



Understanding the Requirements Related to the Use of Non-GAAP Financial Measures

The use of non-GAAP financial measures by public companies continues to be a focus of attention for the U.S. Securities and Exchange Commission ("SEC"). In the last two decades, the SEC has observed the increased prevalence and prominence of non-GAAP financial measures in public company disclosures and voiced its concern about their potential to distort actual company performance and mislead the investing public.¹

The SEC has reminded registrants of the importance of this topic by way of several initiatives. On May 17, 2016, the SEC's Division of Corporation Finance (the "Staff") provided guidance on the use of non-GAAP financial measures in the form of updated Compliance and Disclosure Interpretations ("C&DIs").² These C&DIs were most recently updated on December 13, 2022, with the Staff focusing on potentially misleading and unduly prominent non-GAAP financial measure disclosures.³ In addition, on January 24, 2024, the SEC adopted final rules implementing new disclosure and other requirements for special purpose acquisition companies ("SPACs") and business combination transactions involving SPACs (i.e., deSPACs),⁴ which, among others, addressed the use of non-GAAP financials measures in projections. Under the amended guidance in Item 10(b) of Regulation S-K, the presentation of projections that include a non-GAAP financial measure should include a clear definition or explanation of the measure, a description of the GAAP financial measure to which it is most closely related, and an explanation why the non-GAAP financial measure was used instead of a GAAP measure. However, the 2024 SPAC amendments explicitly did not impact the Staff's guidance under the C&DIs related to non-GAAP financials.

The use of non-GAAP financial measures has also been consistently one of the most cited issues in Staff comment letters to registrants in recent years. In fact, non-GAAP financial measures has been one of the top three most frequent topics in Staff comment letters in almost every year since 2013, and was the most frequent topics cited by the Staff in the one-year period ended June 2025.⁵

¹ As early as December 2001, the SEC sounded a warning to public companies that present to the public their earnings and results of operations information on the basis of methodologies other than Generally Accepted Accounting Principles ("GAAP") (such information, then referred to as 'pro forma financial information'). The SEC observed that such information, under certain circumstances, can mislead investors if it obscures GAAP results. In particular, the SEC noted that "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." See "Cautionary Advice Regarding the Use of 'Pro Forma' Financial Information in Earnings Releases", SEC Release Nos. 33-8039, 34-45124, FR-59, available at <https://www.sec.gov/rules/2001/12/cautionary-advice-regarding-use-pro-forma-financial-information-earnings-releases>. In December 2015, the then SEC Chair Mary Jo White called non-GAAP financial measures an area that "deserves close attention, both to make sure that our current rules are being followed and to ask whether they are sufficiently robust in light of current market practices." See Mary Jo White, "Keynote Address at the 2015 AICPA National Conference: 'Maintaining High-Quality, Reliable Financial Reporting: A Shared and Weighty Responsibility,'" December 9, 2015, available at <https://www.sec.gov/news/speech/keynote-2015-aicpa-white.html>. Wesley R. Bricker, then SEC chief accountant, observed in a speech in May 2016 that certain company practices related to the use of non-GAAP financial measures have raised concerns and may be potentially misleading to investors. See Wesley R. Bricker, "Remarks before the 2016 Baruch College Financial Reporting Conference," May 5, 2016, available at <http://www.legalexecutiveinstitute.com/wp-content/uploads/2016/09/22.-Bricker-May-Speech-Baruch-College-Financial-Reporting-Conference.pdf>.

² See Compliance & Disclosure Interpretations on Non-GAAP Financial Measures, available at: <https://www.sec.gov/divisions/corpfin/guidance/nongapinterp.htm>.

³ See SEC Announcement, "New update to Non-GAAP Financial Measures Compliance & Disclosure Interpretations Question," December 13, 2022, available at <https://www.sec.gov/corpfin/announcement/announcement-update-non-gaap>. The Staff updated the 2026 C&DIs relating to non-GAAP financial measures, by clarifying Questions 100.01 and 100.04, adding new Questions 100.05 and 100.06, and expanding Question 102.10.

