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## The Use of Non-GAAP Financial Measures — A Disclosure Guide

If you have any questions regarding the matters discussed in this memorandum, please contact the attorneys listed on the last page or call your regular Skadden contact.

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Companies commonly supplement their reported earnings under U.S. generally accepted accounting principles (GAAP) with non-GAAP financial measures that they believe more accurately reflect their results of operations or financial position or that are commonly used by investors to evaluate performance. A non-GAAP financial measure is a numerical measure of a company's historical or future financial performance, financial position or cash flows that includes or excludes amounts from the most directly comparable GAAP measure. Non-GAAP financial measures are used by companies to bridge the divide between corporate reporting that is standardized under GAAP and reporting that is tailored to a particular industry or circumstance.

The U.S. Securities and Exchange Commission (SEC) permits companies to present non-GAAP financial measures in their public disclosures as well as registration statements filed under the Securities Act of 1933 (Securities Act) and periodic reports filed under the Securities Exchange Act of 1934 (Exchange Act), subject to compliance with Regulation G and Item 10(e) of Regulation S-K (Item 10(e)). These regulations were adopted to ensure that investors are provided with financial information that is fulsome and not misleading.

### What Disclosure Is Covered by Regulation G and Item 10(e)?

**Regulation G:** All public disclosures that contain non-GAAP financial measures by any company that has a class of securities registered under the Exchange Act or is required to file reports pursuant to the Exchange Act are subject to Regulation G, including press releases, investor presentations and conference calls, whether such disclosure is made in print, orally, telephonically, by webcast or by broadcast.<sup>1</sup> Therefore, registrants must be aware of disclosure of non-GAAP financial measures in all information released to the public.

**Item 10(e):** Item 10(e) governs all filings with the SEC under the Securities Act and the Exchange Act<sup>2</sup> and prohibits the presentation of non-GAAP financial measures on the

<sup>1</sup> Regulation G, Rule 100(a). Regulation G does not apply to registered investment companies (RICs) and certain disclosure related to proposed business combinations. Regulation G, Rule 101(c), Rule 100(d). Although Regulation G does not technically apply to voluntary filers, the SEC nevertheless strongly encourages such filers to comply with Regulation G. Non-GAAP Financial Measures CDI No. 107.01 (Jan. 11, 2010).

<sup>2</sup> Item 10(e) does not apply to filings by RICs and certain filings with respect to proposed business combinations. Regulation S-K, Item 10(e)(6),(7). Exempt filings with respect to proposed business combinations are those made pursuant to Rule 425 under the Securities Act, Rules 14a-12 and 14d-2(b) (2) under the Exchange Act and Item 1015 of Regulation M-A. Regulation S-B, Item 10(h) contains parallel provisions governing the disclosure of non-GAAP financial measures by small business issuers. Item 10(e) does not apply to a free writing prospectus, which is not considered to be filed as part of a registration statement and therefore is not subject to Regulation S-K, unless such free writing prospectus is included in or incorporated by reference into a registration statement filed under the Securities Act or a periodic report filed under the Exchange Act. Non-GAAP Financial Measures CDI No. 102.08 (Jan. 11, 2010).

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face of a registrant's financial statements or in the accompanying notes, as well as on the face of any pro forma financial information required to be disclosed pursuant to Regulation S-X.<sup>3</sup>Item 10(e) typically applies to the Summary Financial Information, Selected Historical Financial Information, Management's Discussion and Analysis as well as any other sections of prospectuses and periodic reports that contain non-GAAP financial measures. Certain provisions of Item 10(e) also apply to earnings releases that are required to be furnished to the SEC pursuant to Item 2.02 of Form 8-K.

Disclosures made by foreign private issuers are subject to special requirements under Regulation G and Item 10(e), which are discussed on page 5.

