

■ Public Company Financial Executive Briefing ■

CHANGES IN SEC RULES ON NON-GAAP FINANCIAL MEASURES

By Jim Pitrat, CPA, Practice Leader - Assurance & Advisory Practice

TUESDAY, MARCH 2, 2010

The Staff of the SEC's Division of Corporation Finance has provided updated guidance on the use of non-GAAP financial measures. The new guidance surrounds the use of Non-GAAP measures in (a) Reporting Business Combinations, (b) Regulation S-K, (c) EBIT and EBITDA, and other areas.

Among others, the following is a summarized discussion of the main points of the Staff's updated and new guidance. This summary should not be used to replace a thorough understanding of the SEC's guidance.

GUIDANCE ON BUSINESS COMBINATIONS TRANSACTIONS

■ Non-GAAP financial measures included in a 1933 Act registration statement or in a proxy or tender offer statement covering a business combination are subject to the requirements of Regulation G and Item 10(e).

■ If a reconciliation of a non-GAAP financial measure is required and the most directly comparable measure is a "pro forma" measure presented in accordance with Article 11 of Regulation S-X, the pro forma measure may be used for reconciliation purposes.

GUIDANCE ON ITEM 10(E) OF REGULATION S-K

■ Prohibits adjusting a non-GAAP financial performance measure to eliminate or smooth items identified as non-recurring (or infrequent or unusual) when the nature of the charge or credit is such that it is reasonably likely to recur within two subsequent years or was present within the two preceding years. While it would not be appropriate to state that a charge or credit is non-recurring, infrequent, or unusual unless it meets specified criteria.

■ The presentation of cash flow per share (and other non-GAAP liquidity measures per share) is prohibited, but non-GAAP earnings per share (or other per-share performance measure) may be presented. It must however be reconciled to GAAP EPS.

■ Although the presentation of so-called free cash flow is permitted, the manner of its computation must be clearly described and accompanied by the required reconciliation. Inappropriate or potentially misleading implications regarding the usefulness of the measure of free cash flow should be avoided.

■ Except for EBIT and EBITDA, a non-GAAP measure of liquidity may not exclude cash charges or liabilities. If, however, a

non-GAAP liquidity measure that excludes such items is deemed otherwise material (e.g., it is the subject of a credit agreement covenant), the measure may be required to be included in MD&A, accompanied by a discussion of the terms of the agreement.

■ It is generally not appropriate to present a full non-GAAP income statement for purposes of reconciling non-GAAP measures to the most directly comparable GAAP measures.

■ A "net-of-tax" adjustment may be made when reconciling a non-GAAP performance measure to the most directly comparable GAAP measure, under certain circumstances.

GUIDANCE ON USING EBIT AND EBITDA

■ In computing EBIT or EBITDA, earnings should represent net income (or net loss) computed in accordance with GAAP. The use of amounts other than net income or net loss may not be labeled as EBIT or EBITDA. Such measures are not exempt from the prohibition regarding exclusion of cash charges or liabilities, generally.

■ If presented as a performance measure, EBIT or EBITDA should be reconciled to net income as presented in the GAAP income statement;

■ A reconciliation to "operating income" is not appropriate.

GUIDANCE ON SEGMENT INFORMATION

■ Information presented in conformity with FASB ASC 280-10-50, "Segment Reporting," in which segment profitability is determined on a basis different from amounts in the GAAP financial statements is not considered a non-GAAP financial measure, subject to certain limitations.

■ The presentation of consolidated segment profit or loss in any context other than the reconciliations required by FASB ASC 280-10-50 is also considered to be a non-GAAP financial measure.

■ A breakdown of revenue by product (as required by FASB ASC 280-10-50) but which

does not sum to the total amount of revenue reported in the consolidated income statement is not considered a non-GAAP financial measure.

GUIDANCE ON ITEM 2.02 OF FORM 8-K

■ Presentation of an audio file on an entity's website at the time of an initial earnings webcast qualifies for the exemption not requiring a Form 8-K, provided the audio file:

- *Includes all material financial and other statistical data contained in the initial webcast, and*
- *Can be accessed and replayed through the entity's website.*

■ A slide (or similar) presentation posted on the company's website containing all the

required information may also satisfy the condition for exemption from the requirement to file a Form 8-K, subject to some limitations.

■ Failure to submit a Form 8-K pursuant to Item 2.02 in a timely manner does not affect a registrant's eligibility to use a Form S-3.

■ A Form 8-K in response to Item 2.02 need not be furnished if material non-public information is disclosed by telephone within 48 hours subsequent to an earnings release, generally.

Additional guidance was issued relating to foreign issuers and voluntary filers. These items are not covered by this summary.

FOR FURTHER INFORMATION, PLEASE CONTACT ONE OF THE FOLLOWING:

■ **Jim Pitrat:**
JPitrat@singerlewak.com
310.477.3924
Practice Leader - Assurance & Advisory

■ **Harmeet Singh:**
HSingh@singerlewak.com
408.294.3924
Business Combinations Subject Matter Expert
Los Angeles, Silicon Valley

■ **Gale Moore:**
GMoore@singerlewak.com
949.261.8600
Business Combinations Subject Matter Expert
Orange County, San Diego

www.SingerLewak.com | 877.754.4557