

Earnings Release Compliance Guide

Public Company Tool Kit

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GOODWIN

Table of Contents

<u>INTRODUCTION</u>	<u>3</u>
<u>BACKGROUND ON EARNINGS GUIDANCE AND OVERVIEW OF REGULATORY FRAMEWORK</u>	<u>3</u>
<u>SUMMARY CHRONOLOGY: RELEASE OF OPERATING RESULTS</u>	<u>3</u>
<u>EARNINGS RELEASE GUIDANCE</u>	<u>7</u>
<u>SAFE HARBORS AND FORWARD-LOOKING STATEMENTS</u>	<u>7</u>
<u>NON-GAAP FINANCIAL MEASURES</u>	<u>8</u>
<u>KEY PERFORMANCE INDICATORS</u>	<u>11</u>
<u>PROPER NOTICE UNDER REGULATION FD</u>	<u>12</u>
<u>FORM 8-K GUIDANCE</u>	<u>14</u>
<u>EARNINGS GUIDANCE</u>	<u>16</u>
<u>FREQUENCY OF GUIDANCE</u>	<u>16</u>
<u>FORM AND SCOPE OF GUIDANCE</u>	<u>17</u>
<u>REVISING, PULLING, OR DISCONTINUING GUIDANCE</u>	<u>17</u>
<u>DUTY TO UPDATE</u>	<u>18</u>

Introduction

This document is a guide for use in the preparation or review of a U.S. public company's Earnings Release, with a focus on compliance with applicable federal securities law requirements and best practices. This Guide explains in greater detail information contained in our separate Earnings Release Compliance Checklist.

Background on Earnings Guidance and Overview of Regulatory Framework

Public companies are not required by the U.S. Securities and Exchange Commission's (SEC) or U.S. national stock exchange rules to provide investors with projections of future operating results. However, investors and analysts often demand, and many public companies elect to provide the market with, guidance about their expectations for the future. A company's decision to give guidance can spring from an inclination to share good news with investors in order to help the market get to a higher valuation for the company's stock or it can spring from a need to correct analysts' overly optimistic earnings expectations. Whatever the motivation, the legal landscape should be carefully understood.

As a result, one must consider the federal securities laws when preparing or reviewing earnings guidance and earnings releases generally, including:

- Regulation FD (Fair Disclosure), which seeks to prevent selective disclosure of material nonpublic information;
- Section 21E of the Securities Exchange Act of 1934 (Exchange Act), which provides a safe harbor for forward-looking statements;
- Regulation G and Item 10(e) of Regulation S-K, which regulates disclosure of non-GAAP financial measures;
- Form 8-K¹ disclosure requirements; and
- Exchange Act Rule 10b-5, which applies to statements made in the context of securities offerings as well as in periodic reports and day-to-day communications with analysts and investors.

Summary Chronology: Release of Operating Results

In complying with the applicable federal securities law requirements, there are key actions involved in a company's release of operating results for a completed quarterly or annual fiscal period. The key actions can be effected in different ways to satisfy the applicable securities law requirements:

Alternative 1:

Step 1: Announce date of earnings release and related conference call or webcast information

Step 2: Issue earnings release

¹ Note that Form 8-Ks that are filed with the SEC under Item 2.02 are considered "furnished" rather than "filed". The result of this is that a company is not subject to potential liability under Section 18 of the Exchange Act, and the Form 8-K is not automatically incorporated by reference into Securities Act or Exchange Act filings.

Earnings Release Compliance Guide

- Step 3: Make Item 2.02 of Form 8-K filing with earnings release as exhibit
- Step 4: Post additional call/webcast non-GAAP financial measure reconciliation on website, if any
- Step 5: Hold call/webcast
- Step 6: Post replay of call/webcast (and any other materials provided in the call/webcast (e.g., presentation slides)) on website and keep it available on website for 12 months

Alternative 2:²

- Step 1: Announce date of earnings release and related conference call or webcast information
- Step 2: Issue earnings release
- Step 3: Post additional call/webcast non-GAAP financial measure reconciliation on website, if any
- Step 4: Hold call/webcast
- Step 5: Make Item 2.02 of Form 8-K filing with earnings release and call/webcast transcript (and any other materials provided in the call/webcast (e.g., presentation slides) included as exhibits

The table that follows summarizes these actions and the key federal securities law requirements that each action is intended to address. To highlight when certain actions should occur, the table divides the key actions in the earnings release process into four phases: pre-earnings call, earnings release, earnings call, and post-earnings call.

