internal control over financial reporting (ICFR), or to both.

As [defined](#) in both SEC and PCAOB rules, ICFR focuses on controls related to the “reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles.” DCPs, on the other hand, are more broadly defined and pertain to all information required to be disclosed by the company.

Because the starting point for a non-GAAP measure is a GAAP measure, ICFR would be relevant to consider up to the point at which the GAAP measure that forms the basis of the non-GAAP measure has been determined. However, regarding controls over the adjustments to the GAAP measure and the related calculation of the non-GAAP measure — including the oversight and monitoring of the non-GAAP measure — it is appropriate to consider such controls within the realm of DCPs.

5.1.1 Non-GAAP Measures, Earnings Releases, and DCPs

The SEC’s [final rule](#) on certifications states that Section 302 of the Sarbanes-Oxley Act of 2002 requires management to certify on a quarterly basis that DCPs are effective “to ensure that information required to be disclosed by the issuer in the reports filed or submitted by it under the Exchange Act [footnote omitted] is recorded, processed, summarized and reported, within the time periods specified in the Commission’s rules and forms.” Earnings releases containing non-GAAP measures are often furnished on Form 8-K, which does not require certifications of the effectiveness of DCPs. However, the final rule also indicates that “[d]isclosure controls and procedures . . . are required to be designed, maintained and evaluated to ensure full and timely disclosure in current reports.”

Therefore, registrants that use non-GAAP measures in earnings releases furnished on Form 8-K — or those that use them in Forms 10-Q and 10-K (outside the financial statements), which would be explicitly covered by Section 302 certifications — should consider the appropriateness of their DCPs in the context of their non-GAAP information. Registrants should, at a minimum, consider designing DCPs to ensure that procedures are in place regarding:

- *Compliance* — Non-GAAP measures are presented in compliance with SEC rules, regulations, and guidance.
- *Consistency of preparation* — Non-GAAP measures are presented consistently each period, and potential non-GAAP adjustments are evaluated on an appropriate, consistent basis each period.
- *Data quality* — Non-GAAP measures are calculated on the basis of reliable inputs that are subject to appropriate controls.
- *Accuracy of calculation* — Non-GAAP measures are calculated with arithmetic accuracy, and the non-GAAP measures in the disclosure agree with the measures calculated.
- *Transparency of disclosure* — Descriptions of the non-GAAP measures, adjustments, and any other required disclosures are clear and not confusing.
- *Review* — Non-GAAP disclosures are reviewed by appropriate levels of management to confirm the appropriateness and completeness of the non-GAAP measures and related disclosures.
- *Monitoring* — The registrant's monitoring function (e.g., internal audit, disclosure committee, or audit committee) appropriately reviews the DCPs related to non-GAAP disclosures. The audit committee is involved in the oversight of the preparation and use of non-GAAP measures.

A critical aspect of such DCPs is the involvement of the appropriate levels of management and those charged with governance. Depending on the registrant, this may include reviewing the selection and determination of non-GAAP measures with a disclosure committee, the audit committee, or both. Establishing a written policy that (1) clearly describes the nature of allowable adjustments to GAAP measures, (2) defines the non-GAAP measure(s) to be used under the policy, and (3) explains how potential changes in the inputs, calculation, or adjustments will be evaluated and approved may help management identify its DCPs. For example, a policy might describe qualitatively the types of adjustments that are nonrecurring and abnormal and thus within the defined policy. It may also outline specific quantitative thresholds for which income or expense items might be evaluated in the determination of whether they should be included in non-GAAP adjustments. This could help ensure that appropriate non-GAAP measures are used as well as eliminate the need for numerous immaterial adjustments in the reconciliation that may confuse investors.

5.1.2 Disclosure Committee Considerations

Some companies may find it helpful to use a disclosure committee to assist the CEO, CFO, and audit committee in preparing and overseeing disclosures, including those related to non-GAAP measures. Disclosure committees are typically management committees, although some companies prefer that the disclosure committee function as a subcommittee of the board and audit committee.

Disclosure committees can set parameters for and determine the appropriateness of disclosures related to non-GAAP measures. In particular, the disclosure committee could review draft earnings releases to provide input and oversight by using the seven considerations outlined above. As part of its review, the disclosure committee can provide effective governance and play an integral role in the accuracy, completeness, timeliness, and fairness of a company's disclosures.

5.1.3 Sample Approach — Controls Associated With the Disclosure of Non-GAAP Measures

A global manufacturing company uses certain non-GAAP measures in its quarterly earnings releases that are furnished to the SEC on Form 8-K. The manager of external reporting (1) prepares the non-GAAP measures that the entity plans to include in the quarterly earnings release and (2) provides to the controller for review the computed non-GAAP measures and related support (e.g., reconciliation between the most directly comparable GAAP financial measure and the non-GAAP measure) for the calculations.

The controller recomputes each non-GAAP measure and agrees the underlying GAAP measure to the general ledger. The controller then reviews each reconciliation of the GAAP measure to the non-GAAP measure, which includes agreeing the adjustments to the trial balance or other support and considering whether the reconciliation clearly labels and describes the nature of each adjustment. The controller also considers whether each adjustment is appropriate under company policy and is consistent with adjustments made in prior periods, and the controller excludes immaterial adjustments that are not the focus of management. Further, the controller reviews a list of prohibited presentations of non-GAAP financial measures to ensure that the measures are consistent with SEC guidance. The list of prohibited presentations includes the following, which can be evaluated before the draft earnings release is prepared:

- The inclusion of material misstatements or omissions that would make the presentation of the non-GAAP financial measure misleading.
- The presentation of per-share measures of liquidity.
- The exclusion of charges or liabilities that require, or will require, cash settlement, or would have required cash settlement in the absence of an ability to settle in another matter, from non-GAAP liquidity measures.
- Adjustments to a non-GAAP performance measure to eliminate or smooth items identified as nonrecurring, infrequent, or unusual when the nature of the charge or gain is such that it is reasonably likely to recur within two years or there was a similar charge or gain within the prior two years.

The controller considers whether the non-GAAP measures contain misleading adjustments, including those that:

- Exclude normal, recurring cash operating expenses necessary for business operation.
- Adjust an item in the current reporting period but do not adjust for a similar item in the prior period.
- Exclude certain nonrecurring charges but do not exclude nonrecurring gains.
- Are based on individually tailored accounting principles, including certain adjusted revenue measures.

The controller considers the income tax effects of the adjustments made to the GAAP measure (mindful that adjusting revenue or income before tax could affect the tax expense or benefits assumed in the calculation of the tax provision and that if the measure is a performance measure, a current and deferred income tax expense commensurate with the non-GAAP measure of profitability should be calculated and included in the disclosure). In addition, the controller verifies that adjustments for

income taxes are presented separately and there is disclosure of how the adjustment for income taxes was determined. Finally, the controller reviews the non-GAAP measures used by the company's peers and considers whether the company's non-GAAP measures are comparable to them. The controller will follow up, if necessary, with the manager of external reporting regarding these review steps and, when any outstanding issues are resolved, will submit the reviewed non-GAAP measures to the director of investor relations. The director of investor relations drafts the earnings release and includes the non-GAAP measures reviewed by the controller.

The draft earnings release is then subject to review by the disclosure committee, which consists of the chief financial officer, the general counsel, the income tax director, and the director of internal audit. The disclosure committee reviews the non-GAAP measures disclosed in the draft earnings release for compliance with Regulation G and other SEC guidance and ensures the following:

- The non-GAAP measure is neither misleading nor prohibited.
- The non-GAAP measure is presented with and reconciled to the most directly comparable GAAP measure and with no greater prominence than the GAAP measure.
- The non-GAAP measure is appropriately defined and described and is clearly labeled as non-GAAP.
- The non-GAAP measure is balanced (i.e., it adjusts not only for nonrecurring expenses but also for nonrecurring gains).
- There is transparent and company-specific disclosure of the substantive reason(s) why management believes that the measure is useful for investors and, if material, the purpose for which management uses the measure.
- The non-GAAP measure is not presented on the face of the GAAP financial statements or in the accompanying notes or on the face of any pro forma financial statements required to be disclosed by Regulation S-X, Article 11.
- The titles or descriptions of non-GAAP financial measures are not the same as, or confusingly similar to, titles or descriptions used for GAAP financial measures.
- The measure is consistently prepared from period to period in accordance with the defined policy and is comparable to that of the company's peers.

If there are any inconsistencies between the above compliance issues and the non-GAAP measures and their disclosure in the draft earnings release, the disclosure committee will follow up with the director of investor relations, the controller, or both and request that conforming changes be made to the draft earnings release. Once any outstanding matters have been resolved, the disclosure committee approves the draft earnings release and forwards it to the audit committee for its review.

The audit committee exercises its oversight with respect to external financial reporting in performing its review of the earnings release, including confirming that the non-GAAP measures are appropriately disclosed in accordance with policy and are consistent with SEC rules, regulations, and guidance.

5.2 Auditor Responsibility for Non-GAAP Measures

Because non-GAAP financial information is not permitted in a registrant's financial statements or in the notes thereto, the external auditor's opinion does not cover it. Therefore, since such information is not subject to audit, the auditor's responsibility with respect to it is limited. In general, when registrants include other information, such as a non-GAAP measure, in a document containing financial statements covered by the auditor's report, professional auditing standards require the auditor to read the other

information and consider whether it is materially inconsistent with the information in the audited financial statements. Auditors may also be asked by underwriters to provide “comfort” regarding the reconciliation between a non-GAAP measure and the closest GAAP measure that was presented in an offering document.

Note, however, that although the external auditor’s report does not currently cover non-GAAP measures, the PCAOB’s Standing Advisory Group discussed the auditor’s role with respect to non-GAAP measures at its May 18–19, 2016, meeting. See Deloitte’s June 22, 2016, [Audit & Assurance Update](#) for more information.

