

# **Earnings Release Compliance Checklist**

**Public Company Tool Kit**

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**Authors:**

**Sean M. Donahue**

**Folake Ayoola**

**John O. Newell**

**Jim Hammons**

**Lauren Visek**

**Stacey Harlow Buttrey**



**GOODWIN**

# Earnings Release Compliance Checklist

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This document is a checklist for use in the preparation or review of U.S. public company earnings releases, with a focus on compliance with applicable federal securities law requirements and best practices. This Checklist is supplemented by a separate Earnings Release Compliance Guide that contains more detailed information about most of the items in this Checklist.

**1. Earnings Release, Script and Slides.** In preparing or reviewing an earnings release, script and related presentations (if any), note the following:

- Use of non-GAAP financial measures and compliance with [Regulation G](#) and [Item 10\(e\)\(1\)\(i\)](#) of Regulation S-K: Attention should be paid to the following key issues:
  - Any non-GAAP measure in the earnings release headline must be preceded by the comparable GAAP measure (the “equal or greater prominence requirement”). If the headline includes a non-GAAP measure, the GAAP measure must precede the non-GAAP measure in the headline.
  - Review the text, charts and tables and other contents to confirm compliance with Item 10(e)(1)(i) by ensuring that the comparable GAAP measures are presented with equal or greater prominence than the comparable non-GAAP measure.
  - Confirm that each non-GAAP measure in the text or any charts or tables, including any ratio that includes one or more non-GAAP measures, is reconciled to the comparable GAAP measure, and comment if the reconciliation is missing.
  - If you see non-GAAP measures in bullet points, confirm that the comparable GAAP measure precedes it (see [SEC Non-GAAP Financial Measures Compliance and Disclosure Interpretations Question 102.10](#)).
  - The earnings release must include an explanation of why the non-GAAP measures are useful to investors. This explanation also needs to provide the additional purposes, if any, for which the company’s management uses the non-GAAP financial measures.
  - Presentation of a full non-GAAP income statement is considered problematic by the SEC (see [SEC Non-GAAP Financial Measures Compliance and Disclosure Interpretations Question 102.10](#)).
  - If a quantitative reconciliation for a forward-looking non-GAAP measure is excluded in reliance on the “unreasonable efforts” exception in Item 10(e)(1)(i)(B), make sure that such reliance is disclosed and identify the information that is unavailable and its probable significance in a location of equal or greater prominence.

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- Check to see if key performance indicators in the earnings release were also disclosed in the prior periodic report (Form 10-K or Form 10-Q), and review for consistency.
  - Review key performance indicators for consistency across quarters and the company's other disclosure documents.
  - Make sure that the key performance indicators are accompanied by: (1) a clear definition of the metric and how it is calculated; (2) a statement indicating the reasons why the metric provides useful information to investors; and (3) a statement indicating how management uses the metric in managing or monitoring the performance of the business.
- Earnings Guidance
  - If the company is providing guidance, review for any inconsistent guidance practices, such as changing measures from quarter to quarter.
  - If the company is revising guidance, make sure an appropriate explanation is given for the reasons for the revisions to guidance.
  - If the company is pulling previously issued guidance, make sure an appropriate explanation is given for the reasons why guidance is being pulled.
  - If the company is discontinuing guidance, make sure an appropriate explanation is given for the reasons why guidance is being discontinued.
  - Ensure that the change in guidance practice is announced in a Regulation FD-compliant manner.
  - If the announcement of the change in guidance practice will not be part of an earnings call and will take place shortly after the end of a quarter, consideration will need to be given to whether an Item 2.02 Form 8-K needs to be filed if any specifics are given about the just-ended quarter's results.
    - **Note that revising, pulling, or discontinuing guidance can raise multiple issues under the securities laws. If you notice that guidance is being revised, pulled, or discontinued, you should strongly consider bringing it to the attention of external securities law counsel.**
- Statutory safe harbor for forward-looking statements and "duty to update" disclaimers:
  - Review and update the forward-looking statement disclaimer to reflect economic, financial or other developments that are new or have changed since the most recent disclaimer.

