



GOODWIN

# Public Company

ADVISORY PRACTICE

## Earnings Release Review Guide

By: Sean M. Donahue and Folake K. Ayoola

## Table of Contents

<b>Introduction</b>	<b>3</b>
<b>Background</b>	<b>3</b>
<b>Summary Chronology: Release of Operating Results</b>	<b>3</b>
<b>Earnings Release Review Guidance</b>	<b>7</b>
Safe Harbors and Forward-Looking Statements.....	7
Non-GAAP Financial Measures.....	8
Key Performance Indicators .....	11
Proper Notice under Regulation FD.....	11
<b>Form 8-K Review Guidance</b>	<b>13</b>
<b>Earnings Call Scripts and Related Investor Presentations</b>	<b>14</b>
<b>Earnings Guidance</b>	<b>15</b>
Frequency of guidance .....	15
Form and Scope of Guidance.....	15
Revising, Pulling, or Discontinuing Guidance .....	15
Duty to Update .....	16

## Background

Neither the SEC nor the stock exchanges require public companies to issue earnings releases or earnings guidance. Earnings releases provide the securities markets with advance notice of periodic operating results prior to the filing of required reports, i.e., the Form 10-K and Form 10-Q. Earnings guidance informs the securities markets of the company's operating and earnings expectations for future periods and, thus, can provide insight regarding management's priorities. Investors and analysts value such disclosures in evaluating public company performance, assessing outlook, and determining estimates and valuations, as applicable.

There are various federal securities law considerations that are relevant to the issuance of earnings releases and earnings guidance, including:

- Regulation FD (Fair Disclosure), which applies to selective disclosure of material nonpublic information to certain persons and mandates that such information be disclosed to the public simultaneously or promptly;
- Section 21E of the Securities Exchange Act of 1934 ("Exchange Act"), which provides a safe harbor from liability for forward-looking statements;
- Regulation G and Item 10(e) of Regulation S-K, which regulate disclosure of non-GAAP financial measures;
- Item 2.02 of Form 8-K, which requires the disclosure of material non-public information about a completed fiscal year or quarter; and
- Exchange Act Rule 10b-5, which prohibits manipulative and deceptive practices, including false statements of a material fact or the omission of a material fact necessary to make statements made, in the light of the circumstances under which they were made, not misleading.

## Summary Chronology: Release of Operating Results and Financial Condition

A company's release of operating results for a completed quarterly or annual fiscal period must comply with applicable federal securities laws. The following approaches to such release would satisfy applicable securities law requirements:

Alternative 1:

**Step 1:** Issue a press release that announces the date earnings will be released and the date of a related earnings call, or webcast information, that is accessible to the public

**Step 2:** Issue the earnings release

**Step 3:** Furnish a Form 8-K under Item 2.02 with the earnings release provided as an exhibit under Item 9.01.

**Step 4:** Post non-GAAP financial measure reconciliation on company's website, as needed

**Step 5:** Hold earnings call/webcast within 48 hours of issuance of the earnings press release (see SEC Form 8-K CDI [206.01](#), which affirms that the timeline does not pertain to business or calendar days)

**Step 6:** Keep replay of call/webcast (and any other materials provided in the call/webcast (e.g., slides, power point)) posted on the company’s website for 12 months

**Step 7:** Retain financial and statistical information discussed on the earnings call/webcast for 12 months

Alternative 2:

**Step 1:** Issue a press release that announces the date earnings will be released and the date of a related earnings call, or webcast information, that is accessible to the public

**Step 2:** Issue the earnings release

**Step 3:** Post non-GAAP financial measure reconciliation on company’s website, as needed

**Step 4:** Hold earnings call/webcast

**Step 5:** Furnish a Form 8-K under Item 2.02 with the earnings release and call/webcast transcript<sup>1</sup> (and any other materials provided in the call/webcast (e.g. power point slides) provided as exhibits under Item 9.01.

**Step 6:** Retain financial and statistical information discussed on the earnings call/webcast for 12 months

The following table summarizes these steps and related federal securities law considerations.