5.3 Use of Non-GAAP Measures to Assess Materiality of Errors

A registrant performs a materiality analysis to determine the impact of identified misstatements on its (1) financial statements and (2) conclusions about ICFR and DCPs. SAB Topics 1.M (SAB 99) and 1.N (SAB 108) contain the SEC staff’s guidance on assessing the materiality of misstatements.

The SEC staff has observed that certain registrants have argued that a quantitatively large error in the GAAP financial statements is immaterial when the error has a quantitatively small impact on non-GAAP metrics. While it may be appropriate for a registrant to look at metrics other than those that are GAAP-based in determining whether the financial statements taken as a whole are materially misstated, the SEC staff will most likely focus primarily on the GAAP metrics. Also, while the SEC staff acknowledged that it is possible for quantitatively small errors to be material and for quantitatively large errors to be immaterial, a quantitatively material GAAP error does not become immaterial simply because of the presentation of non-GAAP measures. Further, there may be circumstances in which an error that is otherwise quantitatively immaterial to the GAAP financial statements — when taken as a whole and depending on the focus that management, investors, and financial statement users have historically placed on non-GAAP information — is qualitatively material in the context of non-GAAP information.

Chapter 6 — Press Releases

Form 8-K, Item 2.02, requires registrants to furnish to the SEC a Form 8-K within four business days of any public release or announcement (often a press 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. In such circumstances, a Form 8-K is required whether or not the press release includes disclosure of a non-GAAP financial measure. Question 106.07 in the [C&DIs on Exchange Act Form 8-K](#) indicates that a registrant must comply with all the requirements of Item 2.02 when it reports "preliminary" earnings and results of operations for a completed quarterly period. Note that a separate Form 8-K may also be required for nonpublic information that is disclosed orally, telephonically, or by webcast, broadcast, or similar means, unless certain conditions are met.¹

The information a registrant provides under Item 2.02 is considered furnished to the SEC, not filed, and therefore is not subject to the requirements in Exchange Act Section 18 on liability for misleading statements. If a registrant specifically states in Form 8-K that the information is to be considered "filed," or incorporates it by reference into a registration statement, proxy statement, or other report, it will be considered filed and therefore subject to Section 18. The concept of furnishing, rather than filing, information is also common in Regulation FD disclosures made under Form 8-K, Item 7.01.

When a press release that is furnished to the SEC ("furnished press release") includes a non-GAAP liquidity or performance measure, registrants are required to comply with the presentation and disclosure requirements of Regulation G and Item 10(e)(1)(i). Although Regulation G and Form 8-K, Item 2.02, do not refer to the specific prohibitions in Item 10(e)(1)(ii), registrants should consider the concepts in these and other prohibitions when using non-GAAP measures. For example, the title used for a non-GAAP financial measure in a Form 8-K should not be the same as, or confusingly similar to, titles or descriptions used for GAAP financial measures.

Registrants may satisfy the disclosure requirements by including the information directly in the Form 8-K containing the furnished press release or as an exhibit to the Form 8-K. Alternatively, registrants may include the disclosures in their most recent annual report filed with the SEC (or a more recent filing) and should update the disclosures, as necessary, before the date the Form 8-K is furnished to the SEC. If a registrant elects to "file" the press release with the SEC, all the provisions in Item 10(e) apply.

¹ See Form 8-K, Item 2.02(b).

Footnote 11 of the Release indicates that regardless of whether the press release is furnished to or filed with the SEC, the prohibition against the presentation of cash flow per-share data and other per-share measures of liquidity applies. The guidance in the footnote prohibits the disclosure of cash flow data on a per-share basis in both materials filed with or furnished to the SEC, including press releases, since such disclosures are prohibited by GAAP and SEC rules. See [Section 4.4](#) for more information about non-GAAP per-share measures.

See [Section 3.1](#) for a summary of the disclosures required by Regulation G; Item 10; and Form 8-K, Item 2.02, about non-GAAP information “furnished” or “filed” by a registrant.

Appendix A — Non-GAAP Measures: What to Ask

Management should consider the following questions related to its use of non-GAAP measures:

- Is the measure neither misleading nor prohibited?
- Is the measure presented with the most directly comparable GAAP measure and with no greater prominence than the GAAP measure?
- Is the measure appropriately defined and described, and is it clearly labeled as non-GAAP?
- Does the reconciliation between the GAAP and non-GAAP measure clearly label and describe the nature of each adjustment, and is each adjustment appropriate?
- Is there transparent and company-specific disclosure of the substantive reason(s) why management believes that the measure is useful for investors and the purpose for which management uses the measure?
- Does the registrant have a policy regarding appropriate non-GAAP measures and, if so, how is it determined? Is the measure consistently prepared from period to period in accordance with that policy, and is it comparable to that of its peers?
- If the registrant makes changes to its non-GAAP measures, are the changes clearly described, and are the reasons for the changes clear?
- Is the measure balanced (i.e., does it adjust not only for nonrecurring expenses but also for nonrecurring gains)?
- Does the measure appropriately focus on material adjustments and not include immaterial adjustments that would not seem to be a focus of management?
- Do the disclosure controls and procedures address non-GAAP measures?
- Is the audit committee involved in the oversight of the preparation and use of non-GAAP measures?

Appendix B — SEC Remarks

Speeches by the chairman, commissioners, and SEC staff generally cover a wide range of topics including the state of the markets and the Commission's current agenda and focus. Non-GAAP measures have been the subject of several speeches in 2015 and 2016 by SEC officials, including Chair Mary Jo White and Chief Accountant James Schnurr. A consistent message conveyed in the speeches has been the SEC's increasing level of concern about how non-GAAP measures are used and interpreted by investors and analysts. Several of these speeches are summarized below, and links to the full text of the presenter's remarks, if available publicly, are provided.

Remarks at the 2015 AICPA Conference

Keynote Address

In her keynote address at the 2015 AICPA Conference, Chair White expressed concern that the prevalent use of non-GAAP measures in financial reporting may be a source of potential confusion for investors. She emphasized that registrants should pay close attention to this topic to ensure that they are applying the current rules. She also encouraged registrants, as well as their audit committees, finance teams, and legal departments, to ask questions such as the following:

- "Why are you using the non-GAAP measure, and how does it provide investors with useful information?"
- "Are you giving non-GAAP measures no greater prominence than the GAAP measures, as required under the rules?"
- "Are your explanations of how you are using the non-GAAP measures — and why they are useful for your investors — accurate and complete, drafted without boilerplate [language]?"
- "Are there appropriate controls over the calculation of non-GAAP measures?"

The [full text](#) of Chair White's speech is available on the SEC's Web site.

Division Staff Discussion

The Division staff reinforced Chair White's comments at the 2015 AICPA Conference and also reminded registrants to (1) clearly label and describe non-GAAP measures and adjustments, (2) use appropriate conventional accounting terminology, and (3) disclose any changes in their method of calculating a non-GAAP measure that may affect comparability with the prior years.

In addition, the staff discussed some examples of disclosures related to non-GAAP measures for system-wide sales (see [Section 4.15](#)), pension adjustments (see [Section 4.16](#)), and normalized market prices (see [Section 4.17](#)).

Finally, the staff reminded registrants that it would continue to object to any non-GAAP measures that are misleading, noting that it is critical to evaluate non-GAAP measures in the context of a registrant's specific facts and circumstances (i.e., notwithstanding the use of non-GAAP measures and disclosures by other registrants).

Remarks at the 2016 Capital Markets Summit

At the [U.S. Chamber of Commerce 2016 Capital Markets Summit](#) in March 2016, Chair White expanded on the remarks she made at the 2015 AICPA Conference, indicating that the SEC staff is concerned that the use of non-GAAP measures in financial reporting may be confusing for investors and analysts. She stated that such use is “something that we are really looking at — whether we need to rein that in a bit even by regulation.” Her remarks reiterated that non-GAAP financial measures should be used to help registrants communicate with financial statement users more meaningfully about results of operations and financial condition. She also urged registrants to carefully consider how non-GAAP measures are being employed. This includes questioning whether (1) registrants are giving equal prominence to GAAP measures and (2) the non-GAAP measures always “result in a much rosier picture” than the GAAP measures.

Remarks Before the 12th Annual Life Sciences Accounting and Reporting Congress

In a speech at the 12th Annual Life Sciences Accounting and Reporting Congress in March 2016, Mr. Schnurr indicated that the SEC staff has observed “a significant and, in some respects, troubling increase over the past few years in the use of, and nature of adjustments within, non-GAAP measures” as well as their prominence. He commented that the non-GAAP measures “are intended to supplement . . . and not supplant the information in the financial statements.” He also discussed the prominence that analysts and the media have placed on such measures when they report on the results of registrants, as well as the increase in the difference between the amounts reported for GAAP and non-GAAP measures, noting that these concerns have led to an increased focus by the SEC staff. Mr. Schnurr indicated that the staff will continue “to monitor non-GAAP disclosures as part of its selective review process” and will be “vigilant in [its] review of the use of these measures for compliance with the rules.”

Mr. Schnurr further remarked that the “proliferation of non-GAAP reporting measures” should cause increased focus by management and the audit committee. He noted that registrants should not only comply with the rules but also question why they have concluded that a non-GAAP measure is the appropriate way to measure performance and convey useful information to investors. He also emphasized that there should be appropriate controls and oversight procedures associated with the use these measures.

The [full text](#) of Mr. Schnurr's speech is available on the SEC's Web site.

Remarks at the 2016 Baruch College Financial Reporting Conference

In a speech at the 2016 Baruch College Financial Reporting Conference in May 2016, then SEC Deputy Chief Accountant Wesley Bricker and SEC Division Chief Accountant Mark Kronforst expressed concerns about the use of specific non-GAAP presentations. Their comments primarily focused on the use of individually tailored accounting principles (see [Section 4.3](#) regarding potentially misleading measures), the appropriate identification of a non-GAAP measure as either a performance measure or a liquidity measure (see [Section 3.2.2](#)), and the tax impact of non-GAAP adjustments (see [Section 4.10](#)).

The [full text](#) of Mr. Bricker's speech is available on the SEC's Web site.