A summary of Regulation G and Item 10(e) and the disclosure required under each is included in the following table:

	Regulation G	Item 10(e)
<b>Scope</b>	All public disclosures by Exchange Act registrants of information that contains non-GAAP financial measures, including: <ul style="list-style-type: none"> <li>- press releases;</li> <li>- conference calls;</li> <li>- PowerPoint presentations; and</li> <li>- other media.</li> </ul>	All filings with the SEC under the Securities Act and the Exchange Act, including: <ul style="list-style-type: none"> <li>- Securities Act registration statements;</li> <li>- free writing prospectuses (if included or incorporated by reference into a registration statement);</li> <li>- annual reports on Form 10-K;</li> <li>- quarterly reports on Form 10-Q;</li> <li>- current reports on Form 8-K; and</li> <li>- proxy statements.</li> </ul>
<b>Required Disclosure</b>	Whenever a registrant makes public a non-GAAP financial measure, it must: <ul style="list-style-type: none"> <li>- present the most directly comparable financial measure calculated and presented in accordance with GAAP; and</li> <li>- reconcile the differences between the non-GAAP financial measure and the most directly comparable GAAP measure.</li> </ul>	Whenever a registrant presents a non-GAAP financial measure, it must (in addition to the requirements for Regulation G): <ul style="list-style-type: none"> <li>- present, with equal or greater prominence, the most directly comparable financial measure calculated and presented in accordance with GAAP;</li> <li>- reconcile the differences between the non-GAAP financial measure and the comparable GAAP measure;</li> <li>- disclose the reasons why the registrant's management believes that the presentation of the non-GAAP financial measure provides useful information to investors regarding the registrant's financial conditions and results of operations; and</li> <li>- to the extent material, disclose the additional purposes, if any, for which the registrant's management uses such non-GAAP financial measure.</li> </ul>
<b>Earnings Releases</b>	A registrant must: <ul style="list-style-type: none"> <li>- present the most directly comparable GAAP financial measure in the release; and</li> <li>- reconcile the two measures.</li> </ul>	Subsection (1)(i) of Item 10(e) applies to a registrant's Item 2.02 Form 8-K (pursuant to which earnings releases are required to be furnished to the SEC). Registrants must either include in the body of the current report or in the earnings release itself: <ul style="list-style-type: none"> <li>- disclosure as to why management believes any non-GAAP financial measure included in the release is useful; and</li> <li>- for what additional purposes, if any, management uses the measure.</li> </ul> <p>In addition, the most directly comparable GAAP financial measure must be presented with equal or greater prominence relative to the non-GAAP measure, and the two measures must be reconciled.</p>

<sup>3</sup>Regulation S-K, Item 10(e)(1)(ii)(C),(D).

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	Regulation G	Item 10(e)
<b>SEC Non-GAAP Measure Prohibitions</b>	A registrant is not permitted to disclose any non-GAAP financial measure if it contains a material misstatement or omits information needed to make the measure not misleading.	<p>A registrant is not permitted to:</p> <ul style="list-style-type: none"> <li>- exclude charges or liabilities that required or will require cash settlement from non-GAAP liquidity measures (except for EBIT and EBITDA);</li> <li>- adjust a non-GAAP performance measure to eliminate or smooth a nonrecurring, infrequent or unusual item where such item is reasonably likely to recur within two years or where there has been a similar charge or gain within the prior two years; or</li> <li>- 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.</li> </ul> <p>Companies may adjust for recurring charges within the two-year look forward/look back window, but the adjustment may not be classified as nonrecurring, infrequent or unusual.</p>

## What Constitutes a Non-GAAP Financial Measure?

The SEC defines a non-GAAP financial measure 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, or (ii) includes amounts, or is subject to adjustments that have the effect of including amounts, that are included in or excluded from, as the case may be, the most directly comparable GAAP measure in the registrant’s statement of income, balance sheet or statement of cash flows (or equivalent statements).<sup>4</sup>

The definition of a non-GAAP financial measure excludes:

- operating and other statistical measures (such as unit sales, numbers of employees, numbers of subscribers or numbers of advertisers);
- ratios or statistical measures calculated using exclusively GAAP financial measures (such as operating margin) or operating measures or other measures that do not constitute non-GAAP financial measures (such as sales per square foot and same store sales);<sup>5</sup> or
- financial measures required to be disclosed by GAAP (such as segment profit or loss and segment total assets<sup>6</sup> and *pro forma* financial information required by Regulation S-X), SEC rules or a system of regulation of a government or governmental

authority or self-regulatory organization<sup>7</sup> that is applicable to a registrant (such as measures of capital or reserves calculated for regulatory purposes<sup>8</sup>).