Actions	Federal Securities Law Considerations
<p><b>Step 1</b> Issue a press release several days in advance of the earnings call (e.g., one to two weeks) announcing:</p> <ul style="list-style-type: none"> <li>• the date and time of the call/webcast;</li> <li>• subject matter for call/webcast (broad enough to cover anticipated topics);</li> <li>• how to access the call/webcast; and</li> <li>• the location on the company’s website where financial and other statistical information to be discussed during the call will be available.</li> </ul>	<p><b>Regulation FD.</b> 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><b>Form 8-K, Item 2.02(b).</b> A Form 8-K related to the content of the earnings call will not be required if, among other things, the registrant announces the call by a widely disseminated press release that includes instructions as to when and how to access the call and the website location where the information will be available.</p>
<p><b>Step 2</b> Issue the earnings release no more than 48 hours prior to the earnings call.</p>	<p><b>Form 8-K, Item 2.02(b).</b> A Form 8-K related to the content of the earnings call will not be required if, among other things, the registrant issues the earnings release within 48 hours prior to the earnings call.</p>

<sup>1</sup> Under Alternative 1, a company does not need to file the earnings call/webcast transcript with the SEC. Most companies use this approach, which is permitted pursuant to Item 2.02(b) of Form 8-K.

<p><b>Step 3 (Alternative 1)</b> Furnish earnings release to the SEC on Form 8-K, prior to the earnings call, under Items 2.02 and 9.01.</p>	<p><b>Form 8-K, Item 2.02(a).</b> 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. The earnings release should be furnished under Item 9.01.</p> <p><b>Form 8-K, Item 2.02(b).</b> A Form 8-K related to the content of the earnings call will not be required if, among other things, the registrant furnishes the earnings release on Form 8-K prior to the call. Note that the earnings release has to actually appear publicly on EDGAR for this requirement to be met.</p>
<p><b>Step 4 (Alternative 1)</b> <b>Step 3 (Alternative 2)</b> Prior to the earnings call, post on the company's website financial and statistical information, including information related to any non-GAAP financial measures, that the company intends to discuss during the earnings call.</p>	<p><b>Form 8-K, Item 2.02(b).</b> A Form 8-K related to the content of the earnings call will not be required if, among other things, the registrant posts this information on its website.</p> <p><b>Regulation G.</b> 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 the comparable GAAP financial measure and the reconciliation information on its website and disclose during the presentation the location of the information on its website.</p>
<p><b>Step 5 (Alternative 1)</b> <b>Step 4 (Alternative 2)</b> Host earnings call/webcast within 48 hours of issuing earnings press release</p> <p>Company should inform participants that:</p> <ul style="list-style-type: none"> <li>• certain statements will be forward-looking;</li> <li>• actual results may differ materially from the results projected in the forward-looking statements;</li> <li>• non-GAAP financial measures will be discussed; and</li> <li>• there are factors that could cause actual results to differ materially and a discussion of such factors can be found in specified SEC filings of the company (e.g., Form 10-K).</li> </ul> <p>Company should inform participants of the location on the company's website of the earnings release</p>	<p><b>PSLRA/Exchange Act Section 21E.</b> A registrant will not be liable in a private action with respect to an oral forward-looking statement based on an untrue statement or omission of a material fact necessary to make the statement not misleading if, among other things, such oral statement is accompanied by "meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement." Such cautionary statement must indicate that the oral statement is a forward-looking statement and that actual results may differ materially from those projected in the forward-looking statement.</p> <p><b>Regulation G.</b> 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 (see the preceding <b>Step</b>)</p>

and other information, including information related to any non-GAAP financial measures, to be discussed during the earnings call.	and disclose, during the presentation, the website location of the information.
<b>Step 6 (Alternative 1)</b> Post replay or transcript  Company should post a replay or transcript of the earnings call on the company's website and it should remain posted for 12 months after the earnings call (see below).	<b>Regulation FD.</b> 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.
<b>Step 5 (Alternative 2)</b> Furnish a Form 8-K under Item 2.02, with the earnings release and earnings call/webcast transcript (and any other materials provided on the call/webcast (e.g. power point slides) provided as exhibits under Item 9.01.	<b>Form 8-K, Items 2.02 and 9.01.</b> Under Alternative 2, the earnings release is not furnished on Form 8-K prior to the earnings call/webcast. Given that, this Form 8-K needs to be filed within four business days of the earnings release.
<b>Step 7 (Alternative 1)</b> <b>Step 6 (Alternative 2)</b>  Company should archive financial and statistical 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.	<b>Form 8-K and Regulation G.</b> 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.

## Contents of the Earnings Release

The following table describes typical contents of earnings releases and applicable securities law considerations.