⁴ See SEC Release No. 33-11265, Final Rule: Special Purpose Acquisition Companies, Shell Companies, and Projections (Jan. 24, 2024), available at <https://www.sec.gov/files/rules/final/2024/33-11265.pdf>.

⁵ See for example PwC's SEC Comment letter Trends (August 24, 2025) showing data from July 1, 2024 to June 30, 2025, available at https://viewpoint.pwc.com/dt/us/en/pwc/sec-comment-letters/comment-letter-trends_DM/SEC-comment-letters.html; and EY's SEC Reporting Update (September 12, 2024) showing data from July 1, 2023 to June 30, 2024, available at <https://www.ey.com/content/dam/ey-unified-site/ey-com/en-us/technical/accountinglink/documents/ey-secru24439-241us-09-12-2024.pdf>.

In this guide, we discuss the nature and purpose of non-GAAP financial measures and the rules governing the use of such financial measures. We also examine recent SEC comment letters and discuss areas of concern identified by the Staff as well as related enforcement actions. Finally, we look at pronouncements that provide guidance on best practices for companies and offer practical guidance.

What is a non-GAAP financial measure?

A non-GAAP financial measure refers to certain financial information not calculated and presented in accordance with U.S. Generally Accepted Accounting Principles (GAAP). The SEC adopted the term “non-GAAP financial measures” in 2003, following enactment of the Sarbanes-Oxley Act of 2002 (the “Sarbanes-Oxley Act”), which sought to eliminate the manipulative or misleading use of what the Sarbanes-Oxley Act referred to as “pro forma financial information” and enhance the comparability with GAAP financial measures. In accordance with this mandate, the SEC adopted Regulation G and Item 10(e) of Regulation S-K (“Item 10(e)”), which both define a non-GAAP financial measure as a numerical measure of a company’s historical or future financial performance, financial position or cash flows, that:

- excludes amounts, or is subject to adjustments that have the effect of excluding amounts, that are included in the most directly comparable measure calculated and presented in accordance with U.S. GAAP (or in the case of foreign private issuers (“FPIs”) whose primary financial statements are prepared in accordance with non-U.S. generally accepted accounting principles, references to GAAP also include the principles under which those primary financial statements are prepared) in the statement of income, balance sheet, or statement of cash flows (or equivalent statements) of the issuer; or
- includes amounts, or is subject to adjustments that have the effect of including amounts, that are excluded from the most directly comparable measure so calculated and presented.

In addition, the SEC’s releases leading to the 2003 adoption of Regulation G and Item 10(e) (the “SEC Releases”) explain that the non-GAAP financial measure definition is intended to capture all measures that have the effect of presenting:

- 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.⁶

The following are excluded from the definition of a non-GAAP financial measure:

- operating and other statistical measures such as unit sales, number of employees, subscribers or advertisers;
- ratios or statistical measures that are calculated using exclusively one or both:
 - financial measures calculated in accordance with GAAP. For example, operating margin derived from GAAP revenue divided by GAAP operating income would not be considered a non-GAAP measure; and
 - operating measures or other measures that are not non-GAAP financial measures such as measures calculated in accordance with GAAP (i.e., sales per square foot or same store sales);
- financial information that does not have the effect of providing numerical measures that are different from the comparable GAAP measure such as:

⁶ See SEC Release No. 33-8145, Proposed Rule: Conditions for Use of Non-GAAP Financial Measures (Nov. 4, 2002), *available at* <https://www.sec.gov/rules/proposed/33-8145.htm> (hereinafter, the “Proposing Release”), and SEC Release No. 33-8176, Final Rule: Conditions for Use of Non-GAAP Financial Measures (Jan. 22, 2003), *available at* <https://www.sec.gov/rules/final/33-8176.htm> (hereinafter, the “Final Rule Release” and, together with the Proposing Release, the “SEC Releases”).