Remarks at the May 18, 2016, Meeting of the PCAOB's Standing Advisory Group

At the May 2016 meeting of the PCAOB's Standing Advisory Group, Mark Kronforst discussed the SEC's concerns about non-GAAP measures, noting that "this next quarter will be a great opportunity for companies to self-correct." Mr. Kronforst also referred to the SEC's issuance that month of new and updated C&DIs on non-GAAP measures, noting that the tone in the C&DIs was intended to "send a message" to registrants to take a fresh look at their use of non-GAAP measures in earnings releases and periodic reports. See Deloitte's May 23, 2016, [Heads Up](#) for more information.

Remarks at the June 27, 2016, International Corporate Governance Network Annual Conference

In a speech at the June 2016 International Corporate Governance Network Annual Conference, Chair White noted that while registrants have flexibility to explain their business "through the eyes of management," non-GAAP measures often become the "key message to investors." In reference to the C&DIs issued by the staff in May, Chair White highlighted that registrants should consider the guidance while revisiting their non-GAAP disclosures. She further noted that the staff is ready to "act through the filing review process, enforcement and further rulemaking if necessary to achieve the optimal disclosures for investors and the markets."

The [full text](#) of Chair White's speech is available on the SEC's Web site.

Appendix C — Examples of SEC Comments on Non-GAAP Measures

Non-GAAP measures continue to be on the top-10 list of topics frequently commented on by the SEC staff. The table below summarizes comment-letter trends in the 12-month period ended June 30, 2016.¹ As noted in the table, comments about non-GAAP measures rose from fourth place for the 12 months ended June 30, 2015, to third place for the 12-month period ended June 30, 2016. Also, for the three months ended June 30, 2016, non-GAAP measures rose to second place, after all sections of MD&A (i.e., results of operations, critical accounting policies, and liquidity combined).

Twelve Months Ended June 30, 2016				
Topic	Reviews²	Percentage of Total³	Rank	Change in Rank From Prior Year
MD&A			1	—
Results of operations	308	23		—
Critical accounting policies and estimates	148	11		—
Liquidity	116	9		—
Fair value	286	21	2	—
Non-GAAP measures (includes EBIT, EBITDA)	240	18	3	↑ 1
Revenue recognition	171	13	4	↓ 1
Segment reporting	166	12	5	↑ 3
Income tax	155	12	6	—
Intangible assets and goodwill	147	11	7	↑ 2
Signatures, exhibits, or agreements	119	9	8	↓ 3
Business overview	104	8	9	↑ 1
Acquisitions, mergers, and business combinations	103	8	10	↓ 3

The table above reflects completed reviews for comment letters that have been posted to EDGAR through June 30, 2016. Note that comment letters and registrants' responses are made public and posted to the SEC EDGAR system no earlier than 20 business days after completion of the Division's review of a periodic or current report. Therefore, the above table does not include any comments that have been issued after the issuance of the C&DIs in May unless the staff's review of the comment letter was completed.

¹ Comment letter trend information in the table was derived from [data](#) provided by Audit Analytics.

² Represents the number of Form 10-K and 10-Q reviews with comment letters that include a comment on topic.

³ Represents the percentage of all comment-letter-yielding Form 10-K and 10-Q reviews that include a comment on topic.

For additional information about SEC staff comment trends, see Deloitte's [SEC Comment Letters — Including Industry Insights: What “Edgar” Told Us](#).

Examples of SEC Comments

Below are extracts from SEC staff comments published on the SEC's Web site. Dollar amounts and information identifying registrants or their businesses have been redacted.

Undue Prominence

The SEC staff has commented when a registrant presents its non-GAAP financial measures more prominently than its GAAP measures (e.g., the registrant presents them before, or places greater emphasis on them than, its GAAP measures or if it uses a full non-GAAP income statement format). [C&DI Question 102.10](#) provides several examples illustrating when the presentation of a non-GAAP measure may be unduly prominent. See [Section 3.3](#) for additional information.

Undue Prominence of a Non-GAAP Financial Measure

Examples of SEC Comments

- With respect to the disclosures of the non-GAAP measures of adjusted net loss and adjusted diluted loss per share in the highlights and in the consolidated results . . . , tell us how you have presented the most directly comparable measures calculated according to GAAP with equal or greater prominence. Refer to the guidance from Item 10(e)(1)(i)(A) of Regulation S-K.
- We note that in your executive summary you focus on key non-GAAP financial measures and not GAAP financial measures which may be inconsistent with the updated Compliance and Disclosure Interpretations issued on May 17, 2016 (specifically Question 102.10). We also note issues related to prominence within your earnings release Please review this guidance when preparing your next earnings release.
- We note the guidance disclosed in the press release for the fiscal year . . . includes a range of expected adjusted EBITDA, adjusted net income and adjusted net income per share. Please note that Regulation G requires a schedule or other presentation detailing the differences between the forward-looking non-GAAP financial measures and the appropriate forward-looking GAAP financial measures. Also, if the GAAP financial measure is not accessible on a forward-looking basis, that fact and reconciling information that is unavailable without an unreasonable effort must be disclosed, and the information that is unavailable must be identified together with its probable significance. In addition, pursuant to Item 10(e)(1)(i) you should disclose why management believes the measures are useful to investors. Please tell us your consideration of providing the required disclosures.

Full Non-GAAP Income Statement

Examples of SEC Comments

- We note you presented full non-GAAP income statements for purposes of reconciling non-GAAP financial measures of adjusted sales and adjusted EPS to the most directly comparable GAAP measures. Please tell us why you believe the presentation of full non-GAAP income statements do not attach undue prominence to the non-GAAP information. Please also revise future filings to comply with the disclosure requirements of Regulation G and Item 10(e) of Regulation S-K.
- We note you present full GAAP to Non-GAAP Adjusted Statements of Earnings Please note that the presentation of a full non-GAAP income statement may place undue prominence to the non-GAAP information and may give the impression that the non-GAAP income statement represents a comprehensive basis of accounting. Please confirm to us that you will not present non-GAAP consolidated income statements in future filings. Please refer to Question 102.10 of the Non-GAAP Financial Measures Codification and Disclosure Interpretation As an alternative, you may present a non-GAAP performance measure reconciled to the most comparable measure calculated in accordance with GAAP.
- We note your reconciliation of non-GAAP Financial Measures in Exhibit 99.1. We believe this presentation [of a full non-GAAP income statement] conveys undue prominence to a statement based on non-GAAP information. Please tell us how you considered Question 102.10 of the Non-GAAP Financial Measures Compliance and Disclosure Interpretations As a substitute for this presentation format, you may consider presenting only individual non-GAAP measures (i.e., line items, subtotals, etc.) provided each one complies with Item 10(e)(1)(i) of Regulation S-K or Regulation G.

Reconciliation

The SEC staff has continued to comment when a non-GAAP measure is not appropriately reconciled. See [Section 3.2](#).

Examples of SEC Comments

- Given your disclosure stating that management utilizes Adjusted EBITDA for evaluating your capacity to fund capital expenditures as well as a measure of your operating performance, please explain why you have not reconciled this non-GAAP liquidity measure to operating cash flow as the most directly comparable GAAP measure, in addition to net income, to comply with Item 10(e)(1)(i)(B) of Regulation S-K.
- You present a summary table of non-GAAP results that includes revenues and operating expenses but we note that you did not reconcile these items to the most directly comparable GAAP financial measures as required by Item 10(e)(1)(i)(B) of Regulation S-K. In future filings when you present non-GAAP measures, please include all of the disclosures required by Item 10(e) of Regulation S-K, including the required reconciliations.
- Please revise your reconciliation of EBITDA and Adjusted EBITDA to begin with net income rather than operating income. Please refer to Question 103.01 of the Non-GAAP Financial Measures Compliance & Disclosure Interpretations for guidance.

Disclosures About the Purpose and Use of Non-GAAP Measures and Clear Labeling

The SEC staff has commented on the extent of a registrant's disclosures and whether the disclosures demonstrate the purpose of the measures (i.e., their usefulness to investors and how management uses them). If a registrant cannot justify why a non-GAAP measure is an appropriate indicator of its performance and how it is useful to investors, the SEC may object to the measure (see [Section 3.4](#)). The SEC staff also issues comments when non-GAAP measures are not clearly labeled. See [Sections 3.5](#) and [4.9](#).

Purpose and Use

Examples of SEC Comments

- Please revise to disclose the reasons why you believe your presentation of each of the non-GAAP financial measures provides useful information to investors regarding your financial condition and results of operations. The justification for the use of the non-GAAP financial measure must be substantive. Merely indicating that you provide such non-GAAP financial measures to give investors additional data to evaluate your operations is not sufficient support for disclosure of the non-GAAP financial measures. Please also revise to expand your disclosure of the additional purposes for which management uses each of the non-GAAP financial measures. Please refer to Item 10(e) of Regulation S-K.
- We note your use of Core Earnings, a non-GAAP measure, in this filing. In future Exchange Act periodic reports, please include all of the disclosures required by Item 10(e) of Regulation S-K, including a discussion of why management believes Core Earning provides useful information to investors regarding your financial condition and results of operations.

Clear Labeling

Examples of SEC Comments

- [In] your summary table of non-GAAP results, you label the items using the same name as your GAAP measures while in your discussion of the non-GAAP measures you refer to the non-GAAP measures with different titles, such as non-GAAP gross profit. In future filings when disclosing non-GAAP financial measures, please revise your presentation to use titles consistently and to use titles or descriptions for your non-GAAP financial measures that are not the same as, or confusingly similar to, titles or descriptions used for GAAP financial measures. Refer to Item 10(e)(1)(ii)(E) of Regulation S-K.
- Please confirm that in future filings and press releases [you] will eliminate all references to "pro forma." The information you have presented should be referred to as "non-GAAP" and not "pro forma." Pro forma has a different meaning as defined by generally accepted accounting principles and SEC rules that is different than your presentation.
- Within your discussion of modified net operating income, we note you have indicated that some of your adjustments are non-recurring. Given the nature of these adjustments, it is not clear why they are non-recurring. Please clarify and/or revise to remove the reference to non-recurring from your disclosure. Reference is made to Question 102.03 of the Division's Compliance and Disclosure Interpretations for Non-GAAP Financial Measures.

