

should be the sole criterion for exemption?

2. Should persons that qualify for any new CPO or CTA registration exemption be subject to a limit on non-hedge commodity interest trading activity that is higher or lower than the limit in the NFA Proposal? Should there be any limit at all on non-hedge activity by such persons?

3. Should persons that qualify for any new CPO or CTA registration exemption be subject to compliance with the special call, recordkeeping, and NFA notice requirements in the NFA Proposal and/or the special call, financial reporting, and CFTC notice and supplemental notice requirements of the MFA Proposal? Should these persons be subject to compliance with any other requirements and, if so, what should they be?

4. Is there any other form of registration relief that the Commission should propose for CPOs or CTAs and, if so, what is it?

5. How should the Commission's proposal address relief for the operator and/or the advisor of an Investor Fund¹⁸?

Issued in Washington, DC on November 6th, 2002, by the Commission.

Jean A. Webb,
Secretary of the Commission.

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 228, 229, 244 and 249

[Release No. 33-8145; 34-46788; File No. S7-43-02]

RIN 3235-A169

Conditions for Use of Non-GAAP Financial Measures

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: As directed by the Sarbanes-Oxley Act of 2002, we are proposing new rules and amendments to address public companies' disclosure or release of certain financial information that is derived on the basis of methodologies other than in accordance with Generally Accepted Accounting Principles

¹⁸ Staff has received numerous informal inquiries regarding the fund of funds issue. The Commission intends to address this issue in a separate context as it applies more broadly to the managed funds industry. However, it is important to recognize the implications for funds of funds in this release, as discussed above.

(GAAP). We are proposing a new disclosure regulation, Regulation G, which would require public companies that disclose or release these non-GAAP financial measures to include, in that disclosure or release, a presentation of the most comparable GAAP financial measure and a reconciliation of the disclosed non-GAAP financial measure to the most comparable GAAP financial measure. We also are proposing to amend Item 10 of Regulation S-K and Item 10 of Regulation S-B to provide additional guidance to those registrants that include non-GAAP financial measures in Commission filings. Additionally, we are proposing to amend Form 20-F to incorporate the proposed amendments to Item 10 of Regulation S-K. Finally, we are proposing to require registrants to file on Form 8-K earnings releases or similar announcements, with those filings subject to the guidance in amended Item 10 of Regulation S-K and Item 10 of Regulation S-B.

DATES: Comments should be received on or before December 13, 2002.

ADDRESSES: To help us process and review your comments more efficiently, please send comments by one method only. Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Comments also may be submitted electronically at the following e-mail address: rule-comments@sec.gov. All comment letters should refer to File No. S7-43-02. This number should be included in the subject line if sent via electronic mail. Electronically submitted comment letters will be posted on the Commission's Internet Web Site (<http://www.sec.gov>). We do not edit personal information, such as names or electronic mail addresses, from electronic submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT:

Joseph P. Babits, Craig Olinger, or Jennifer Minke-Girard at (202) 942-2910, Division of Corporation Finance, U.S. Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0402.

SUPPLEMENTARY INFORMATION: We are proposing new Regulation G.¹

We also are proposing amendments to Item 10 of Regulation S-K,² Item 10 of Regulation S-B,³ and Securities

¹ 17 CFR 244.100 through 244.102.

² 17 CFR 229.10.

³ 17 CFR 228.10.

Exchange Act of 1934⁴ Forms 8-K⁵ and 20-F.⁶

I. Background

On July 30, 2002, President Bush signed into law the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley Act").⁷ Among its many goals, the Sarbanes-Oxley Act seeks to enhance the financial disclosures of public companies. As part of this effort to enhance disclosure to investors, Congress and the President recognized the immediate need to address issues relating to public companies' use of so-called "pro forma financial information."

Like Congress, the Commission also has been concerned with the use of "pro forma financial information." In 1973, the Commission issued Accounting Series Release No. 142, warning of possible investor confusion from the use of financial measures outside of GAAP:

[T]he unilateral development and presentation on an unaudited basis of various measures of performance by different companies which constitute departures from the generally understood accounting model has led to conflicting results and confusion for investors. Additionally, it is not clear that simple omission of depreciation and other non-cash charges deducted in the computation of net income provides an appropriate alternative measure of performance for any industry either in theory or in practice. * * * If accounting net income computed in conformity with generally accepted accounting principles is not an accurate reflection of economic performance for a company or an industry, it is not an appropriate solution to have each company independently decide what the best measure of its performance should be and present that figure to its shareholders as Truth.⁸

More recently, in December 2001, we issued cautionary advice regarding the use of "pro forma financial information" in earnings releases:

[W]e are concerned that "pro forma" financial information, under certain circumstances, can mislead investors if it obscures GAAP results. Because this "pro forma" financial information by its very nature departs from traditional accounting conventions, its use can make it hard for investors to compare an issuer's financial information with other reporting periods and with other companies.⁹

Additionally, earlier this year, we brought an enforcement action against Trump Hotels & Casino Resorts, Inc., where we found the use of pro forma

⁴ 15 U.S.C. §§ 78a *et seq.*

⁵ 17 CFR 249.308.

⁶ 17 CFR 249.220.

⁷ Pub. L. No. 107-204, 116 Stat. 745 (2002).

⁸ See Release No. 33-5337 (Mar. 15, 1973).

⁹ See Release No. 33-8039 (Dec. 4, 2001) [66 FR 63731].

financial information to be materially misleading.¹⁰

Like the Commission, Congress also was specifically concerned with pro forma results that are prepared or derived on a basis other than GAAP when it included Section 401(b) in the Sarbanes-Oxley Act. Because the Commission's rules and regulations address the use of "pro forma financial information" in other contexts, particularly in Regulation S-X,¹¹ and use that term differently from its use in the Sarbanes-Oxley Act,¹² we are adopting the term "non-GAAP financial measures" to identify the types of information targeted by Section 401(b) of the Sarbanes-Oxley Act. The Sarbanes-Oxley Act sought to eliminate the manipulative or misleading use of non-GAAP financial measures and, at the same time, enhance the comparability associated with the use of that information. As the Senate Committee on Banking, Housing, and Urban Affairs noted in their Committee Report:

The Committee seeks to address problems attendant to pro forma financial disclosures by requiring the SEC to promulgate rules requiring that issuers publish pro forma data with a reconciliation to comparable financial data calculated according to GAAP and in a way that is not misleading and does not contain untrue statements. The reconciliation presumes, and would require, the issuer to publish financial data calculated according to GAAP at the same time as it publishes pro forma data. This should enable investors to, at the least, simultaneously compare the pro forma financial data with the same types of financial disclosures (e.g., earnings) calculated according to GAAP for the comparable reporting period.¹³

Accordingly, Section 401(b) of the Sarbanes-Oxley Act directs the Commission to adopt rules requiring

¹⁰ See *In the Matter of Trump Hotels & Casino Resorts, Inc.*, Release No. 34-45287 (Jan. 16, 2002).

¹¹ 17 CFR 210.1-01 through 210.12-29.

¹² In limited circumstances, such as in a merger, pro forma financial information is required to be disclosed in Commission filings. See Article 11 of Regulation S-X 17 CFR 210.11-01—210.11-03] for the conditions that require the presentation of pro forma information, as well as the preparation requirements. Such pro forma information is intended to depict the continuing impact of an actual or proposed transaction on the historical GAAP financial statements. Article 11 requires tabular presentation of the balance sheet and income statements, starting with the historical GAAP financial statements, showing the specific adjustments that would have been required by GAAP had the transaction occurred at an earlier time, and ending with the pro forma statements, and also requires disclosure of the assumptions which underlie its preparation. Pro forma information presented pursuant to Article 11 would not be subject to the rules and amendments we propose in this release.

¹³ Sen. Rep. No. 107-205, 107 Cong. 2d Sess. at 29 (2002).

that any public disclosure or release of non-GAAP financial measures by a company filing reports under Section 13(a)¹⁴ or 15(d)¹⁵ of the Exchange Act be presented in a manner that:

- Does not contain an untrue statement of a material fact or omit to state a material fact necessary in order to make the non-GAAP financial measure, in light of the circumstances under which it is presented, not misleading; and
- Reconciles the non-GAAP financial measure presented with the financial condition and results of operations of the registrant under GAAP. These rules would address the use of non-GAAP financial measures, regardless of whether that use would violate current Commission disclosure or antifraud rules.

As used in this release, a "non-GAAP financial measure" is a numerical measure of an issuer'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 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 comparable measure so calculated and presented.

In their efforts to enhance financial disclosure, Congress and the President recognized the importance of timely information to investors and our markets. Section 409 of the Sarbanes-Oxley Act added to the Exchange Act new Section 13(l), which obligates public companies to "disclose to the public on a rapid and current basis such additional information concerning material changes in the financial condition or operations of the issuer, in plain English, which may include trend and qualitative information and graphic presentations, as the Commission determines, by rule, is necessary or useful for the protection of investors and in the public interest."¹⁶ Before the adoption of the Sarbanes-Oxley Act, we had taken important steps in this regard by proposing accelerated deadlines by which companies would be required to disclose significantly expanded categories of material information.¹⁷

¹⁴ 15 U.S.C. § 78m(a).

¹⁵ 15 U.S.C. § 78o(d).

¹⁶ 15 U.S.C. § 78m(l).

¹⁷ See Release No. 33-8106 (June 17, 2002) [67 FR 42913] and Release No. 33-8128 (Sept. 5, 2002) [67 FR 58479].

