

Earnings Releases: Legal Requirements & Practice Tips

Public Company Advisory Practice (PCAP)

Sean M. Donahue
David H. Roberts
Gail A. Pierce
October 2022



Overview

- Earnings Releases: Generally
- Earnings Releases: Typical Contents
- Earnings Releases: Typical Process Surrounding Release
- Federal Securities Law Considerations
- Regulation FD: Avoiding Selective Disclosure
- Section 21E: Safe Harbor for Forward-Looking Statements
- Non-GAAP Financial Measure Topics
- Form 8-K: Earnings Release Disclosure Requirement
- Earnings Call/Webcast Considerations
- Earnings Guidance Considerations
- Key Performance Indicators
- Earnings Release: Key Review Tips

Earnings Releases: Generally

- Companies issue earnings releases to satisfy market pressure for such information in advance of the filing of quarterly reports on Form 10-Q and annual reports on Form 10-K.
- In addition to historical information, some earnings releases also include earnings guidance, i.e., projections/forecasts regarding the company's future operating results.
- Earnings releases are not required by the SEC or the national securities exchanges. There are, however, various federal securities law considerations relevant to the issuance and content of earnings releases and earnings guidance.
- Earnings releases are typically followed by an earnings call/webcast, during which management will present and discuss operating results, and may present guidance.
- Typically, earnings releases are issued via a wire service and soon after furnished to the SEC. In some cases, though, companies furnish the earnings release to the SEC after the call but within four business days of issuance.

Earnings Releases: Typical Contents

- Results of operations, financial condition, earnings guidance, and possibly key performance indicators.
- A safe harbor statement that expressly identifies forward-looking statements and provides cautionary statements identifying important factors that could cause actual results to differ materially from the results projected in forward-looking statements.
- Access details for a related earnings call/webcast, i.e., the date and time of the earnings call; how to join the call; and the location on the company's website where financial and other statistical information to be discussed during the call/webcast will be available.
- If non-GAAP financial measures are included: the most directly comparable GAAP measure, with equal or greater prominence; a reconciliation to the comparable GAAP measure; a statement disclosing why management believes the non-GAAP measure is useful to investors; and a statement disclosing any additional material purposes for which management uses the non-GAAP measure.
- The website location of the replay or transcript of the earnings call and the length of time it will be available after the earnings call/webcast.

Earnings Releases: Typical Process Surrounding Release

- Step 1: Announce when earnings will be released, the time of the related earnings call/webcast, and how the public can gain access to the call/webcast.
- Step 2: Issue the earnings release in advance of the call/webcast; the press release should be publicly available before proceeding to the next step.
- Step 3: Furnish the earnings release in an Item 2.02 Form 8-K to the SEC, with the earnings release provided as an exhibit under Item 9.01; this Form 8-K should be reflected on EDGAR before the call/webcast begins.
- Step 4: Post on the company's website a reconciliation for any non-GAAP financial measure that will be discussed on the call/webcast; this information should be live before the call/webcast begins.
- Step 5: Hold the call/webcast within 48 hours of issuing the earnings release.
- Step 6: Post replay or transcript of the call/webcast (and related materials provided during the call/webcast (e.g., power point slides)) on the company's website and retain there for 12 months.

Federal Securities Law Considerations

- Regulation FD (Fair Disclosure) is relevant when there is selective disclosure of material non-public information to certain persons; it mandates that such information be disclosed to the public simultaneously or promptly.
- Section 21E of the Securities Exchange Act of 1934 is relevant if the earnings release contains forward-looking statements; it provides a safe harbor from liability for such statements.
- Regulation G and Item 10(e) of Regulation S-K are relevant if the earnings release includes non-GAAP financial measures.
- Item 2.02 of Form 8-K requires disclosure if a company announces material non-public information about its operations results or financial condition for a completed fiscal year or quarter.
- Exchange Act Rule 10b-5 prohibits false statements pertaining to a material fact or the omission of a material fact necessary to make statements made not misleading, in connection with the purchase or sale of a security.

Regulation FD: Avoiding Selective Disclosure

- Regulation FD was adopted to address the selective disclosure of material non-public information by public companies to certain securities market professionals and investors, which persons are enumerated in the Regulation.
- If disclosure is made to such persons, public disclosure is required simultaneously (if disclosure was intentional) or promptly (if disclosure was unintentional).
- Material nonpublic information disclosed during an earnings call/webcast that was properly noticed will not be regarded as selective disclosure.
- Proper notice should be issued, see Step 1 above, several days in advance of the earnings call (e.g., one to two weeks) and such notice should clearly state that the company may discuss or disclose material business, financial or other information that is not contained in the earnings release.
- If the company intends to use its website as a Regulation FD-compliant disclosure method, the notice and earnings release must alert investors of the company's practice of periodically providing information for investors on its website.
- For earnings releases, the public disclosure requirement of Regulation FD can be satisfied by issuing the release via a wire service or furnishing the release on Form 8-K.

