

**SEC ADOPTS FINAL RULES PURSUANT TO THE SARBANES-OXLEY ACT:
NON-GAAP FINANCIAL MEASURES AND EARNINGS RELEASES**

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MARCH 27, 2003

On January 22, 2003, the Securities and Exchange Commission adopted final rules (the "Rules") relating to "non-GAAP financial information", as directed by Section 401(b) of the Sarbanes-Oxley Act of 2002 (the "Act") and also requiring U.S. registrants generally to furnish to the SEC any press release or other public announcements relating to financial information for any completed fiscal period under cover of a Form 8-K.¹ The Rules arise from the recent legislative initiatives intended to increase the transparency and understandability of financial information disseminated by reporting. The Rules generally become effective on March 28, 2003.

The SEC has recently adopted final rules regarding several other provisions of the Act. We are preparing separate memoranda regarding these other important developments (including a separate memorandum for registered investment companies), each of which will be distributed to our mailing list and will be available upon request or at our website at www.simpsonthacher.com.²

EXECUTIVE SUMMARY

The Rules generally define "non-GAAP financial measures" as financial information not presented in accordance with generally accepted accounting principles ("GAAP") that are adjusted to exclude certain items "as if" those items did not exist or certain transactions had not occurred or adjusted to include certain items to give effect to certain transactions.³ Common examples of non-GAAP financial measures include earnings before interest, taxes, depreciation

¹ SEC Release Nos. 33-8176 and 34-47226 (Jan. 22, 2003) (the "Release").

² This memorandum supplements our earlier memoranda regarding the Act, which are available upon request or at our website at www.simpsonthacher.com. If you would like to be added to our mailing list, please e-mail sbussy@stblaw.com.

³ The SEC has elected to use the term "non-GAAP financial measure" rather than the term "pro forma financial information" used in the Act to avoid confusion with the pro forma financial information prescribed by Regulation S-X, e.g., pro forma information presenting the effects of a merger in accordance with GAAP financial information.

and amortization or EBITDA, adjusted EBITDA, cash earnings, operating earnings, adjusted earnings, core earnings, recurring earnings and earnings excluding special items.

The stated purpose of Section 401(b) of the Act and the Rules is to improve the disclosure relating to non-GAAP financial measures so that such disclosure is not misleading and does not contain untrue statements. Specifically, the Rules address four principal areas of concern regarding the presentation of non-GAAP financial measures: (1) the lack of universal standards applicable to the creation of non-GAAP financial measures, (2) the lack of comparability of non-GAAP financial measures among reporting companies, (3) lack of comparability of non-GAAP financial measures between periods for the same company and (4) liberal characterizations of items as “non-recurring.”

The Rules consist of the introduction of a new Regulation G, amendments to Regulations S-K and S-B and amendments to Form 8-K.

- *Regulation G*

- requires reporting companies to accompany public disclosures that include non-GAAP financial measures with disclosure of the “most directly comparable” GAAP financial information and a quantitative reconciliation of the non-GAAP financial measures to that GAAP financial information;
- prohibits companies from making public non-GAAP financial measures that, taken together with the information accompanying that non-GAAP financial information, contains an untrue statement of a material fact or omits to state a material fact necessary in order to make the presentation of the non-GAAP financial measures, in light of the circumstances under which it is presented, not misleading; and
- applies to all disclosures of non-GAAP financial measures as of March 28, 2003.

- *Regulation S-K and S-B Amendments*

- require companies to limit the types of non-GAAP financial measures that may be included in their periodic reports and other SEC filings (other than on Forms 6-K and 40-F), including registration statements;
- require companies to accompany disclosure of non-GAAP financial information in such reports and filings with
 - equally or more prominent disclosure of the most directly comparable GAAP financial information, a quantitative reconciliation of the non-GAAP financial measure to that GAAP financial information, and

- a description of the reasons why management believes the information is useful to investors and, to the extent material, the additional purposes, if any, for management's use of the non-GAAP financial measure; and
- apply to any annual or quarterly report filed with respect to a fiscal period ending after March 28, 2003 and any other SEC filing (other than on Forms 6-K and 40-F) containing information with respect to a fiscal period ending after March 28, 2003.
- *8-K Amendments*
 - require reporting companies, other than foreign private issuers, that publicly disclose material non-public information regarding their results of operations or financial condition for a completed quarterly or annual fiscal period, for example by issuing an earnings release, to furnish, subject to certain exceptions, that information on a current basis on Form 8-K; and
 - apply to earnings releases and similar announcements made after March 28, 2003.