Metrics used in financial covenants that constitute material terms of a credit agreement or other agreement, which are material to an investor’s understanding of its financial condition and/or liquidity, may be disclosed even if they constitute non-GAAP financial measures or are prepared on a basis that is not consistent with Item 10(e).<sup>10</sup> For example, if a registrant’s credit agreement uses the defined term “adjusted EBITDA” for its financial covenants, then a registrant may use that non-GAAP financial measure calculated pursuant to the credit agreement in its periodic reports. Also, target levels in executive compensation agreements discussed in Compensation Discussion and Analysis are exempt from Regulation G and Item 10(e).<sup>11</sup>

Commonly used non-GAAP financial measures include EBIT (earnings before interest and taxes) and EBITDA (earnings before interest, taxes, depreciation and amortization).<sup>12</sup> Non-GAAP financial measures of earnings that are calculated differently from EBIT and EBITDA should also be titled differently, such as “adjusted EBITDA” or “earnings before interest, taxes, depreciation, amortization and rent” (EBITDAR), a non-GAAP

<sup>4</sup> Regulation S-K, Item 10(e)(2); Regulation G, Rule 101(a)(1).

<sup>5</sup> Release No. 33-8176, 34-47226 (Jan. 22, 2003), Section II(A)(2)(b). Breakdown of revenue by product, without providing a total, would not constitute a non-GAAP financial measure as long as the product revenue amounts are calculated in accordance with GAAP. Non-GAAP Financial Measures CDI No. 104.05 (Jan. 11, 2010).

<sup>6</sup> Non-GAAP Financial Measures CDI No. 104.01 (Jan. 11, 2010).

<sup>7</sup> A financial measure that does not comply with GAAP, which is presented in accordance with guidance published by a government, governmental authority or self-regulatory organization applicable to the registrant but is not required thereby, would be considered a non-GAAP financial measure under Regulation G and Item 10(e). Non-GAAP Financial Measures CDI No. 102.12 (Apr. 24, 2009).

<sup>8</sup> Release No. 33-8176, 34-47226 (Jan. 22, 2003), Section II(A)(2)(b).

<sup>9</sup> Regulation G, Rule 101(a)(2),(3); Regulation S-K, Item 10(e)(4),(5).

<sup>10</sup> Non-GAAP Financial Measures CDI No. 102.09 (Jan. 11, 2010).

<sup>11</sup> Regulation S-K, Item 402(b), Instruction 5.

<sup>12</sup> Release No. 33-8176, 34-47226 (Jan. 22, 2003), Section I.

financial measure commonly used by real estate companies.<sup>13</sup> Similarly, where operating income is adjusted to exclude one or more expense or revenue items, the resulting non-GAAP financial measure should be distinguished from operating income, a GAAP financial measure, by referring to it as “adjusted operating income,” “net operating income” or a similarly titled measure.<sup>14</sup>

Neither Regulation G nor Item 10(e) prohibits the presentation of non-GAAP financial measures on a per share basis where they are measures of performance, provided that they are reconciled to GAAP earnings per share; however, the presentation of non-GAAP financial measures on a per share basis where they are measures of liquidity is prohibited. Whether per share data is prohibited in a specific instance depends on whether the non-GAAP financial measure can be used as a liquidity measure, even if management presents it solely as a performance measure. In this regard, the SEC staff focuses on the substance of the non-GAAP financial measure rather than on management’s characterization of the measure.<sup>15</sup>

## Practice Point

To ensure compliance with Regulation G, registrants must be aware of disclosure of non-GAAP financial measures in all information released to the public, including press releases, investor presentations and conference calls, whether such disclosure is made in print, orally, telephonically, by webcast or by broadcast.