Liquidity Versus Performance Measures

The SEC staff has commented when a non-GAAP measure is not reconciled to the appropriate GAAP measure as determined on the basis of whether the purpose of the non-GAAP measure is to assess the registrant's performance or its liquidity or both. Further, the staff may comment on how a registrant characterizes a non-GAAP measure. See [Section 3.2.2](#).

Examples of SEC Comments

- We note you believe Adjusted EBITDA is presented, in part, as a performance measure. As previously requested, please tell us the appropriateness of this measure as a performance measure.
- Please ensure your disclosures appropriately characterize your non-GAAP measures as operating performance measures and/or liquidity measures or cash flow measures. For example, you appear to have characterized free cash flow as an operating performance measure. . . . However, you reconciled free cash flow from net cash used for operating activities . . . which indicates that free cash flow is a liquidity measure.

Nature of Adjustments

The SEC staff has commented on the nature of the reconciling adjustments and the related disclosures.

Examples of SEC Comments

- Please expand your disclosures to explain how you calculated the tax effect for the adjustments to net (loss) income attributable to . . . and per diluted share in accordance with the guidance in Question 102.11 of the Non-GAAP Financial Measures Compliance & Disclosure Interpretations.
- Please significantly expand your disclosures in footnotes . . . of the net income to adjusted net income before income taxes reconciliation to include discussions of the nature of the purchase accounting adjustments and purchase accounting amortization including the various components making up these adjustments as described in detail in your response.

Appendix D — Summary of Disclosure Requirements and Prohibitions

The following chart summarizes the disclosure requirements and prohibitions under Regulation G, Item 10(e), and for furnished press releases, that apply to domestic¹ registrants:

Non-GAAP Measures: Summary of Disclosure Requirements and Prohibitions Applicable to Domestic Registrants

Disclosure Requirements/Prohibitions	All Disclosure of Non-GAAP Financial Measures (Regulation G ^{2,3})	SEC Filings (Regulation S-K, Item 10(e) ^{4,5})	Press Releases Furnished to the SEC (Form 8-K, Item 2.02 ⁶)
Presentation requirements:			
• Presentation of the most directly comparable GAAP financial measure	X		
• Presentation, with equal or greater prominence , of the most directly comparable GAAP financial measure		X	X
• Quantitative reconciliation of the non-GAAP financial measure to the most directly comparable GAAP financial measure	X	X	X
• Statement disclosing the reasons why management believes the non-GAAP financial measure provides useful information to investors		X	X
• To the extent material, a statement disclosing the additional purposes for which management uses the non-GAAP financial measure		X	X

¹ For guidance applicable to FPIs, see Regulation G; Regulation S-K, Item 10(e); [Section 106](#) of the C&DIs; and [Section 8140](#) of the FRM.

² Regulation G applies whenever a registrant, or person acting on its behalf, publicly discloses or releases material information that includes a non-GAAP financial measure, whether that information is furnished to, or filed with, the SEC.

³ In certain situations, the requirements of Regulation G and Regulation S-K, Item 10(e), do not apply. For example, these rules do not apply to non-GAAP measures related to a proposed business combination or measures required to be disclosed by a governmental authority. See [Section 2.3](#) for a discussion of measures that do not meet the definition of a non-GAAP measure under the Rules.

⁴ Regulation S-K, Item 10(e), applies to all SEC filings that include non-GAAP financial measures.

⁵ See footnote 3.

⁶ Form 8-K, Item 2.02, requires registrants to furnish to the SEC all releases or announcements disclosing material nonpublic financial information about completed annual or quarterly fiscal periods, regardless of whether the release or announcement includes disclosure of a non-GAAP financial measure. If a registrant elects to file the release or announcement with the SEC, such disclosure is subject to the requirements of Regulation S-K, Item 10.

Disclosure Requirements/Prohibitions (continued)	All Disclosure of Non-GAAP Financial Measures (Regulation G)	SEC Filings (Regulation S-K, Item 10(e))	Press Releases Furnished to the SEC (Form 8-K, Item 2.02)
Prohibitions on certain presentations of non-GAAP financial measures: ⁷			
<ul style="list-style-type: none"> Material misstatements or omissions that would make the presentation of the non-GAAP financial measure misleading⁸ 	X	X	X
<ul style="list-style-type: none"> Presenting per-share measures of liquidity⁹ 		X	X
<ul style="list-style-type: none"> Excluding charges or liabilities that require, or will require, cash settlement, or would have required cash settlement in the absence of an ability to settle in another manner, from non-GAAP liquidity measures (other than EBIT and EBITDA) 		X	
<ul style="list-style-type: none"> Adjusting a non-GAAP performance measure to eliminate or smooth items identified as nonrecurring, infrequent, or unusual when the nature of the charge or gain is such that it is reasonably likely to recur within two years or there was a similar charge or gain within the prior two years (prohibition is based on the description of the charge or gain that is being adjusted) 		X	
<ul style="list-style-type: none"> Presenting non-GAAP financial measures on the face of the GAAP financial statements or in the accompanying notes 		X	
<ul style="list-style-type: none"> Presenting non-GAAP financial measures on the face of any pro forma financial statements required to be disclosed by Regulation S-X, Article 11 		X	
<ul style="list-style-type: none"> 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 		X	

⁷ Although Form 8-K, Item 2.02, and Regulation G do not refer to the prohibitions in Regulation S-K, Item 10(e)(1)(ii), registrants should consider the concepts in these and other prohibitions when using non-GAAP measures.

⁸ See Regulation G, Rule 100(b), and [Section 100](#) of the C&DIs.

⁹ Footnote 11 of SEC Rule Release 33-8176, *Conditions for the Use of Non-GAAP Measures*, notes that certain non-GAAP per-share measures are prohibited under GAAP and SEC rules.

Appendix E — Regulation G

The text of SEC Regulation G is reproduced below.

Part 244 — Regulation G

244.100 — General rules regarding disclosure of non-GAAP financial measures.

(a) Whenever a registrant, or person acting on its behalf, publicly discloses material information that includes a non-GAAP financial measure, the registrant must accompany that non-GAAP financial measure with:

(1) A presentation of the most directly comparable financial measure calculated and presented in accordance with Generally Accepted Accounting Principles (GAAP); and

(2) 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 comparable financial measure or measures calculated and presented in accordance with GAAP identified in paragraph (a)(1) of this section.

(b) A registrant, or a person acting on its behalf, shall not make public a non-GAAP financial measure that, taken together with the information accompanying that measure and any other accompanying discussion of 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.

(c) This section shall not apply to a disclosure of a non-GAAP financial measure that is made by or on behalf of a registrant that is a foreign private issuer if the following conditions are satisfied:

(1) The securities of the registrant are listed or quoted on a securities exchange or inter-dealer quotation system outside the United States;

(2) The non-GAAP financial measure is not derived from or based on a measure calculated and presented in accordance with generally accepted accounting principles in the United States; and

(3) The disclosure is made by or on behalf of the registrant outside the United States, or is included in a written communication that is released by or on behalf of the registrant outside the United States.

(d) This section shall not apply to a non-GAAP financial measure included in disclosure relating to a proposed business combination, the entity resulting therefrom or an entity that is a party thereto, if the disclosure is contained in a communication that is subject to § 230.425 of this chapter, § 240.14a-12 or § 240.14d-2(b)(2) of this chapter or § 229.1015 of this chapter.

Part 244 — Regulation G (continued)

Notes to § 244.100:

1. If a non-GAAP financial measure is made public orally, telephonically, by Web cast, by broadcast, or by similar means, the requirements of paragraphs (a)(1)(i) and (a)(1)(ii) of this section will be satisfied if:

(i) The required information in those paragraphs is provided on the registrant's Web site at the time the non-GAAP financial measure is made public; and

(ii) The location of the web site is made public in the same presentation in which the non-GAAP financial measure is made public.

2. The provisions of paragraph (c) of this section shall apply notwithstanding the existence of one or more of the following circumstances:

(i) A written communication is released in the United States as well as outside the United States, so long as the communication is released in the United States contemporaneously with or after the release outside the United States and is not otherwise targeted at persons located in the United States;

(ii) Foreign journalists, U.S. journalists or other third parties have access to the information;

(iii) The information appears on one or more web sites maintained by the registrant, so long as the web sites, taken together, are not available exclusively to, or targeted at, persons located in the United States; or

(iv) Following the disclosure or release of the information outside the United States, the information is included in a submission by the registrant to the Commission made under cover of a Form 6-K.

244.101 — Definitions.

This section defines certain terms as used in Regulation G (§§ 244.100 through 244.102).

(a) (1) *Non-GAAP financial measure.* A non-GAAP financial measure is a numerical measure of a registrant's historical or future financial performance, financial position or cash flows that:

(i) 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

(ii) Includes amounts, or is subject to adjustments that have the effect of including amounts, that are excluded from the most directly comparable measure so calculated and presented.

(2) A non-GAAP financial measure does not include operating and other financial measures and ratios or statistical measures calculated using exclusively one or both of:

(i) Financial measures calculated in accordance with GAAP; and

(ii) Operating measures or other measures that are not non-GAAP financial measures.

(3) A non-GAAP financial measure does not include financial measures required to be disclosed by GAAP, Commission rules, or a system of regulation of a government or governmental authority or self-regulatory organization that is applicable to the registrant.

Part 244 — Regulation G (continued)

(b) *GAAP*. GAAP refers to generally accepted accounting principles in the United States, except that:

(1) In the case of foreign private issuers whose primary financial statements are prepared in accordance with non-U.S. generally accepted accounting principles, GAAP refers to the principles under which those primary financial statements are prepared; and

(2) In the case of foreign private issuers that include a non-GAAP financial measure derived from a measure calculated in accordance with U.S. generally accepted accounting principles, GAAP refers to U.S. generally accepted accounting principles for purposes of the application of the requirements of Regulation G to the disclosure of that measure.