Comments regarding our proposed accelerated deadlines for periodic reports of registrants, while not fully supporting that proposal, recognized the need for more current information.¹⁸ In fact, the comments of the American Bar Association's Subcommittee on Disclosure and Continuous Reporting of the Committee on Federal Regulation of Securities, Section of Business Law, proposed alternatively that we require companies to file their earnings reports on Form 8-K. The ABA Subcommittee expressed the view that such a requirement:

- Would enhance the attention and level of care companies bring to those disclosures because companies would be aware that the disclosures will become part of the formal reporting system; and
- Would bring those disclosures into the formal disclosure system where they would be available electronically on a widespread basis.¹⁹

Today, to implement the Sarbanes-Oxley Act's directives regarding the use of non-GAAP financial measures and further the statutory objective of increased real-time issuer disclosures, we are proposing new Regulation G, amendments to Item 10 of Regulation S-K, amendments to Item 10 of Regulation S-B and amendments to Exchange Act Forms 8-K and 20-F.

II. Discussion of Proposals

We intend the proposed rules and amendments to implement the requirements of the Sarbanes-Oxley Act, improve the transparency and quality of disclosure of non-GAAP financial measures and related information and enhance the current reporting of earnings information. We are taking a two-part approach to the disclosure of non-GAAP financial measures. First, we are proposing new Regulation G, which would apply whenever a company publicly discloses or releases material information that includes a non-GAAP financial measure. While Section 401(b) of the Sarbanes-Oxley Act refers to any communication of "pro forma financial information," we believe that proposing to make Regulation G applicable to public disclosures of material information containing or accompanied by non-GAAP financial measures delineates appropriately the scope of the rules required by Section 401(b). This regulation would impose specific requirements in connection with the

¹⁸ See National Investor Relations Institute letter to Mr. Jonathan G. Katz dated May 20, 2002, and American Bar Association letter to Mr. Jonathan G. Katz dated June 4, 2002.

¹⁹ American Bar Association letter to Mr. Jonathan G. Katz dated June 4, 2002, at page 4.

public communication of non-GAAP financial measures and, without affecting the existing antifraud regime, would prohibit material misstatements or omissions that would make the presentation of the material non-GAAP financial measure, under the circumstances in which it is made, misleading. Regulation G provides a limited exception for foreign private issuers based on what we believe to be an appropriate territorial approach. This limited exception applies the principles of territoriality based on where the disclosure is initially made and is similar to that provided by Rule 135e²⁰ under the Securities Act of 1933²¹ for offshore press and related activities.

Second, pursuant to the Sarbanes-Oxley Act and our existing authority under the Securities Act and Exchange Act, we are proposing to amend Item 10 of Regulation S-K and Item 10 of Regulation S-B to address specifically the use of non-GAAP financial measures in filings with the Commission.²² These proposed amendments would apply to the same categories of non-GAAP financial measures as are covered by proposed Regulation G, but contain somewhat more detailed requirements than proposed Regulation G.²³

In addition to these proposals, in order to bring earnings information within our current reporting system, we are proposing an amendment to Form 8-K that would require the filing with the Commission of releases or announcements disclosing material non-public financial information about completed annual or quarterly fiscal periods. Our proposal would not require the issuance of earnings releases or similar announcements. However, such releases and announcements would trigger the new proposed filing requirement. The proposed filing requirement would apply regardless of whether the release or announcement included disclosure of a non-GAAP financial measure. Public disclosure of financial information for a completed fiscal period in a presentation that is made orally, telephonically, by webcast, broadcast or similar means would not be required to be filed, if the presentation:

- Occurs within 48 hours of a related release or announcement that is filed

²⁰ 17 CFR 230.135e.

²¹ 15 U.S.C. §§ 77a *et seq.*

²² We also are proposing amendments to Exchange Act Form 20-F that would reference Item 10 of Regulation S-K.

²³ These proposed amendments would apply only to non-GAAP financial measures in filings with the Commission. Regulation G would apply to any public disclosure of material non-public information that included a non-GAAP financial measure, regardless of whether it is in a filing with the Commission.

under proposed Item 1.04 of Form 8-K; and

- Is accessible to the public.

A. Proposed Regulation G

Proposed Regulation G would apply to any entity that is required to file reports pursuant to Sections 13(a) or 15(d) of the Exchange Act, other than a registered investment company.²⁴ Regulation G would apply whenever such 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 would require the registrant to provide the following information as part of the disclosure or release of the non-GAAP financial measure:

- A presentation of the most comparable financial measure calculated and presented in accordance with GAAP;²⁵ and
- A reconciliation (by schedule or other clearly understandable method), which shall be quantitative for historic measures and quantitative, to the extent available without unreasonable efforts, for prospective measures, of the differences between the non-GAAP financial measure presented and the comparable financial measure or measures calculated and presented in accordance with GAAP.

If a non-GAAP financial measure is released orally, telephonically, in a webcast or broadcast or by similar means, proposed Regulation G would permit a registrant to provide the required accompanying information by posting it on the registrant's website. The registrant would be required to disclose the location and availability of the required accompanying information during its presentation.

With regard to the quantitative reconciliation of non-GAAP financial measures that are forward-looking, a schedule or other presentation detailing the differences between the forward-looking non-GAAP financial measure and the appropriate forward-looking GAAP financial measure would be required. If the GAAP financial measure is not accessible on a forward-looking basis, the registrant must disclose that

²⁴ See proposed Section 244.101(c) of Regulation G. Registered investment companies are excluded from the definition of "registrant" for purposes of Regulation G, as Section 405 of the Sarbanes-Oxley Act exempts investment companies registered under Section 8 of the Investment Company Act of 1940 (15 U.S.C. § 80a-8) from Section 401 of the Sarbanes-Oxley Act and any rules adopted by the Commission under Section 401.

²⁵ Examples of financial measures calculated and presented in accordance with GAAP would include, but not be limited to, earnings or cash flows as reported in the GAAP financial statements.

fact, explain why it is not accessible on a forward-looking basis and provide any reconciling information that is available without an unreasonable effort. Furthermore, the registrant must identify any information that is unavailable and disclose its probable significance.

Proposed Regulation G also provides that a non-GAAP financial measure, taken together with the accompanying information, may not misstate a material fact or omit to state a material fact necessary to make the presentation of the non-GAAP financial measure not misleading, in light of the circumstances under which it is presented.²⁶

For purposes of Regulation G, a non-GAAP financial measure would be 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 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 comparable measure so calculated and presented.

In this regard, "GAAP" refers to generally accepted accounting principles in the United States, except that in the case of foreign private issuers whose primary financial statements are prepared in accordance with other generally accepted accounting principles, references to GAAP also include the principles under which those primary financial statements are prepared. We do not intend today's proposals to capture measures of operating performance or financial measures that fall outside the scope of the definition set forth above.

Non-GAAP financial measures would not include:

- Operating and other statistical measures (such as unit sales, numbers of employees, numbers of subscribers, or numbers of advertisers); and
- Ratios or measures that are calculated using only:
 - Financial measures calculated in accordance with GAAP; and
 - Operating measures or other measures that are not non-GAAP financial measures.

Non-GAAP financial measures would not include financial information that does not have the effect of providing

²⁶ 17 CFR 244.100(b).

numerical measures that are different from the comparable GAAP measure. Examples of measures to which Regulation G would not apply would include the following:

- Disclosure of amounts of expected indebtedness, including contracted and anticipated amounts;
- Disclosures or amounts of repayments that have been planned or decided upon but not yet made;
- Disclosures of estimated revenues or expenses of a new product line, so long as such amounts were estimated as GAAP figures; and
- Measures of profit or loss and total assets for each segment required to be disclosed in accordance with GAAP.²⁷

We do intend that the definition of non-GAAP financial measure capture all measures that have the effect of depicting either:

- 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.

An example of a non-GAAP financial measure would be a measure of operating income that excludes one or more expense or revenue items that are identified as "non-recurring." Another example would be EBITDA (earnings before interest, taxes, depreciation and amortization), which could be calculated using elements derived from GAAP financial presentations but, in any event, is not presented in accordance with GAAP. Examples of ratios and measures that would not be non-GAAP financial measures would include sales per square foot (assuming that the sales figure was calculated in accordance with GAAP) or same store sales (again assuming the sales figures for the stores were calculated in accordance with GAAP). An example of a ratio that would be a non-GAAP financial measure would be a measure of operating margin where either the revenue component or the operating

²⁷ FASB Statement 131, *Disclosures about Segments of an Enterprise and Related Information*, requires that companies report a measure of profit or loss and total assets for each reportable segment. This tabular information is presented in a note to the audited financial statements and is required to be reconciled to the GAAP measures, with all significant reconciling items separately identified and described. A registrant is required to provide a Management's Discussion & Analysis of segment information if such a discussion is necessary to an understanding of the business. Such discussion would generally include the measures reported under FASB Statement 131.

income component of the calculation, or both, were not calculated in accordance with GAAP.

The proposed regulation would apply to registrants that are foreign private issuers,²⁸ subject to a limited exception. Specifically, Regulation G would not apply to public disclosure of a non-GAAP financial measure by or on behalf of a registrant that is a foreign private issuer if the following conditions were satisfied:

- The securities of the issuer are listed or quoted on a securities exchange or inter-dealer quotation system outside the United States;
- The non-GAAP financial measure and the most comparable GAAP financial measure are not calculated and presented in accordance with generally accepted accounting principles in the United States; 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 only outside the United States.

We believe that these conditions, by focusing on whether the financial measure relates to U.S. GAAP and on the territorial principle of where the disclosure is made by or on behalf of the foreign private issuer, appropriately balance the interests of U.S. investors, including those interests as provided by the Sarbanes-Oxley Act, with the interests of foreign private issuers in communicating in their home markets. The Commission has not historically applied specific disclosure requirements to communications by foreign private issuers other than in their annual reports on Form 20-F. We believe that it is appropriate to take the Sarbanes-Oxley Act as a direction to apply Regulation G to foreign private issuers, subject to the exception we have proposed.