Commonly used non-GAAP financial measures considered to be liquidity measures include “free cash flow” and “funds from operations” (FFO). Free cash flow, EBIT and EBITDA may not be presented on a per share basis, although FFO as defined by the National Association of Real Estate Investment Trusts may be presented on a per share basis.<sup>16</sup> The term “free cash flow” also 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 nondiscretionary expenditures that are not deducted from the measure.<sup>17</sup>

<sup>13</sup>Non-GAAP Financial Measures CDI No. 103.01 (Jan. 11, 2010).

<sup>14</sup>A non-GAAP measure that substitutes GAAP revenue recognition or measurement methods could be viewed as a violation of Regulation G. Non-GAAP Financial Measures CDI No. 100.04 (May 17, 2016).

<sup>15</sup>Non-GAAP Financial Measures CDI No. 102.05 (May 17, 2016).

<sup>16</sup>Non-GAAP Financial Measures CDI Nos. 102.01, 102.05 and 103.02 (May 17, 2016).

<sup>17</sup>Non-GAAP Financial Measures CDI No. 102.05 (May 17, 2016).

## How to Comply With Regulation G

### Practice Point

Where public disclosure is made orally, telephonically or by webcast, broadcast or similar means that may not readily lend themselves to the presentation of detailed financial tables, the SEC permits registrants, as an alternative to including the required reconciliation under Regulation G in the body of the presentation, to post the reconciliation simultaneously to its website and announce to investors the location of the presentation that includes the non-GAAP financial measure.<sup>18</sup>

While broader in scope than Item 10(e), Regulation G is more limited in its requirements regarding a registrant’s disclosure of non-GAAP financial measures. In order to comply with Regulation G, whenever a registrant makes public a non-GAAP financial measure, it must:

- present the most directly comparable financial measure calculated and presented in accordance with GAAP; and
- reconcile the differences between the non-GAAP financial measure and such comparable GAAP measure.<sup>19</sup>

For historical non-GAAP financial measures, the reconciliation is required to be quantitative, while for forward-looking information, the reconciliation is only required to be quantitative to the extent available without unreasonable efforts.<sup>20</sup> If the forward-looking non-GAAP financial measure is not able to be quantified without unreasonable efforts, the registrant should describe the anticipated differences between such non-GAAP financial measure and the most directly comparable financial measure qualitatively.

## How to Comply With Item 10(e)

In order to comply with Item 10(e), whenever a registrant presents a non-GAAP financial measure in SEC filings, it must, *in addition to the requirements set forth above for Regulation G*:

- disclose the reasons why the registrant’s management believes that the presentation of the non-GAAP financial measure provides useful information to investors regarding the registrant’s financial condition and results of operations; and

<sup>18</sup>Item 10(e)(1)(i)(A) requires that the comparable GAAP financial measure be presented with equal or greater prominence than the non-GAAP financial measure.

<sup>19</sup>Regulation G, Rule 100(a).

<sup>20</sup>Regulation G, Rule 100(a)(2).

- to the extent material, disclose the additional purposes, if any, for which the registrant's management uses such non-GAAP financial measure.<sup>21</sup>

Management's stated rationale for the use of any non-GAAP financial measure should not be boilerplate. Instead, in addition to being clear and understandable, it should be tailored to the measure used, as well as to the registrant itself, the nature of its business and industry, and the manner in which management assesses the measure and applies it in making decisions.<sup>22</sup>

In addition, unlike Regulation G, Item 10(e) requires that the presentation of the most directly comparable financial measure, calculated and presented in accordance with GAAP, be made with equal or greater prominence relative to the non-GAAP financial measure. Whether a non-GAAP financial measure is more prominent than the comparable GAAP financial measure, and therefore does not satisfy the Item 10(e) requirement, generally depends on the particular facts and circumstances. The SEC staff has indicated, however, that the following examples of disclosure of non-GAAP financial measures do not satisfy the equal or greater prominence requirement:

- 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 or 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 a 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.<sup>23</sup>

## Practice Point

Regulation G applies to the disclosure of a non-GAAP financial measure in an earnings release, so a registrant must present the most directly comparable GAAP financial measure in the release and reconcile the two measures. Because Subsection (1)(i) of Item 10(e) applies to a registrant's Item 2.02 8-K that includes its earnings release, registrants also must either disclose in the body of the current report or in the earnings release itself why management believes any non-GAAP financial measure included in the release is useful and for what additional purposes, if any, management uses the measure. In addition, the most directly comparable GAAP financial measure must be presented with equal or greater prominence relative to the non-GAAP measure.