(c) *Registrant*. A registrant subject to this regulation is one that has a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or is required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), excluding any investment company registered under Section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a-8).

(d) *United States*. United States means the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.

244.102 — No effect on antifraud liability.

Neither the requirements of this Regulation G (17 CFR 244.100 through 244.102) nor a person's compliance or non-compliance with the requirements of this Regulation shall in itself affect any person's liability under Section 10(b) (15 U.S.C. 78j(b)) of the Securities Exchange Act of 1934 or § 240.10b-5 of this chapter.

Appendix F — Regulation S-K, Item 10(e)

The text of SEC Regulation S-K, Item 10(e), is reproduced below.

Regulation S-K, Item 10(e)

(e) *Use of non-GAAP financial measures in Commission filings.* (1) Whenever one or more non-GAAP financial measures are included in a filing with the Commission:

(i) The registrant must include the following in the filing:

(A) A presentation, with equal or greater prominence, of the most directly comparable financial measure or measures calculated and presented in accordance with Generally Accepted Accounting Principles (GAAP);

(B) 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 identified in paragraph (e)(1)(i)(A) of this section;

(C) 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; and

(D) 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 disclosed pursuant to paragraph (e)(1)(i)(C) of this section; and

(ii) A registrant must not:

(A) Exclude 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 earnings before interest and taxes (EBIT) and earnings before interest, taxes, depreciation, and amortization (EBITDA);

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

(C) Present non-GAAP financial measures on the face of the registrant's financial statements prepared in accordance with GAAP or in the accompanying notes;

(D) Present non-GAAP financial measures on the face of any pro forma financial information required to be disclosed by Article 11 of Regulation S-X (17 CFR 210.11-01 through 210.11-03); or

(E) Use 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; and

(iii) If the filing is not an annual report on Form 10-K or Form 20-F (17 CFR 249.220f), a registrant need not include the information required by paragraphs (e)(1)(i)(C) and (e)(1)(i)(D) of this section if that information was included in its most recent annual report on Form 10-K or Form 20-F or a more recent filing, provided that the required information is updated to the extent necessary to meet the requirements of paragraphs (e)(1)(i)(C) and (e)(1)(i)(D) of this section at the time of the registrant's current filing.

Regulation S-K, Item 10(e) (continued)

(2) For purposes of this paragraph (e), a non-GAAP financial measure is a numerical measure of a registrant's historical or future financial performance, financial position or cash flows that:

- (i) 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
- (ii) Includes amounts, or is subject to adjustments that have the effect of including amounts, that are excluded from the most directly comparable measure so calculated and presented.

(3) For purposes of this paragraph (e), GAAP refers to generally accepted accounting principles in the United States, except that:

- (i) In the case of foreign private issuers whose primary financial statements are prepared in accordance with non-U.S. generally accepted accounting principles, GAAP refers to the principles under which those primary financial statements are prepared; and
- (ii) In the case of foreign private issuers that include a non-GAAP financial measure derived from or based on a measure calculated in accordance with U.S. generally accepted accounting principles, GAAP refers to U.S. generally accepted accounting principles for purposes of the application of the requirements of this paragraph (e) to the disclosure of that measure.

(4) For purposes of this paragraph (e), non-GAAP financial measures exclude:

- (i) Operating and other statistical measures; and
- (ii) Ratios or statistical measures calculated using exclusively one or both of:
 - (A) Financial measures calculated in accordance with GAAP; and
 - (B) Operating measures or other measures that are not non-GAAP financial measures.

(5) For purposes of this paragraph (e), non-GAAP financial measures exclude financial measures required to be disclosed by GAAP, Commission rules, or a system of regulation of a government or governmental authority or self-regulatory organization that is applicable to the registrant. However, the financial measure should be presented outside of the financial statements unless the financial measure is required or expressly permitted by the standard-setter that is responsible for establishing the GAAP used in such financial statements.

(6) The requirements of paragraph (e) of this section shall not apply to a non-GAAP financial measure included in disclosure relating to a proposed business combination, the entity resulting therefrom or an entity that is a party thereto, if the disclosure is contained in a communication that is subject to § 230.425 of this chapter, § 240.14a-12 or § 240.14d-2(b)(2) of this chapter or § 229.1015 of this chapter.

(7) The requirements of paragraph (e) of this section shall not apply to investment companies registered under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a-8).

Notes to paragraph (e):

A non-GAAP financial measure that would otherwise be prohibited by paragraph (e)(1)(ii) of this section is permitted in a filing of a foreign private issuer if:

1. The non-GAAP financial measure relates to the GAAP used in the registrant's primary financial statements included in its filing with the Commission;
2. The non-GAAP financial measure is required or expressly permitted by the standard-setter that is responsible for establishing the GAAP used in such financial statements; and
3. The non-GAAP financial measure is included in the annual report prepared by the registrant for use in the jurisdiction in which it is domiciled, incorporated or organized or for distribution to its security holders.

Appendix G — Compliance and Disclosure Interpretations — Non-GAAP Financial Measures

The C&DIs below are reprinted from the SEC's [Web site](#) as updated on May 17, 2016.

Section 100. General

Question 100.01

Question: Can certain adjustments, although not explicitly prohibited, result in a non-GAAP measure that is misleading?

Answer: Yes. Certain adjustments may violate Rule 100(b) of Regulation G because they cause the presentation of the non-GAAP measure to be misleading. For example, presenting a performance measure that excludes normal, recurring, cash operating expenses necessary to operate a registrant's business could be misleading. [May 17, 2016]

Question 100.02

Question: Can a non-GAAP measure be misleading if the measure excludes charges, but does not exclude any gains?

Answer: Yes. For example, a non-GAAP measure that adjusts a particular charge or gain in the current period and for which other, similar charges or gains were not also adjusted in prior periods could violate Rule 100(b) of Regulation G unless the change between periods is disclosed and the reasons for it explained. In addition, depending on the significance of the change, it may be necessary to recast prior measures to conform to the current presentation and place the disclosure in the appropriate context. [May 17, 2016]

Question 100.03

Question: Can a non-GAAP measure be misleading if it is presented inconsistently between periods?

Answer: Yes. For example, a non-GAAP measure that is adjusted only for non-recurring charges when there were non-recurring gains that occurred during the same period could violate Rule 100(b) of Regulation G. [May 17, 2016]

Question 100.04

Question: A registrant presents a non-GAAP performance measure that is adjusted to accelerate revenue recognized ratably over time in accordance with GAAP as though it earned revenue when customers are billed. Can this measure be presented in documents filed or furnished with the Commission or provided elsewhere, such as on company websites?

Answer: No. Non-GAAP measures that substitute individually tailored revenue recognition and measurement methods for those of GAAP could violate Rule 100(b) of Regulation G. Other measures that use individually tailored recognition and measurement methods for financial statement line items other than revenue may also violate Rule 100(b) of Regulation G. [May 17, 2016]

Section 101. Business Combination Transactions

Question 101.01

Question: Does the exemption from Regulation G and Item 10(e) of Regulation S-K for non-GAAP financial measures disclosed in communications relating to a business combination transaction extend to the same non-GAAP financial measures disclosed in registration statements, proxy statements and tender offer materials?

Answer: No. There is an exemption from Regulation G and Item 10(e) of Regulation S-K for non-GAAP financial measures disclosed in communications subject to Securities Act Rule 425 and Exchange Act Rules 14a-12 and 14d-2(b)(2); it is also intended to apply to communications subject to Exchange Act Rule 14d-9(a)(2). This exemption does not extend beyond such communications. Consequently, if the same non-GAAP financial measure that was included in a communication filed under one of those rules is also disclosed in a Securities Act registration statement or a proxy statement or tender offer statement, no exemption from Regulation G and Item 10(e) of Regulation S-K would be available for that non-GAAP financial measure.

In addition, there is an exemption from Regulation G and Item 10(e) of Regulation S-K for non-GAAP financial measures disclosed pursuant to Item 1015 of Regulation M-A, which applies even if such non-GAAP financial measures are included in Securities Act registration statements, proxy statements and tender offer statements. [Jan. 11, 2010]

Question 101.02

Question: If reconciliation of a non-GAAP financial measure is required and the most directly comparable measure is a “pro forma” measure prepared and presented in accordance with Article 11 of Regulation S-X, may companies use that measure for reconciliation purposes, in lieu of a GAAP financial measure?

Answer: Yes. [Jan. 11, 2010]

Section 102. Item 10(e) of Regulation S-K

Question 102.01

Question: What measure was contemplated by “funds from operations” in footnote 50 to Exchange Act Release No. 47226, Conditions for Use of Non-GAAP Financial Measures, which indicates that companies may use “funds from operations per share” in earnings releases and materials that are filed or furnished to the Commission, subject to the requirements of Regulation G and Item 10(e) of Regulation S-K?

Answer: The reference to “funds from operations” in footnote 50, or “FFO,” refers to the measure defined as of January 1, 2000, by the National Association of Real Estate Investment Trusts (NAREIT). NAREIT has revised and clarified the definition since 2000. The staff accepts NAREIT’s definition of FFO in effect as of May 17, 2016 as a performance measure and does not object to its presentation on a per share basis. [May 17, 2016]

Question 102.02

Question: May a registrant present FFO on a basis other than as defined by NAREIT as of May 17, 2016?

Answer: Yes, provided that any adjustments made to FFO comply with Item 10(e) of Regulation S-K and the measure does not violate Rule 100(b) of Regulation G. Any adjustments made to FFO must comply with the requirements of Item 10(e) of Regulation S-K for a performance measure or a liquidity measure, depending on the nature of the adjustments, some of which may trigger the prohibition on presenting this measure on a per share basis. See Section 100 and Question 102.05. [May 17, 2016]

Section 102. Item 10(e) of Regulation S-K (continued)

Question 102.03

Question: Item 10(e) of Regulation S-K prohibits adjusting a non-GAAP financial performance measure to eliminate or smooth items identified as non-recurring, infrequent or unusual when the nature of the charge or gain is such that it is reasonably likely to recur within two years or there was a similar charge or gain within the prior two years. Is this prohibition based on the description of the charge or gain, or is it based on the nature of the charge or gain?