In addition, we believe that the worldwide availability of information properly disclosed outside the United States and the interests of U.S. investors in information communicated by or on behalf of the issuer outside the United States dictate that the exception for foreign private issuers should continue to apply where:

- Foreign or U.S. journalists or other third parties have access to the information, so long as the information is disclosed or released by or on behalf of the registrant only outside the United States;

- Following its release or disclosure, the information appears on one or more

²⁸ "Foreign private issuer" is defined in Rule 405 under the Securities Act [17 CFR 230.405].

web sites maintained by the registrant, so long as the web sites, 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 to the Commission made under cover of a Form 6-K.²⁹

Indeed, regulators worldwide have been addressing this issue within their own jurisdictions. In May 2002, the Technical Committee of the International Organization of Securities Commissions (IOSCO) published a Cautionary Statement Regarding Non-GAAP Results Measures that urged issuers, investors and other users of financial information to use care when presenting and interpreting such information.³⁰ This IOSCO Cautionary Statement notes the universal concerns that regulators have about the potential misuse of non-GAAP earnings measures and provides examples of statements of cautionary advice regarding the appropriate use of non-GAAP information that have been issued in various countries.

Proposed Regulation G would be a disclosure provision applicable to entities that are required to file reports under Section 13(a) or Section 15(d) of the Exchange Act, other than registered investment companies.³¹ Proposed Rule 102 of Regulation G³² expressly provides that nothing in Regulation G shall affect any person's liability under Exchange Act Section 10(b)³³ or Rule 10b-5 thereunder.³⁴ Proposed Rule 102 also states that a person's compliance or non-compliance with the requirements of Regulation G would not affect that person's liability under Section 10(b) or Rule 10b-5. The facts and circumstances surrounding a violation of Regulation G, however, may give rise to a Rule 10b-5 violation if all the elements for such a violation are present. In this regard, we reminded companies in December 2001 that, under certain circumstances, non-GAAP financial measures could mislead investors if they obscure the company's

²⁹ 17 CFR 249.306.

³⁰ This document is available at www.iosco.org/press/presscomm020530.html.

³¹ A registrant's failure to include all of the information required to be included in a public announcement by Regulation G would not affect that registrant's form eligibility under the Securities Act or whether there is adequate current public information regarding the registrant for purposes of Securities Act Rule 144(c) [17 CFR 230.144(c)].

³² 17 CFR 244.102

³³ 15 U.S.C. 78j.

³⁴ 17 CFR 240.10b-5.

GAAP results.³⁵ We continue to be of the view that some disclosures of non-GAAP financial measures could give rise to actions under Rule 10b-5.³⁶

Section 3(b) of the Sarbanes-Oxley Act provides that a violation of that Act or the Commission's rules thereunder shall be treated for all purposes as a violation of the Exchange Act. Therefore, if an issuer, or any person acting on its behalf, fails to comply with Regulation G, the issuer and/or the person acting on its behalf could be subject to a Commission enforcement action alleging violations of Regulation G. Additionally, if the facts and circumstances warrant, we could bring an action under both Regulation G and Rule 10b-5.

Questions Regarding Proposed Regulation G

- As proposed, Regulation G would apply only to companies that are required to file reports pursuant to Section 13(a) or 15(d) of the Exchange Act. Should we expand the scope of the regulation to apply to all companies that publicly disclose non-GAAP financial measures, excluding registered investment companies?

- As an alternative to requiring reconciliation to the most directly comparable financial measure calculated and presented in accordance with GAAP, should we require reconciliation to specific GAAP financial measures in all cases, such as net income and cash flow from operating activities? If yes, to which GAAP financial measures should we require reconciliation?

- Should the presentation of certain non-GAAP financial measures require the presentation of a reconciled (full or summary) consolidated balance sheet, income statement and cash flow statement? If so, which non-GAAP financial measure(s) should trigger this requirement?

- Should the requirement of a quantitative reconciliation include an exception for prospective measures where the necessary information cannot be obtained without unreasonable effort?

- Should we limit the definition of non-GAAP financial measures to historical financial measures?

- Does the proposed definition of "non-GAAP financial measure" capture non-GAAP information where enhanced disclosure is appropriate? Does the proposed definition capture the pro

forma financial information that the Sarbanes-Oxley Act targets? Should Regulation G apply to disclosures of material information including *any* financial measure calculated and presented otherwise than in accordance with GAAP? Is the proposed definition otherwise too narrow or too broad? If so, how should it be changed?

- Should we exclude non-GAAP financial measures communicated orally from the proposed regulation? Would such an exclusion be consistent with the terms of the Sarbanes-Oxley Act?

- Is there a danger that investors would consider the reconciliation to have been audited or reviewed by the issuer's independent auditors? Should Regulation G require companies to disclose whether the reconciliation has been reviewed or audited by their independent accountants in order to avoid investor confusion?

- In this release, we propose to require companies that include non-GAAP financial measures in filings to also include a discussion of the purposes for which the company's management uses the non-GAAP financial measure and why management believes the presentation of the non-GAAP financial measure provides useful information to investors.³⁷ Should we require that information in all communications that are subject to Regulation G? If so, why? If not, why not?

- Should we allow registrants greater latitude to satisfy the requirements of proposed Regulation G by posting the non-GAAP financial measure's components and the comparative GAAP financial measure on their website or in their Commission filings?

- As proposed below, and consistent with staff practice, the Commission generally has more detailed disclosure requirements where non-GAAP financial measures are included in Commission filings. Should we require these additional disclosure requirements in all cases, even in documents not filed with the Commission?

- Should we prohibit the presentation, whether or not included in filings with the Commission, of certain non-GAAP financial measures (for example, certain per-share measures or liquidity measures that exclude cash items)? If so, which measures?

- Will proposed Regulation G limit the use of non-GAAP financial measures? Please explain.

- Is the limited exception from Regulation G for foreign private issuers

appropriate in furtherance of the purposes of the Sarbanes-Oxley Act? Should the exception be broader or more limited? If so, how?

- Does the limited exception from Regulation G for foreign private issuers deprive U.S. investors of material information? Alternatively, would eliminating the limited exception for foreign private issuers deprive U.S. investors of non-GAAP financial measures? Furthermore, would eliminating the limited exception from Regulation G for foreign private issuers result in foreign private issuers de-registering and exiting the U.S. capital markets?

- Proposed Regulation G would apply to disclosures of non-GAAP financial measures that represent projections or forecasts of results of business combination transactions ("post-transaction measures") and that are filed with the Commission as information pursuant to the communications rules applicable to business combination transactions,³⁸ as well as non-GAAP financial measures of each registrant that are used to calculate post-transaction measures. Should there be an exception from certain requirements of Regulation G for post-transaction measures or other measures filed as information under the business combination rules? Should such measures be treated differently under Regulation G? If so, how? Business combination communications often include brief statements regarding the potential benefits to be achieved by the business combination (e.g., synergies, valuations, dividend amounts, etc.). Either instead of or in addition to the requirements of proposed Regulation G, should the rules specifically require the disclosure of any assumptions or bases underlying these measures?

- Should Regulation G be enforceable by the Commission only or also by private plaintiffs? Should language be included in Regulation G that makes explicit the manner in which it is to be enforced?

- Will proposed Regulation G meet the goals of Section 401(b) of the Sarbanes-Oxley Act? Does proposed Regulation G meet those goals in the most appropriate manner? Is there a way to achieve those goals that is less burdensome than that in proposed Regulation G? If so, what is it?

³⁵ See Release No. 33-8039 (Dec. 4, 2001) [59 FR 63731].

³⁶ See Release No. 33-8039 (Dec. 4, 2001) [59 FR 63731] and *In the Matter of Trump Hotels & Casino, Inc.*, Release No. 34-45287 (Jan. 16, 2002).

³⁷ See the discussion of the proposed amendments to Item 10 of Regulation S-K and Item 10 of Regulation S-B in Section II.B. of this release.

³⁸ See Exchange Act Rules 14a-12 [17 CFR 240.14a-12] and 14d-2 [17 CFR 240.14d-2] and Securities Act Rules 165 [17 CFR 230.165] and 425 [17 CFR 230.425].

B. Proposed Amendments to Item 10 of Regulation S-K, Item 10 of Regulation S-B and Form 20-F

We are proposing to amend Item 10 of Regulation S-K and Item 10 of Regulation S-B to add a statement concerning the use of non-GAAP financial measures in filings made with the Commission.³⁹ In addition, we are proposing to amend Exchange Act Form 20-F to incorporate Item 10 of Regulation S-K (as proposed to be amended). The proposed amendments to Item 10 of Regulation S-K and Item 10 of Regulation S-B would make clear that registrants using non-GAAP financial measures in filings with the Commission would have to provide:

- A presentation, with equal or greater prominence, of the most directly comparable financial measure calculated and presented in accordance with GAAP;
- A quantitative reconciliation (by schedule or other clearly understandable method) of the differences between the non-GAAP financial measure disclosed with the most directly comparable measure or measures calculated and presented in accordance with GAAP;
- A statement disclosing the purposes for which the registrant's management uses the non-GAAP financial measure presented; and
- A statement describing the reasons why the registrant's management believes such non-GAAP financial measures provide useful information to investors.

In addition to these mandated disclosure requirements, we propose to amend Item 10 of Regulation S-K and Item 10 of Regulation S-B to prohibit the following:

- Presenting a non-GAAP financial measure in a manner that would give it greater authority or prominence than the comparable GAAP financial measure or measures;
- Excluding 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;
- Adjusting a non-GAAP performance measure to eliminate or smooth items identified as non-recurring, infrequent or unusual, when the nature of the charge or gain is such that it is reasonably likely to recur;
- Presenting non-GAAP financial measures on the face of the registrant's financial statements prepared in

accordance with GAAP or in the accompanying notes;

- Presenting non-GAAP financial measures on the face of any pro forma financial information required to be disclosed by Article 11 of Regulation S-X;
- Using 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; and
- Presenting a non-GAAP per-share measure.

The requirement of Regulation G that the presentation of a non-GAAP financial measure, taken together with the information accompanying the measure and any other accompanying discussion, not contain a material misstatement or material omission necessary in order to make the presentation not misleading, in light of the circumstances in which the presentation is made, would also apply to disclosures in documents filed with the Commission.