Actions	Federal Securities Law Requirements
Pre-Earnings Call	
Issue press release several days in advance of the earnings call (e.g., one to two weeks) announcing: <ul style="list-style-type: none"> • the date and time of the call/webcast; • subject matter for call/webcast (broad enough to cover anticipated topics); • how to access the call/webcast; and • the location on the company's website where financial and other statistical information to be discussed during the call will be available. 	<p>Regulation FD. Material nonpublic information publicly disclosed during a conference call or webcast that has been properly noticed will not be regarded as selective disclosure.</p> <p>Form 8-K—Item 2.02(b). A Form 8-K related to the content of the earnings call will not be required if the registrant announces the call by a widely disseminated press release and satisfies the other requirements of Item 2.02(b).</p>
Issue earnings release no more than 48 hours prior to the earnings call.	<p>Form 8-K—Item 2.02(b). A Form 8-K related to the content of the earnings call will not be required if the registrant issues the earnings release within 48 hours prior to the earnings call and satisfies the other requirements of Item 2.02(b).</p>

² To avoid filing the earnings call transcript and any related presentation slides with the SEC, most companies prefer to use Alternative 1 and take advantage of the Form 8-K Item 2.02(b) 48-hour safe harbor. Also see SEC Exchange Act Form 8-K Compliance and Disclosure Interpretation [Question 206.01](#).

Earnings Release Compliance Guide

Actions	Federal Securities Law Requirements
<p>Furnish earnings release to the SEC on Form 8-K prior to the earnings call.</p>	<p>Form 8-K—Item 2.02(a). A registrant must furnish on Form 8-K any public announcement or release of material nonpublic information regarding its results of operations or financial condition for a completed quarterly or annual period.</p> <p>Form 8-K—Item 2.02(b). A Form 8-K related to the content of the earnings call will not be required if the registrant furnishes the earnings release on Form 8-K prior to the call and satisfies the other requirements of Item 2.02(b). Note that the earnings release has to actually appear publicly on EDGAR for this requirement to be met.</p>
<p>Prior to the earnings call, post financial and other information (including information related to any non-GAAP financial measures) that the company intends to disclose during the earnings call on the company's website.</p>	<p>Form 8-K—Item 2.02(b). A Form 8-K related to the content of the earnings call will not be required if the registrant posts this information on its website and satisfies the other requirements of Item 2.02(b).</p> <p>Regulation G. A registrant that publicly discloses material information that includes non-GAAP financial measures orally, telephonically, by webcast, or by similar means must simultaneously with or prior to such public disclosure post this information on its website and disclose during the presentation the location of the information on its website.</p>
Earnings Release	
<p>Include the following information:</p> <ul style="list-style-type: none"> • the date and time of the earnings call; • how to access the call; and • the location on the company's website where financial and other statistical information to be discussed during the call will be available. 	<p>Form 8-K—Item 2.02(b). A Form 8-K related to the content of the earnings call will not be required if the registrant includes this information in a widely disseminated press release and satisfies the other requirements of Item 2.02(b).</p>
<p>Provide the location on the company's website of the replay or transcript of the earnings call and the length of time it will be available after the earnings call.</p>	<p>Regulation FD. The SEC recommends (but does not require) that a registrant post a replay or transcript of the earnings call on its website for a "reasonable period of time" after the call.</p>