Item 10(e) also prohibits certain practices with respect to the presentation of non-GAAP financial measures. Specifically, a registrant is not permitted to:

- exclude charges or liabilities that required or will require cash settlement, absent an ability to settle in another manner, from non-GAAP liquidity measures (except for EBIT and EBITDA);
- adjust a non-GAAP performance measure to eliminate or smooth items identified as nonrecurring, infrequent or unusual where such items are reasonably likely to recur within two years or where there has been a similar charge or gain within the prior two years;<sup>24</sup> or
- 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.<sup>25</sup>

Companies may, however, adjust for recurring charges or gains within the two-year look forward/look back window, provided that the adjustment is not described as nonrecurring, infrequent or unusual and is otherwise consistent with Item 10(e) and Regulation G.

<sup>21</sup> Regulation S-K, Item 10(e)(1)(i)(D).

<sup>22</sup> Release No. 33-8176, 34-47226 (Jan. 22, 2003), Section II(B)(2).

<sup>23</sup> Non-GAAP Financial Measures CDI No. 102.10 (May 17, 2016).

<sup>24</sup> Non-GAAP Financial Measures CDI No. 102.03 (May 17, 2016).

<sup>25</sup> Regulation S-K, Item 10(e)(1)(iii)(A),(B) and (E).

## Income Tax Effects Related to GAAP to Non-GAAP Adjustments

The SEC staff has indicated that a registrant should provide income tax effects of its non-GAAP measures depending on the nature of the measures.<sup>26</sup> In particular, if a non-GAAP financial measure is a liquidity measure that includes income taxes, adjusting GAAP taxes to show cash taxes paid in cash might be an acceptable approach. On the other hand, if a non-GAAP financial 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, rather than presenting adjustments to arrive at a non-GAAP measure as “net of tax,” the registrant should present income taxes as a separate adjustment that is clearly explained.

## What Requirements Apply to Foreign Private Issuers?

Foreign private issuers are subject to both Regulation G and Item 10(e).<sup>27</sup> For both sets of requirements, the generally accepted accounting principles applicable to a foreign private issuer are — if other than U.S. GAAP — those pursuant to which its primary financial statements are prepared, be they accounting principles generally accepted in its home country (Local GAAP) or International Financial Reporting Standards (IFRS).<sup>28</sup> Therefore, where foreign private issuers publicly disclose financial measures that deviate from the accounting principles pursuant to which they prepare financial statements (whether U.S. GAAP, Local GAAP or IFRS), they must provide the same reconciliation that other registrants are required to provide under Regulation G and Item 10(e), subject to the qualifications set forth below. In addition, under Item 10(e), where foreign private issuers prepare financial statements pursuant to Local GAAP or IFRS but use a non-GAAP financial measure derived from or based on a measure calculated in accordance with U.S. GAAP, the registrant must reconcile such non-GAAP financial measure to U.S. GAAP.

Regulation G does not apply to public disclosure of a non-GAAP financial measure made by a foreign private issuer if its securities are listed or quoted on a securities exchange or inter-dealer

quotation system outside the United States, the non-GAAP financial measure is not derived from or based on a measure calculated and presented in accordance with U.S. GAAP, and such disclosure is made outside the United States or is included in a registrant’s written communication released outside the United States.<sup>29</sup> If a foreign private issuer’s disclosure of a non-GAAP financial measure is made contemporaneously both inside and outside the United States, Regulation G exempts the U.S. disclosure from Regulation G so long as:

- the communication is not targeted at persons located in the United States;
- journalists and other third parties (both U.S. and foreign) have access thereto;
- the disclosure appears on the registrant’s website; and
- the registrant submits the information to the SEC on Form 6-K following its disclosure or release.<sup>30</sup>