The requirements for filed information are proposed to be more extensive and detailed than those of proposed Regulation G. The additional requirements would be generally consistent with the staff's historical practice in situations where it has reviewed filings containing non-GAAP financial measures. In addition, the requirements for a GAAP presentation and for a reconciliation would be slightly more stringent than those set forth under Regulation G. In particular, in filings with the Commission, the presentation of the comparable GAAP financial measure must have equal or greater prominence, and there would not be an "unreasonable effort" exception for forward-looking information to the requirement for a quantitative reconciliation between the non-GAAP financial measure and the comparable GAAP financial measure. Additionally, any non-GAAP financial measure presented must be accompanied by statements disclosing the purposes for which the registrant's management uses the non-GAAP financial measure and why the registrant believes the non-GAAP financial measure would be useful to investors. This requirement is designed to ensure that companies are using non-GAAP financial measures that provide information that is important in analyzing and understanding the registrant. We believe that these more stringent requirements are appropriate for filings with the Commission.

The requirements that a statement regarding the purposes for which management uses the non-GAAP

financial measure and the utility of the non-GAAP financial measure to investors could be satisfied by including the statements in the most recent annual report filed with the Commission (or a more recent filing) and by updating those statements, as necessary, no later than the time of the filing.⁴⁰

The definition of "non-GAAP financial measure" would be the same for purposes of these proposals as for Regulation G. Unlike under Regulation G, however, there is no limited exception for foreign private issuers and, therefore, the proposed requirements would apply to filings on Form 20-F. However, a non-GAAP financial measure that would otherwise be prohibited would be permitted in a Form 20-F filing of a foreign private issuer if the measure was expressly permitted under the generally accepted accounting principles used in the issuer's primary financial statements and was included in the issuer's annual report or financial statements used in its home country jurisdiction or market.

We are not proposing to subject filers on Form 40-F under the Multi-Jurisdictional Disclosure System (MJDS) to the proposed requirements because, under the philosophy of MJDS, which is currently applicable to certain Canadian issuers, the Canadian disclosure form requirements dictate required disclosure in filings with the Commission. Public disclosures in the United States by these issuers, including filings with the Commission on Form 40-F, would be subject to proposed Regulation G.

Questions Regarding Amendments to Item 10 of Regulation S-K, Item 10 of Regulation S-B and Form 20-F

- Are the proposed additional disclosures required in filings necessary in light of proposed Regulation G?
- Consistent with current staff policy, our proposal would prohibit the use of non-GAAP per-share measures. Is such a prohibition necessary, or would it suffice to reconcile both the numerator and denominator of the non-GAAP per-share measure with comparable GAAP measures, respectively?
- Should the non-GAAP financial measures be presented in a separate section of a Commission filing?
- Should the requirements for filings and those required in Regulation G be

³⁹ The proposed amendments to Item 10 of Regulation S-K would not apply to registered investment companies [17 CFR 229.10(e)(5)].

⁴⁰ With regard to the issuer's statement as to why investors may find the non-GAAP financial measure useful, the sole fact that the non-GAAP financial measure is used by or useful to analysts cannot be the sole support for presenting the non-GAAP financial measure. Rather, the justification for the use of the measure must be substantive; it can, of course, be a justification that causes a measure to be used by or useful to analysts.

different? For example, should the requirement that the GAAP measure in a filing be presented with equal or greater prominence be included in Regulation G or not included in Item 10 of Regulation S-K and Item 10 of Regulation S-B?

- Should the requirement that a quantitative reconciliation of prospective measures be included in the filing have an exception similar to that proposed in Regulation G where the necessary information cannot be obtained without unreasonable effort?

• Are there additional disclosures that should be required in filings? If so, what disclosure items would be beneficial to investors?

• Consistent with current staff policy, our proposals would prohibit specified types of disclosures. Is such a prohibition necessary and appropriate?

• Should the proposed requirements apply to foreign private issuers' reports on Form 20-F?

• Should the proposed requirements apply to filings by Canadian issuers under the MJDS on Form 40-F?

• As with Regulation G, in the case of business combinations, the proposed requirements would apply to "post-transaction measures" filed as information under the communication rules applicable to business combination transactions.⁴¹ Is an exception from certain of the requirements for post-transaction measures or other measures filed as information under the business combination rules appropriate? Should such measures be treated differently? If so, how? Either instead of or in addition to the requirements of proposed Regulation G, should the rules specifically require the disclosure of assumptions or bases underlying announcements of potential benefits to be achieved by the business combination (e.g., synergies, valuations, dividend amounts, etc.)?

• If a company presents a non-GAAP measurement for a previous completed fiscal period, should it be required to present that same non-GAAP measurement in future filings where the previous period is compared to a recent completed fiscal period? For example, if a company presents a non-GAAP financial measurement that for the first fiscal quarter of 2002, should it be required to present the same non-GAAP measurement for the first fiscal quarter of 2003?

⁴¹ See footnote 38.

C. Proposed New Item 1.04 of Form 8-K

We propose to amend Form 8-K to add new Item 1.04 "Disclosure of Results of Operations and Financial Condition."⁴² New Item 1.04 would require registrants to file a Form 8-K within two business days of any public announcement or release disclosing material non-public information regarding a registrant's results of operations or financial condition for an annual or quarterly fiscal period that has ended.

Today, these types of announcements and releases are subject to Regulation FD.⁴³ Unlike disclosure made to satisfy Regulation FD, however, historical information filed under proposed Item 1.04 of Form 8-K always would be considered filed with the Commission for liability purposes.⁴⁴ Further, a Form 8-K filed pursuant to Item 1.04 would satisfy an issuer's obligation under Regulation FD only if the Form 8-K were filed within the time frame required by Regulation FD. Regulation FD could, of course, be satisfied by public disclosure other than through the filing of a Form 8-K meeting Regulation FD's requirements; in that case, a Form 8-K filed pursuant to Item 1.04 would be required to be filed within the two-business day timeframe.

Proposed Item 1.04 would require the registrant to identify briefly the announcement or release and file the announcement or release as an exhibit to the Form 8-K. Further, the requirements of proposed Item 10(e) of Regulation S-K or Item 10(h) of Regulation S-B would apply to a Form 8-K filed under proposed Item 1.04.

If non-public information is disclosed orally, telephonically, by webcast, broadcast, or similar means, Item 1.04 would not require the registrant to file a Form 8-K if:

- The disclosure initially occurs within 48 hours of a written release or announcement filed on Form 8-K pursuant to Item 1.04;

⁴² In Release No. 33-8106, we proposed significant amendments to Form 8-K. This release should be read as a companion proposing release to Release No. 33-8106. Accordingly, Item numbers used in this release refer to those proposed in Release No. 33-8106.

⁴³ 17 CFR 243.100—243.103.

⁴⁴ The requirements of proposed Item 1.04 would be in addition to the requirements of Regulation FD. Accordingly, information furnished under existing Item 9 (proposed to be Item 6.01) of Form 8-K for the purpose of Regulation FD would not satisfy proposed Item 1.04 as it would not be considered filed with the Commission. Of course, information filed pursuant to Item 1.04, if filed in accordance with the time frame established by Regulation FD, would satisfy an issuer's Regulation FD obligation.

- The presentation is accessible to the public by dial-in conference call, webcast or similar technology;

- The financial and statistical information contained in the presentation is provided on the registrant's Web site, together with any information that would be required under proposed 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 Web site where the information would be available.

As noted above, our proposal would not require any registrant to issue an earnings release or similar announcement. However, if a registrant issues such a release or announcement containing material non-public information regarding the registrant's results of operations or financial condition for an annual or quarterly fiscal period that has ended, it would trigger the new proposed filing requirement.

The filing requirement under proposed Item 1.04 of Form 8-K would be triggered by the disclosure of material non-public information regarding a completed fiscal year or quarter. Repetition of previously publicly disclosed information or release of the same information in a different form, for example in an interim or annual report to shareholders, would not trigger the proposed Item 1.04 requirement. This result would not change if the repeated information were accompanied by 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 operation or financial condition for a completed fiscal year or quarter would trigger an additional Item 1.04 filing requirement. Issuers 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 which portion of the report contains the information required to be filed under Item 1.04. In addition, the requirement to file under Item 1.04 of Form 8-K would not apply to issuers that make these announcements and disclosures only in their quarterly reports filed with the Commission on Form 10-Q⁴⁵ (or 10-QSB⁴⁶) or their annual reports filed

⁴⁵ 17 CFR 249.308a.

⁴⁶ 17 CFR 249.308b.

with the Commission on Form 10-K⁴⁷ (or 10-KSB⁴⁸).

Proposed Item 1.04 of Form 8-K would apply only to publicly disclosed or released material non-public information concerning an annual or quarterly fiscal period that has ended. While such disclosure may also include forward-looking information, it is the material information about the completed fiscal period that triggers proposed Item 1.04. Accordingly, proposed Item 1.04 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.⁴⁹ In such a case, specifically identified forward-looking information could be furnished under Item 6.01⁵⁰ rather than filed under proposed Item 1.04. Information furnished under Item 6.01 should be included in the same Form 8-K that contains the historical material information filed pursuant to Item 1.04.

Information furnished under Item 6.01 would not be subject to Section 18⁵¹ of the Exchange Act, nor would it be incorporated by reference into a registration statement, proxy statement or other report. The registrant would be required to identify the specific forward-looking statements it did not want to be considered filed.⁵²

Questions Regarding Proposed Item 1.04 of Form 8-K

- Is proposed Item 1.04 necessary given Regulation FD and proposed Regulation G?
- Should the Commission define “public disclosure” for purposes of proposed Item 1.04?
- Proposed Item 1.04 would apply only to disclosures regarding completed annual or quarterly fiscal periods. Should we expand the scope of proposed Item 1.04 to require the filing

⁴⁷ 17 CFR 249.310.