**DEFINITION OF
NON-GAAP FINANCIAL MEASURE**

Definition. The Rules define "non-GAAP financial measure" for purposes of Regulation G and the Regulation S-K and S-B Amendments to mean:

"a numerical measure of a registrant'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 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 set forth in the Release include measures of operating income that exclude one or more expense or revenue items that are identified as "non-recurring" and the measure of EBIT and EBITDA.

Exceptions. Pursuant to the Rules, the term non-GAAP financial measure does not include:

- operating and other statistical measures; and
- ratios or statistical measures calculated using only:
 - financial measures calculated in accordance with GAAP; and
 - operating measures or other measures that are not non-GAAP financial measures.

Unit sales, numbers of employees, numbers of subscribers and numbers of advertisers are mentioned in the Release as examples of operating and other statistical measures that are excluded from the definition of non-GAAP financial measure. Examples set forth in the Release of ratios or measures that are excluded from the definition of non-GAAP financial measure include sales per square foot (assuming that the sales figure is calculated in accordance with GAAP), same store sales (assuming that the sales figures for the stores are calculated in accordance with GAAP) and a measure of operating margin that is calculated by dividing revenues into operating income, where both revenue and operating income are calculated in accordance with GAAP. The Release contrasts these ratios to a measure of operating margin, the revenue component or the operating income component of which is not calculated in accordance with GAAP. Such an operating margin would constitute a non-GAAP financial measure.

The Release clarifies that, in the case of ratios or measures where a non-GAAP financial measure is the numerator and/or the denominator in the calculation of a ratio or measure, the registrant must provide a reconciliation with regard to each non-GAAP financial measure used in the calculation and must also show the ratio or measure as calculated using the most directly comparable GAAP financial measures.

In addition, pursuant to the Rules, the term non-GAAP financial measure excludes financial measures required to be disclosed by GAAP, SEC rules or a system of regulation of a government or governmental authority or self-regulatory organization that is applicable to the registrant. Examples of these financial measures are measures of capital or reserves calculated for such a regulatory purpose. In SEC filings, other than Forms 6-K and 40-F and other than in the context of information furnished (as opposed to filed) on Form 8-K, these financial measures should be presented outside of the financial statements unless the financial measures are required or expressly permitted by the standard-setter that is responsible for establishing the GAAP used in such financial statements.

Further Clarifications. The Release clarifies that the term non-GAAP financial measure does not include financial information that does not have the effect of providing numerical measure that is different from the comparable GAAP measure, including:

- disclosure of amounts of expected indebtedness, including contracted and anticipated amounts;
- disclosure of amounts of repayments that have been planned or decided upon but not yet made;
- disclosure of estimated revenues or expenses of a new product line, so long as such amounts were estimated in the same manner as would be computed under GAAP; and
- measures of profit or loss and total assets for each segment required to be disclosed in accordance with GAAP.

The Rules also provide an exception for non-GAAP financial measures included in disclosure describing a proposed business combination transaction, the entity resulting from the business combination transaction or an entity that is a party to the business combination transaction if the disclosure is contained in a communication that is subject to the SEC's communications rules applicable to business combination transactions.⁴

The Release also clarifies that the definition of non-GAAP financial measure is intended to capture all measures that have the effect of depicting:

- a measure of performance that is different from that presented in the financial statements (such as income or loss before taxes or net income or loss as calculated in accordance with GAAP); or
- a measure of liquidity that is different from cash flow or cash flow from operations computed in accordance with GAAP.

According to the Release, the SEC intends to provide registrants with the flexibility to make the best determination as to which is the most directly comparable financial measure calculated and presented in accordance with GAAP. The Release states, however, that the SEC staff is of the view that (1) non-GAAP financial measures that measure cash or funds generated from operations (liquidity) should be balanced with disclosure of amounts from the statement of cash flows and (2) non-GAAP financial measures that depict performance should be balanced with net income or income from continuing operations, taken from the statement of operations.

