

How To Draft A Regulation G-Compliant Disclosure

Law360, New York (November 21, 2013, 3:34 PM ET) -- Companies wishing to discuss non-GAAP (generally accepted accounting principles) financial measures either orally, in written statements or in public disclosure documents must carefully follow the requirements of Regulation G for any disclosure of material information containing a non-GAAP financial measure and Item 10(e) (17 CFR 229.10) of Regulation S-K for any U.S. Securities and Exchange Commission filings.

For instance, if a company would like to include a non-GAAP financial measure in the management discussion and analysis (MD&A) in its annual report or in a registration statement, it must ensure all elements required under Item 10(e) of Regulation S-K are followed, including providing a reconciliation to the most comparable GAAP measure, ensuring the non-GAAP measure is not afforded greater prominence than the closest comparable GAAP measure, and providing a discussion of why management feels this metric is relevant to its business.

Very often, companies disclose non-GAAP financial measures in connection with their quarterly and annual earnings announcements in the form of an earnings release and earnings calls. These earnings announcements are subject to the disclosure requirements in Item 2.02 of Form 8-K.

Earnings Reports

Earnings Release

Earnings announcements typically include both a written earnings release and an earnings call. Item 2.02 of Form 8-K requires that registrants furnish any written public announcement or release disclosing material nonpublic information regarding the registrant's results of operations or financial condition for an annual or quarterly fiscal period (regardless of whether it includes a non-GAAP financial measure), within four business days of such written public announcement or release.

In the event that the public announcement or release is going to include non-GAAP financial measures, the presentation of, and reconciliation to, the most comparable GAAP financial measure required under Regulation G is typically included in such written public announcement or release.

An earnings release is typically in the form of a press release and includes financial information, a reconciliation for any non-GAAP financial measures, information as to when the earnings call will be held, how a person can access the call and where the person can access the necessary presentation materials. This press release is then included as an exhibit under Item 2.02 of Form 8-K.

It is important to note that while Regulation G only requires the disclosure of the most comparable non-GAAP financial measure and reconciliation thereto, Item 2.02 of Form 8-K also requires disclosure as to why management believes the measure is useful and for what other purpose management uses the measure, as required by Items 10(e)(1)(i)(C) and (D) of Regulation S-K.

Such explanation can be included either in the earnings release itself or in the body of the Form 8-K. In both the adopting release (see SEC Release No. 33-8176 (Jan. 23, 2003)) and subsequent guidance, the SEC has made clear that statements required by Items 10(e)(1)(i)(C) and (D) should be written in a clear, understandable manner and should be tailored to the company's industry and practice. Furthermore, management does not need to use the non-GAAP financial measure in managing its business in order for it to be included in any public disclosure.

Earnings Calls

In the case of earnings calls and any other announcements made orally, telephonically, by webcast, by broadcast, or by other similar means, Item 2.02 of Form 8-K stipulates that the registrant can satisfy its reconciliation obligations under Regulation G by (1) posting the most comparable GAAP financial measure and reconciliation thereto on the company's website (and maintaining it there for at least 12 months) prior to the oral announcement and (2) stating during the oral announcement that the information is available on the company's website and providing the website address. In the event the oral disclosure is unexpected, the registrant must post the information to the website promptly thereafter.

In practice, earnings calls typically follow shortly after an earnings release. Companies are not required to furnish an additional Form 8-K for the earnings call if:

- the information on the earnings call is provided as part of a presentation that is complementary to, and occurs no more than 48 hours after, the earnings release was furnished on Form 8-K pursuant to Item 2.02;
- the earnings call is broadly accessible to the public by dial-in conference call, by webcast, by broadcast or by other similar means;
- the registrant posts the financial and other statistical information discussed on the earnings call, including the required Regulation G disclosure for any non-GAAP financial measures, on its website; and
- the earnings call was announced by a widely disseminated press release, that included instructions as to when and how to access the earnings call and the location on the registrant's website where the information would be available.

"Furnished" Versus "Filed"

The fact that Item 2.02 of Form 8-K is typically furnished, rather than filed, with the SEC has a number of implications that a company should bear in mind before opting to file rather than furnish such a report. First, information furnished on a Form 8-K is not subject to liability under Section 18 (15 USCS § 78r) of the Securities Exchange Act of 1934, as amended (the "Exchange Act").

Nevertheless, the registrant will still be subject to liability under Section 10(b) (15 USCS § 78j) of the Exchange Act and Rule 10b-5 (17 CFR 240.10b-5) thereof for material misstatements or omissions, and the SEC has also indicated that it could bring a cause of action under Regulation G.

Second, the furnished information is not automatically incorporated by reference into the registrant's registration statements, proxy statements or other reports, meaning

that the registrant is not subject to liability under Sections 11 (15 USC §77k) or 12 (15 USC §77l) of the Securities Act of 1933, as amended.

Third, the information required to be disclosed therein is not subject to the additional Item 10(e) requirements for filed 8-Ks (for instance, the information is not subject to the prohibitions listed in Item 10(e)(1)(ii)).

—By Michael Zeidel, Skadden Arps Slate Meagher and Flom LLP

Michael Zeidel is a corporate finance partner in the New York office of Skadden Arps Slate Meagher and Flom.

This article is excerpted from Lexis® Practice Advisor, a comprehensive practical guidance resource providing insight from leading practitioners on the topics critical to attorneys who handle transactional matters. For more information on Lexis Practice Advisor or to sign up for a free trial please [click here](#). Lexis is a registered trademark of Reed Elsevier Properties Inc., used under license.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

All Content © 2003-2013, Portfolio Media, Inc.