Earnings Releases and Earnings Calls

COLIN J. DIAMOND AND IRINA YEVMENENKO, WHITE & CASE LLP

This Note provides an overview of the key legal and practical considerations for reporting companies to consider when issuing an earnings release and hosting an earnings call. It discusses the key rules and regulations governing the earnings announcement process, explains the typical timeline for issuing an earnings release and hosting an earnings call, and reviews the roles generally played by key participants. The Note also discusses special considerations related to announcing earnings results, including issues that arise when an earnings release and an earnings call are close in time to a securities offering, and the pros and cons of giving earnings guidance.

SEC reporting companies report their quarterly and annual results of operations to their stockholders and the public using a press release (earnings release), which is usually followed by a presentation by the company's senior management discussing the earnings information (earnings call).

An earnings release is typically the end result of a carefully orchestrated process involving the reporting company and its counsel. Although the content of earnings releases and calls is not prescribed in the same way as the content of annual reports on Form 10-K and quarterly reports on Form 10-Q, earnings releases and calls are among the most material announcements that reporting companies make. They often result in significant movements in a reporting company's stock price. In fact, a company's stock price usually is not affected by the filing of its Form 10-K or Form 10-Q following a corresponding earnings release, because all material information has already been disclosed in the earnings release.

In this Practice Note, an earnings release and the related earnings call are collectively referred to as an earnings announcement. In drafting the earnings release, preparing for the earnings call and planning the timeline for the earnings announcement process, a reporting company must consider various SEC rules, applicable exchange requirements and best practice trends that interact in complex ways. This Note:

- Describes the content of a typical earnings announcement.
- Examines the main rules and regulations affecting the content.
- Explains the roles of key participants.
- Provides an overview of the earnings announcement process.
- Highlights special considerations when the timing of a securities offering coincides with an earnings announcement.
- Considers pros and cons of providing earnings guidance and offers suggestions to companies that decide to stop providing this guidance.

This Note does not address restrictions on trading by company management and other insiders under the federal securities law or company policy that may apply in the period surrounding the earnings announcement. For a discussion of this, see *Standard Document, Sample Corporate Policy on Insider Trading (http://us.practicallaw.com/7-502-0160)*.

CONTENT OF EARNINGS ANNOUNCEMENTS

Under federal securities law, companies are not required to disclose their financial results for a completed fiscal period outside of the requirement to file their annual report on Form 10-K or quarterly report on Form 10-Q. In practice, most reporting companies voluntarily release their earnings information before filing their annual reports, and many do so before filing their quarterly reports. Companies do this for a variety of reasons, including to:

- Respond to the investors' demands for information to be shared as soon as possible.
- Enable the company and insiders who are aware of the information to trade in the company's securities.

While the content of the earnings announcement is not prescribed by SEC rules, as a matter of practice, it follows a standard format which is discussed in this section.

EARNINGS RELEASES

The core of the earnings release is financial information about the recently completed fiscal period, presented in financial tables. Earnings releases do not include full financial statements with footnotes. Instead, they are generally limited to a balance sheet and an income statement, and sometimes include a statement of cash flows. A quarterly earnings release may also contain supplemental performance metrics that relate specifically to the company's business, such as same store sales (for companies in the retail industry) and production data (for oil and gas companies).

The financial statements are preceded by a press release announcing key results and discussing performance highlights. Companies often include a quote from their CEO or another senior executive providing insight into, or context for, the company's financial performance or industry conditions. Quotes included in the press release should ideally convey senior management's assessment of the results and their impact on the strategic direction of the company, and not just restate the results.

Earnings releases also typically include information on how to access the earnings call.

EARNINGS CALLS

An earnings call is typically held immediately (within a few hours) after the earnings release is issued. An earnings call is an oral presentation by senior management via a conference call or webcast. Typically, the CEO and the CFO lead the earnings call, while other executives may present information about their particular areas. The presentation is usually fully scripted and may be accompanied by slides. Frequently, the presentation is followed by a Q&A session. Most questions tend to be from financial analysts who follow the company.

REGULATION OF THE CONTENT

Federal securities law and SEC rules affect the content of the earnings announcement in several ways. Key regulatory considerations involve:

- Limiting exposure to securities law liability (see *Securities Law Liability Provisions*).
- Complying with Regulation G when disclosing non-GAAP financial measures (see *Regulation G and Non-GAAP Financial Measures*).
- Taking advantage of the safe harbor for forward-looking statements (see *Safe Harbor for Forward-Looking Statements*).
- Complying with Regulation FD (see *Regulation FD*).
- If a securities offering is planned close in time to the earnings announcement, ensuring the earnings release does not constitute an "offer" of securities (see *Rule 168 and Concurrent Securities Offerings*).

SECURITIES LAW LIABILITY PROVISIONS

When a reporting company issues an earnings release, it must file a Form 8-K with the SEC that includes the text of the release (see *Complying with Item 2.02 of Form 8-K*). However, the information in the filing is considered "furnished" rather than "filed" under federal securities law, unless the company takes certain affirmative actions (*Form 8-K, Instruction B.2*). The fact that the earnings release is considered furnished (and not filed) means:

- The company does not have potential liability under Section 18 of the Securities Exchange Act of 1934 (Exchange Act) for the information contained in the filing, unless it specifically states that the information should be considered filed under the Exchange Act.
- The information will not be incorporated by reference into registration statements under the Securities Act of 1933 (Securities Act), unless the company specifically states in a registration statement that the earnings release information is incorporated by reference. This means the company does not have potential liability under Sections 11 or 12 of the Securities Act for that information.