⁴⁸ 17 CFR 249.310b.

⁴⁹ Of course, Regulation FD would continue to apply to disclosure of such forward-looking information if it were material.

⁵⁰ In Release No. 33-8106 we proposed to revise and move Item 9 of Form 8-K to Item 6.01. See footnote 42. We include in this release proposed amendments to Item 6.01 of Form 8-K to reflect proposed Item 1.04.

⁵¹ 15 U.S.C. § 78r.

⁵² If information that was not forward-looking in nature or did not meet the definition in Section 21E of the Exchange Act [15 U.S.C. § 78u-5] was identified as forward-looking information, that information would, nonetheless, be considered filed for purposes of Section 18 of the Exchange Act and would, where appropriate, be incorporated by reference into a registration statement, proxy statement or other report.

of all material updates to estimates for current or future fiscal periods?

- Will proposed Item 1.04 have the effect of decreasing the extent to which public companies make public announcements or releases of material non-public information regarding completed fiscal periods? If so, what are the specific factors that would result in that decrease? Why would those factors result in that decrease?
- Is the posting of the complementary information on a Web site sufficient disclosure or should a filing be required for this information as well?
- Regulation G requires that any information provided on a Web site be available at the time the original public communication is made. Is it necessary for Item 1.04 to contain the same timing requirement?
- Should we require forward-looking information to be considered filed for purposes of Section 18 of the Exchange Act? Should forward-looking information, where appropriate, be incorporated by reference into a registration statement, proxy statement or other report?

• Should the disclosure requirements of Item 10 of Regulation S-K and Item 10 of Regulation S-B apply to complementary information not filed with the Commission?

• Would the application of Item 1.04 only to disclosures regarding completed annual or quarterly periods cause public companies to increase their disclosure of intra-period information, rather than disclosure regarding completed periods, in an effort to avoid the requirements of Item 1.04?

D. General Request for Comment

We request and encourage any interested person to submit comments regarding:

- The proposed rule and amendments that are the subject of this release;
- Additional or different changes; or
- Other matters that may have an effect on the proposals contained in this release.

We request comment from the point of view of registrants, investors and other market participants. With regard to any comments, we note that such comments are of great assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments.

III. Paperwork Reduction Act

Proposed Regulation G and related amendments to Regulations S-K, Form 8-K and Form 20-F contain “collections of information” requirements within the meaning of the Paperwork Reduction

Act of 1995 (“PRA”),⁵³ and the Commission has submitted the proposals to the Office of Management and Budget (“OMB”) for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The titles for the information collections are: Regulation G, Regulation S-K, Regulation S-B, Form 8-K and Form 20-F.

The Commission is proposing Regulation G pursuant to Section 401 of the Sarbanes-Oxley Act. Proposed Regulation G would require registrants when publicly disclosing material information that include non-GAAP financial measures to provide a reconciliation to comparable GAAP figures. Regulation G is intended to implement the requirements of the Sarbanes-Oxley Act. Specifically, Regulation G is intended to provide investors with balanced financial disclosure when non-GAAP financial measures are presented. Regulation G defines a non-GAAP financial measure as a numerical measure of an issuer’s historical or future financial performance, financial position or cash flow that:

- Excludes amounts, or is subject to adjustments that have the effect of excluding amounts, that are included in the 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 comparable measure calculated and presented in accordance with GAAP.

Accordingly, by definition, a non-GAAP financial measure that triggers the application of Regulation G would have been derived from a GAAP measure. For example, generally, EBITDA is net income before interest, taxes, depreciation and amortization. In order for a company to present EBITDA it must already know the amount of net income. We expect the cost of obtaining the additional disclosure required by Regulation G to be minimal. Moreover, much of the disclosure mandated by Regulation G, such as the most directly comparable GAAP measure, is already required to be provided pursuant to other forms and regulations, such as Form 10-K, Form 10-Q and Regulation S-X. Therefore, most of the costs associated with collecting such information are already included in the burden hours associated with those forms and regulations. Thus, we have estimated for purposes of the PRA that

⁵³ 44 U.S.C. § 3501 et seq.

it will take .5 burden hour for compliance with Regulation G. We anticipate that on average a company will have to comply with Regulation G roughly six times a year. Since there are approximately 14,000 public companies that would be subject to Regulation G we have estimated that there will be 84,000 disclosures made in accordance with Regulation G for a total of 42,000 burden hours. We would expect that an in house junior accountant would prepare the actual reconciliation.

Regulations S-K (OMB Control No. 3235-0071) and S-B (OMB Control No. 3235-0417) prescribe disclosure requirements that registrants must follow when filing registration statements, reports and schedule with the Commission. Our amendments to Item 10 of Regulation S-K and S-B incorporate the requirements of Regulation G and codify existing staff interpretations. Because the collection of information regarding the reconciliation is already being accounted for in Regulation G, we do not believe adding the same requirement to Item 10 of Regulation S-K and Item 10 of Regulation S-B incurs an additional collection of information within the meaning of the PRA. To account for the proposed reconciliation in both Regulation G and Item 10 or Regulation S-K and Item 10 of Regulation S-B would result in double counting. Additionally, companies already, usually and customarily, disclose the purposes for which the registrant's management uses the non-GAAP financial measure and why it believes that its presentation of the non-GAAP financial measure provides useful information to investors. Accordingly, we do not believe that our amendments to Item 10 of Regulation S-K and Item 10 of Regulation S-B contain a new "collection of information" or alter the existing burden of these collections of information within the meaning of the PRA.

Form 8-K (OMB Control No. 3235-0060) prescribes information, such as material events or corporate changes that a registrant must disclose. Proposed Item 1.04 of Form 8-K would require a company that publicly discloses material information regarding its actual or expected quarterly or annual results of operations or financial condition for a completed fiscal period to file the text of the public disclosure and any accompanying analysis. Proposed Item 1.04 of Form 8-K would not require companies to actually issue an earnings announcement or release but only require that it be filed if they choose to issue an earnings announcement or

release. Proposed Item 1.04 would bring earnings announcements and releases into the formal disclosure system where they would be available to investors on a widespread basis.

Proposed Item 1.04 of Form 8-K would impose the obligation to file a public company's earnings release. We estimate for purposes of the PRA that the burden associated with actually filing the Form 8-K to be minimal. We believe that proposed Item 1.04 of Form 8-K would require approximately .5 of a burden hour. We estimate that approximately 14,000 public companies would make an average of four filings per year. We believe the total burden hours associated with proposed Item 1.04 would be 28,000 hours. We would expect that companies would use in house personal to file the Form 8-K.

We have amended Form 20-F (OMB Control Number 3235-0288) to incorporate our amendment to Item 10 of Regulation S-K. While proposed Regulation G provides a limited exception for foreign private issuers, this exception would not apply to their Form 20-F filing or any disclosure of non-GAAP financial measures made in the United States. Accordingly, we do not believe our amendment to Form 20-F would result in an additional collection of information as any burden is already accounted for in Regulation G.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Compliance with the disclosure requirements is mandatory. There is no mandatory retention period for the information disclosed, and responses to the disclosure requirements will not be kept confidential.

Request for Comment

We request comment in order to: (a) Evaluate whether the proposed collection of information and amendments to existing collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (b) evaluate the accuracy of our estimate of the burden of the proposed collection of information and amendments to existing collection of information; (c) determine whether there are ways to enhance the quality, utility and clarity of the information to be collected; and (d) evaluate whether there are ways to minimize the burden of the proposed collection of information and amendments of existing collections of information on those who respond,

including through the use of automated collection techniques or other forms of information technology.⁵⁴

Persons who desire to submit comments on the proposed collections of information requirements should direct their comments to the OMB, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and send a copy of the comments to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549-0609, with reference to File No. S7-XX-02. Requests for materials submitted to the OMB by us with regard to this collection of information should be in writing, refer to File No. S7-XX-02 and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services, 450 Fifth Street NW., Washington, DC 20549. Because the OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, your comments are best assured of having their full effect if the OMB receives them within 30 days of publication.

IV. Cost and Benefits

The Sarbanes-Oxley Act seeks to enhance the financial disclosure of public companies. In furtherance of this goal, the Sarbanes-Oxley Act has required the Commission, among other things, to adopt rules requiring that if a company publicly discloses non-GAAP financial measures or includes them in a Commission filing, the company must reconcile those non-GAAP financial measurements to a company's financial condition and results of operations under GAAP. Moreover, Sarbanes-Oxley requires that any public disclosure of non-GAAP financial measures not contain an untrue statement of a material fact or omit to state a material fact necessary in order to make the non-GAAP financial measure, in light of circumstances under which it is presented not misleading. Additionally, the Sarbanes-Oxley Act seeks to have companies that report under Sections 13(a) and 15(d) of the Exchange Act disclose to the public on a rapid and current basis such additional information concerning material changes in its financial condition or operations.

Proposed Regulation G, amendments to Item 10 of Regulation S-K, Item 10 of Regulation S-B and Form 20-F, upon

⁵⁴Comments are requested pursuant to 44 U.S.C. § 3506(c)(2)(B).

adoption, would fulfill the statutory directive under Section 401(b) of the Sarbanes-Oxley Act. We recognize that any implementation of the Sarbanes-Oxley Act would likely result in costs as well as benefits and have an effect on the economy. We are sensitive to the costs and benefits of our proposals. We discuss these costs and benefits below as well as the costs and benefits associated with our amendments to Form 8-K.

A. Benefits

The proposed rules and amendments are intended to ensure that investors and others are not misled by the use of non-GAAP financial measures.

Additionally, the proposed amendments to Form 8-K are intended to create a central depository where investors and other market participants can look to find the latest earning announcements and releases by public companies and provide enhanced attention to those announcements and releases.