Earnings Release Compliance Guide

Actions	Federal Securities Law Requirements
<p>Include a safe harbor statement that:</p> <ul style="list-style-type: none"> expressly identifies any forwarding-looking statements; and provides meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statements. 	<p>PSLRA/Exchange Act—Section 21E. A registrant will not be liable with respect to any forward-looking statement in a private action based on an untrue statement or omission of a material fact necessary to make the statement not misleading if the registrant provides an appropriate safe harbor statement and satisfies the other requirements of Section 21E.</p>
<p>Provide the following information for each non-GAAP financial measure:</p> <ul style="list-style-type: none"> with equal or greater prominence, the most directly comparable GAAP measure; a reconciliation to the GAAP measure;³ a statement disclosing why management believes the non-GAAP measure is useful to investors; and a statement disclosing the additional material purposes for which management uses the non-GAAP measure, if any. 	<p>Regulation G. Any public disclosure of material information that includes a non-GAAP financial measure must be accompanied by the information set forth in the first two bullet points to the left.</p> <p>Form 8-K—Item 2.02 and Regulation S-K—Item 10(e). A non-GAAP financial measure included in a report furnished with the SEC pursuant to Item 2.02 of Form 8-K must be accompanied by the information set forth in all four bullet points to the left.</p>
Earnings Call	
<p>Company needs to inform participants that:</p> <ul style="list-style-type: none"> certain statements will be forward-looking; actual results may differ materially from those in the forward-looking statements; non-GAAP financial measures will be discussed; and there are factors that could cause actual results to differ materially that can be found in specified SEC filings of the company (e.g., Form 10-K). 	<p>PSLRA/Exchange Act—Section 21E. A registrant will not be liable with respect to any oral forward-looking statement in a private action based on an untrue statement or omission of a material fact necessary to make the statement not misleading if the oral statements are accompanied by this information and the registrant satisfies the other requirements of Section 21E.</p>
<p>Company needs to inform participants of the location on the company's website where the earnings release and other information (including information related to any non-GAAP financial measures) to be discussed during the earnings call can be found.</p>	<p>Regulation G. A registrant that publicly discloses material information that includes non-GAAP financial measures orally, telephonically, by webcast, or by similar means must post this information on its website and disclose during the presentation the location of the information on its website.</p>

³ For forward-looking non-GAAP measures, to the extent available without unreasonable efforts.

Earnings Release Compliance Guide

Actions	Federal Securities Law Requirements
Post-Earnings Call	
Company should post a replay or transcript of the earnings call on the company's website for two to four weeks after the call, although the time period can be even longer, such as 12 months (see below).	Regulation FD. The SEC recommends (but does not require) that a registrant post a replay or transcript of the earnings call on its website for a "reasonable period of time" after the call.
Company should archive financial and other information (including information related to any non-GAAP financial measures) related to the earnings call on the company's website for 12 months after the call. This often results in companies leaving up the replay of the earnings call for 12 months.	Form 8-K and Regulation G. The SEC recommends (but does not require) that any financial and other information related to an earnings call remain on a registrant's website for at least 12 months after the call.

Earnings Release Guidance

Safe Harbors and Forward-Looking Statements

Regulatory Framework

- The Private Securities Litigation Reform Act of 1995 (PSLRA) enacted safe harbor provisions in both the Securities Act of 1933 and the Exchange Act for forward-looking statements that are (1) identified as such and (2) accompanied by "meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement."
- The federal courts have held that forward-looking statements that are accompanied by appropriate cautionary language do not give rise to a claim for liability under the federal securities laws because the predictive statement read in context with the risk disclosure is not misleading as a matter of law.
- Note that despite the broad protections of the PSLRA's safe harbor, boilerplate cautionary language may not be sufficient. Some courts have declined to allow the protections of the safe harbor where risk disclosures did not change over time or did not identify the risks that ultimately caused the prediction not to come to pass.

Drafting and Review Approach - Carefully Tailored Cautionary Statements

- Avoid including boilerplate cautionary language regarding forward-looking statements.
- Ensure that there is specific, robust and dynamic cautionary language that is tailored for each significant forward-looking statement. Any areas of heightened risk or known uncertainties warrant fact-specific disclosures that are customized to the particular risks underlying each forward-looking statement.
- Review and update the forward-looking disclaimer for the specific forward-looking statements that are made in the earnings release or are to be made in the earnings call.

Earnings Release Compliance Guide

- 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.
- 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.
- Ensure that risk factor type disclosures in the forward-looking statement disclaimer have been appropriately updated.
- Ensure that some of the material assumptions on which the guidance is based are disclosed and confirm whether the cautionary language ties to the achievement of those assumptions. For example, a 10% increase in earnings that is premised on cutting redundant overhead costs is not the same as a 10% increase that is premised on a substantial increase in market share. The point of cautionary language is to explain the assumptions underlying the guidance so investors can make their own informed decisions about the likelihood of the projected outcome actually being realized.
- 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.

Non-GAAP Financial Measures

Background

- Companies use non-GAAP financial measures as a supplement to their financial statements to tell their stories. Some companies use them to show investors management’s view of their core operations, typically by eliminating nonrecurring charges and other amounts they believe are not indicative of their ongoing performance, such as major strategic restructurings.
- A measure becomes a non-GAAP measure and is subject to the SEC’s non-GAAP rules and interpretive guidance when it excludes amounts that are included in (or includes amounts that are excluded from) the most directly comparable GAAP measure. Operating or other statistical measures (for example, unit sales, number of employees, and number of subscribers), certain ratios, and financial information that does not provide numerical measures that are different from the comparable GAAP measures (for example, the amount of debt repayments planned but not yet made) are not subject to the non-GAAP guidance. That said, certain of these measures may be subject to SEC guidance on key performance indicators, as further discussed below.