In practice, few companies choose to "file" their earnings releases or incorporate them by reference into Securities Act registration statements, since doing so potentially exposes them to additional liability.

The general antifraud provisions of Section 10(b) and Rule 10b-5 under the Exchange Act, which prohibit material misstatements or omissions, however, are applicable to earnings releases and earnings calls (and generally to any statements made by the company). For more information, see *Practice Note, Liability Provisions: Securities Offerings (http://us.practicallaw.com/6-381-1466).*

REGULATION G AND NON-GAAP FINANCIAL MEASURES

An earnings release may include financial information that is not prepared in accordance with generally accepted accounting principles (GAAP). This can include non-GAAP financial measures that are commonly used by many companies (such as earnings before the deduction of interest, taxes, depreciation and amortization (EBITDA)) or measures with company-specific adjustments. A company might use a non-GAAP financial measure if management believes that it conveys more clearly the company's underlying performance to investors.

Under Regulation G, when a reporting company publicly discloses a non-GAAP financial measure, it must also include the most comparable GAAP financial measure and a reconciliation of the two. Regulation G prohibits the use of non-GAAP financial measures that, taken together with the accompanying disclosure, contain material misstatements or omissions.

Regulation G contains two relief provisions that often apply to earnings announcements. These are relief provisions for:

- **Forward-looking non-GAAP financial measures.** Reconciliations for forward-looking non-GAAP financial measures are not required by Regulation G if the corresponding GAAP information is not reasonably available (Regulation G, Rule 100(a)(2)). A company only needs to disclose the reconciliations that are available without unreasonable effort, and can otherwise state that information needed to complete a reconciliation is unavailable.
- **Oral non-GAAP disclosures.** In recognition that oral reconciliation of non-GAAP measures (including on an earnings call) may be cumbersome, Regulation G includes special rules for oral non-GAAP disclosures. When a company discloses non-GAAP measures orally on an earnings call or webcast, it can satisfy the reconciliation requirement by posting the reconciliation to its website if the following conditions are met:
  - the information is posted before the time of the call or webcast. Because Regulation G reconciliations are usually included in the earnings release, this can often be satisfied by posting the earnings release on the website;
  - the location of the materials containing the required reconciliations is announced during the presentation; and
  - the reconciliation is included in the presentation materials for the call or webcast, if any.

As discussed, earnings releases are generally considered furnished, rather than filed, with the SEC (see *Securities Law Liability Provisions*). However, the instructions to Item 2.02 of Form 8-K specifically provide that the requirements of Item 10(e)(1)(i) of Regulation S-K apply to earnings releases furnished under Item 2.02. The disclosure requirements of Item 10(e)(1)(i) are more burdensome than the general Regulation G disclosure requirements, and generally only apply to documents filed with the SEC. Item 10(e)(1)(i) requires inclusion of an explanation of why management believes the non-GAAP financial measure is useful to investors and a discussion of what purpose the measure is intended to serve. The GAAP financial measure must be disclosed with equal or greater prominence. For more information, see *Practice Note, Using Non-GAAP Financial Information (http://us.practicallaw.com/8-502-4025)*.

Developing SEC Guidance on Non-GAAP Financial Measures

In 2010, the SEC revised earlier guidance on non-GAAP financial measures to confirm that companies may adjust GAAP financial measures in almost any way, as long as they appropriately characterize and do not inappropriately describe adjustments as non-recurring or one-time (*Question 102.03, Compliance and Disclosure Interpretations: Non-GAAP Financial Measures (Non-GAAP C&DIs)*). The SEC continues to focus on the use of inherently misleading non-GAAP financial measures (see *Box, Tips for Using Non-GAAP Financial Measures*).

For example, in a series of comments made on the draft registration statements filed during late 2011 for Groupon, Inc.'s initial public offering, the SEC raised questions about whether Groupon's use of a non-GAAP financial measure the company referred to as adjusted consolidated segment operating income (ACSOI) was compliant with Regulation G. The comments focused on the fact that the measure excluded significant marketing expenses, which was misleading to prospective investors. Groupon eventually removed the measure from its registration statement, but the perceived damage to management's integrity was done.

SAFE HARBOR FOR FORWARD-LOOKING STATEMENTS

Earnings releases, calls and related presentation materials often contain forward-looking information, even if they do not contain earnings guidance (see *Earnings Guidance and "Going Dark"*).

Section 21E of the Exchange Act provides a safe harbor from liability for material misstatements or omissions in statements made by companies in their SEC filings, press releases, investor presentations and other public announcements that are identified as "forward-looking statements" and, among other things, are accompanied by "meaningful cautionary statements." The required forward-looking statements disclaimer does not have to identify all potential risks among the cautionary factors to make the safe harbor available. Instead, the safe harbor is available so long as in the "total mix of information" investors are warned that there is a risk involved.