While the Rules are designed to limit, and improve, the disclosure of non-GAAP financial measures, we do not believe that the SEC will use the rules to adversely affect the quality of management's discussion and analysis disclosure. Indeed, we believe that Rules will encourage

⁴ These rules include Rules 14a-12 and 14d-2 under the Securities Exchange Act of 1934, as amended, Rules 165 and 425 under the Securities Act of 1933, as amended, and Item 1015 of Regulation M-A.

registrants to expand their management's discussion and analysis disclosure to cover information that previously had been included in conclusory financial measures. For example, instead of disclosing adjusted operating income, a registrant would disclose that its operating income was adversely affected by the items which would have been deducted in calculating adjusted operating income. Furthermore, although the Rules prohibit disclosure in periodic reports of non-GAAP financial measures that exclude non-recurring items if similar items have occurred or are reasonably likely to occur within two years, we believe that describing these items in a management's discussion and analysis and indicating that management believes that they will not recur in the following year should be permitted.

REGULATION G

Applicability. Regulation G applies to any entity, other than an investment company (a "registrant"), that:

- has a class of securities registered under Section 12 of the Exchange Act; or
- is required to file reports under Section 15(d) of the Exchange Act.

Accordingly, Regulation G does not apply to so-called "voluntary filers," that is, companies filing reports with the SEC but which have fewer than 300 holders and have not filed a registration statement within the past year. We recommend, however, that voluntary filers endeavor to comply with Regulation G as the SEC has indicated that it believes that non-conforming presentations of non-GAAP financial measures may give rise to liability under Rule 10b-5 of the Exchange Act.

Regulation G flatly prohibits the registrants, or persons acting on their behalf, from making public a non-GAAP financial measure that, taken together with the information accompanying that measure and any other accompanying discussion of that measure, contain untrue statements of a material fact or omit to state a material fact necessary in order to make the presentation of the non-GAAP financial measure, in light of the circumstances under which it is presented, not misleading. The Release states that this requirement also applies to disclosures in all SEC filings (including filings on Forms 6-K and 40-F and information *furnished* to the SEC under cover of a Form 8-K) by registrants of material information that includes a non-GAAP financial measure.

Requirements. Regulation G applies whenever a registrant, or a person acting on its behalf, discloses or releases publicly any material information that includes a non-GAAP financial measure. Regulation G requires that the registrant accompany the non-GAAP financial measure with:

- a presentation of the most directly comparable financial measure calculated and presented in accordance with GAAP; and

- a reconciliation (by schedule or other clearly understandable method), which must be quantitative for historical non-GAAP measures presented, and quantitative, to the extent available without unreasonable efforts, for forward-looking information, of the differences between the non-GAAP financial measure disclosed or released with the most directly comparable financial measure or measures calculated and presented in accordance with GAAP.

Accordingly, if a registrant includes a non-GAAP financial measure in a press release, the requirements of Regulation G will be triggered.⁵ Disclosure of a non-GAAP financial measure on a conference call with analysts will similarly require compliance with Regulation G. It is important to note that any public disclosure of a non-GAAP financial measure on behalf of a registrant will trigger the requirements of Regulation G regardless of who makes the disclosure. The SEC expressly rejected the concept that only material disclosure by the specified list of company officials who are acting for a registrant under Regulation FD should require compliance with Regulation G. Moreover, if Regulation FD requires a registrant to make public a disclosure that was initially made in a private context, the requirements of Regulation G would be applicable to the Regulation FD disclosure.

As indicated above, with respect to quantitative reconciliations of non-GAAP financial measures that are forward-looking, Regulation G requires a schedule or other presentation detailing the differences between the forward-looking non-GAAP financial measure and the appropriate forward-looking GAAP financial measure. The Release indicates that if the GAAP financial measure is not accessible on a forward-looking basis, the registrant must disclose that fact and provide any reconciling information that is available without an unreasonable effort. In addition, the registrant must identify any information that is unavailable and disclose its probable significance.

If a non-GAAP financial measure is made public orally, telephonically, by webcast or broadcast or by similar means, the requirements of Regulation G may be satisfied if:

- the required accompanying information is provided on the registrant's website at the time the non-GAAP financial measure is made public (emphasis added); and
- the location of the website is made public in the same presentation in which the non-GAAP financial measure is made public.