Earnings Release Compliance Guide

- Some common non-GAAP measures are:
 - EBIT - earnings before interest and taxes
 - EBITDA - earnings before interest, taxes, depreciation, and amortization
 - Adjusted earnings or adjusted EBITDA - removes various one-time, irregular, or nonrecurring items from earnings or EBITDA
 - Free cash flow - typically calculated as cash flows from operating activities less capital expenditures

Regulatory Framework

- Regulation G and Item 10(e) of Regulation S-K provide the SEC disclosure rules for non-GAAP financial measures. Although it will usually be clear whether a financial measure is a non-GAAP financial measure, note the following:
 - A ratio that includes one or more non-GAAP measures is a non-GAAP measure and requires a reconciliation of the ratio as well as its constituent parts.
 - Financial measures that are not measures of the company's financial condition, performance or cash flows are not subject to Regulation G or Item 10(e).
 - Statistical or operating measures that are not financial measures are not subject to Regulation G or Item 10(e).
 - Non-GAAP projections require reconciliation only to the extent possible without "unreasonable efforts."
 - Additional information can be found in the resources listed below. It may also be helpful to discuss questions with the company's independent auditors and internal financial/accounting staff, as appropriate.
 - SEC's Division of Corporation Finance's [non-GAAP Compliance and Disclosure Interpretations](#)
 - [Topic 8](#) of the SEC's Division of Corporation Finance [Financial Reporting Manual](#)
- Regulation G applies to all public disclosures, however and wherever made, and requires:
 - a presentation of the most directly comparable GAAP measure; and
 - a quantitative reconciliation of each non-GAAP measure to the comparable GAAP measure (for forward-looking non-GAAP measures, to the extent available without unreasonable efforts).

Earnings Release Compliance Guide

- Item 10(e)(1)(i) applies to non-GAAP measures in all SEC filings and Item 2.02 of Form 8-K reports (including earnings releases that are furnished under SEC rules), and requires:
 - equally or more prominent presentation of most directly comparable GAAP measure in all instances, including the earnings release headline, bullet lists, charts and tables (note that the “equal or greater prominence” requirement applies only to SEC filings and Form 8-K Item 2.02 earnings release reports);
 - a quantitative reconciliation of each non-GAAP measure to the comparable GAAP measure (for forward-looking non-GAAP measures, to the extent available without unreasonable efforts)
 - a statement of reasons why management believes that each non-GAAP financial measure provides useful information to investors; and
 - a statement of additional purposes (if any, and only to the extent material, and not already disclosed in response to the disclosure requirement in the immediately preceding bullet) for which management uses each non-GAAP measure.
 - The last two bullets above may be satisfied by including the statements in (1) the earnings release, (2) the Form 8-K or (3) the most recent Form 10-K or more recent SEC filing, with any necessary updating (companies that do not regularly use non-GAAP measures in their periodic filings are likely to simply place this disclosure in each earnings release).
- Item 10(e)(2), which is included here only for the sake of completeness, applies only to SEC filings but does not apply to Form 8-K Item 2.02 earnings release reports, and provides that a company may not:
 - exclude from non-GAAP liquidity measures (other than EBITDA and EBIT) any charges or liabilities that required, or will require, cash settlement, or would have required cash settlement absent an ability to settle in another manner;
 - adjust a non-GAAP performance measure to eliminate or “smooth” non-recurring, infrequent or unusual items if the charge or gain is reasonably likely to recur within two years or if there was a similar charge or gain within the prior two years;
 - present non-GAAP measures on the face of the company’s GAAP financial statements or in the accompanying notes;
 - present non-GAAP measures on the face of any pro forma financial information required to be disclosed by Article 11 of Regulation S-X; 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 measures.