To take advantage of the safe harbor for forward-looking statements for:

- An oral communication (such as an earnings call), the company must state in that oral communication that:
  - it may make forward-looking statements;
  - actual results could differ materially from what is described in those statements; and
  - additional information on factors that could cause results to differ is available in the company's most recent Form 10-K (or more recent SEC filing, if relevant).
- A written statement (such as an earnings release), the document must:
  - identify what a forward-looking statement is; and
  - include a cautionary statement identifying important factors that could cause actual results to differ materially from those included in the forward-looking statements.

  These statements are sometimes referred to collectively as a safe harbor legend.

At the start of an earnings call, a company representative should read a statement that meets the requirements set out above for oral communications (see also *Holding the Earnings Call*). Earnings releases should include the safe harbor legend.

For practical tips to help ensure the Section 21E safe harbor will be available for forward-looking statements, see *Box, Forward-Looking Statements: Best Practices*. For a detailed discussion of the safe harbor for forward-looking statements generally, see *Practice Note, Forward-looking Statements: Securing the Safe Harbor (http://us.practicallaw.com/7-508-7513)*.

REGULATION FD

Regulation FD (Fair Disclosure) is a set of rules designed to prevent "selective disclosure" by reporting companies. Selective disclosure refers to reporting companies providing information to certain securities market professionals, or selected investors who are reasonably likely to trade on the basis of the information, before it is released to the general public.

Under Regulation FD, when a reporting company discloses material nonpublic information to certain market professionals or security holders, it must simultaneously disclose that information to the general public. Regulation FD and related SEC guidance specify the means of disclosure that satisfy the public disclosure requirement. These approved means of disclosure are often referred to as Regulation FD-compliant methods.

Since much of the information in an earnings release and the related earnings call is material, companies must ensure that these communications are initially disclosed through Regulation FD-compliant methods (see *Practice Note, Complying with Regulation FD (Fair Disclosure) (http://us.practicallaw.com/1-383-2635)*). For details on managing the earnings announcement process to ensure compliance with Regulation FD, see *Earnings Announcement Process*.

RULE 168 AND CONCURRENT SECURITIES OFFERINGS

When the earnings announcement process occurs concurrently with or shortly before a securities offering, there is a risk that under the federal securities law the earnings release or call could be considered an "offer" of the securities. Companies generally prefer to avoid this, because it would create filing obligations and potential Securities Act liability for the earnings announcement information.

To prevent the earnings release or call from being considered an offer, the company should ensure that it can take advantage of the Securities Act Rule 168 safe harbor for regularly released factual business information and forward-looking information. For more information on this safe harbor, see *Earnings Releases and Securities Offerings*.

KEY PARTICIPANTS

Preparing for issuing an earnings release and hosting an earnings call involves compliance, disclosure and communications considerations. It is crucial that participants communicate effectively so all legal and regulatory requirements are met. The key participants in the earnings release and call process typically are:

- The company's investor relations staff (see *Investor Relations Staff*).
- The company's senior management (see *Senior Management*).
- Independent auditors (see *Independent Auditors*).
- In-house and outside counsel (see *In-house and Outside Counsel*).
- The audit committee (see *Audit Committee*).
- The disclosure committee (see *Disclosure Committee*).
- The board of directors as a whole (see *Board of Directors*).

INVESTOR RELATIONS STAFF

The company's investor relations staff typically takes the lead on preparing the initial draft of the earnings release and other materials for the earnings announcement, including the presentation slides and the earnings call script. Investor relations staff also generally coordinates the earnings announcement process. This includes:

- Consulting with senior management and outside advisors to gather comments and consolidate input on the announcement.
- Researching and communicating to senior management what investors and analysts expect to hear on the call.
- Providing market intelligence to senior management and the board of directors for use in strategic decision making.
- Interacting with the newswire service and other service providers.

To perform their duties, investor relations staff must have full knowledge of the company's strategy, budgets, forecasts and key developments. In recent years, there has been a growing trend of investor relations staff having a deep familiarity with the company, access to management and a key role in the earnings announcement process. This has elevated investor relations officers' role and responsibilities.

SENIOR MANAGEMENT

Various members of the senior executive team are involved in the earnings announcement process. Members of the CFO's staff typically work closely with investor relations staff to compile and analyze the information in the earnings announcement. The CFO and CEO, and sometimes other senior executives, lead the earnings call and respond to analyst questions in the Q&A session (see *Box, Earnings Call and Q&A Session Tips*).

To deliver the company's message effectively and accurately, executives presenting on the call must be prepared for analyst questions. Investor relations staff or in-house counsel may organize formal preparation sessions with these executives, focusing on:

- Developing detailed earnings call scripts and talking points.
- Identifying key elements and figures investors and analysts want most to hear on the call, to ensure that the company's message is delivered accurately and confidently.

INDEPENDENT AUDITORS

The company's independent auditors typically complete (or substantially complete) their audit before the annual earnings release is issued.

Before a quarterly earnings release is issued, the independent auditors will usually sign off on a substantially final draft of the company's Form 10-Q, which contains unaudited interim financial statements that the independent auditors have reviewed in accordance with applicable auditing standards.

IN-HOUSE AND OUTSIDE COUNSEL

Because the applicable SEC rules and exchange standards interact in complex ways throughout the earnings announcement process, the legal team plays an important role in advising senior management. The company's in-house counsel, and often its outside counsel, typically reviews and comments on the draft earnings announcement produced by investor relations staff before it is sent to the audit committee for review.