Answer: The prohibition is based on the description of the charge or gain that is being adjusted. It would not be appropriate to state that a charge or gain is non-recurring, infrequent or unusual unless it meets the specified criteria. The fact that a registrant cannot describe a charge or gain as non-recurring, infrequent or unusual, however, does not mean that the registrant cannot adjust for that charge or gain. Registrants can make adjustments they believe are appropriate, subject to Regulation G and the other requirements of Item 10(e) of Regulation S-K. See Question 100.01. [May 17, 2016]

Question 102.04

Question: Is the registrant required to use the non-GAAP measure in managing its business or for other purposes in order to be able to disclose it?

Answer: No. Item 10(e)(1)(i)(D) of Regulation S-K states only that, “[t]o the extent material,” there should be a statement disclosing the additional purposes, “if any,” for which the registrant’s management uses the non-GAAP financial measure. There is no prohibition against disclosing a non-GAAP financial measure that is not used by management in managing its business. [Jan. 11, 2010]

Question 102.05

Question: While Item 10(e)(1)(ii) of Regulation S-K does not prohibit the use of per share non-GAAP financial measures, the adopting release for Item 10(e), Exchange Act Release No. 47226, states that “per share measures that are prohibited specifically under GAAP or Commission rules continue to be prohibited in materials filed with or furnished to the Commission.” In light of Commission guidance, specifically Accounting Series Release No. 142, *Reporting Cash Flow and Other Related Data*, and Accounting Standards Codification 230, are non-GAAP earnings per share numbers prohibited in documents filed or furnished with the Commission?

Answer: No. Item 10(e) recognizes that certain non-GAAP per share performance measures may be meaningful from an operating standpoint. Non-GAAP per share performance measures should be reconciled to GAAP earnings per share. On the other hand, non-GAAP liquidity measures that measure cash generated must not be presented on a per share basis in documents filed or furnished with the Commission, consistent with Accounting Series Release No. 142. Whether per share data is prohibited depends on whether the non-GAAP measure can be used as a liquidity measure, even if management presents it solely as a performance measure. When analyzing these questions, the staff will focus on the substance of the non-GAAP measure and not management’s characterization of the measure. [May 17, 2016]

Question 102.06

Question: Is Item 10(e)(1)(i) of Regulation S-K, which requires the prominent presentation of, and reconciliation to, the most directly comparable GAAP financial measure or measures, intended to change the staff’s practice of requiring the prominent presentation of amounts for the three major categories of the statement of cash flows when a non-GAAP liquidity measure is presented?

Answer: No. The requirements in Item 10(e)(1)(i) are consistent with the staff’s practice. The three major categories of the statement of cash flows should be presented when a non-GAAP liquidity measure is presented. [Jan. 11, 2010]

Section 102. Item 10(e) of Regulation S-K (continued)

Question 102.07

Question: Some companies present a measure of “free cash flow,” which is typically calculated as cash flows from operating activities as presented in the statement of cash flows under GAAP, less capital expenditures. Does Item 10(e)(1)(ii) of Regulation S-K prohibit this measure in documents filed with the Commission?

Answer: No. The deduction of capital expenditures from the GAAP financial measure of cash flows from operating activities would not violate the prohibitions in Item 10(e)(1)(ii). However, companies should be aware that this measure does not have a uniform definition and its title does not describe how it is calculated. Accordingly, a clear description of how this measure is calculated, as well as the necessary reconciliation, should accompany the measure where it is used. Companies should also avoid inappropriate or potentially misleading inferences about its usefulness. For example, “free cash flow” should not be used in a manner that inappropriately implies that the measure represents the residual cash flow available for discretionary expenditures, since many companies have mandatory debt service requirements or other non-discretionary expenditures that are not deducted from the measure. Also, free cash flow is a liquidity measure that must not be presented on a per share basis. See Question 102.05. [May 17, 2016]

Question 102.08

Question: Does Item 10(e) of Regulation S-K apply to filed free writing prospectuses?

Answer: Regulation S-K applies to registration statements filed under the Securities Act, as well as registration statements, periodic and current reports and other documents filed under the Exchange Act. A free writing prospectus is not filed as part of the issuer’s registration statement, unless the issuer files it on Form 8-K or otherwise includes it or incorporates it by reference into the registration statement. Therefore, Item 10(e) of Regulation S-K does not apply to a filed free writing prospectus unless the free writing prospectus is included in or incorporated by reference into the issuer’s registration statement or included in an Exchange Act filing. [Jan. 11, 2010]

Question 102.09

Question: Item 10(e)(1)(ii)(A) of Regulation S-K prohibits “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 earnings before interest and taxes (EBIT) and earnings before interest, taxes, depreciation and amortization (EBITDA).” A company’s credit agreement contains a material covenant regarding the non-GAAP financial measure “Adjusted EBITDA.” If disclosed in a filing, the non-GAAP financial measure “Adjusted EBITDA” would violate Item 10(e), as it excludes charges that are required to be cash settled. May a company nonetheless disclose this non-GAAP financial measure?

Answer: Yes. The prohibition in Item 10(e) notwithstanding, because MD&A requires disclosure of material items affecting liquidity, if management believes that the credit agreement is a material agreement, that the covenant is a material term of the credit agreement and that information about the covenant is material to an investor’s understanding of the company’s financial condition and/or liquidity, then the company may be required to disclose the measure as calculated by the debt covenant as part of its MD&A. In disclosing the non-GAAP financial measure in this situation, a company should consider also disclosing the following:

- the material terms of the credit agreement including the covenant;
- the amount or limit required for compliance with the covenant; and
- the actual or reasonably likely effects of compliance or non-compliance with the covenant on the company’s financial condition and liquidity. [Jan. 11, 2010]

Section 102. Item 10(e) of Regulation S-K (continued)

Question 102.10

Question: Item 10(e)(1)(i)(A) of Regulation S-K requires that when a registrant presents a non-GAAP measure it must present the most directly comparable GAAP measure with equal or greater prominence. This requirement applies to non-GAAP measures presented in documents filed with the Commission and also earnings releases furnished under Item 2.02 of Form 8-K. Are there examples of disclosures that would cause a non-GAAP measure to be more prominent?

Answer: Yes. Although whether a non-GAAP measure is more prominent than the comparable GAAP measure generally depends on the facts and circumstances in which the disclosure is made, the staff would consider the following examples of disclosure of non-GAAP measures as more prominent:

- Presenting a full income statement of non-GAAP measures or presenting a full non-GAAP income statement when reconciling non-GAAP measures to the most directly comparable GAAP measures;
- Omitting comparable GAAP measures from an earnings release headline or caption that includes non-GAAP measures;
- Presenting a non-GAAP measure using a style of presentation (e.g., bold, larger font) that emphasizes the non-GAAP measure over the comparable GAAP measure;
- A non-GAAP measure that precedes the most directly comparable GAAP measure (including in an earnings release headline or caption);
- Describing a non-GAAP measure as, for example, “record performance” or “exceptional” without at least an equally prominent descriptive characterization of the comparable GAAP measure;
- Providing tabular disclosure of non-GAAP financial measures without preceding it with an equally prominent tabular disclosure of the comparable GAAP measures or including the comparable GAAP measures in the same table;
- Excluding a quantitative reconciliation with respect to a forward-looking non-GAAP measure in reliance on the “unreasonable efforts” exception in Item 10(e)(1)(i)(B) without disclosing that fact and identifying the information that is unavailable and its probable significance in a location of equal or greater prominence; and
- Providing discussion and analysis of a non-GAAP measure without a similar discussion and analysis of the comparable GAAP measure in a location with equal or greater prominence. [May 17, 2016]

Question 102.11

Question: How should income tax effects related to adjustments to arrive at a non-GAAP measure be calculated and presented?

Answer: A registrant should provide income tax effects on its non-GAAP measures depending on the nature of the measures. If a measure is a liquidity measure that includes income taxes, it might be acceptable to adjust GAAP taxes to show taxes paid in cash. If a measure is a performance measure, the registrant should include current and deferred income tax expense commensurate with the non-GAAP measure of profitability. In addition, adjustments to arrive at a non-GAAP measure should not be presented “net of tax.” Rather, income taxes should be shown as a separate adjustment and clearly explained. [May 17, 2016]

Section 102. Item 10(e) of Regulation S-K (continued)

Question 102.12

Question: A registrant discloses a financial measure or information that is not in accordance with GAAP or calculated exclusively from amounts presented in accordance with GAAP. In some circumstances, this financial information may have been prepared in accordance with guidance published by a government, governmental authority or self-regulatory organization that is applicable to the registrant, although the information is not required disclosure by the government, governmental authority or self-regulatory organization. Is this information considered to be a “non-GAAP financial measure” for purposes of Regulation G and Item 10 of Regulation S-K?

Answer: Yes. Unless this information is *required* to be disclosed by a system of regulation that is applicable to the registrant, it is considered to be a “non-GAAP financial measure” under Regulation G and Item 10 of Regulation S-K. Registrants that disclose such information must provide the disclosures required by Regulation G or Item 10 of Regulation S-K, if applicable, including the quantitative reconciliation from the non-GAAP financial measure to the most comparable measure calculated in accordance with GAAP. This reconciliation should be in sufficient detail to allow a reader to understand the nature of the reconciling items. [Apr. 24, 2009]

Section 103. EBIT and EBITDA

Question 103.01

Question: Exchange Act Release No. 47226 describes EBIT as “earnings before interest and taxes” and EBITDA as “earnings before interest, taxes, depreciation and amortization.” What GAAP measure is intended by the term “earnings”? May measures other than those described in the release be characterized as “EBIT” or “EBITDA”? Does the exception for EBIT and EBITDA from the prohibition in Item 10(e)(1)(ii)(A) of Regulation S-K apply to these other measures?