Furthermore, as the ABA noted in their comment letter regarding the Commission's recent proposal on accelerated reporting periods, the filing of the earnings reports would enhance the attention and level of care companies bring to those disclosures because they will become part of the formal reporting system and provide widespread access to investors. Therefore, we would expect the accuracy and reliability of a company's earnings report to be enhanced.

Regulation G and amendments to Item 10 of Regulations S-K and S-B require that any non-GAAP financial measure presented be reconciled with its most comparable financial measure prepared in accordance with GAAP. We anticipate that this reconciliation will help investors and market professionals to better evaluate the non-GAAP financial measures presented. It is possible that the reconciliation will provide the securities markets with additional information to more accurately evaluate companies' securities and in turn result in a more accurate pricing of securities. We, however, do not currently have sufficient information to quantify these or other benefits that Regulation G and our amendments to Item 10 of Regulation S-K, Regulation S-B, and Form 8-K and Form 20-F would provide. We therefore request your comments, including supporting data, on the benefits of these proposals.

B. Costs

As discussed in the PRA section, we believe that the costs associated with the proposed Regulation G and

amendments will be minimal. With regard to Regulation G, the costs associated with the requirement to reconcile the non-GAAP financial measure, should be minimal since by definition the non-GAAP financial measure would have been derived from a GAAP financial measure. Accordingly, in most cases, the registrant already will have available the comparable GAAP financial measure. Moreover, in cases where the GAAP financial measure is not available, any costs associated with obtaining the GAAP financial measure would reduce future costs associated with filing other forms, such as the Form 10-Q and Form 10-K where the GAAP measure must be presented.

We have estimated that public companies would have to comply with Regulation G six times a year. There are roughly 14,000 public companies. Using our estimates from the PRA section, we would expect that it would take a junior accountant roughly .5 hours to complete the required reconciliation and ensure there are no material misstatements. Accordingly, we have estimated that the total burden hours needed to comply with Regulation G would be 42,000 hours. Using cost data from the Securities Industry Association's Report on Management & Professional Earnings in the Securities Industry 2001 (SIA Report)⁵⁵ and adding an additional 35% for costs associated with overhead, we find that, on average, a junior accountant would earn \$26 an hour. We believe the salary of a junior accountant is appropriate for our estimates since in most cases we would expect the most directly comparable GAAP measure to be available. Therefore, we have estimated the total costs associated with complying with Regulation G to be \$1,092,000.

Our amendments to Item 10 of Regulation S-K and Item 10 of Regulation S-B incorporate the requirements of Regulation G. Because the costs associated with providing a reconciliation are already being accounted for in Regulation G, we do not believe adding the same requirement to Item 10 of Regulation S-K and Item 10 of Regulation S-B incurs any additional cost to the registrant. To account for the required reconciliation in both Regulation G and Item 10 or Regulation S-K and Item 10 of Regulation S-B would result in double counting. Additionally, because companies currently disclose the purposes for which the registrant's management uses the non-GAAP

financial measure and why it believes that presentation of the non-GAAP financial measure provides useful information to investors, this aspect of the proposed rule would not increase costs already being borne by registrants. Accordingly, we do not believe our amendments to Item 10 of Regulation S-K and Item 10 of Regulation S-B would result in any additional costs not already included in Regulation G or current filing requirements.

Our amendment to Form 8-K, would result in the additional cost of actually filing the earnings release or earnings announcement. There is no requirement to actually make an earnings announcement or release. The only requirement is to file such announcement or release if it is publicly disclosed. We have not included in our estimates any additional legal review costs associated with the filing of earnings releases or announcements, since we do not anticipate any additional significant review would be needed. In this regard, we note that many issuers already file their earnings releases and those releases whether filed or not are subject to Rule 10b-5.

We believe that personnel in finance, investor relations or corporate communications departments would most likely file the earnings announcements or releases since most earnings announcements are disseminated via press release. We have estimated that the actual time required to file an earnings announcement or release on Form 8-K to be .5 hour. In estimating this time burden we note that most press releases are fairly short in length, making the actual process of filing easier. We also note that the software necessary to file a Form 8-K is available free of charge from the Commission. We have estimated that public companies would be required to comply with Item 1.04 of Form 8-K roughly four times a year. Assuming 14,000 public companies and a total burden of .5 hour for the filing, we estimate that companies will spend 28,000 hours complying with our proposed Form 8-K amendment. Again using the SIA Report, and adding an additional 35% for costs associated with overhead, we find that a Corporate Communications Manager, on average, earns \$56.00 an hour. Accordingly, we have estimated the total salary cost associated with our amendments to Form 8-K to be \$1,568,000.

Finally, our proposed amendments to Form 20-F would incorporate Item 10 of Regulation S-K. While proposed Regulation G provides a limited exception for foreign private issuers, this exception would not apply to their

⁵⁵The cost estimates are based on the SIA Report for employees based outside the New York City metropolitan area.

Form 20-F filing or any disclosure of non-GAAP financial measures made in the United States. Accordingly, the costs associated with our amendment to Form 20-F are already accounted for in our cost estimates for Regulation G.

We request your comments, including any supporting data, on our estimates of the costs of the proposals and any alternative options that may reduce the costs or enhance the benefits of our proposal.

C. Questions

- We have assumed that non-GAAP measures are derived and calculated from the GAAP measures. Accordingly, we do not believe there would be significant costs associated with the proposed reconciliation. Is our assumption that the comparable GAAP measure would be available at the time the non-GAAP measure is presented correct? If not, please discuss the nature and type of costs that may be incurred as a result of the reconciliation requirement.

- We believe the costs associated with the proposed filing requirement of Item 1.04 Form 8-K to be mainly administrative in nature. Are there other additional costs that may be incurred as a result of the proposed filing requirement of Form 8-K? If yes, please discuss the types and expected dollar amounts of such costs.

V. Effect on Efficiency, Competition, and Capital Formation

Section 23(a)(2)⁵⁶ of the Exchange Act requires us when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purpose of the Exchange Act. Proposed Regulation G and our proposed amendments to Item 10 of Regulation S-K, Item 10 of Regulation S-B, Form 20-F and Form 8-K would apply only to companies subject to the reporting requirements of Sections 13(a) and 15(d) of the Exchange Act, other than registered investment companies. Given that the estimated costs associated with our proposals are small we do not expect that competitors not subject to our proposals would gain any competitive advantage over those subject to the proposals. We, however, request comment on whether our proposals, if adopted, would impose a burden on competition. Commenters are requested to provide empirical data and

other factual support for their views if possible.

In addition, Section 2(b)⁵⁷ of the Securities Act and Section 3(f)⁵⁸ of the Exchange Act require us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation. Proposed Regulation G and our proposed amendments to Item 10 of Regulation S-K, Item 10 of Regulation S-B and Form 20-F are proposed pursuant to the Sarbanes-Oxley Act. As noted above the costs associated with these proposals and our proposed amendment to Form 8-K are expected to be minimal. Accordingly we do not believe that there will be any significant effects on competition or capital formation. We do believe, however, that there may be some benefits with regard to investor protection and efficiency of the market. The additional information provided has the potential to limit any misunderstanding with regard to the value of certain non-GAAP measures. Accordingly, this may allow the market to more rapidly and accurately price securities. If this occurs there would be a benefit to capital formation.

We request comment on whether proposed Regulation G and our proposed amendments, if adopted would promote efficiency, competition, and capital formation. Commenters are requested to provide empirical data and other factual support for their views if possible.

VI. Regulatory Flexibility Analysis

The Commission hereby certifies pursuant to 5 U.S.C. § 605(b), that proposed Regulation G, amendments to Item 10 of Regulation S-K, Item 10 of Regulation S-B, Form 20-F and Form 8-K, contained in this release, if adopted, would not have a significant economic impact on a substantial number of small entities. The certification is based on the following analysis.

The proposals would affect companies that are small entities. Rule 0-10(a)⁵⁹ defines a company, other than an investment company, to be a "small business" or "small organization" for purposes of the Regulatory Flexibility Act if it had total assets of \$10 million or less on the last day of its most recent fiscal year. We estimate that there were approximately 2,500 public companies,

other than investment companies, that may be considered small entities.

Proposed Regulation G would require registrants when publicly disclosing material information that includes a non-GAAP financial measure to provide a quantified reconciliation to the most directly comparable GAAP financial measure. Regulation G is intended to implement the requirements of the Sarbanes-Oxley Act. Specifically, Regulation G is intended to provide investors with balanced financial disclosure when non-GAAP financial measures are presented. Regulation G defines a non-GAAP financial measure as a numerical measure of an issuer's historical or future financial performance, financial position or cash flow that:

- Excludes amounts, or is subject to adjustments that have the effect of excluding amounts, that are included in the 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 comparable measure calculated and presented in accordance with GAAP.

Accordingly, by definition, a non-GAAP financial measure that triggers the application of Regulation G would have been derived from a GAAP financial measure. Therefore, we expect the cost of obtaining the additional disclosure required by Regulation G to be minimal. Moreover, much of the disclosure mandated by Regulation G, such as the most directly comparable GAAP measure, is already required to be provided pursuant to other forms and regulations, such as Form 10-KSB, Form 10-QSB and Regulation S-X. We have estimated for purpose of the PRA that it will take .5 hour for small businesses to comply with Regulation G. We anticipate that on average a company will have to comply with Regulation G six times year. We would expect that an in house junior accountant would prepare the actual reconciliation.

Using cost data from the Securities Industry Association's Report on Management & Professional Earnings in the Securities Industry 2001 ("SIA") and adding an additional 35% for costs associated with overhead, we find that, on average, a junior accountant would earn \$26 an hour. We believe the salary of a junior accountant is appropriate for our estimates since in most cases we

⁵⁶ 15 U.S.C. § 77b(b).

⁵⁸ 15 U.S.C. § 78c(f).

⁵⁹ 17 CFR 240.0-10(a).

would expect the most directly comparable GAAP financial measure to be available. Therefore, we have estimated the total salary costs associated with complying with Regulation G to be \$78 per small business⁶⁰.