When a securities offering is being launched shortly after an earnings announcement, counsel typically reviews the draft earnings announcement to ensure, among other things, that the announcement can rely on the Securities Act Rule 168 safe harbor (see *Earnings Releases and Securities Offerings*).

AUDIT COMMITTEE

Section 303A.07(b)(i)(C) of the NYSE Listed Company Manual requires listed companies' audit committee charters to require discussion of "the listed company's earnings press releases, as well as financial information and earnings guidance provided to analysts and rating agencies." The commentary to this section states that the "audit committee's responsibility to discuss earnings releases, as well as financial information and earnings guidance, may be done generally (i.e., discussion of the types of information to be disclosed and the type of presentation to be made)" and that the "audit committee need not discuss in advance each earnings release or each instance in which a listed company may provide earnings guidance." NASDAQ's listing rules do not contain similar mandatory requirements, but as matter of good governance, NASDAQ companies should (and generally do) follow a similar process.

While audit committees might not be required to pre-review every earnings release, in practice, most audit committees do. Many audit committees also hold telephonic meetings to discuss each earnings release before it is issued. When a company's practice is for the audit committee not to pre-review the earnings release, the audit committee nevertheless may be informed of the matters to be discussed in the release, either orally at a meeting or in writing.

Companies often issue their annual earnings release a number of weeks before they file their Form 10-K containing audited financial statements. Although the earnings release is issued before the audited financial statements, the audit should be complete or substantially complete when the earnings release is issued and the audit committee should review the earnings release as part of its responsibility for overseeing the completion of the audit.

Companies may file their Forms 10-Q containing reviewed interim financial statements the same day they issue their quarterly earnings releases, or several days or weeks later. It is typical for a company's audit committee to review a draft earnings release at the same time it reviews a substantially final draft Form 10-Q.

DISCLOSURE COMMITTEE

In response to the requirement of the Sarbanes-Oxley Act of 2002 that reporting companies maintain "disclosure controls and procedures," consistent with the SEC's recommendations, many reporting companies (particularly large companies) have established disclosure committees. These committees are responsible for:

- Considering the materiality of certain information.
- Ensuring the company meets its disclosure obligations in a timely manner.
- Assisting senior management, including the CEO, CFO and audit committee, in preparing SEC filings and other public disclosures.
- Overseeing implementation of the company's disclosure controls and procedures, as mandated by Rules 13a-15 and 15d-15 under the Exchange Act.

The composition of disclosure committees varies among companies, but may include:

- The controller.
- The general counsel.
- Corporate or securities counsel.
- An investor relations officer.
- A member of the internal audit department.

To perform their disclosure controls functions effectively, disclosure committees must stay current on disclosure rules and requirements, and on the company's financial performance. To do this, the disclosure committee (or certain members representing the committee) should be involved in the earnings announcement process, including reviewing the earnings announcement before it is released. For a standard form disclosure committee charter with detailed drafting notes on the role of the committee, see *Standard Document, Disclosure Committee Charter (http://us.practicallaw.com/6-506-4786).*

BOARD OF DIRECTORS

The role of the board of directors in the earnings announcement process varies among companies, and can vary within the same company for the annual and quarterly earnings announcements.

For quarterly earnings releases, some companies hold board meetings the day after the audit committee meeting at which the draft Form 10-Q and the earnings release is discussed (see *Coordinating Timing with Periodic Reports and Board Review*). Following its review by the audit committee, the earnings release is then reviewed by the board at these meetings. Annual earnings releases are less likely to be reviewed by the entire board, since they are typically issued a number of weeks before the board approves the draft Form 10-K.

EARNINGS ANNOUNCEMENT PROCESS

This section describes the main steps in the earnings announcement process. For an indicative timeline of the process, see *Earnings Announcement Timeline Checklist (http://us.practicallaw.com/4-507-5050).*

For a discussion of legal considerations and best practices concerning private communications with certain investors or securities analysts around the time of the earnings announcement, see *Box, Considerations for Private Communications with Investors and Analysts*.

COMPLYING WITH ITEM 2.02 OF FORM 8-K

Reporting companies are required to file a Form 8-K when they disclose material, nonpublic information about their results of operations for a completed fiscal period (Form 8-K, Item 2.02). Item 2.02 is triggered by disclosure of material, nonpublic information about a completed fiscal period, regardless of whether the disclosure is:

- Oral or written.
- Final, or preliminary and limited. This means Item 2.02 is triggered by the release of a full set of results for a completed fiscal period or by a pre-announcement of a range of revenues for that completed period.

When an issuer, or a person acting on its behalf, makes a communication that triggers Item 2.02, the issuer must furnish a copy (or transcript) of the communication with the SEC in a Form 8-K filing within four business days. However, Item 2.02 includes an exception (sometimes referred to as the earnings call exception) to the Form 8-K requirement for certain oral, telephonic, webcast, broadcast and other non-written communications, including earnings calls. A transcript of an earnings call does not need to be furnished on a Form 8-K if all of the following conditions are met:

- The earnings call is pre-announced in a widely-disseminated press release that includes instructions on when and how the public can access the call and where presentation materials will be available (see *Pre-announcement of the Call*).
- The earnings call takes place no more than 48 hours after the earnings release is issued.
- The earnings call is broadly accessible to the public by dial-in conference call, webcast, broadcast or similar means.
- The company posts the financial and statistical information in the earnings call, including any Regulation G disclosure, on its website (see *Regulation G and Non-GAAP Financial Measures*).