Earnings Release Compliance Guide

Drafting and Review Guidance

- Regulation G and Item 10(e) of Regulation S-K regulate the use of non-GAAP financial measures. In the course of your review or preparation of materials, focus on the following:
 - 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.
 - Ensure that statements regarding non-GAAP financial measures identify where the required reconciliations can be found.
 - Confirm that any non-GAAP measures included in bullet points are preceded by the comparable GAAP measure (see SEC Non-GAAP Financial Measures Compliance and Disclosure Interpretations 102.10).
 - The earnings release must include an explanation of why certain non-GAAP measures are useful to investors. This explanation also needs to disclose the additional purposes, if any, for which the company’s management uses the non-GAAP financial measures, or such disclosure needs to be provided separately.
 - Presentation of a full non-GAAP income statement is considered problematic by the SEC (see SEC Non-GAAP Financial Measures Compliance and Disclosure Interpretations CDI 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.

Key Performance Indicators

- Review key performance measures/indicators (KPIs) for consistency across quarters and other disclosure documents.
- KPIs are used by management to manage or evaluate the performance of the business. Certain KPIs may not meet the definition of a non-GAAP financial measure and thus may not be subject to Regulation G or Item 10(e) of Regulation S-K. Nevertheless, you need to consider what additional information may be necessary to provide adequate context for an investor to understand the KPI metric

presented. In this regard, the SEC generally expects the following disclosures to accompany any KPI metric:

- a clear definition of the metric and how it is calculated,
- a statement indicating the reasons why the metric provides useful information to investors, and
- a statement indicating how management uses the metric in managing or monitoring the performance of the business.

Proper Notice under Regulation FD

Regulatory Framework

- In 2000, the SEC adopted Regulation FD in an effort to create a level playing field for all investors for access to material nonpublic information. The SEC's primary concern was that selective disclosure, and the perception of selective disclosure to analysts and institutional investors, of material nonpublic information, leads to a loss of investor confidence in the integrity and fairness of the securities markets.
- Generally, no person acting on behalf of a company may make an intentional disclosure of material nonpublic information to market professionals or shareholders unless public disclosure of such information is made simultaneously. If a person acting on behalf of a company makes a non-intentional disclosure of material nonpublic information to market professionals or shareholders, public disclosure is required promptly (i.e., no later than 24 hours after the disclosure or, if later, the commencement of the next day's trading on the relevant market) after a senior official of the company learns of the disclosure and knows (or is reckless in not knowing) that the information disclosed was both material and nonpublic.
- The public disclosure element of Regulation FD is satisfied by a method or combination of methods that are in fact reasonably designed to effect broad, non-exclusionary distribution of the information to the public. Public disclosure can be made by:
 - Filing or furnishing a Form 8-K
 - Issuing a press release, carried through a widely circulated news or wire service such as Dow Jones, Bloomberg, Business Wire, PR Newswire or Reuters—if a company's press releases are routinely not carried by major business wire services, it will likely need to rely on filing a Form 8-K to achieve broad public dissemination of information
 - Making an announcement in a forum to which the public has been granted access (in person or by telephone or webcast), so long as adequate advance notice (including the date, time, subject matter and manner of access to the announcement) has been given. The period of advance notice deemed reasonable will often depend on whether the information is unexpected or critical or time sensitive. In addition, if a company is making disclosure via a webcast or conference call, the SEC has noted that the company should consider making the webcast or conference call available for access at a later time and indicate in the notice of the webcast or conference call, how and for how long the record will be available to the public

Earnings Release Compliance Guide

- On August 1, 2008, the SEC published an interpretive release ([Release No. 34-58288](#)) that provided guidance as to the circumstances under which information posted on a company's website would be considered "public" for purposes of evaluating (i) applicability of Regulation FD to subsequent private discussions or disclosure of the information which had been posted and (ii) satisfaction of Regulation FD's "public disclosure" requirement. The following conditions must be satisfied for information to be "public" or publicly "disseminated" on a company's website and will depend on the underlying facts and circumstances:
 - The company's website must be a recognized distribution channel for information about the company as well as its business, financial condition and operations;
 - Posting must result in dissemination of information in a manner making it available to the securities marketplace in general; and
 - A reasonable waiting period must have occurred for investors and the securities marketplace to react to the information

Supporting factors include:

- marketplace awareness of the website
 - the company's posting pattern/practice
 - a website design which leads investors and the market to information efficiently and with easy accessibility
 - the extent to which website information is regularly picked up by the market and readily available media
 - the steps the company has taken to make its website and the information accessible (including the use of "push" technology)
 - whether the company has maintained its website to ensure information is accurate and current
- In April 2013, the SEC issued a Section 21(a) Report of Investigation ([Release No. 69279](#)) in which it affirmed that a company may use social media to disclose material nonpublic information to investors without violating Regulation FD provided the company makes investors aware in advance of which social media channels it expects to use so that they know where to look for the information or what they need to do to be in a position to receive it. The Report emphasizes the SEC's expectation that a company will rigorously examine the non-exclusive list of factors included in the 2008 guidance to determine whether a particular social media channel is a recognized channel of distribution for communicating with its investors.

