



GOODWIN

# Public Company

ADVISORY PRACTICE

## Earnings Release Review Checklist

**By: Sean M. Donahue and Folake K. Ayoola**

This document has been prepared to assist with the review of earnings releases and related Form 8-K disclosure. This document is supplemented by a separate Earnings Release Review Guide that contains more detailed information about matters discussed in this checklist and is available on our website.

The summaries of Securities and Exchange Commission (SEC) rules, Form 8-K requirements, and applicable guidance and interpretations in this document are not a substitute for review of the actual regulatory and interpretive text, nor are these summaries a substitute for the advice of qualified legal and accounting professionals.

Set forth below are the tasks that should generally be performed upon receiving a draft earnings release and related Form 8-K.

### Procedural Considerations

- Your review should include analysis of drafts of the Form 8-K, the call/webcast script, and any accompanying slide deck.
- Your review should also include ensuring that the company's timetable for issuing the earnings call announcement press release, the earning press release, and the related Form 8-K are consistent with SEC regulations and market practices.
  - Generally, the Form 8-K should be filed after the market closes on the evening before the call/webcast or before market opens on the day of the call/webcast.
    - 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.

### Substantive Considerations

- Determine whether the documents contain any **non-GAAP financial measures**. Refer to Goodwin's Earnings Release Review Guide, in this regard.
  - If you see a non-GAAP measure in the earnings release headline that is not preceded by the comparable GAAP measure (the "equal or greater prominence requirement"), comment on it. 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)(i) by ensuring that the comparable GAAP measures are presented with equal or greater prominence than the comparable non-GAAP measures.

- 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. Note also that a full non-GAAP income statement also fails the equal or greater prominence test. See Non-GAAP Financial Measures C&DI [102.10](#) for other examples, in this regard.
  - If the draft earnings release fails to explain why certain non-GAAP measures are useful to investors, comment on it. 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.
  - If a company excludes a quantitative reconciliation for a forward-looking non-GAAP measure 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.
- Determine if **key performance indicators** in the earnings release were also disclosed in the prior periodic report (10-K/10-Q).
- Review any key performance indicators for consistency across quarters and with the prior annual fiscal year.
  - Ensure that the key performance indicators are accompanied by:
    - 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.
- Assess the adequacy of **forward-looking statement disclaimers**.
- Confirm that forward-looking statements are appropriately identified, e.g., a “Forward-looking Statements” subheading or “The following forward-looking statements . . .”
  - 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.
  - Review and update the forward-looking statement disclaimer for the specific forward-looking statements that are made in the earnings release/slide deck/call script.
  - Ensure that there are sufficient “meaningful cautionary statements” in the disclaimer that *specify* conditions/factors that could cause actual results to differ from those projected in the forward-looking statements. Avoid boilerplate language.
- Ensure that the company has provided **proper public notice of the earnings call**, pursuant to Regulation FD and Item 2.02 of Form 8-K.
- Confirm that the company has issued or will issue 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.
  - Confirm that the press release included instructions as to when and how to access the earnings call and the website location where related information is or will be available. (See Regulation FD C&DI [102.01](#))

- 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 providing information for investors on its website.
- Confirm **factual assertions** and encourage a practice of compiling relevant backup.
- Reconcile the earnings release with the draft of the periodic report for the same period. If there are material differences, the company should include the "trend" disclosure in the periodic report.
    - Companies sometimes provide more "color" in the earnings release than in MD&A, which can draw an SEC comment seeking the same "trends" disclosure in the MD&A. The failure to disclose a trend in the periodic report that is disclosed in the earnings release has also resulted in SEC enforcement actions.
  - For factual assertions (e.g., market leadership, best quarter ever), confirm with the client that there is data or documentation to support the assertion and encourage the client to compile and store such information.
  - For statements of opinion, ensure that the language properly clarifies that it is an opinion rather than a factual assertion (e.g., use "we believe").
  - For definitive commitments or predictions, e.g., the company "will" achieve or do something, consider whether "expects," "anticipates" or "intends" to do something, or "we believe" is more appropriate.
- Review the **draft Form 8-K** for compliance with current requirements.
- Ensure that the cover page complies with the current SEC Form 8-K requirements.
  - Confirm that relevant Form 8-K Items are identified for the earnings release, i.e., Items 2.02 and 9.01.
    - Often the Item 2.02 disclosure notes the announcement of financial results and refers readers to the earnings release filed as an exhibit.
    - If Item 2.02 contains substantive disclosure, consider whether the disclosure complies with SEC rules relating to non-GAAP financial measures, i.e., Regulation G, Item 10 (e)(1)(i) of Regulation S-K, and is in conformance with other disclosure matters discussed in this Checklist.
    - Ensure that all required exhibits are listed, including an Exhibit 99.X for the earnings press release and an Exhibit 104 for Inline XBRL formatting.
  - Confirm that the signature page is dated and the conformed signature of an authorized officer is shown.
  - Assess whether Item 2.02(b) disclosure is required for oral statements made on the earnings call.
  - Item 2.02(b) disclosure is not required if:
    - (1) the call/webcast is complementary to and occurs within 48 hours after the earnings release is issued and (2) the company furnishes the earnings release on Form 8-K pursuant to Item 2.02 before the call/webcast;
    - the call/webcast is broadly accessible to the public;
    - financial and statistical information mentioned in the call/webcast is provided on the company's website, together with any information that is required under Regulation G; and

- the 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 Form 8-K with the earnings release must appear on the company's EDGAR filing page prior to the call/webcast for the Item 2.02(b) safe harbor to apply. Also note that Form 8-K EDGAR filings submitted after 5:30 p.m. Eastern Time are not publicly available until 6:00 a.m. Eastern Time on the following business day.
- If the Form 8-K with the earnings release is not filed prior to the earnings call/webcast, the Item 2.02(b) safe harbor is not available. In such a case:
  - the earnings release must be furnished under Item 2.02(a) within four business days after issuance; and
  - the company must also furnish an 8-K for the call/webcast pursuant to Item 2.02(b), together with a summary of any material information disclosed during the call or webcast.
    - In practice, companies usually satisfy this requirement by furnishing a transcript of the earnings call/webcast as an exhibit to the Form 8-K. Thus, the company can 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.

#### Earnings guidance

- If the company provides earnings guidance (i.e., financial forecasts/expectations), comment on any inconsistent guidance practices, e.g., use of different measures from quarter to quarter.
- If the company is revising, pulling (i.e., retracting), or discontinuing earnings guidance, ensure that there is an appropriate discussion of the reasons for the company's action.
- Assess whether the change in guidance practice is announced in a Regulation FD-compliant manner, e.g., on a previously announced and broadly accessible earnings call. Refer to the Earning Release Review Guide.
  - 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, assess whether an Item 2.02 Form 8-K is required if any specifics are given about the just-ended quarter's operating results and/or the company's financial condition.

#### **Additional Considerations**

- Listen to the earning call – this will help you understand the company's investor relations strategy and how analysts are thinking about its business and financial condition.