Item 10(e) permits foreign private issuers to use a non-GAAP financial measure that would otherwise be prohibited under Item 10(e) if the measure relates to Local GAAP or IFRS, is required or “expressly permitted” by the applicable standard-setter and is included in the annual report prepared by the registrant for use in its home jurisdiction for distribution to securityholders.<sup>31</sup> A measure is considered to be “expressly permitted” if (i) it is clearly and specifically identified as an acceptable measure by the standard-setter that is responsible for establishing the generally accepted accounting principles used in the registrant’s primary financial statements included in its filings with the SEC or (ii) there is explicit acceptance of a presentation by the primary securities regulator in the foreign private issuer’s home country jurisdiction or market, including published views of such regulator or its staff, or a letter from the regulator or its staff to the foreign private issuer indicating acceptance of the presentation.<sup>32</sup>

<sup>26</sup>Non-GAAP Financial Measures CDI No. 102.11 (May 17, 2016).

<sup>27</sup>For additional information about the SEC rules and regulations applicable to foreign private issuers, see our January 2014 *Corporate Finance Alert* “[Are You a Foreign Private Issuer?](#)”

<sup>28</sup>Regulation G, Rule 101(b); Regulation S-K, Item 10(e)(3). Filings by Canadian issuers on Form 40-F under the Multi-Jurisdictional Disclosure System are not subject to Item 10(e) of Regulation S-K. Release No. 33-8176, 34-47226 (Jan. 22, 2003), Section II(B)(1)(b).

<sup>29</sup>Regulation G, Rule 100(c).

<sup>30</sup>Regulation G, Rule 100, Note 2.

<sup>31</sup>Note to Regulation S-K, Item 10(e).

<sup>32</sup>Non-GAAP Financial Measures CDI No. 106.01 (Jan. 11, 2010).

## Cautionary Note as to Misleading Information

### Practice Point

Registrants should be consistent in the manner in which they disclose non-GAAP financial measures. A non-GAAP financial measure generally should be calculated in the same manner over time to the extent possible so that a registrant is not, for instance, presenting different measures of adjusted EBITDA for the same fiscal period in separate disclosures. If a non-GAAP measure is presented differently between periods, such difference should be disclosed and the reasons for it explained. In addition, if a change in presentation is significant, it may be necessary to recast prior periods.

The SEC has long taken the position that the misleading presentation of financial information presented on a basis other than GAAP, whether in SEC filings or public disclosures, may subject an issuer to liability under anti-fraud provisions of the federal securities laws.<sup>33</sup> Even prior to the adoption of Regulation G and Item 10(e) in 2003,<sup>34</sup> the SEC cautioned registrants that:

- the anti-fraud provisions of the federal securities laws apply to a company issuing *pro forma* (i.e., non-GAAP) financial information that has been made misleading through selective editing or “cherry picking”;
- when a registrant purports to announce earnings excluding “unusual or nonrecurring transactions,” it should describe the particular transactions and the kind of transactions that are omitted and apply the methodology described when presenting purportedly comparable information about other periods; and
- investors are likely to be deceived if a registrant uses a *pro forma* (i.e., non-GAAP) presentation to recast a loss as if it were a profit or to obscure a material result of GAAP financial statements, without clear and comprehensible explanations of the nature and size of the omissions.<sup>35</sup>

Regulation G strengthened the SEC’s hand in the enforcement of rules regarding the disclosure of misleading non-GAAP financial information by establishing a definitive rule as to the presentation of misleading non-GAAP financial measures: “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.”<sup>36</sup>

The SEC staff has provided examples of disclosure practices that, while not specifically prohibited, could be misleading. Those examples include:

- presenting a performance measure that excludes normal, recurring cash-operating expenses necessary to operate the registrant’s business;<sup>37</sup>
- presenting a measure inconsistently between periods unless the change between periods is disclosed and the reasons for it explained and, if the change is sufficiently significant, recasting prior measures to conform to the current presentation and placing the disclosure in the appropriate context;<sup>38</sup>
- adjusting a measure for only nonrecurring charges when there were nonrecurring gains during the same period;<sup>39</sup> and
- substituting individually tailored revenue or other financial statement line item recognition or measurement methods for those of GAAP (e.g., accelerating revenue recognized ratably over time in accordance with GAAP as though the registrant earned revenue when customers were billed).