Earnings Release Compliance Guide

Compliance Guidelines

- Ensure that a press release was issued 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 or social media channels as Regulation FD compliant disclosure methods, 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 or through its social media channels. See below for sample language:

We periodically provide other information for investors on our corporate website, [INSERT WEBSITE], and our investor relations website, [INSERT WEBSITE], and through various social media channels [INSERT SOCIAL MEDIA CHANNELS]. This includes press releases and other information about financial performance, information on corporate governance and details related to our annual meeting of stockholders. We intend to use our website and social media channels as a means of disclosing material non-public information and for complying with our disclosure obligations under Regulation FD. Accordingly, investors should monitor our website and social media channels, in addition to following the Company's press releases, SEC filings and public conference calls and webcasts.

Form 8-K Guidance

Regulatory Framework

- Item 2.02 of Form 8-K requires the reporting of any public announcement or release that discloses material nonpublic information regarding results of operations or financial condition for a completed quarterly or annual fiscal period, which may include:
 - non-quantitative and/or limited announcements regarding historical financial/business matters (e.g., market information, product development, etc.)
 - disclosures or announcements other than press releases (e.g., investor conferences)
 - does not apply to disclosures of earnings estimates for future periods, unless contained in a release or announcement containing the information specified in the preceding bullets
- A Form 8-K is not required to be furnished to the SEC under this item in the case of disclosure of material non-public information that is disclosed orally, telephonically, by webcast, by broadcast or by similar means if:
 - the information is provided as part of a presentation that is complementary to, and initially occurs within 48 hours after, a related, written announcement or release that has been furnished on Form 8-K pursuant to Item 2.02 prior to the presentation;
 - the presentation is broadly accessible to the public by dial-in conference call, by webcast, by broadcast or by similar means;

Earnings Release Compliance Guide

- the financial and other statistical information contained in the presentation is provided on the company's website, together with any information that would be required under Regulation G; and
- the presentation was announced by a widely disseminated press release, which 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

Compliance Guidelines

- 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 company's security and Nasdaq recommends companies wait until at least 4:01, but prefers if companies wait until 4:05.
- As part of the preparation and review of the earnings release as discussed above, ensure the text of the Form 8-K report complies with Regulation G, Item 10(e) of Regulation S-K and Instruction 2 to Item 2.02 of Form 8-K if the earnings release or any disclosure in the body of the Form 8-K includes any non-GAAP measures (often times the disclosure in the Form 8-K just refers to the earnings release). Also, if the Form 8-K contains substantive disclosure, review it for the other items contained in this Guide.
- No separate Item 2.02(b) disclosure is required for oral disclosure of earnings information (e.g., call/webcast) if:
 - (1) call/webcast is complementary to and occurs within 48 hours after issuance of the related written release or announcement and (2) the company furnishes announcement or 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. See SEC Exchange Act Form 8-K Compliance and Disclosure Interpretation [Question 106.02](#). 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 the company does not furnish the Form 8-K report within the requirements for reliance on the exception for oral statements made during the earnings call or webcast:

Earnings Release Compliance Guide

- the earnings release must be furnished under Item 2.02 within four business days after issuance; and
- the company must also furnish an Item 2.02 Form 8-K for the call/webcast, 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 Item 2.02 Form 8-K with the press release and the transcript of the call/webcast filed as exhibits.
- Confirm 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](#).

Earnings Guidance

Frequency of guidance

- In terms of the frequency of guidance, there is no one-size-fits-all answer. The key is to be consistent with past practice. For newly public companies, management needs to determine whether the company wants to give guidance, and, if so, whether to provide it on a quarter-by-quarter basis or on a year-by-year basis, and how far forward the company wants to provide projected results. Some businesses are stable and predictable. For them, predicting earnings on a quarter-by-quarter basis may be an option. A company with a predictable earnings stream is in a very different position than a company with unpredictable operating results. Businesses with lumpy revenue streams or that experience seasonality or weather issues may not feel they can make quarterly projections prudently.