Contents	Securities Law Considerations
Results of Operations and Financial Condition	<b>Exchange Act Rule 10b-5</b> , which prohibits false and misleading statements.
Access details: <ul style="list-style-type: none"> <li>the date and time of the earnings call;</li> <li>how to access the call; and</li> <li>the location on the company's website where financial and other statistical information to be discussed during the call will be available.</li> </ul>	<b>Form 8-K, Item 2.02(b).</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).
Safe harbor statement that: <ul style="list-style-type: none"> <li>expressly identifies any forwarding-looking statements; and</li> <li>provides meaningful cautionary statements identifying important factors that could cause actual results to differ materially from the</li> </ul>	<b>PSLRA/Exchange Act Section 21E.</b> 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

results projected in the forward-looking statements.	statement and satisfies the other requirements of Section 21E.
<p>Information for each non-GAAP financial measure:</p> <ul style="list-style-type: none"> <li>the most directly comparable GAAP measure, with equal or greater prominence;</li> <li>a reconciliation to the GAAP measure;<sup>2</sup></li> <li>a statement disclosing why management believes the non-GAAP measure is useful to investors; and</li> <li>a statement disclosing the additional material purposes for which management uses the non-GAAP measure, if any.</li> </ul>	<p><b>Regulation G.</b> 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><b>Form 8-K, Item 2.02 and Regulation S-K Item 10(e).</b> 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>
Website location of the replay or transcript of the earnings call and the length of time it will be available after the earnings call.	<b>Regulation FD.</b> 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.

## Earnings Release Review Guidance

### Safe Harbors and Forward-Looking Statements

#### Regulatory Framework

The Private Securities Litigation Reform Act of 1995 (PSLRA) provides safe harbors in Section 27A of the Securities Act and Section 21E of the Exchange Act for forward-looking statements. To get the benefit of the safe harbor the statement must be identified as a forward-looking statement, and be accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement.

Companies have successfully argued in federal litigation that where there is appropriate use of meaningful cautionary language for forward-looking statements such statements do not give rise to liability.

Some federal courts have declined to allow the protections of the PSLRA’s safe harbor where risk disclosures did not change over time or did not identify the risks that ultimately caused the projection not to come to pass.

Review approach: focus on adequacy of cautionary statements and whether they are sufficiently specific.

<sup>2</sup> For forward-looking non-GAAP measures, to the extent available without unreasonable efforts.

- Review and update the forward-looking statement disclaimer for the specific forward-looking statements that are made in the earnings release or that are to be made in the earnings call/webcast. Identify specific economic, financial, or operational developments that should be reflected in such disclaimer.
- Avoid boilerplate cautionary language for forward-looking statements. The language should be specifically tailored for each material forward-looking statement and the cautionary language should be dynamic over time. Cautionary language should identify specific areas of heightened risk or specific known uncertainties.
- Confirm that “meaningful cautionary statements” accompany the forward-looking statements and are not incorporated by reference.
- If there are assumptions on which earnings guidance is based, it is important that the cautionary language specially references such assumptions.
- Ensure that affirmative predictions (e.g., “will achieve”) are instead framed as aspirations (e.g., expects/anticipates/intends to achieve).

## **Non-GAAP Financial Measures**

### Background

Companies use non-GAAP financial measures as a supplement to their financial statements prepared in accordance with US generally accepted accounting principles (GAAP) to provide a different perspective of their financial results and financial position. 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 non-GAAP financial measure can pertain to historical or future financial performance, financial position, or cash flows.

A financial measure becomes a non-GAAP financial 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. 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
- Adjusted revenues
- Free cash flow - typically calculated as cash flows from operating activities less capital expenditures

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) (discussed below).
- Statistical or operating measures that are not financial measures are not subject to Regulation G or Item 10(e).

### Regulatory Framework

Regulation G and Item 10(e) of Regulation S-K set forth the SEC disclosure rules for non-GAAP financial measures.

Regulation G applies to all public disclosures of material information that includes a non-GAAP financial measure, 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, the reconciliation should be provided to the extent available without unreasonable efforts.

Item 10(e) applies to non-GAAP measures in all SEC filings. While Item 2.02 Form 8-K reports are typically furnished and not filed, an instruction to Item 2.02 specifies that Item 10(e)(1)(i) applies to such disclosure. When a non-GAAP financial measure is provided in this context, Item 10(e)(1)(i) requires:

- an equally or more prominent presentation of the most directly comparable GAAP measure (or measures);
- a quantitative reconciliation of each non-GAAP measure to the comparable GAAP measure; for forward-looking non-GAAP measures the reconciliation should be provided to the extent available without unreasonable efforts;
- a statement regarding why management believes that each non-GAAP financial measure provides useful information to investors; and

- a statement regarding additional purposes for which management uses each non-GAAP measure, if any, and only to the extent material, and not already disclosed in response to the disclosure requirement in the immediately preceding bullet.