The Release suggests that at a minimum registrants should provide web site access to the foregoing information for at least a 12-month period.

⁵ See the section entitled "Amendments to Form 8-K – Earnings Releases" below for a discussion of obligations of U.S. registrants to furnish to the SEC any press release relating to financial information for a completed fiscal period under cover of a Form 8-K.

Foreign Private Issuers. While Regulation G generally applies to foreign private issuers that are registrants, the regulation provides an exception for certain disclosures of non-GAAP financial information by foreign private issuers. Regulation G does not apply to a disclosure of a non-GAAP financial measure by or on behalf of a registrant that is a foreign private issuer if the following conditions are satisfied:

- the securities of the registrant are listed or quoted on a securities exchange or inter-dealer quotation system outside the United States;
- the non-GAAP financial measure is not derived from or based on a measure calculated and presented in accordance with U.S. GAAP; and
- the disclosure is made by or on behalf of the registrant outside the United States or is included in a written communication that is released by or on behalf of the registrant outside the United States.

This exception applicable to a registrant that is a foreign private issuer will apply, notwithstanding the existence of one or more of the following circumstances:

- a written communication is released in the United States as well as outside the United States, so long as the communication is released in the United States contemporaneously with or after the release outside the United States and is not otherwise targeted at persons located in the United States;
- foreign or U.S. journalists or other third parties have access to the information;
- the information appears on one or more websites maintained by the registrant, so long as the websites, taken together, are not available exclusively to, or targeted at, persons located in the United States; and/or
- following the disclosure or release of the information outside the United States, the information is included in a submission by the registrant to the SEC made under cover of a Form 6-K.

Subject to the exception discussed above, in the case of foreign private issuers that prepare their primary financial statements in accordance with GAAP other than U.S. GAAP (“home country GAAP”), GAAP for purposes of Regulation G refers to home country GAAP. In addition, in the case of foreign private issuers that publicly disclose or release a non-GAAP financial measure derived from or based on a financial measure calculated in accordance with U.S. GAAP, GAAP for purposes of Regulation G refers to U.S. GAAP.

Rule 144A Offerings. In connection with 144A offerings, many companies disclose non-GAAP financial measures in the offering memoranda. If a registrant makes this disclosure, we believe that the registrant should comply with Regulation G since 144A offering memoranda are likely to be considered public disclosure for purposes of Regulation G. While voluntary

filers, or companies who do not file with the SEC, are not required to comply with Regulation G, we recommend that all companies disclosing non-GAAP financial measures in a 144A offering memoranda endeavor to comply with Regulation G as the SEC has indicated that it believes that non-conforming presentations of non-GAAP financial measures may give rise to liability under Rule 10b-5 of the Exchange Act.

**AMENDMENTS APPLICABLE
TO REGULATIONS S-K AND S-B**

Applicability. The Rules contain amendments to existing Regulations S-K and S-B which apply to periodic reports and all other filings, including registration statements, made by companies under the Securities Act and the Exchange Act, other than filings on Forms 6-K and 40-F and information furnished to the SEC under cover of a Form 8-K.⁶

Requirements. The S-K and S-B Amendments require that, whenever a company includes one or more non-GAAP financial measures in an applicable filing with the SEC, the company must include the following with the filing:

- a presentation with equal or greater prominence of the most directly comparable financial measure or measures calculated and presented in accordance with GAAP;
- a reconciliation (by schedule or other clearly understandable method), which must be quantitative for historical non-GAAP measures presented, and quantitative, to the extent available without unreasonable efforts, for forward-looking information, of the differences between the non-GAAP financial measure disclosed or released with the most directly comparable financial measure or measures calculated and presented in accordance with GAAP;
- a statement disclosing the reasons why the registrant's management believes that presentation of the non-GAAP financial measure provides useful information to investors regarding the registrant's financial condition and results of operations; and

⁶ The S-K and S-B Amendments add a new section to Item 10 of Regulation S-K and Item 10 of Regulation S-B and amend Form 20-F to incorporate Item 10 of Regulation S-K, as amended. No corresponding amendments have been adopted with respect to Form 40-F. Canadian Form 40-F filers, however, will be subject to Regulation G. The Rules provide that information provided under Item 12 of Form 8-K – see section entitled “Amendments to Form 8-K – Earnings Releases” below – will be furnished to, and not filed with, the SEC. The Release states that, although the S-K and S-B Amendments do not apply to materials submitted to the SEC on Form 6-K, if the information in the Form 6-K is incorporated by reference into a registration statement, prospectus or annual report, the S-K and S-B Amendments would then apply to that information.