According to a [2018 Policy Statement from the National Investor Relations Institute](#) (NIRI), the practice of providing quarterly guidance is increasingly rare as companies have shifted to communicating guidance on long-term strategy and value drivers. Most guidance-giving companies provide annual estimates only – which are typically communicated on a quarterly basis. The most common frequency for communicating/updating estimates is on a quarterly basis. Even the most stable businesses typically elect not to provide earnings guidance beyond the year in progress, although some businesses will provide long-term estimates or goals for longer periods.

Form and Scope of Guidance

- There is no limit to the forms that guidance can take. Any guidance given should be on a metric that the company feels comfortable it can accurately predict and that will remain a viable metric for guidance over time.

NIRI's Policy Statement on Guidance Practices recommends that companies provide long-term guidance (one year or longer) on a consistent set of financial and non-financial metrics that, together, constitute the key long-term value drivers of the business. NIRI also encourages providing a range of reasonable potential outcomes for each timeframe and metric.

Some companies will guide investor expectations by giving a range of anticipated earnings per share metrics or simply by saying that they are "comfortable with the Wall Street analysts' consensus" regarding earnings per share for the year. However, explicitly blessing a specific analyst's estimate can be viewed under the case law as "adopting" it, which has the same liability considerations as issuing guidance directly. This casual approach to guidance usually does not offer an opportunity to include appropriate cautionary disclosure.

Many companies prefer to provide the market with forecasts of an Adjusted Net Income or Adjusted EBITDA metric that excludes the impact of expected (or unexpected) non-recurring, non-cash and/or unusual items. Adjusted measures of operating performance are easier to predict accurately since they are unaffected by many of the income statement items that impact earnings per share. Note that public release of these non-GAAP financial measures will need to comply with Regulation G and Item 10(e) of Regulation S-K (to the extent applicable).

Other companies stop their numerical guidance at the revenue line, projecting only a targeted revenue growth in percentage terms. Revenue-only guidance may be supplemented with a comment about profit margins. Still another form of guidance involves non-financial measures. There are multiple forms that guidance can take. What is appropriate for one company in one industry may be totally inappropriate for another company, even one in the same industry.

Revising, Pulling, or Discontinuing Guidance

Background

- As discussed, earnings guidance is information provided by the management of a publicly traded company regarding its expected future results, including estimates of revenues, expenses, margins, and earnings. However, from time to time, companies revisit their earnings guidance practices and decide to suspend or terminate providing guidance or reduce the frequency of their guidance (e.g., from quarterly to annual). This trend is usually accelerated with deteriorating or unpredictable economic conditions such as those that transpired in 2020 with the COVID-19 global pandemic and the resulting supply chains issues.

Earnings Release Compliance Guide

Considerations

- Changes in guidance practice must be announced in a Regulation FD-compliant manner. For example, if a company is going to announce the change on an earnings call, it should issue a press release well in advance of the call providing details on how the public can access the call. For consistency sake, we recommend making the announcement in the same manner, e.g., Form 8-K or press release, in which guidance was given.
- The disclosure needs to provide the reason for the change in guidance practices. For example, if the reason guidance is being discontinued relates to uncertain economic conditions, a starting point for this disclosure could be: “Due to the economic uncertainty and unpredictability [of retail markets, foreign exchange rates, etc.] [of the COVID-19 global pandemic] forecasting our full year results would be difficult at this time. Therefore, we have made a decision to discontinue annual guidance until conditions normalize and long term visibility improves.”
- If previously issued guidance is being pulled and should no longer be relied upon, ensure that the press release provides the reasons why guidance is being pulled.
- If previously issued guidance is being revised, ensure that the press release provides the reasons why guidance is being revised.
- 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.

Duty to Update

- As a quarter or year progresses, companies need to consider whether there’s a need to update previous earnings guidance. This is complicated and depends very much on the facts and circumstances at hand, including a review of what was said in the first place and whether the company is in the middle of selling or purchasing its own securities.

Although the PSLRA explicitly states that it does not “impose upon any person a duty to update a forward-looking statement,” some courts have suggested that a duty to update may apply if events transpire that cause a company’s prior disclosure to become materially inaccurate, even though that prior disclosure was accurate when made. There is no requirement that a public company immediately make public all material facts that come into its possession on a real-time basis, but where a public company’s affirmative and definitive prior statement becomes clearly and materially false, it should consider issuing a clarifying, correcting or updating statement.

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