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 a 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)(1)(ii), which is included here for the sake of completeness and because it represents a disclosure best practice, 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.

Review approach: focus on equal or greater prominence and reconciliation

If the earnings release headline includes a non-GAAP financial measure that is not preceded by the comparable GAAP financial measure (the “equal or greater prominence requirement”), comment that the GAAP financial measure must precede the non-GAAP financial measure in the headline.

Review the text, charts, and tables to confirm compliance with Item 10(e)(1)(i) by ensuring that the comparable GAAP financial measures are presented with equal or greater prominence than the non-GAAP financial measures.

Confirm that each non-GAAP financial measure in text, charts or tables, including any ratio that includes one or more non-GAAP financial measures, is reconciled to the comparable GAAP financial measure. Comment if the reconciliation is missing.

Ensure that statements regarding non-GAAP financial measures identify where the required reconciliations can be found.

Confirm that non-GAAP financial measures in bullet points are preceded by the comparable GAAP financial measure. See SEC Staff CDI [102.10](#), which presents other examples of disclosures that would

not meet the equal or greater prominence requirement, including a full income statement of non-GAAP financial measures.

Ensure that there is an explanation regarding why the non-GAAP measures are useful to investors and, if applicable, other purposes for which the company's management uses the non-GAAP financial measures.

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), ensure that such reliance is disclosed and identify the information that is unavailable and its probable significance in a location of equal or greater prominence.

Confirm that internal financial/accounting staff and the independent auditors have reviewed the disclosure.

Additional guidance can be found in:

- SEC Corp Fin's [non-GAAP Compliance and Disclosure Interpretations](#)
- Topic 8 of the Corp Fin [Financial Reporting Manual](#)

### **Key Performance Indicators and Metrics**

Key performance indicators ("KPIs") and other metrics encompass key variables and qualitative and quantitative factors that are specific to a company that management uses to manage the company's operations and are necessary to understand and evaluate the business. See the SEC's 2020 [Interpretive Release](#).

If an earnings release includes KPIs, consider if the same KPIs are consistently disclosed across quarters and other disclosure documents. If not, ask why that is the case. Examples of KPIs and other metrics include same store sales, sales per square foot, revenue per subscriber, and total energy consumed.

KPIs and other metrics that do not meet the definition of a non-GAAP financial measure are not subject to Regulation G or Item 10(e) of Regulation S-K.

Consider if additional information is necessary to provide adequate context for an investor to understand the KPI or metric presented. In this regard, the SEC generally expects the following disclosures to accompany any 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](#) to address the practice of public companies selectively disclosing material nonpublic information to certain persons (generally, securities market professionals and certain institutional investors) before publicly disclosing such information. Under this regulation, if disclosure is made to such persons, disclosure to the public is required simultaneously (if disclosure was intentional) or promptly (if disclosure was unintentional). The SEC's primary concern was that selective disclosure of material nonpublic information, and the perception of selective disclosure to analysts and institutional investors, erodes 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.

Among other methods, the public disclosure element of Regulation FD could be met by filing or furnishing a Form 8-K or issuing a press release carried through a widely circulated news or wire service such as Dow Jones, Bloomberg, Business Wire, PR Newswire or Reuters.

In 2008, the SEC provided [guidance](#) regarding how to satisfy the public disclosure requirement of Regulation FD with website disclosure. Among other things, in considering whether information is public, a company should analyze whether:

- its website is a recognized distribution channel for information about the company, its business, financial condition, and operations
- posting on its website will result in dissemination that makes information available to the securities marketplace in general
- a reasonable waiting period has occurred for investors and the securities marketplace to react to the posted information

In 2013, the SEC issued a Section 21(a) [Report of Investigation](#) in which the SEC affirmed that a company may use social media to disclose material nonpublic information to investors without violating Regulation FD provided the company makes investors, the market, and media aware in advance of which social media channels it expects to use so that they know where to find information or what they need to do to receive information.

Review approach: focus on advance notice of information channels

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 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 Review Guidance

### Regulatory Framework

Item 2.02(a) 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)

A Form 8-K is not required to be furnished to the SEC under Item 2.02(b) 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 occurs within 48 hours after, a related, written announcement or release has been furnished on Form 8-K 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;
- the financial and other statistical information contained in the presentation is posted on the company's website, together with any information that would be required under Regulation G, i.e., the comparable GAAP financial measure and a quantitative reconciliation; and
- the presentation was announced in advance by a widely disseminated press release, which included dial-in or access instructions and the location on the company's website where the information would be available

Review approach: focus on Form compliance and EDGAR submission timelines

In most cases, the earnings release Form 8-K is submitted to EDGAR 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.)