Answer: “Earnings” means net income as presented in the statement of operations under GAAP. Measures that are calculated differently than those described as EBIT and EBITDA in Exchange Act Release No. 47226 should not be characterized as “EBIT” or “EBITDA” and their titles should be distinguished from “EBIT” or “EBITDA,” such as “Adjusted EBITDA.” These measures are not exempt from the prohibition in Item 10(e)(1)(ii)(A) of Regulation S-K, with the exception of measures addressed in Question 102.09. [Jan. 11, 2010]

Question 103.02

Question: If EBIT or EBITDA is presented as a performance measure, to which GAAP financial measure should it be reconciled?

Answer: If a company presents EBIT or EBITDA as a performance measure, such measures should be reconciled to net income as presented in the statement of operations under GAAP. Operating income would not be considered the most directly comparable GAAP financial measure because EBIT and EBITDA make adjustments for items that are not included in operating income. In addition, these measures must not be presented on a per share basis. See Question 102.05. [May 17, 2016]

Section 104. Segment Information

Question 104.01

Question: Is segment information that is presented in conformity with Accounting Standards Codification 280, pursuant to which a company may determine segment profitability on a basis that differs from the amounts in the consolidated financial statements determined in accordance with GAAP, considered to be a non-GAAP financial measure under Regulation G and Item 10(e) of Regulation S-K?

Answer: No. Non-GAAP financial measures do not include financial measures that are required to be disclosed by GAAP. Exchange Act Release No. 47226 lists “measures of profit or loss and total assets for each segment required to be disclosed in accordance with GAAP” as examples of such measures. The measure of segment profit or loss and segment total assets under Accounting Standards Codification 280 is the measure reported to the chief operating decision maker for purposes of making decisions about allocating resources to the segment and assessing its performance.

The list of examples in Exchange Act Release No. 47226 is not exclusive. As an additional example, because Accounting Standards Codification 280 requires or expressly permits the footnotes to the company's consolidated financial statements to include specific additional financial information for each segment, that information also would be excluded from the definition of non-GAAP financial measures. [Jan. 11, 2010]

Question 104.02

Question: Does Item 10(e)(1)(ii) of Regulation S-K prohibit the discussion in MD&A of segment information determined in conformity with Accounting Standards Codification 280?

Answer: No. Where a company includes in its MD&A a discussion of segment profitability determined consistent with Accounting Standards Codification 280, which also requires that a footnote to the company's consolidated financial statements provide a reconciliation, the company also should include in the segment discussion in the MD&A a complete discussion of the reconciling items that apply to the particular segment being discussed. In this regard, see Financial Reporting Codification Section 501.06.a, footnote 28. [Jan. 11, 2010]

Question 104.03

Question: Is a measure of segment profit/loss or liquidity that is not in conformity with Accounting Standards Codification 280 a non-GAAP financial measure under Regulation G and Item 10(e) of Regulation S-K?

Answer: Yes. Segment measures that are adjusted to include amounts excluded from, or to exclude amounts included in, the measure reported to the chief operating decision maker for purposes of making decisions about allocating resources to the segment and assessing its performance do not comply with Accounting Standards Codification 280. Such measures are, therefore, non-GAAP financial measures and subject to all of the provisions of Regulation G and Item 10(e) of Regulation S-K. [Jan. 11, 2010]

Question 104.04

Question: In the footnote that reconciles the segment measures to the consolidated financial statements, a company may total the profit or loss for the individual segments as part of the Accounting Standards Codification 280 required reconciliation. Would the presentation of the total segment profit or loss measure in any context other than the Accounting Standards Codification 280 required reconciliation in the footnote be the presentation of a non-GAAP financial measure?

Answer: Yes. The presentation of the total segment profit or loss measure in any context other than the Accounting Standards Codification 280 required reconciliation in the footnote would be the presentation of a non-GAAP financial measure because it has no authoritative meaning outside of the Accounting Standards Codification 280 required reconciliation in the footnotes to the company's consolidated financial statements. [Jan. 11, 2010]

Section 104. Segment Information (continued)**Question 104.05**

Question: Company X presents a table illustrating a breakdown of revenues by certain products, but does not sum this to the revenue amount presented on Company X's financial statements. Is the information in the table considered a non-GAAP financial measure under Regulation G and Item 10(e) of Regulation S-K?

Answer: No, assuming the product revenue amounts are calculated in accordance with GAAP. The presentation would be considered a non-GAAP financial measure, however, if the revenue amounts are adjusted in any manner. [Jan. 11, 2010]

Question 104.06

Question: Company X has operations in various foreign countries where the local currency is used to prepare the financial statements which are translated into the reporting currency under the applicable accounting standards. In preparing its MD&A, Company X will explain the reasons for changes in various financial statement captions. A portion of these changes will be attributable to changes in exchange rates between periods used for translation. Company X wants to isolate the effect of exchange rate differences and will present financial information in a constant currency — e.g., assume a constant exchange rate between periods for translation. Would such a presentation be considered a non-GAAP measure under Regulation G and Item 10(e) of Regulation S-K?

Answer: Yes. Company X may comply with the reconciliation requirements of Regulation G and Item 10(e) by presenting the historical amounts and the amounts in constant currency and describing the process for calculating the constant currency amounts and the basis of presentation. [Jan. 11, 2010]

Section 105. Item 2.02 of Form 8-K**Question 105.01**

Question: Item 2.02 of Form 8-K contains a conditional exemption from its requirement to furnish a Form 8-K where earnings information is presented orally, telephonically, by webcast, by broadcast or by similar means. Among other conditions, the company must provide on its web site any financial and other statistical information contained in the presentation, together with any information that would be required by Regulation G. Would an audio file of the initial webcast satisfy this condition to the exemption?

Answer: Yes, provided that: (1) the audio file contains all material financial and other statistical information included in the presentation that was not previously disclosed, and (2) investors can access it and replay it through the company's web site. Alternatively, slides or a similar presentation posted on the web site at the time of the presentation containing the required, previously undisclosed, material financial and other statistical information would satisfy the condition. In each case, the company must provide all previously undisclosed material financial and other statistical information, including information provided in connection with any questions and answers. Regulation FD also may impose disclosure requirements in these circumstances. [Jan. 11, 2010]

Question 105.02

Question: Item 2.02 of Form 8-K contains a conditional exemption from its requirement to furnish a Form 8-K where earnings information is presented orally, telephonically, by webcast, by broadcast or by similar means. Among other conditions, the company must provide on its web site any material financial and other statistical information not previously disclosed and contained in the presentation, together with any information that would be required by Regulation G. When must all of this information appear on the company's web site?

Answer: The required information must appear on the company's web site at the time the oral presentation is made. In the case of information that is not provided in a presentation itself but, rather, is disclosed unexpectedly in connection with the question and answer session that was part of that oral presentation, the information must be posted on the company's web site promptly after it is disclosed. Any requirements of Regulation FD also must be satisfied. A webcast of the oral presentation would be sufficient to meet this requirement. [Jan. 11, 2010]

Section 105. Item 2.02 of Form 8-K (continued)

Question 105.03

Question: Does a company's failure to furnish to the Commission the Form 8-K required by Item 2.02 in a timely manner affect the company's eligibility to use Form S-3?

Answer: No. Form S-3 requires the company to have filed in "a timely manner all reports required to be filed in twelve calendar months and any portion of a month immediately preceding the filing of the registration statement." Because an Item 2.02 Form 8-K is furnished to the Commission, rather than filed with the Commission, failure to furnish such a Form 8-K in a timely manner would not affect a company's eligibility to use Form S-3. While not affecting a company's Form S-3 eligibility, failure to comply with Item 2.02 of Form 8-K would, of course, be a violation of Section 13(a) of the Exchange Act and the rules thereunder. [Jan. 11, 2010]

Question 105.04 [withdrawn]**Question 105.05**

Question: Company X files its quarterly earnings release as an exhibit to its Form 10-Q on Wednesday morning, prior to holding its earnings conference call Wednesday afternoon. Assuming that all of the other conditions of Item 2.02(b) are met, may the company rely on the exemption for its conference call even if it does not also furnish the earnings release in an Item 2.02 Form 8-K?

Answer: Yes. Company X's filing of the earnings release as an exhibit to its Form 10-Q, rather than in an Item 2.02 Form 8-K, before the conference call takes place, would not preclude reliance on the exemption for the conference call. [Jan. 11, 2010]

Question 105.06

Question: Company A issues a press release announcing its results of operations for a just-completed fiscal quarter, including its expected adjusted earnings (a non-GAAP financial measure) for the fiscal period. Would this press release be subject to Item 2.02 of Form 8-K?

Answer: Yes, because it contains material, non-public information regarding its results of operations for a completed fiscal period. The adjusted earnings range presented would be subject to the requirements of Item 2.02 applicable to non-GAAP financial measures. [Jan. 11, 2010]

Question 105.07

Question: A company issues its earnings release after the close of the market and holds a properly noticed conference call to discuss its earnings two hours later. That conference call contains material, previously undisclosed, information of the type described under Item 2.02 of Form 8-K. Because of this timing, the company is unable to furnish its earnings release on a Form 8-K before its conference call. Accordingly, the company cannot rely on the exemption from the requirement to furnish the information in the conference call on a Form 8-K. What must the company file with regard to its conference call?

Answer: The company must furnish the material, previously non-public, financial and other statistical information required to be furnished on Item 2.02 of Form 8-K as an exhibit to a Form 8-K and satisfy the other requirements of Item 2.02 of Form 8-K. A transcript of the portion of the conference call or slides or a similar presentation including such information will satisfy this requirement. In each case, all material, previously undisclosed, financial and other statistical information, including that provided in connection with any questions and answers, must be provided. [Jan. 15, 2010]

Section 106. Foreign Private Issuers

Question 106.01

Question: The Note to Item 10(e) of Regulation S-K permits a foreign private issuer to include in its filings a non-GAAP financial measure that otherwise would be prohibited by Item 10(e)(1)(ii) if, among other things, the non-GAAP financial measure is required or expressly permitted by the standard setter that is responsible for establishing the GAAP used in the company's primary financial statements included in its filing with the Commission. What does "expressly permitted" mean?