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- Review and update the forward-looking statement disclaimer for the specific forward-looking statements that are made in the earnings release or are to be made in the earnings call.
- Confirm that the “meaningful cautionary statements” required by the statutory safe harbor accompany the forward-looking statements. There is no clear authority for relying on incorporation by reference of this disclosure, and failure to satisfy the statutory requirement exposes the company to loss of the safe harbor.
- Avoid including boilerplate cautionary language regarding forward-looking statements.
- Proper public notice under Regulation FD and Item 2.02 of Form 8-K:
  - Ensure that the company has issued a press release several days in advance of the earnings call (e.g., one to two weeks) and that the press release clearly states that the company may discuss or disclose material business, financial or other information that is not contained in the earnings release.
  - If the company intends to use its website as a Regulation FD compliant disclosure method, ensure that there is disclosure in the press release and earnings release that alerts investors to the company’s practice of periodically providing information for investors on its website.
- Factual backup, general disclosure and Rule 10b-5 matters:
  - Reconcile the earnings release with the draft of the periodic report for the same period (to the extent a draft is available). Companies sometimes provide more “color” in the release than in MD&A, which then can draw a comment from the SEC staff asking for the same “trends” disclosure in the MD&A (and such failure to disclose the trend in the periodic report has also resulted in SEC enforcement actions). The company should include consistent “trend” disclosure in the periodic report.
  - Confirm that there is data or documentation to support all factual assertions in the press release quote and other text (e.g., market leadership, best quarter ever). For statements of opinion, ensure that the language properly clarifies that it is an opinion rather than a factual assertion.
  - Edit statements that say that the company “will” do something when it is more appropriate to say that the company “expects,” “anticipates” or “intends” to do something.
  - Edit definitive statements that make claims that, when viewed in hindsight, may be construed as false and misleading by adding “we believe” or similar language.

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### 2. **Form 8-K Item 2.02 reports.** Key issues related to the earnings release Form 8-K:

- The Form 8-K should be filed after market closes on the evening before the call/webcast or before market opens on the day of the call/webcast. Note that NYSE rules require companies to wait to issue the press release until the earlier of 4:05 p.m. or the publication of the official closing price of the listed company's security, and Nasdaq recommends companies wait until at least 4:01, but prefers if companies wait until 4:05.
- It is often the case that the Form 8-K simply incorporates by reference the earnings release. If the Form 8-K contains substantive disclosure, ensure the text of the Form 8-K is in compliance with Regulation G, Item 10 (e)(1)(i) of Regulation S-K, and the other items discussed in this Checklist.
- No separate Item 2.02(b) disclosure in the Form 8-K is required for oral statements relating to earnings information (e.g., call/webcast) if:
  - (1) the call/webcast is complementary to, and occurs within 48 hours after, issuance of the related written release and (2) the company furnishes the release on Form 8-K pursuant to Item 2.02 before the call/webcast;
  - call/webcast is broadly accessible to the public;
  - financial and statistical information in call/webcast is provided on the company's website, together with any information that is required under Regulation G; and
  - call/webcast was announced by a widely disseminated press release that included instructions as to when and how to access the presentation and the location on the company's website where the information would be available.
  - Note that the press release must be filed and appear on the company's EDGAR filing page in order to rely on the Item 2.02(b) safe harbor. As a reminder, Form 8-K filings made after 5:30 p.m. Eastern time are not publicly available until 6:00 a.m. Eastern Time on the following business day.
- **Alternative:** if company does not furnish the Form 8-K report in compliance with the requirements for reliance on the Item 2.02(b) safe harbor for oral statements made during the earnings call or webcast:
  - the earnings release must be furnished under Item 2.02(a) within four business days after issuance; and
  - the company must also furnish a Form 8-K for the call/webcast pursuant to Item 2.02(b), together with a summary of any additional material information disclosed during the call or webcast. In practice, companies usually satisfy this requirement by furnishing a transcript of the call/webcast as an exhibit to the Form 8-K. The company can thus satisfy the earnings release Form 8-K requirement and the call/webcast Form 8-K requirement by furnishing a single

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Item 2.02 Form 8-K with the press release and the transcript of the call/webcast filed as exhibits.

- Confirm the Form 8-K is in compliance with the [current SEC version of Form 8-K](#) and other [Form 8-K requirements](#), including, but not limited to:
  - Cover page: confirm that the cover page complies with the current SEC Form 8-K requirements.
  - Signature page: confirm that the signature page is dated and the conformed signature of an authorized officer is shown.
  - Exhibits: confirm that all required exhibits are listed, including XBRL exhibits such as the [Item 104 exhibit](#).

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