Our amendments to Item 10 of Regulation S-K and Item 10 of Regulation S-B incorporate the requirements of Regulation G and codify certain staff interpretations. Because the costs associated with providing a reconciliation are already being accounted for in Regulation G, we do not believe adding the same requirement to Item 10 of Regulation S-K and Item 10 of Regulation S-B incurs any additional costs to small businesses. To account for the required reconciliation in both Regulation G and Item 10 or Regulation S-K and Item 10 of Regulation S-B would result in double counting. Additionally, because the staff companies currently disclose the purposes for which the registrant's management uses the non-GAAP financial measure and why it believes that presentation of the non-GAAP financial measure provides useful information to investors, this disclosure would not impose new costs on small businesses. Accordingly, we do not believe our amendments to Item 10 Regulation S-K and Regulation S-B result in any additional costs not already included in Regulation G or current filing requirements.

Our amendment to Form 8-K, would require the filing of earnings releases or earnings announcement. There is no requirement to actually make an earnings announcement or release. We have not included in our estimates any additional legal review costs associated with the filing of earnings releases or announcements, since we do not anticipate any additional significant review would be needed. In this regard, we note that many issuers already file their earnings releases and those releases whether filed or not are subject to Rule 10b-5.

We believe that personnel in finance, investor relations or corporate communications departments would most likely file the earnings announcement or release since most earnings announcements and releases are disseminated via press release. We have estimated that the actual time required to file an earnings announcement or release on Form 8-K to be .5 hours. In estimating this time

⁶⁰ Our \$78 estimate is calculated by multiplying six (the estimated number of Regulation G occurrences in a year) by .5 (the estimated hourly burden for each occurrence) and then multiplying that total by \$26 (the estimated cost per hour).

burden we note that most press releases are fairly short in length, making the actual process of filing easier. We also note that the software necessary to file a Form 8-K is available free of charge from the Commission.

We have estimated that small businesses would be required to comply with Item 1.04 of Form 8-K roughly four times a year. Again using the SIA Report and adding an additional 35% for costs associated with overhead, a Corporate Communications Manager, on average, earns \$56.00 an hour. Accordingly, we have estimated the total costs to a small business associated with our amendments to Form 8-K to be \$112.⁶¹

Additionally, our proposed amendments to Form 20-F would incorporate Item 10 of Regulation S-K. Because only foreign private issuers file Form 20-F we do not include the impact on them in our analysis.

Finally, to further examine the possible impact of the proposals on small businesses, we sampled publicly available information about 75 small businesses. We searched the Dow Jones Press Release Wire, for the period January 1, 2001 to July 1, 2002 to review any earnings announcements or earnings releases by the 75 small businesses. We found that 30 small businesses had no earnings announcements or releases available over the period and the other 45 companies reported only GAAP earnings. Accordingly, the cost impact would be significantly less if the small business does not use non-GAAP financial measures since there would be no reconciliation required. Additionally, if the small business does not issue earnings releases or announcements there would be no filing requirement on Form 8-K.

In sum, the proposals are expected to result in minimal additional costs to all subject companies, large or small. Accordingly, we believe the proposals should not have a significant economic impact on a substantial number of small entities.

We encourage written comments regarding this certification. We solicit comment as to whether the proposed changes could have an effect that we have not considered. We request that commenters describe the nature of any impact on small entities and provide empirical data to support the extent of the impact.

⁶¹ Our \$112 estimate is calculated by multiplying four (the estimated number of Item 1.04 Forms 8-K expected to be filed) by .5 (the estimated hourly burden for each filing) and then multiplying that total by \$56 (the estimate cost per hour).

VII. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, a rule is "major" if it has resulted, or is likely to result in:

- An annual effect on the economy of \$100 million or more;
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment or innovation.

We request comment with regard to our analysis. Commenters should provide empirical data on (a) the annual effect on the economy; (b) any increase in costs or prices for consumers or individual industries; and (c) any effect on competition, investment or innovation.

VIII. Statutory Basis

The proposed new Regulation G, new Item 1.04 to Form 8-K and the amendments to Item 6.01 of Form 8-K, Item 10 of Regulation S-K, Item 10 of Regulation S-B and Form 20-F are being proposed pursuant to Sections 2(b), 6, 7, 8, 19(a), and 28 of the Securities Act of 1933 as amended, Sections 3, 4, 10, 12, 13, 15, 23 and 36 of the Securities Exchange Act of 1934, as amended and Sections 3(a), 401 and 409 of the Sarbanes-Oxley Act.

List of Subjects

17 CFR Part 228

Reporting and recordkeeping requirements, Securities, Small businesses.

17 CFR Parts 229, 244 and 249

Reporting and recordkeeping requirements, Securities.

Text of the Proposed Amendments

In accordance with the foregoing, the Securities and Exchange Commission proposes to amend Title 17, chapter II of the Code of Federal Regulations as follows:

PART 228—INTEGRATED DISCLOSURE SYSTEM FOR SMALL BUSINESS ISSUERS

1. The general authority citation for Part 228 is revised to read as follows:

Authority: 15 U.S.C. 7261, 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77jj, 77nnn, 77sss, 78l, 78m, 78n, 78o, 78u-5, 78w, 78ll, 78mm, 80a-8, 80a-29, 80a-30, and 80b-11.

* * * * *

2. Amend § 228.10 by adding paragraph (h) to read as follows:

§ 228.10 (Item 10) General.

* * * * *

(h) *Use of non-GAAP financial measures in Commission filings.* (1) Whenever one or more non-GAAP financial measures are included in a filing with the Commission:

(i) The registrant must include the following in the filing:

(A) A presentation with equal or greater prominence of the most directly comparable financial measure or measures calculated and presented in accordance with Generally Accepted Accounting Principles (GAAP);

(B) A quantitative reconciliation (by schedule or other clearly understandable method) of the differences between the non-GAAP financial measure disclosed or released with the financial measure or measures calculated and presented in accordance with GAAP identified in paragraph (h)(1)(i)(A) of this section;

(C) A statement disclosing the purposes for which the registrant's management uses the non-GAAP financial measure; and

(D) 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

(ii) A registrant must not:

(A) Present the non-GAAP financial measure in a manner that would give it greater authority or prominence than the comparable GAAP financial measure or measures;

(B) 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;

(C) Adjust a non-GAAP performance measure to eliminate or smooth items identified as non-recurring, infrequent or unusual, when the nature of the charge or gain is such that it is reasonably likely to recur;

(D) Present non-GAAP financial measures on the face of the registrant's financial statements prepared in accordance with GAAP or in the accompanying notes;

(E) Present non-GAAP financial measures on the face of any pro forma financial information required to be disclosed by Article 11 of Regulation S-X (17 CFR 210.11-01 through 210.11-03);

(F) 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; or

(G) Present a non-GAAP per-share measure; and

(iii) If the filing is not an annual report on Form 10-KSB (17 CFR 249.310b), a registrant need not include the information required by paragraphs (h)(1)(i)(C) and (h)(1)(i)(D) of this section if that information was included in its most recent annual report on Form 10-KSB or a more recent filing, provided that the required information is updated to the extent necessary to meet the requirements of paragraphs (h)(1)(i)(C) and (h)(1)(i)(D) of this section at the time of the registrant's current filing.

(2) For purposes of this paragraph (h), a non-GAAP financial measure is a numerical measure of a registrant's historical or future financial performance, financial position or cash flow that:

(i) Excludes amounts, or is subject to adjustments that have the effect of excluding amounts, that are included in the 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

(ii) Includes amounts, or is subject to adjustments that have the effect of including amounts, that are excluded from the comparable measure so calculated and presented.

(3) For purposes of this paragraph (h), "GAAP" refers to generally accepted accounting principles in the United States.

(4) For purposes of this paragraph (h), non-GAAP financial measures exclude operating and other financial measures and ratios or measures calculated using only:

(i) Financial measures calculated in accordance with GAAP and;

(ii) Operating measures or other measures that are not non-GAAP financial measures.

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S-K

3. The general authority citation for Part 229 is revised to read as follows:

Authority: 15 U.S.C. 7261, 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jj, 77nnn, 77sss, 78c, 78i, 78j, 78l, 78m, 78n, 78o, 78u-5, 78w, 78ll(d), 78mm, 79e, 79n, 79t, 80a-8, 80a-29, 80a-30, 80a-31(c), 80a-37, 80a-38(a) and 80b-11, unless otherwise noted.

* * * * *

4. Amend § 229.10 by revising the section heading and adding paragraph (e) to read as follows:

§ 229.10 (Item 10) General.

* * * * *

(e) *Use of non-GAAP financial measures in Commission filings.* (1) Whenever one or more non-GAAP financial measures are included in a filing with the Commission:

(i) The registrant must include the following in the filing:

(A) A presentation of the most directly comparable financial measure or measures calculated and presented in accordance with Generally Accepted Accounting Principles (GAAP);

(B) A quantitative reconciliation (by schedule or other clearly understandable method) of the differences between the non-GAAP financial measure disclosed with the financial measure or measures calculated and presented in accordance with GAAP identified in paragraph (e)(1)(i)(A) of this section;

(C) A statement disclosing the purposes for which the registrant's management uses the non-GAAP financial measure; and

(D) 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

(ii) A registrant must not:

(A) Present the non-GAAP financial measure in a manner that would give it greater authority or prominence than the comparable GAAP financial measure or measures;

(B) 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;

(C) Adjust a non-GAAP performance measure to eliminate or smooth items identified as non-recurring, infrequent or unusual, when the nature of the charge or gain is such that it is reasonably likely to recur;

(D) Present non-GAAP financial measures on the face of the registrant's financial statements prepared in accordance with GAAP or in the accompanying notes;

(E) Present non-GAAP financial measures on the face of any pro forma financial information required to be disclosed by Article 11 of Regulation S-X (17 CFR 210.11-01 through 210.11-03);

(F) Use 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; or

(G) Present a non-GAAP per share measure; and

(iii) If the filing is not an annual report on Form 10-K or Form 20-F (17 CFR 249.220f), a registrant need not include the information required by paragraphs (e)(1)(i)(C) and (e)(1)(i)(D) of this section if that information was included in its most recent annual report on Form 10-K or Form 20-F or a more recent filing, provided that the required information is updated to the extent necessary to meet the requirements of paragraphs (e)(1)(i)(C) and (e)(1)(i)(D) of this section at the time of the registrant's current filing.