Section 21E: Safe Harbor for Forward-Looking Statements

- Section 21E of the Securities Exchange Act provides a safe harbor from liability in a private action for oral and written forward-looking statements made by public companies.
- The safe harbor applies if the forward-looking statement is identified as such, and “is accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement.”
- A forward-looking statement includes a statement that projects revenues, income, and earnings; a statement of management’s plans and objectives for future operations; and related assumptions.
- “Meaningful cautionary statements” should *accompany* forward-looking statements; in that regard, earnings releases typically include a paragraph disclaimer/legend/cautionary statements pertaining to forward-looking statements. Such disclaimer must not be boilerplate; to be meaningful, it should be specifically tailored to address potential risks that could impact projected results.
- The disclaimer should be updated when used to reflect material pertinent events or developments and known uncertainties.

Section 21E: Safe Harbor for Forward-Looking Statements (con't)

- For oral forward-looking statements made during an earnings call/webcast, the safe harbor applies if:
 - such statements are accompanied by a cautionary statement that identifies the oral forward-looking statements and that notes that actual results could differ materially from the results projected in forward-looking statements;
 - such statements are accompanied by an oral statement that additional information is available in a written document concerning factors that could cause actual results to materially differ from those projected in the forward-looking statement;
 - the preceding statement identifies the document or portion of the document that contains the additional information about the factors relating to the forward-looking statements; and
 - the information contained in the referenced document (or portion thereof) has appropriate cautionary language.
- Before forward-looking statements are made on an earnings call/webcast, a cautionary statement that meets the preceding requirements should be made.

Non-GAAP Financial Measure: Defined

- Regulation G and Item 10(e) of Regulation S-K are relevant if an earnings release includes non-GAAP financial measures.
- A non-GAAP financial measure is a numerical measure of a company's "historical or future financial performance, financial position or cash flows that:
 - Excludes amounts, or is subject to adjustments that have the effect of excluding amounts, that are included in the most directly comparable measure calculated and presented in accordance with GAAP in the statement of comprehensive income, balance sheet or statement of cash flows (or equivalent statements) of the issuer; or
 - Includes amounts, or is subject to adjustments that have the effect of including amounts, that are excluded from the most directly comparable measure so calculated and presented."
- Examples of non-GAAP financial measures include: free cash flow (see Non-GAAP CDI 102.07); EBIT/EBITDA (see Non-GAAP CDIs 102.09, 103.01 and 103.02); adjusted revenues; and funds from operations (see Non-GAAP CDIs 102.01 and 102.02).

Non-GAAP Financial Measure: Defined (con't)

- Non-GAAP financial measures exclude:
 - “ (i) operating and other statistical measures; and (ii) ratios or statistical measures calculated using exclusively one or both of: (A) financial measures calculated in accordance with GAAP; and (B) operating measures or other measures that are not non-GAAP financial measures.”
- Other examples of measures that are not non-GAAP are set forth in the SEC staff’s [Financial Reporting Manual](#) and include:
 - Disclosure of expected or contracted indebtedness.
 - Disclosure of estimated revenues or expenses of a new product line (so long as the amounts were estimated in the same manner as would be computed under GAAP) (see Non-GAAP CDI 104.05).
 - Financial measures that are required to be disclosed by a system of regulation of a governmental authority or self-regulatory organization that is applicable to the registrant (such as different levels of capital required by banks) (see Non-GAAP CDI 102.12).

Non-GAAP Financial Measure: Accompany with Comparable GAAP Measure; Present Reconciliation

- **Regulation G** applies to the public disclosure of material information that includes non-GAAP financial measures. In that context, a public company must:
 - present the most directly comparable GAAP measure; and
 - provide a quantitative reconciliation of each historical non-GAAP measure to the comparable GAAP measure; and a quantitative reconciliation for forward-looking non-GAAP measures, to the extent available without unreasonable efforts.
- For non-GAAP financial measures orally conveyed on an earnings call/webcast, a company can satisfy the preceding requirements by posting such information on its website before the call/webcast begins and, during the call/webcast, disclosing the location on the website where the information is available.
- Regulation G prohibits disclosure of a non-GAAP financial measure that, considered with other information accompanying it, would be materially false or would omit to state a material fact necessary to make such non-GAAP financial measure not misleading.

Non-GAAP Financial Measure: Accompany with Comparable GAAP Measure; Present Reconciliation (cont.)