- to the extent material, a statement disclosing the additional purposes, if any, for which the registrant's management uses the non-GAAP financial measure that are not otherwise disclosed.

In addition, the S-K and S-B Amendments would prohibit:

- the exclusion of charges or liabilities that required or will require cash settlement, or would have required cash settlement absent an ability to settle in another manner, from non-GAAP liquidity measures, other than the measures EBIT and EBITDA (emphasis added);
- the adjustment of a non-GAAP performance measure to eliminate or smooth items identified as non-recurring, infrequent or unusual, when (1) the nature of the charge or gain is such that it is reasonably likely to recur within two years or (2) there was a similar charge or gain within the prior two years;
- the presentation of non-GAAP financial measures on the face of the company's financial statements prepared in accordance with GAAP or in the accompanying notes;
- the presentation of non-GAAP financial measures on the face of any pro forma financial information required to be disclosed by Article 11 of Regulation S-X; or
- the use of titles or descriptions of non-GAAP financial measures that are the same as, or confusingly similar to, titles or descriptions used for GAAP financial measures.

The prohibition of disclosure of non-GAAP financial measures that exclude charges or liabilities that required or will require cash settlement, or would have required cash settlement absent an ability to settle in another manner, from non-GAAP liquidity measures will likely have the effect of significantly limiting the types of non-GAAP financial measure relating to liquidity which may be disclosed. While the measures of EBIT and EBITDA are expressly permitted by the Rules, the Release may prohibit as a liquidity measure most, if not all, presentations of Adjusted EBITDA.

In addition, companies will now need to carefully consider excluding so-called "non-recurring charges" to avoid finding themselves in a position of having a similar charge occur within two years. If this occurs, the SEC could question whether the company made the correct judgment that the charge was not reasonably likely to occur within two years.

With respect to quantitative reconciliations of non-GAAP financial measures that are forward-looking, the S-K and S-B Amendments require a schedule or other presentation detailing the differences between the forward-looking non-GAAP financial measure and the appropriate forward-looking GAAP financial measure. The Release provides that if the GAAP financial measure is not accessible on a forward-looking basis, the company must disclose that fact and provide any reconciling information that is available without an unreasonable effort.

In addition, the registrant must identify any information that is unavailable and disclose its probable significance.

The Release states that in order to satisfy these requirements that management state why it believes the non-GAAP financial measure provides useful information to investors, companies must do more than simply state that the non-GAAP financial measure is used by or is useful to analysts and that the required explanation may not be boilerplate. Rather, the justification for the use of the non-GAAP financial measure must be substantive, clear and understandable and must be specific to the non-GAAP financial measure used, the registrant, the nature of the registrant's business and industry and the manner in which management assesses the non-GAAP financial measure. The Release provides, however, that these requirements may be satisfied by including the necessary explanation in the most recent annual report filed with the SEC, or a more recent filing, and by updating the statement, as necessary, no later than the time of the applicable filing of disclosure containing non-GAAP financial measures.

As proposed, the S-K and S-B Amendments prohibited non-GAAP per share financial measures. The S-K and S-B Amendments, as adopted, do not include that prohibition. The Release clarifies, however, that per share measures that are prohibited specifically under GAAP or SEC rules continue to be prohibited in materials filed with or furnished to the SEC.⁷

Foreign Private Issuers. The S-K and S-B Amendments do not provide any exceptions for foreign private issuers. However, the S-K and S-B Amendments provide that a non-GAAP financial measure that would otherwise be prohibited would be permitted in a filing of a foreign private issuer if the non-GAAP financial measure:

- relates to the GAAP used in the foreign private issuer's primary financial statements included in its filing with the SEC;
- is required or expressly permitted by the standard-setter that is responsible for establishing the GAAP used in the foreign private issuer's primary financial statements; and
- is included in the foreign private issuer's annual report used in its home country jurisdiction or for distribution to its security holders.