In practice, most companies structure their earnings announcement process to take advantage of the earnings call exception.

COORDINATING TIMING WITH PERIODIC REPORTS AND BOARD REVIEW

Reporting companies must carefully coordinate the timing of the earnings announcement, the filing of the Form 10-K or Form 10-Q and audit committee and board meetings.

Reporting companies often issue their annual earnings release a number of weeks before they file their Forms 10-K containing audited financial statements. However, the audit should still be complete or substantially complete before the earnings release is issued, and the audit committee should review the annual earnings release before it is issued.

As discussed, reporting companies may file their Forms 10-Q containing reviewed interim financial statements the same day they issue their quarterly earnings release, or several days or weeks later. Typically, however, the audit committee will review the draft quarterly earnings release at the same time they review a substantially final draft Form 10-Q.

PRE-ANNOUNCEMENT OF THE CALL

The first public step in the earnings announcement process is issuing a press release that includes all of the following information:

- When the earnings call will be held.
- How to access the call.
- Where to obtain the presentation materials.

Generally, there is no Form 8-K associated with this pre-announcement. The pre-announcement press release satisfies the first requirement of the earnings call exception to Item 2.02 of Form 8-K (see *Complying with Item 2.02 of Form 8-K*). It also helps ensure that any information disclosed on the earnings call will be considered simultaneously disclosed to the public under Regulation FD (see *Regulation FD*).

SEC guidance suggests that material information disclosed on a conference call is considered simultaneously publicly disclosed if the public had reasonable advance notice of the call and an opportunity to join (*Section II.B.4.b, Regulation FD Adopting Release (Selective Disclosure and Insider Trading), SEC Release No. 33-7881 (Aug. 15, 2000)* and *Question 102.01, Compliance and Disclosure Interpretations: Regulation FD*). Even though companies pre-announce their earnings call, many still try to ensure all material information that will be discussed on the call is included in the earnings release itself (see *Holding the Earnings Call*).

ISSUING THE EARNINGS RELEASE

Traditionally, companies issued earnings releases through a newswire service (such as PRNewswire or Business Wire). To do this, the company sends the earnings release to the newswire service and that service in turn sends it to the media. The company's investor relations personnel are typically responsible for interacting with the newswire service. Using newswire services continues to be the most popular way for reporting companies to issue earnings releases.

A few companies use their websites to disseminate earnings information, including by posting this information to their websites. However, before posting earnings information to their websites, most companies satisfy Regulation FD by issuing a traditional press release and filing a Form 8-K furnishing the release.

Companies have also been incorporating their social media channels into their earnings announcement process, particularly since the SEC's release of guidance in April 2013 on the circumstances under which social media may be considered a Regulation FD compliant means of disclosure (see *SEC Guidance on the Use of Company Websites and Social Media*). While company websites, RSS feeds, blogs and social media sites facilitate access to information and give companies the ability to immediately connect with customers, clients, or stockholders, they also make it more difficult for these audiences to determine where the most relevant material information is located.

Companies considering communicating any material or possibly material information via social media should carefully consider the SEC's April 2013 guidance with counsel before doing so (see *SEC Guidance on the Use of Company Websites and Social Media*). For more information on social media and the securities laws, see *Practice Note, Social Media Compliance with Securities and Disclosure Laws (http://us.practicallaw.com/6-523-5948).*

Separate from the question of whether website or social media communications containing earnings information comply with Regulation FD, any disclosure of material, nonpublic information about a company's results of operations for a completed fiscal period must be furnished on Form 8-K to comply with the filing requirements of Item 2.02 (see *Complying with Item 2.02 of Form 8-K*).

SEC Guidance on Use of Company Websites and Social Media

The SEC, in its 2008 interpretive release on the use of company websites (*Commission Guidance on the Use of Company Web Sites, SEC Release No. 34-58288 (Aug. 1, 2008)*) (the website release), clarified that posting information to the company website is a Regulation FD-compliant method of disclosure only if the website is "a recognized channel for investors." The website release provides a non-exclusive list of company-specific factors that a company should consider in determining if its website meets that definition, which include, among other factors:

- Whether the company has made investors aware that it posts important information on its website and the company's past practice.
- Whether the website is designed to provide investors with efficient and ready access to information about the company.
- Whether the information is prominently disclosed on the website in a location known and routinely used for these types of disclosures.
- The extent to which information posted on the website is regularly picked up by the market and readily available media.
- The steps taken by the company to make its website and posted information accessible, including the use of push technology (such as e-mail alerts and RSS feeds) or releases through other distribution channels, either to widely distribute this type of information or advise the market of its availability.

In April 2013 the SEC issued a report of its investigation into whether Netflix, Inc. and its chief executive officer had violated Regulation FD when the CEO used his widely-followed personal Facebook account to announce non-financial operational data about Netflix without accompanying the post with a press release or Form 8-K filing. While the SEC ultimately decided not to pursue enforcement action against Netflix or its CEO, the report offers guidance about the use of social media by reporting companies consistent with Regulation FD.