- Item 10(e)(1)(i) of Regulation S-K is applicable to non-GAAP financial measures in earnings releases that are furnished on Form 8-K to the SEC. Item 10(e)(1)(i) requires:
 - equal or greater prominence of the most directly comparable GAAP financial measure in all instances, including the earnings release headline, charts and tables;
 - a quantitative reconciliation of each historical non-GAAP financial measure to the comparable GAAP measure; a quantitative reconciliation for forward-looking non-GAAP measures, to the extent available without unreasonable efforts;
 - a statement of the reasons why management believes that each non-GAAP financial measure provides useful information to investors, and the purposes for which management uses each non-GAAP measure; and
 - if material, disclosure of additional purposes, if any, for the company's use of the non-GAAP financial measure.

Non-GAAP Financial Measure: Sample SEC Comments

- The use of non-GAAP financial measures in earnings releases remains an area of interest for SEC staff. Below are examples of SEC staff comments issued in the past few months (emphasis added):
 - Please revise your presentation to disclose and emphasize the most comparable GAAP measures for EBITDA, EBITDA growth, EBITDA Margin, and net debt with equal or greater prominence. Refer to the guidance in Item 10(e)(1)(i)(A) of Regulation S-K and Question 102.10 of the Compliance and Disclosure Interpretations on Non-GAAP Measures. We note **GAAP results should be at the forefront of your presentation and discussion**. Also, include a reconciliation for EBITDA and EBITDA Margin in accordance with Item 10(e)(1)(i)(B) of Regulation S-K.
 - We note your discussion and presentation of Direct-to-Consumer-Agency (DTCA) operations throughout your earnings releases furnished on Form 8-K, including year-over-year DTCA revenue growth, policy growth and agent growth by quarter, DTCA revenue as a percentage of total revenue, and health-DTCA revenue. Please tell us **what consideration was given to disclosing this information in your Form 10-K and Form 10-Q filings**. As part of your response, please tell us how you define your DTCA operations including the types of revenues included. Refer to Item 303(b) of Regulation S-K and SEC Release No. 33-10751.

Non-GAAP Financial Measure: Sample SEC Comments (con't)

- We note you provided a range for adjusted EPS per diluted share as your full-year fiscal 2022 guidance. However, you did not provide reconciliations to the most directly comparable GAAP measures. In future filings, please **provide the reconciliations** required by Item 10(e)(1)(i) of Regulation S-K. To the extent you are relying on the “unreasonable efforts” exception in Item 10(e)(1)(i)(B), please revise future filings to disclose this fact and **identify any information that is unavailable and its probable significance**. Reference is made to Question 102.10 of the Division’s Compliance and Disclosure Interpretations for Non-GAAP Financial Measures.
- We note that in sections of the earning release **your non-GAAP measures have different labels**. For example, adjusted diluted EPS in the first section of the *earnings release* is labeled adjusted EPS per diluted share in the highlights sections and non-GAAP net earnings per diluted share in the reconciliation of this non-GAAP measure to the most directly comparable GAAP measure. Please clarify and/or in future filings, please revise to label your non-GAAP measure consistently.

Non-GAAP Financial Measure: Key Review Tips

- Confirm that any non-GAAP measure in the earnings release headline is preceded by the comparable GAAP measure (the “equal or greater prominence requirement”).
- Review the text, charts, and tables and other contents to confirm that the comparable GAAP measures are presented with equal or greater prominence.
- 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.
- Confirm that the earnings release explains 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.
- If you observe a full non-GAAP income statement, comment on it, i.e., indicate that it should not be included.
- 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.

Form 8-K: Earnings Release Disclosure Requirement

- **Form 8-K**, Item 2.02 – *Results of Operations and Financial Condition*: disclosure is required if there is a public announcement of material non-public information regarding a company’s results of operations or financial condition for a completed quarterly or annual fiscal period.
- An Item 2.02 Form 8-K must: (i) disclose the date that the earnings release was issued; (ii) identify the earnings release; and (iii) include a copy of the earnings release as an exhibit under Item 9.01.
- Instruction 2 to Item 2.02 imposes the requirements of Item 10(e)(1)(i) if any non-GAAP financial measures are disclosed.
- General Instruction 2 to Form 8-K indicates that information disclosed under Item 2.02 is not deemed “filed” for purposes of Section 18 of the Securities Exchange Act, which pertains to liability for false or misleading statements about a material fact in “filed” materials. As such, disclosure under Item 2.02 is deemed furnished and not filed with the SEC. Thus, an Item 2.02 Form 8-K is not incorporated by reference into filings unless the company specifically states that the information is “filed” or specifically incorporates it by reference.

Form 8-K: Earnings Release Disclosure Requirement (cont.)