The Release clarifies that the foregoing exception is intended to cover only situations in which the foreign organization affirmatively acts to require or permit the non-GAAP financial measure and not situations in which the measure is merely not prohibited. However, the

⁷ As an example, the Release refers to the prohibition on cash flow per share in paragraph 33 of FASB Statement No. 95, *Statement of Cash Flows*.

remaining requirements relating to non-GAAP financial measures in SEC filings under the Rules would apply to non-GAAP financial measures presented by foreign private issuers.

AMENDMENTS TO FORM 8-K
– EARNINGS RELEASES

Applicability. The Rules amend Form 8-K (the “8-K Amendments”) to add new Item 12, “Disclosure of Results of Operations and Financial Condition,” which applies to any U.S. reporting company, including voluntary filers.

Requirements. Item 12 provides that if a U.S. reporting company or any person acting on its behalf makes any public announcement or release disclosing material, non-public information regarding the U.S. reporting company’s results of operations or financial condition for an annual or quarterly fiscal period that has ended, the U.S. reporting company will furnish to the SEC a Form 8-K within five business days, briefly identifying the announcement or release and including the text of that announcement or release as an exhibit to the Form 8-K.⁸ The requirements of Item 12 apply regardless of whether the release or announcement includes disclosure of a non-GAAP financial measure.

Exceptions. A U.S. reporting company would not be required to furnish a current report on Form 8-K under Item 12 if material, non-public information regarding results of operations or financial condition is disclosed orally, telephonically, by webcast, broadcast or 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 12 prior to the presentation (i.e. to use this 48-hour grace period, you cannot wait the five days to file the 8-K);
- 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 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 that included instructions as to when and how to access the presentation and the location on the registrant’s website where the information would be available.

⁸ The Release suggests that the five business days period is a temporary filing deadline for furnishing a report under Item 12 and that this deadline may be shortened to two business days when the SEC finalizes its currently proposed amendments to Form 8-K. See SEC Release Nos. 33-8106 and 34-46084 (June 17, 2002).

The Release suggests that at a minimum registrants should provide website access to the foregoing information for at least a 12-month period.

We believe that a U.S. reporting company need not furnish an additional Form 8-K if it holds a conference call with analysts during which complementary non-GAAP financial information is disclosed within 48 hours of the furnishing of the company's earnings release under Form 8-K as long as the disclosure complies with the "Exceptions" set forth above, including the requirement that the disclosures be made in compliance with Regulation G.

Further Clarifications. The 8-K Amendments would not *require* any domestic registrant to issue an earnings release or similar announcement. However, if a U.S. reporting company issues an earnings release or announcement containing material non-public information regarding the U.S. reporting company's results of operations or financial condition for an annual or quarterly fiscal period that has ended, it would trigger the new Item 12 disclosure requirement.

The 8-K Amendments also provide that repetition of information that was previously publicly disclosed or the release of the same information in a different form, for example in an interim or annual report to shareholders, would not trigger the Item 12 disclosure requirement. This result would not change if the repeated information were accompanied by additional information that was not material, whether or not already public. However, release of additional or updated material, non-public information regarding the registrant's results of operations or financial condition for a completed fiscal year or quarter would trigger an additional Item 12 disclosure obligation.

In addition, the 8-K Amendments would not apply to public disclosure of earnings estimates for future or ongoing fiscal periods, unless those estimates are included in the public announcement or release of material non-public information regarding an annual or quarterly fiscal period that has ended. U.S. reporting companies that make earnings announcements or other disclosures of material non-public information regarding a completed fiscal year or quarter in an interim or annual report to shareholders would be permitted to specify in the Form 8-K which portion of the report contains the information required to be furnished under Item 12. The requirement to furnish a Form 8-K under Item 12 would not apply to U.S. reporting companies that make these announcements and disclosures only in their quarterly reports filed with the SEC on Form 10-Q or 10-QSB or their annual reports filed with the SEC on Form 10-K or 10-KSB.