According to the report, to determine whether a particular social media channel is a Regulation FD-compliant method of disclosure, a company must determine whether that channel is a "recognized channel of distribution" for communicating with investors. This determination turns on the application of principles articulated in the website release. The report suggests that issuers might take the following steps, among others, to alert investors that a particular social media channel may be used to disclose material nonpublic information:

- Issuing a press release, or filing a Form 8-K, notifying investors of the specific channel a company will use for the communication of material, nonpublic information.
- Stating in periodic reports and on the corporate website the specific channels a company will use for this purpose.

For more information on complying with Regulation FD, see *Practice Note, Complying with Regulation FD (Fair Disclosure) (http://us.practicallaw.com/1-383-2635).*

FILING THE 8-K

Companies typically issue the earnings release and file the related Form 8-K at the same time, and then hold their earnings call within a few hours. Issuing the release and filing the Form 8-K first thing in the morning on the day of the earnings call ensures both:

- Compliance with the second requirement of the earnings call exception to Item 2.02 of Form 8-K, which requires the earnings call to be held no more than 48 hours after the earnings release is issued.
- Dissemination of the most material information to be discussed on the call (the information in the financial tables), by Regulation FD-compliant methods of public disclosure before the call. Both the earnings press release and the Form 8-K are Regulation FD-compliant methods.

HOLDING THE EARNINGS CALL

Earnings calls generally begin within a few hours of the earnings release being issued and the Form 8-K being filed. The call typically starts with a member of the company's investor relations staff making the following statements:

- Certain statements included in the call may be forward-looking.
- Relevant factors that could cause actual results to differ materially from those forward-looking statements are listed in the earnings release and the company's SEC filings.

(See *Safe Harbor for Forward-Looking Statements*.)

If non-GAAP financial measures will be discussed on the call, a disclaimer stating that a reconciliation is available in the earnings release or on the company's website should also be read (see *Regulation G and Non-GAAP Financial Measures*).

Generally, earnings calls are widely listened to by analysts and investors. As discussed, many companies issue the pre-announcement press release and make a recording of the earnings call available on their website for a set period of time after the call. As a result, companies may take the position that anything said on the call, however material, has been disseminated in a manner that is compliant with Regulation FD (see *Pre-announcement of the Call*).

Still, most companies choose to include all material information in the earnings release itself (which, by the time of the earnings call, will typically have been disseminated by two separate Regulation FD-compliant methods). This is considered better practice since investors are not forced to listen to a lengthy presentation to get material information. In particular, companies may decide that if they give earnings guidance, the guidance should be included in the earnings release itself, and not only stated orally on the earnings call or included in the presentation materials.

One practical reason for including all material information in the earnings release is that it allows companies to get comfortable that they do not need to alert their stock exchange of the upcoming earnings call. Many earnings calls are held while the trading markets are open. If a company plans to release material information while the trading markets are open, it is expected to give advance notice to its stock exchange. The stock exchange may temporarily suspend trading in the company's stock. Companies, of course, seek to avoid trading suspensions. Including all material information in the earnings release allows companies to take the position that the earnings call will not result in the release of new material information.

Some companies post a transcript of the earnings call on their websites or furnish a transcript to the SEC. This ensures that the statements made on the call, including those in the Q&A portion of the presentation, are readily accessible by all investors.

Increasingly, companies are using Twitter to communicate highlights from their earnings calls during the calls. If a company has already included all material information to be discussed on the call in an earnings release that has been disseminated through a press release or other Regulation FD compliant means of disclosure, this practice is unlikely to cause concern under Regulation FD. However, tweeting earnings highlights can raise other issues under the securities laws. For example, concerns under Rule 10b-5 can be raised if a company tweets positive information from its earnings call without including disclosure that provides context and balances the positive information with related cautionary statements. Given Twitter's 140 character limit, it may be difficult to craft a tweet that includes full context for a positive statement. Also, any tweets including non-GAAP measures must comply with Regulation G (for a discussion of these issues and related concerns, see *Practice Note, Social Media Compliance with Securities and Disclosure Laws: Lack of Context (http://us.practicallaw.com/6-523-5948)*).

To ensure these concerns are properly addressed, tweets and other social media posts including earnings information should be carefully planned and reviewed by counsel in advance.

EARNINGS RELEASES AND SECURITIES OFFERINGS

The earnings announcement process sometimes occurs during a period when a company is contemplating a securities offering. In some cases, a company launches an offering at the same time it announces earnings. When this happens, the company should consider the additional issues described below.

RULE 168

When an offering is launched shortly after an earnings announcement, there is a risk that the earnings announcement might fall into the broad definition of an "offer" of the securities under the Securities Act. This means that the release or call would need to be filed with the SEC as a free writing prospectus (FWP), and that the company would have potential liability under Section 12(a)(2) of the Securities Act for the release or call. Because Section 12(a)(2) contains a lower standard of liability than Rule 10b-5, companies want to avoid it when possible.

Rule 168 under the Securities Act provides a safe harbor for a reporting company's regularly released business communications, in recognition that these communications should not be considered offers of securities just because they coincide with a securities offering. Communications that meet Rule 168 are not considered offers of securities, and do not have to be filed as FWPs. The Rule 168 safe harbor is available to a disclosure by a reporting company that meets all of the following conditions:

- The disclosure is of factual business information or forward-looking information, both as defined in Rule 168.
- The company has previously released information of the same type in the ordinary course of business.
- The information is disseminated in a way that is consistent with past practice in timing, manner and form.