Review the Form 8-K report for compliance with Regulation G and Item 10(e) of Regulation S-K if the earnings release or any disclosure in the body of the Form 8-K includes non-GAAP financial measures (often times, the disclosure in the body of Form 8-K just refers to the earnings release filed as an exhibit). If the body of the Form 8-K contains substantive disclosure, review it with reference to the matters discussed in this Guide.

With respect to the availability of the Item 2.02(b) safe harbor for oral statements made on the earnings call/webcast, confirm that the earnings press release will be filed and appear on the company's EDGAR filing page in advance of the earnings call/webcast. (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.)

If a company chooses not to rely on the Item 2.02(b) safe harbor, confirm that:

- the earnings release will be submitted to EDGAR under Item 2.02 within four business days after issuance; and
- the company will provide disclosure pertaining to the content of the earnings call/webcast, including a summary of any additional material information disclosed during the earnings 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. Thus, a 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.

Review the Form 8-K draft for compliance with the [current SEC version of the Form](#), including, but not limited to:

- Cover page: confirm that the cover page complies with the current Form.
- 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 Call Scripts and Related Investor Presentations

Review the earnings call script and presentation for compliance with the above guidance related to the earnings release.

Ensure that the script and presentation are consistent with the earnings release, as well as consistent with the periodic report for the quarter, to the extent that it has been provided for review.

## Earnings Guidance

### Background

Earnings guidance is information provided by management of a publicly traded company regarding its expected future results, including estimates of revenues, expenses, margins, and earnings. In addition, earnings guidance gives the market insight into management's vision by the way it has defined its short-term and long-term goals.

### Frequency of guidance

For established companies, determine historic practice and assess consistency; for newly public companies, determine the period for which the company wants to provide earnings guidance and how often it wants to provide such guidance. In recent years, most companies that provide guidance give annual guidance that is communicated on a quarterly basis.

Each company will need to evaluate for itself based on its unique circumstances whether to provide earnings guidance and the best approach to providing such guidance. Once an approach is established, it is critical that guidance be given in a consistent manner and if changes to guidance practices are made such changes are explained.

### Form and Scope of Guidance

Confirm that the company issues a consistent set of metrics. Note that 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.

Confirm that the public release of any non-GAAP financial measures complies with Regulation G and Item 10(e) of Regulation S-K (to the extent applicable).

Many companies provide non-GAAP financial measures in their earnings guidance rather than providing GAAP measures.

### Revising, Pulling, or Discontinuing Guidance

#### Background

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 pandemic.

Review approach: focus on how changes are communicated and if the reason(s) for such changes is(are) sufficiently explained

Ensure that any change in guidance practice is announced in a Regulation FD-compliant manner. For example, if a company is going to announce the change on an earnings call/webcast, it should issue a press release well in advance of the call/webcast providing details on how the public can access the call/webcast. For consistency sake, we recommend making any such announcement in the same manner in which guidance was given, e.g., Form 8-K or press release.

Confirm that the press release provides the reason for any 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 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 revised or pulled and should no longer be relied upon, ensure that the press release provides the reasons why guidance is being pulled.

If the announcement of the change in guidance practice will not be part of an earnings call/webcast and will take place shortly after the end of a quarter, determine whether an Item 2.02 Form 8-K is required if any specifics are given about the just-ended quarter’s results.

### **Duty to Update**

Consider whether there is a need to update previous earnings guidance. This is a fact intensive analysis that includes a review of the nature of the prior guidance, as well as what other actions the company is taking or planning on taking, such as whether the company is conducting a securities offering or repurchasing its securities and whether insiders are making purchases or sales of the company’s securities. Consideration should also be given to whether a company needs to update guidance to be able to communicate accurately with investors and analysts about the company as such conversations may become difficult or impossible to have without updating guidance that is no longer accurate.

This informational piece, which may be considered advertising under the ethical rules of certain jurisdictions, is provided on the understanding that it does not constitute the rendering of legal advice or other professional advice by Goodwin Procter or its lawyers. Prior results do not guarantee a similar outcome. Goodwin Procter is an international legal practice carried on by Goodwin Procter LLP and its affiliated entities. For further information about our offices and the regulatory regimes that apply to them, please refer to [www.goodwinlaw.com/legal-notices](http://www.goodwinlaw.com/legal-notices).

© 2022 Goodwin Procter. All rights reserved