In 2009, the SEC brought its first and only enforcement action under Regulation G against SafeNet, Inc. and certain of its senior executives for what the SEC described as an “earnings management scheme,” including the improper classification of certain ordinary operating expenses as nonrecurring expenses, which resulted in the dissemination of what the SEC characterized as false and misleading non-GAAP financial results.<sup>40</sup> The action was ultimately settled, resulting in a \$1 million civil penalty for the registrant and disgorgement of profits and lesser civil penalties for certain of the registrant’s senior executives. SafeNet should not be viewed as prohibiting or discouraging the use of non-GAAP financial measures that comply with Regulation G; rather, it serves as a reminder that the public disclosure of financial information, including non-GAAP financial measures, that is deemed by the SEC to be misleading, particularly if it is viewed as earnings management, may result in an enforcement action against the registrant and members of its management team.

<sup>36</sup>Regulation G, Rule 100(b).

<sup>37</sup>Non-GAAP Financial Measures CDI No. 100.01 (May 17, 2016).

<sup>38</sup>Non-GAAP Financial Measures CDI No. 100.02 (May 17, 2016).

<sup>39</sup>Non-GAAP Financial Measures CDI No. 100.03 (May 17, 2016).

<sup>40</sup>Complaint at ¶ 73, *Commission v. SafeNet, Inc. et al.*, No. 1:09-cv-02117-RWR (D.D.C. Nov. 12, 2009).

<sup>33</sup>Release No. 33-8039, 34-45124 (Dec. 4, 2001). Release No. 33-8176, 34-47226 (Jan. 22, 2003), Section II(A)(4).

<sup>34</sup>Release No. 33-8176, 34-47226 (Jan. 22, 2003).

<sup>35</sup>Release No. 33-8039, 34-45124 (Dec. 4, 2001).

## Practical Tips for Compliance

Registrants must be thoughtful about the disclosure of financial measures in SEC filings and submissions *as well as in press releases, investor presentations and conference calls*. All such measures should be evaluated by appropriate personnel who are responsible for disclosure controls and procedures to determine whether such measures constitute non-GAAP financial measures within the scope of Regulation G or Item 10(e) and, if so, whether they contain the required reconciliation and disclosure. Additionally, measures that, for example, adjust a particular charge or gain should be presented consistently between periods to avoid being characterized as misleading.<sup>41</sup> Foreign private issuers do not have blanket exemptions from these regulations, so they must be equally vigilant to comply with the regulations or the exemptions granted to foreign private issuers.

It is important to note that even compliance with the letter of applicable federal securities laws, rules and regulations regarding the disclosure of non-GAAP financial measures will not preclude SEC inquiries or enforcement actions if the spirit of the disclo-

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<sup>41</sup> Non-GAAP Financial Measures CDI No. 100.02 (May 17, 2016).

sure is inconsistent with those laws, rules and regulations and with the guiding principle that such disclosure not be misleading to investors. With respect to a registrant's public filings, particular attention should be paid to how adjustments are titled and whether charges that are identified as "one-time items" are added back to non-GAAP measures. For example, restructuring charges that are described as a one-time item should in fact represent expenses that did not occur within the past two years and are not likely to recur within the following two years.<sup>42</sup> In addition, registrants should ensure that any reconciliation of a non-GAAP measure to the most directly comparable GAAP measure in SEC filings is accompanied by an explanation sufficient to permit an investor to understand the differences between the two financial measures and why such non-GAAP financial measures may provide a meaningful assessment of a registrant's financial performance, financial position or cash flows.

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<sup>42</sup> Although a registrant is not permitted to describe a charge or gain as nonrecurring, infrequent or unusual if it falls inside the two-year look forward/look back window, the registrant may nevertheless be permitted to adjust for the charge or gain if the registrant otherwise deems it appropriate in compliance with Item 10(e). Non-GAAP Financial Measures CDI No. 102.03 (Jan. 11, 2010).



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## Contacts

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