Therefore, if a company provided earnings guidance for the first time in an earnings release issued just before a securities offering, the earnings release might not qualify for the safe harbor. Similarly, if an earnings call that was held close to an offering was not consistent in timing, manner or form with prior calls, it would not qualify for the Rule 168 safe harbor. In these examples, the release or a transcript of the earnings call might need to be filed as an FWP for the offering. Further, if an earnings release is motivated solely by the offering (for example, the company decides to pre-announce its revenues for the first time), that would also not meet the safe harbor and would likely need to be filed as an FWP.

When a company is planning to launch an offering shortly after releasing earnings, counsel should carefully review a draft of the earnings release and earnings call script against the company's past practice, and consider whether the Rule 168 safe harbor is available. The working group for the offering should discuss any departures from past practice. The working group might decide that the proposed communication should be modified to be more consistent with past practice.

INCORPORATING EARNINGS INFORMATION BY REFERENCE

When a company launches a securities offering shortly after the earnings release, but before the filing of the corresponding periodic report, the company will usually need to include the financial data from the earnings release in the prospectus for the offering. Companies and underwriters are generally wary of incorporating the entire earnings release into the prospectus because they do not want to expose themselves to potential liability for the "soft" statements in the release (such as the quote by senior management) or for earnings guidance. In this situation, a company can file a version of the earnings release containing only the financial data with a Form 8-K, and incorporate that Form 8-K by reference into the registration statement for the offering. The underwriters will generally only permit this if the auditors have completed their interim review and can provide customary comfort on the financial information.

EARNINGS GUIDANCE AND "GOING DARK"

The phrase "providing earnings guidance" refers to a company publicly disclosing its own projections of its financial results for the upcoming quarter or fiscal year. Reporting companies are permitted, but not required, to provide earnings guidance. Companies that provide earnings guidance typically include it in their earnings announcement.

Companies that provide earnings guidance often believe that it helps securities analysts to check projections regarding the company's results of operations. This, in turn, keeps market expectations in line with the company's own expectations and reduces volatility.

Some companies have found that providing earnings guidance has disadvantages, including:

- Exacerbating already significant short-term pressures on the company to achieve internal earnings guidance.
- Creating challenging disclosure issues if the company realizes a few weeks before it is scheduled to release earnings that it will not achieve its earnings guidance.

Arguably, there is no duty to update bona fide projections that had a reasonable basis when they were made. However, as an investor relations matter, many companies feel they must tell investors when they realize that previous earnings guidance is not accurate anymore. Counsel might support prompt updates, because they exclude any investor who buys or sells the company's stock after the update from joining a potential class action lawsuit based on the original guidance.

These concerns have contributed to some major companies' decision to stop giving earnings guidance. When a company that previously provided earnings guidance stops doing so, it is sometimes referred to as "going dark." Companies that have chosen to go dark in recent years include General Electric Company and McDonald's Corporation. As part of the going-dark process, companies seek to shift their focus away from short-term performance and toward the drivers of long-term stockholder value and goals. For more information, see *Box, Managing the Going-Dark Process Effectively*.

Smaller companies with a narrow analyst following or high-growth companies may decide they cannot give meaningful quarterly earnings guidance. These companies might only provide annual earnings guidance, and might give guidance as a range, rather than a specific dollar amount.

EARNINGS GUIDANCE LIABILITY CONSIDERATIONS

Reporting companies are particularly sensitive about potential liability for earnings guidance. Minimizing the liability provisions of federal securities law that apply to earnings guidance is a key reason that companies take advantage of the opportunity to furnish rather than file earnings releases that contain earnings guidance (see *Securities Law Liability Provisions*).

TIPS FOR USING NON-GAAP FINANCIAL MEASURES

In light of the SEC's ongoing focus on non-GAAP financial measures, companies should consider the following guidance:

- Use non-GAAP financial measures consistently across all forms of disclosure, including Exchange Act reports, earnings releases and calls and offering documents.
- Give comparable GAAP measures equal or greater prominence.
- If using adjusted EBITDA, review specific SEC guidance on the appropriate corresponding GAAP measure (*Questions 103.02 and 102.09, Non-GAAP C&DIs*).
- Do not use the terms non-recurring, infrequent or unusual for items that occurred within the last two years or are reasonably likely to recur in the next two years.
- Do not present full non-GAAP balance sheets or income statements to reconcile non-GAAP measures. Instead, reconcile to the nearest comparable GAAP measure.
- Do not use non-GAAP financial measures to "smooth earnings" (to make earnings look less variable over time).

FORWARD-LOOKING STATEMENTS: BEST PRACTICES

Companies should consider the following best practices when making forward-looking statements:

- Avoid unnecessary forward-looking statements.
- Before making a forward-looking statement, keep in mind that even if a particular projection or forecast has a reasonable basis and seems correct at the time, the company may still decide it needs to update it if the company determines the projection or forecast is no longer correct.
- Include a safe harbor legend, or have someone read the text of one, as part of all communications that could possibly include forward-looking statements. This includes oral presentations and website disclosures.
- Regularly review and update the company's safe harbor legend to ensure it includes specific references to the current risks described in the company's most recent SEC filings.