Safe Harbor. As proposed, Item 12 would have required U.S. reporting companies to file earnings releases or similar disclosures in a Form 8-K. As adopted, Item 12 requires that such information earnings releases or similar disclosures be furnished to, rather than filed with, the SEC in a Form 8-K. The Release explains that the most significant implications of furnishing a Form 8-K to the SEC, rather than filing a Form 8-K with the SEC, are the following:

- information that is furnished with the SEC in a Form 8-K is not subject to Section 18 of the Exchange Act, unless the registrant specifically states that the information is to be considered filed;⁹
- information that is furnished with the SEC in a Form 8-K is not incorporated by reference into a registration statement, proxy statement or other report unless the registrant specifically incorporates that information into those documents by reference; and
- information that is furnished to the SEC in a Form 8-K is not subject to the requirements of the S-K and S-B Amendments.

Regulation G (but not Item 10 of Regulation S-K, except as provided below), however, applies to earnings releases or similar disclosures furnished to the SEC under cover of a Form 8-K to the extent that such disclosures include a non-GAAP financial measure. In addition, Item 12 requires a U.S. reporting company to disclose with respect to any non-GAAP financial measure furnished under Item 12:

- with equal or greater prominence, the most directly comparable financial measure or measures calculated and presented in accordance with GAAP;
- the reasons why the company's management believes that presentation of the non-GAAP financial measure provides useful information to investors regarding the registrant's financial condition and results of operations; and
- to the extent material, the additional purposes, if any, for which the company's management uses the non-GAAP financial measure that are not otherwise disclosed.

The Release clarifies that U.S. reporting companies may satisfy the foregoing requirements to state the reasons why the information is useful to investors and, to the extent material, the purposes for which the information is used by management by including the disclosure in the Form 8-K or in the release or announcement that is included as an exhibit to the Form 8-K. As discussed previously, U.S. reporting companies may also satisfy this requirement by including the disclosure in their most recent annual report filed with the SEC (or a more recent filing) and by updating those statements, as necessary, no later than the time the Form 8-K is furnished with the SEC.

Foreign Private Issuers. Foreign private issuers will be required to furnish earnings releases and announcements on Form 6-K to the extent they are currently required to do so.

⁹ Section 18 imposes liability in the event of any statement, which was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, set forth in a report or other document filed pursuant to the Exchange Act.

LIABILITY ISSUES

Exchange Act. Earnings releases (including any historical or forecast non-GAAP financial measures contained in earnings releases) are currently subject to liability under Sections 10(b) and 20(a) of the Exchange Act. Rule 102 of Regulation G states that a person's compliance or non-compliance with the requirements of Regulation G will not affect that person's liability under Section 10(b) or Rule 10b-5. The Release states, however, that disclosure pursuant to Regulation G that is materially deficient may, in addition to violating Regulation G, give rise to a violation of Section 10(b) or Rule 10b-5 thereunder if all the elements for such violation are present.

In addition, if a registrant, or any person acting on its behalf, failed to comply with Regulation G, the registrant and/or the person acting on its behalf could be subject to SEC enforcement proceedings. The Release provides that, if the facts and circumstances warrant, the SEC could bring an action under both Regulation G and Rule 10b-5.

Securities Act. Earnings releases or similar announcements furnished to the SEC under cover of Form 8-K will not be deemed to be incorporated by reference into registration statements pursuant to the Securities Act unless specifically incorporated by reference into those registration statements. The materiality of any such information must be considered, however, in the context of an offering of securities, and it may therefore need to be specifically incorporated or set forth in a registration statement, subject to compliance with Regulation S-K and S-B Amendments.

To the extent that earnings releases furnished on Form 8-K are incorporated by reference into registration statements pursuant to the Securities Act, those earnings releases (including any non-GAAP financial measures contained in those earnings releases) would be subject to liability under Sections 11, 12(a)(2) and 15 of the Securities Act. In addition, earnings releases (including any non-GAAP financial measures contained in those earnings releases) incorporated by reference into registration statements pursuant to the Securities Act could become the subject of SEC enforcement proceedings under Section 17(a) of the Securities Act.

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This memorandum is for general information purposes only and should not be regarded as legal advice. Please contact your relationship partner if we can be of assistance regarding these important developments. The names and office locations of all of our partners, as well as additional memoranda regarding recent corporate governance developments, can be obtained from our website, www.simpsonthacher.com.

SIMPSON THACHER & BARTLETT LLP