Answer: A measure is "expressly permitted" if the particular measure is clearly and specifically identified as an acceptable measure by the standard setter that is responsible for establishing the GAAP used in the company's primary financial statements included in its filing with the Commission.

The concept of "expressly permitted" can be also be demonstrated with explicit acceptance of a presentation by the primary securities regulator in the foreign private issuer's home country jurisdiction or market. Explicit acceptance by the regulator would include (1) published views of the regulator or members of the regulator's staff or (2) a letter from the regulator or its staff to the foreign private issuer indicating the acceptance of the presentation — which would be provided to the Commission's staff upon request. [Jan. 11, 2010]

Question 106.02

Question: A foreign private issuer furnishes a press release on Form 6-K that includes a section with non-GAAP financial measures. Can a foreign private issuer incorporate by reference into a Securities Act registration statement only those portions of the furnished press release that do not include the non-GAAP financial measures?

Answer: Yes. Reports on Form 6-K are not incorporated by reference automatically into Securities Act registration statements. In order to incorporate a Form 6-K into a Securities Act registration statement, a foreign private issuer must specifically provide for such incorporation by reference in the registration statement and in any subsequently submitted Form 6-K. See Item 6(c) of Form F-3. Where a foreign private issuer wishes to incorporate by reference a portion or portions of the press release provided on a Form 6-K, the foreign private issuer should either: (1) specify in the Form 6-K those portions of the press release to be incorporated by reference, or (2) furnish two Form 6-K reports, one that contains the full press release and another that contains the portions that would be incorporated by reference (and specifies that the second Form 6-K is so incorporated). Using a separate report on Form 6-K containing the portions that would be incorporated by reference may provide more clarity for investors in most circumstances. A company must also consider whether its disclosure is rendered misleading if it incorporates only a portion (or portions) of a press release. [Jan. 11, 2010]

Question 106.03

Question: A foreign private issuer publishes a non-GAAP financial measure that does not comply with Regulation G, in reliance on Rule 100(c), and then furnishes the information in a report on Form 6-K. Must the foreign private issuer comply with Item 10(e) of Regulation S-K with respect to that information if the company chooses to incorporate that Form 6-K report into a filed Securities Act registration statement (other than an MJDS registration statement)?

Answer: Yes, the company must comply with all of the provisions of Item 10(e) of Regulation S-K. [Jan. 11, 2010]

Question 106.04

Question: If a Canadian company includes a non-GAAP financial measure in an annual report on Form 40-F, does the company need to comply with Regulation G or Item 10(e) of Regulation S-K with respect to that information if the company files a non-MJDS Securities Act registration statement that incorporates by reference the Form 40-F?

Answer: No. Information included in a Form 40-F is not subject to Regulation G or Item 10(e) of Regulation S-K. [Jan. 11, 2010]

Section 107. Voluntary Filers

Question 107.01

Question: Section 15(d) of the Exchange Act suspends automatically its application to any company that would be subject to the filing requirements of that section where, if other conditions are met, on the first day of the company's fiscal year it has fewer than 300 holders of record of the class of securities that created the Section 15(d) obligation. This suspension, which relates to the fiscal year in which the fewer than 300 record holders determination is made on the first day thereof, is automatic and does not require any filing with the Commission. The Commission adopted Rule 15d-6 under the Exchange Act to require the filing of a Form 15 as a notice of the suspension of a company's reporting obligation under Section 15(d). Such a filing, however, is not a condition to the suspension. A number of companies whose Section 15(d) reporting obligation is suspended automatically by the statute choose not to file the notice required by Rule 15d-6 and continue to file Exchange Act reports as though they continue to be required. Must a company whose reporting obligation is suspended automatically by Section 15(d) but continues to file periodic reports as though it were required to file periodic reports comply with Regulation G and the requirements of Item 10(e) of Regulation S-K?

Answer: Yes. Regulation S-K relates to filings with the Commission. Accordingly, a company that is making filings as described in this question must comply with Regulation S-K or Form 20-F, as applicable, in its filings.

As to other public communications, any company "that has a class of securities registered under Section 12 of the Securities Exchange Act of 1934, or is required to file reports under Section 15(d) of the Securities Exchange Act of 1934" must comply with Regulation G. The application of this standard to those companies that no longer are "required" to report under Section 15(d) but choose to continue to report presents a difficult dilemma, as those companies technically are not subject to Regulation G but their continued filing is intended to and does give the appearance that they are a public company whose disclosure is subject to the Commission's regulations. It is reasonable that this appearance would cause shareholders and other market participants to expect and rely on a company's required compliance with the requirements of the federal securities laws applicable to companies reporting under Section 15(d). Accordingly, while Regulation G technically does not apply to a company such as the one described in this question, the failure of such a company to comply with all requirements (including Regulation G) applicable to a Section 15(d)-reporting company can raise significant issues regarding that company's compliance with the anti-fraud provisions of the federal securities laws. [Jan. 11, 2010]

Section 108. Compensation Discussion and Analysis/Proxy Statement

Question 108.01

Question: Instruction 5 to Item 402(b) provides that "[d]isclosure of target levels that are non-GAAP financial measures will not be subject to Regulation G and Item 10(e); however, disclosure must be provided as to how the number is calculated from the registrant's audited financial statements." Does this instruction extend to non-GAAP financial information that does not relate to the disclosure of target levels, but is nevertheless included in Compensation Discussion & Analysis ("CD&A") or other parts of the proxy statement - for example, to explain the relationship between pay and performance?

Answer: No. Instruction 5 to Item 402(b) is limited to CD&A disclosure of target levels that are non-GAAP financial measures. If non-GAAP financial measures are presented in CD&A or in any other part of the proxy statement for any other purpose, such as to explain the relationship between pay and performance or to justify certain levels or amounts of pay, then those non-GAAP financial measures are subject to the requirements of Regulation G and Item 10(e) of Regulation S-K.

In these pay-related circumstances only, the staff will not object if a registrant includes the required GAAP reconciliation and other information in an annex to the proxy statement, provided the registrant includes a prominent cross-reference to such annex. Or, if the non-GAAP financial measures are the same as those included in the Form 10-K that is incorporating by reference the proxy statement's Item 402 disclosure as part of its Part III information, the staff will not object if the registrant complies with Regulation G and Item 10(e) by providing a prominent cross-reference to the pages in the Form 10-K containing the required GAAP reconciliation and other information. [July 8, 2011]

Appendix H — Glossary of Standards and Other Literature

The standards and literature below were cited or linked to in this publication.

FASB Accounting Standards Codification (ASC) Topics

ASC 230, *Statement of Cash Flows*

ASC 260, *Earnings per Share*

ASC 280, *Segment Reporting*

SEC Division of Corporation Finance FRM

Topic 8, “Non-GAAP Measures of Financial Performance, Liquidity, and Net Worth”

SEC Final Rules

33-8039, *Cautionary Advice Regarding the Use of “Pro Forma” Financial Information in Earnings Releases*

33-8124, *Certification of Disclosure in Companies’ Quarterly and Annual Reports*

33-8176, *Conditions for Use of Non-GAAP Financial Measures*

SEC Regulation S-K

Item 10, “General”

Item 303, “Management’s Discussion and Analysis of Financial Condition and Results of Operations”

SEC Regulation S-X

Article 11, “Pro Forma Financial Information”

SEC Regulation M-A

Item 1015, “Reports, Opinions, Appraisals and Negotiations”

SEC Accounting Series Release

ASR 142 (FRR Section 202), *Reporting Cash Flow and Other Related Data* (Rule 5-02.28 of SEC Regulation S-X)

SEC SAB Topics

SAB Topic 1.M, “Materiality” (SAB 99)

SAB Topic 1.N, “Considering the Effects of Prior Year Misstatements When Quantifying Misstatements in Current Year Financial Statements” (SAB 108)

SAB Topic 5.P, “Restructuring Charges”

Securities Act of 1933 Rules

Rule 425 “Filing of Certain Prospectuses and Communications Under § 230.135 in Connection With Business Combination Transactions”

Securities Exchange Act of 1934 Rules

Rule 14a-12, “Solicitation Before Furnishing a Proxy Statement”

Rule 14d-9, “Recommendation or Solicitation by the Subject Company and Others”

SEC Compliance and Disclosure Interpretation (C&DI) Topics

Non-GAAP Financial Measures

Exchange Act Form 8-K

Appendix I — Abbreviations

Abbreviation	Description
AICPA	American Institute of Certified Public Accountants
ASC	FASB Accounting Standards Codification
ASR	SEC Accounting Series Release
C&DI	SEC Compliance and Disclosure Interpretation
CAQ	Center for Audit Quality
CD&A	Compensation Discussion and Analysis
CEO	chief executive officer
CFO	chief financial officer
DCPs	disclosure controls and procedures
EBIT	earnings before interest and taxes
EBITDA	earnings before interest, taxes, depreciation, and amortization
EDGAR	SEC's Electronic Data Gathering, Analysis, and Retrieval system
FASB	Financial Accounting Standards Board
FAQs	frequently asked questions

Abbreviation	Description
FFO	funds from operations
FPI	foreign private issuer
FRM	SEC Financial Reporting Manual
GAAP	generally accepted accounting principles
ICFR	internal control over financial reporting
IFRS	International Financial Reporting Standard
IPO	initial public offering
MD&A	Management's Discussion and Analysis
NAREIT	National Association of Real Estate Investment Trusts
NOI	net operating income
PCAOB	Public Company Accounting Oversight Board
SAB	SEC Staff Accounting Bulletin
SEC	Securities and Exchange Commission
S&P	Standard and Poor's