EARNINGS CALL AND Q&A SESSION TIPS

Companies should consider the following points as they prepare executives to present on an earnings call:

- The earnings call script should include questions that analysts are likely to ask and possible answers to those questions. In particular, the script should focus on what response management should give if an analyst asks a question that might elicit material, previously undisclosed information.
- The CEO, the CFO and other members of senior management presenting on earnings calls should be instructed to closely follow the script during the call. Company executives should avoid inadvertently disclosing sensitive competitive information or citing "price leadership" or other hints about competition or future pricing plans.

CONSIDERATIONS FOR PRIVATE COMMUNICATIONS WITH INVESTORS AND ANALYSTS

From time to time, a company's management may wish to:

- Hold private meetings with certain investors.
- Review and privately comment on analyst reports or models before they become publicly available.

These types of communications can be helpful to shareholder relations and the accuracy of analyst reports. However, they raise concerns under Regulation FD and the antifraud provisions of the federal securities law. These concerns may be particularly acute when these communications are held around the time of an earnings announcement, as the company is more likely to have material nonpublic information at that time. Before taking part in these communications, a company must consider whether there is a risk it might share material nonpublic information during the communications, and should be mindful of antifraud considerations.

To avoid violating Regulation FD, generally speaking a company must not share material nonpublic information in private communications with analysts and investors. When assessing if information is material, companies should keep in mind that the SEC continues to endorse the so-called mosaic theory of materiality. Under mosaic theory, companies can disclose a piece of immaterial information to third parties such as securities analysts even if that piece of information, without the company's knowledge, helps that third party complete a mosaic of information that as a whole is likely material. The SEC staff recognizes that analysts commonly examine many separate pieces of information that may not be significant to an ordinary investor and use them to make material conclusions. However, as a practical matter, reporting companies and their counsel should keep in mind that there is a very fine line between what is material and immaterial in this context. In addition, holding private meetings between management and investors generally goes against the spirit of Regulation FD, which seeks to ensure all investors have equal access to information. For more information on materiality, see *Practice Note, Determining Materiality in Securities Offerings and Corporate Disclosure (http://us.practicallaw.com/3-521-5541).*

A company's management may view an invitation to review an analyst report before its publication as a welcome opportunity to correct errors. However, this practice has led to companies being held liable under Rule 10b-5 for false statements contained in the resulting third-party analyst report. Liability has been imposed on companies in these circumstances under two common law theories known as entanglement and adoption.

Entanglement has been found in circumstances where companies have been involved in the preparation of third-party reports. For example, a company is liable for inaccuracies in a research report published by someone else if it "sufficiently entangled itself" with such information to render it attributable to the company (*Elkind v. Liggett & Myers, Inc., 635 F.2d 156, 163 (2d Cir. 1980)*). Therefore, the entanglement theory focuses on the company's involvement with a third-party report before it is published. A company may also be liable for false statements contained in a third-party report if it adopts, expressly or impliedly, the statements after they are published, even if management had no role in preparing the reports. Therefore, the adoption theory focuses on the company's endorsement, express or implied, after a third-party report is published.

By agreeing to review an analyst report in advance, a company may be perceived to expressly or impliedly ratify the report before its publication, and in turn become responsible for the report's accuracy (including for predictive statements and any duty to update them post-publication). While it is very hard to find a bright line here, companies should consider the following guidelines:

- Entanglement and adoption should generally not be a concern when a company comments solely on factual matters. This would include commenting on whether an analyst's assumptions are correct, so long as the company does not comment directly on projections.
- A company should be able to tell an analyst that the analyst has made a faulty assumption about the company's business or operations, even if this comment would invariably cause the analyst to reconsider the analyst's projections in the process.
- **Any** commentary in this context is subject to Regulation FD, which is triggered by disclosures of material nonpublic information.

QUIET PERIODS FOR ANALYST AND PRIVATE INVESTOR COMMUNICATIONS

As a best practice, many companies observe a quarterly quiet period during which they refrain from holding meetings or otherwise interacting with analysts or commenting on financial outlook. These quiet periods frequently coincide with the trading blackout periods for company officers and directors set by the company's insider trading policy, and are typically included as a provision of the company's Regulation FD or insider trading policy. The company's board, a board committee or members of management typically are given discretionary authority to waive the quiet period requirements and allow certain analyst or private investor communications during the quiet period in specific circumstances. For a form of Regulation FD policy including a quiet period provision, see *Standard Document, Regulation FD Policy (http://us.practicallaw.com/3-522-2990)*. For more information on insider trading policies, see *Standard Document, Sample Corporate Policy on Insider Trading (http://us.practicallaw.com/7-502-0160)*.

There is no specific federal securities law or SEC rule mandating quiet periods in this context or prescribing the length of the period. However, reporting companies tend to observe a quiet period to:

- Guard against the potential for selective disclosure or the perception or appearance of selective disclosure.
- Ensure they communicate with all audiences consistently and share the same information.

In essence, companies adopt these quiet periods to prevent the release of information during those sensitive times when the company is aware of its quarterly or annual financial results or other material nonpublic information but has not yet publicly announced the information.

MANAGING THE GOING-DARK PROCESS EFFECTIVELY

While increasing numbers of companies are going dark, companies considering it should think about whether it will signal to the market that the company is uncertain of its performance or has a negative short-term outlook. When announcing the change, a company should:

- Emphasize that the change reflects its focus on the long-term performance and health of the business.
- Expressly state that poor expectations of future performance are not the reason for its decision to go dark.

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