(2) For purposes of this paragraph (e), a non-GAAP financial measure is a numerical measure of a registrant's historical or future financial performance, financial position or cash flows that:

(i) Excludes amounts, or is subject to adjustments that have the effect of excluding amounts, that are included in the 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

(ii) Includes amounts, or is subject to adjustments that have the effect of including amounts, that are excluded from the comparable measure so calculated and presented.

(3) For purposes of this paragraph (e), "GAAP" refers to generally accepted accounting principles in the United States, except that in the case of foreign private issuers whose primary financial statements are prepared in accordance with other generally accepted accounting principles, references to GAAP also include the principles under which those primary financial statements are prepared.

(4) For purposes of this paragraph (e), non-GAAP financial measures exclude operating and other financial measures and ratios or measures calculated using only:

(i) Financial measures calculated in accordance with GAAP; and

(ii) Operating measures or other measures that are not non-GAAP financial measures.

(5) This paragraph (e) is not applicable to investment companies registered under Section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a-8).

Note to paragraph (e). A non-GAAP financial measure that would otherwise be prohibited by paragraph (e)(1)(ii) of this section is permitted in a filing of a foreign private issuer if:

1. The non-GAAP financial measure is expressly permitted under the GAAP used in the registrant's primary financial statements included in the filing with the Commission; and

2. The non-GAAP financial measure is included in the annual report prepared by the registrant for use in the jurisdiction in which it is domiciled, incorporated or organized or for distribution to its security holders.

5. Part 244 is added to read as follows:

PART 244—Regulation G

Sec.

244.100 General rules regarding disclosure of non-GAAP financial measures.

244.101 Definitions.

244.102 No effect on antifraud liability.

Authority: 15 U.S.C. 7261, 78c, 78i, 78j, 78m, 78o, 78w, 78mm, and 80a-29.

§ 244.100 General rules regarding disclosure of non-GAAP financial measures.

(a) Whenever a registrant, or person acting on its behalf, publicly discloses material information that includes a non-GAAP financial measure, the registrant must accompany that non-GAAP financial measure with:

(1) A presentation of the most directly comparable financial measure calculated and presented in accordance with Generally Accepted Accounting Principles (GAAP); and

(2) A reconciliation (by schedule or other clearly understandable method), which shall 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 comparable financial measure or measures calculated and presented in accordance with GAAP identified in paragraph (a)(1)(i) of this section; and

(b) A registrant, or a person acting on its behalf, shall not make public a non-GAAP financial measure that, taken together with the information accompanying that measure and any other accompanying discussion of that measure, 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 measure, in light of the circumstances under which it is presented, not misleading.

(c) This section shall not apply to a disclosure of a non-GAAP financial measure that is made by or on behalf of a registrant that is a foreign private issuer if the following conditions are satisfied:

(1) The securities of the registrant are listed or quoted on a securities exchange or inter-dealer quotation system outside the United States;

(2) The non-GAAP financial measure and the most comparable GAAP financial measure are not calculated and presented in accordance with generally accepted accounting principles in the United States; and

(3) 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 only outside the United States.

Notes to § 244.100:

1. If a non-GAAP financial measure is made public orally, telephonically, by webcast or broadcast or by similar means, the requirements of paragraphs (a)(1)(i) and (a)(1)(ii) of this section will be satisfied if:

(i) The required information in those paragraphs is provided on the registrant's Web site at the time the non-GAAP financial measure is made public; and

(ii) The location of the Web site is made public in the same presentation in which the non-GAAP financial measure is made public.

2. The provisions of paragraph (c) of this section shall apply notwithstanding the existence of one or all of the following circumstances:

(i) Foreign or U.S. journalists or other third parties have access to the information, so long as the information is disclosed or released by or on behalf of the registrant only outside the United States;

(ii) Following its release or disclosure, the information appears on one or more web sites maintained by the registrant, so long as the web sites, taken together, are not available exclusively to, or targeted at, persons located in the United States; and/or

(iii) Following the disclosure or release of the information outside the United States, the information is included in a submission by the registrant to the Commission made under cover of a Form 6-K.

§ 244.101 Definitions.

This section defines certain terms as used in Regulation G (§§ 244.100 through 244.102).

(a)(1) **Non-GAAP financial measure.** A non-GAAP financial measure is a numerical measure of a registrant's historical or future financial performance, financial position or cash flows that:

(i) Excludes amounts, or is subject to adjustments that have the effect of excluding amounts, that are included in the 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

(ii) Includes amounts, or is subject to adjustments that have the effect of including amounts, that are excluded

from the comparable measure so calculated and presented.

(2) A non-GAAP financial measure would not include operating and other financial measures and ratios or measures calculated using only:

- (i) Financial measures calculated in accordance with GAAP; and
- (ii) Operating measures or other measures that are not non-GAAP financial measures.

(b) *GAAP.* GAAP refers to generally accepted accounting principles in the United States, except that in the case of foreign private issuers whose primary financial statements are prepared in accordance with other generally accepted accounting principles, references to GAAP also include the principles under which those primary financial statements are prepared.

(c) *Registrant.* A registrant subject to this regulation is one that has a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or is required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), excluding any investment company registered under Section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a-8).

(d) *United States.* United States means the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.

§ 244.102 No effect on antifraud liability.

Nothing in this Regulation G (§§ 244.100 through 244.102) shall affect any person's liability, and a person's compliance or non-compliance with this Regulation G shall not affect any person's liability, under Section 10(b) (15 U.S.C. 78j(b)) of the Securities Exchange Act of 1934 or § 240.10b-5 of this chapter.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

7. The authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a, *et seq.*, unless otherwise noted.

* * * * *

8. Amend Form 8-K (referenced in § 249.308 as proposed in Release No. 33-8106, 67 FR 42913) by adding Item 1.04 and revising Item 6.01 of Section 1.

Note.—The text of Form 8-K does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 8-K—Current Report

Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934

Section 1—Registrant's Business Operations

* * * * *

Item 1.04. Results of Operations and Financial Condition

(a) If a registrant, or any person acting on its behalf, makes any public announcement or release (including any update of an earlier announcement or release) disclosing material non-public information regarding the registrant's results of operations or financial condition for a completed quarterly or annual fiscal period, the registrant shall briefly identify the announcement or release and file the text of that announcement or release as an exhibit;

(b) A filing under this Item shall not be required in the case of disclosure of material non-public information that is disclosed orally, telephonically, webcast, or by similar means if:

(1) The information is provided as part of a presentation that initially occurs within 48 hours of a related, written announcement or release that is filed on Form 8-K pursuant to this Item 1.04;

(2) The presentation is accessible to the public by dial-in conference call, webcast or similar technology;

(3) The financial and other statistical information contained in the presentation is provided on the registrant's Web site, together with any information that would be required under § 244.100 of Regulation G; and

(4) 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 Web site where the information would be available.

(c) Forward-looking information, as defined by Section 21E of the Securities Exchange Act of 1934, included in an announcement or release that would otherwise be required to be filed pursuant to paragraph (a) of this Item, may instead be identified specifically and furnished under Item 6.01 in the same Form 8-K that contains the historical information filed pursuant to Item 1.04.

Instructions

- The filing requirement under this Item 1.04 is triggered by the disclosure of material non-public information regarding a completed fiscal year or quarter. Release of additional or updated material non-public information regarding a completed fiscal year or quarter would trigger an additional Item 1.04 filing requirement.

- Issuers 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, are permitted to specify which portion of the report contains the information required to be filed under Item 1.04.

- This Item 1.04 does not apply in the case of a disclosure of material non-public information that is made in a quarterly report filed with the Commission on Form 10-Q (or 10-QSB) or an annual report filed with the Commission on Form 10-K (or 10-KSB).

* * * * *

Item 6.01. Regulation FD Disclosure and Forward Looking Information

Unless filed under Item 7.01 or Item 1.04, report under this item only information that the registrant elects to disclose through Form 8-K pursuant to Regulation FD (§§ 243.100–243.103 of this chapter) or forward-looking information that is required to be filed under Item 1.04 of this form.

* * * * *

9. By amending Form 20-F (referenced in § 249.220) by removing in General Instruction C.(e) the words "performance and the Commission's policy on securities ratings" and adding, in their place, the words "performance, the Commission's policy on securities ratings and the Commission's policy on use of non-GAAP financial measures in Commission filings".

Dated: November 4, 2002.

By the Commission.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 02-28603 Filed 11-12-02; 8:45 am]

BILLING CODE 8010-01-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52

[SC-041, 046–200211(b); FRL-7406-8]

Approval and Promulgation of Implementation Plans; South Carolina; Adoption of Revision Governing Credible Evidence and Removal of Standard 3

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA proposes to approve a revision to the State Implementation Plan (SIP) submitted on October 7, 2002, by the State of South Carolina, Department of Health and Environmental Control (Department). This revision consisted of an addition to Regulation 61–62.1, Definitions and General Requirements, entitled "Section V—Credible Evidence." The submission of Section V—Credible Evidence by South Carolina is to meet the requirements for credible evidence set forth in EPA's May 23, 1994, SIP call letter. EPA is also proposing to approve a correction to the SIP regarding removal of Standard 3 "Emissions from Incinerators" from the SIP as requested by the State of South Carolina. In the Final Rules Section of this **Federal Register**, the EPA is approving the State's SIP revision as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the