- Item 2.02(b) does not require disclosure of material non-public information conveyed orally during an earnings call/webcast if the following four conditions are met:
 - the information is provided as part of a call/webcast that is complementary to, and initially occurs within 48 hours after, the related earnings release is furnished on an Item 2.02 Form 8-K **prior to** the presentation;
 - the call/webcast is broadly accessible to the public;
 - financial and other statistical information contained in the call/webcast is posted on the company's website, together with any information that would be required under Regulation G (i.e., for non-GAAP financial measures, the inclusion of the comparable GAAP measures and related reconciliation) and available when oral statements are made; and
 - the call/webcast was announced by a widely disseminated press release, which included instructions as to when and how to access the call/webcast and where the information would be available on the company's website.
- If a company does not meet the condition of Item 2.02(b) for oral statements made during the earnings call/webcast, the earnings release must be furnished under Item 2.02 within four business days after it is issued; additionally, the transcript for the call/webcast or slides, together with a summary of any additional material information disclosed during the call or webcast, also must be furnished.
- Many companies furnish their earnings releases on Form 8-K prior to the related earnings call and avoid being required to furnish the transcript/slides, etc.

Earnings Call/Webcast Considerations

- Given federal securities law implications, including liability considerations, earnings calls/webcasts are typically scripted. As such, the script should be reviewed in advance of the call, with consideration given to the following matters:
 - Forward-looking statements about financial or operational performance or product release plans should be framed as aspirations and preceded by words such as “we expect,” “we anticipate,” or “we forecast,” rather than “we will.”
 - Statements that are opinions and not facts – or more the former than the latter – should be preceded by words such as “we believe,” e.g., “we believe that the company is well-positioned to achieve its operational objectives, given current market trends.”
 - Definitive factual assertions that relate to the company’s market position or performance should be based on objective data, e.g., “market leader,” “record performance.”
 - Key performance indicators disclosed should be consistent across quarters and with the company’s disclosure documents.
- If material information is disclosed unexpectedly during the call (e.g., in connection with the Q&A period), the information disclosed should be promptly posted on the company’s website.

Earnings Guidance Considerations

- Some companies provide earnings guidance, i.e., projections/forecasts, in their earnings releases or during their earnings calls/webcasts.
- Guidance can pertain to quarterly and/or annual periods.
- If guidance includes a non-GAAP financial measure and a quantitative reconciliation cannot be obtained without “unreasonable efforts,” that fact should be disclosed, and the information that is unavailable should be identified along with its probable significance, in an equal and prominent way.
- While Section 21E does not impose a duty to update a forward-looking statement, if events cause prior guidance to become materially inaccurate, consideration should be given to whether such guidance should be updated, even if the prior guidance was reasonable when made.
- Disclosed measures should be consistently used from period to period, or an explanation should be provided relating to any inconsistency.
- Revisions to or retractions of earnings guidance, or termination of the practice of providing guidance should be explained; disclosure, in this regard, should be provided in a Regulation FD-compliant manner.

Key Performance Indicators

- KPIs and other metrics include key variables and qualitative and quantitative factors that are specific to a company and that management uses to manage operations (e.g., same store sales, sales per square foot, revenue per subscriber, and total energy consumed).
- KPIs are more commonly found in MD&A disclosure; however, if an earnings release/call/webcast includes a KPI, it needs to be accompanied by: (1) a clear definition of the metric and how it is calculated; (2) a statement indicating the reasons why the metric provides useful information to investors; and (3) a statement indicating how management uses the metric in managing or monitoring the performance of the business.
- Note that the SEC staff may question whether a metric disclosed outside of a periodic report (e.g., during an earnings call) is a KPI that should be discussed in MD&A. For example, see the following 2020 comment:
 - We note in your earnings calls that you discuss net revenue per client, success rates of items sent in the first fix during a given period compared to the prior period, and inventory turnover. If these metrics are used by management to manage the business, and promote an understanding of the company's operating performance, they should be identified as key performance indicators and discussed pursuant to Instruction 1 of paragraph 303(a) or Regulation S-K and Section III.B.1 of SEC Release No. 33-8350. Please tell us your consideration of disclosing these metrics, or other key performance indicators used.

Earnings Release: Key Review Tips

- Confirm that a company's process for releasing operating results and posting related information on its website meets the requirements of Regulation FD.
- Ensure compliance with Regulation G and Item 10(e)(1) for non-GAAP financial measures.
- Confirm that “meaningful cautionary statements” (not boilerplate cautionary language) accompany the forward-looking statements and are updated and specific to the forward-looking statements that are actually made in the earnings release or are to be made during the earnings call/webcast. Updates should consider company, industry, economic and global developments and trends that could have a material impact on the company.
- Determine if earnings guidance refers to the same measures from period to period.
- If KPIs are disclosed, make sure they are accompanied by explanatory disclosure, and consider whether they have been used consistently, and whether they have been discussed in prior periodic reports.
- If the earnings release is not furnished on Form 8-K prior to the earnings call, confirm that it will include the call transcript and other materials disclosed during the call.

Thank You