- disclosure of amounts of expected indebtedness, including contracted and anticipated amounts;
- disclosure of amounts of repayments that have been planned or decided upon but not yet made;
- disclosure of estimated revenues or expenses of a new product line, so long as such amounts were estimated in the same manner as would be computed under GAAP; and
- measures of profit or loss and total assets for each segment required to be disclosed in accordance with GAAP; and
- financial measures required to be disclosed by GAAP, SEC rules, or a system of regulation of a government or governmental authority or self-regulatory organization that is applicable to the registrant such as measures of capital or reserves calculated for regulatory purposes.⁷

Examples of commonly used non-GAAP measures include “adjusted net income” or EBITDA. If a company takes a GAAP measure like net income and adjusts that by excluding or including one or more expense or revenue items that are “non-recurring,” the resulting measure, or “adjusted net income” as it is sometimes presented, would be considered a non-GAAP measure. Companies that use EBITDA derive this non-GAAP measure by taking GAAP earnings, such as GAAP net income as presented in the statement of operations, and adjusting for interest, taxes, depreciation and amortization components, which are elements derived from GAAP financial presentations. Other common examples of non-GAAP financial measures include variations of EBITDA, such as EBIT (earnings before interest and taxes), EBITA (earnings before interest, taxes and amortization), EBITD (earnings before interest, taxes and depreciation, or sometimes called “PBDIT” or profit before depreciation, interest and taxes), EBITDAR (earnings before interest, taxes, depreciation, amortization and restructuring or rent costs), adjusted EBITDA, core earnings, adjusted earnings, adjusted earnings per share, adjusted revenues, free cash flow, funds from operations (“FFO”) and Adjusted FFO (“AFFO”).

Do non-GAAP measures serve a purpose?

Companies usually present non-GAAP financial measures in order to supplement GAAP financial presentations and to provide investors with a better illustration of their performance, liquidity and financial position. Non-GAAP financial measures often enable a company’s management to present a company’s financial condition or results of operations and provide meaningful performance measures in a manner that GAAP results alone may not properly convey. The SEC allows the presentation of non-GAAP financial measures in order to provide information to investors that a registrant believes is relevant and useful in understanding its performance or liquidity. When used, non-GAAP financial measures are typically disclosed in the “Management’s Discussion and Analysis of Financial Condition and Results of Operations” (“MD&A”) section of periodic reports, as well as in earnings releases, investor presentations and other company communications. In addition, research analysts, rating agencies and other financial professionals often use non-GAAP operating measures to evaluate or compare the performance of comparable companies. For example, EBITDA is commonly found in debt covenants and used in financial projections and assessments of a company’s operating cash flow or cash available to service its debt. Analysts also use EBITDA in the valuation of businesses, including a company’s enterprise value which is usually calculated as a multiple of EBITDA.

Which rules govern the use of non-GAAP measures?

Regulation G

Companies subject to the filing requirements of Sections 13(a) or 15(d) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”) must comply with Regulation G when publicly disclosing material information that includes a non-GAAP financial measure. This includes the use of non-GAAP financial measures in public disclosures such as SEC-filed

⁷ Regulation G, Rule 101(a)(2) and (3); Regulation S-K, Item 10(e)(4) and (5); *see also* Final Rule Release.



reports, earnings releases, earnings calls or investor presentations. In such public disclosures, a registrant must provide the following to accompany the non-GAAP financial measure:

- A presentation of the most directly comparable financial measure calculated and presented in accordance with GAAP; and
- A quantitative reconciliation of the differences between the non-GAAP financial measure and the most directly comparable GAAP financial measure.⁸

For example, if a registrant presents EBIT or EBITDA as a non-GAAP performance measure, that measure should be reconciled to net income as presented in the statement of operations under GAAP because net income is the most directly comparable financial measure calculated and presented in accordance with GAAP. Even for companies for which operating income is a GAAP financial measure, operating income would not be considered the most directly comparable GAAP financial measure because EBIT and EBITDA make adjustments for items that are not included in operating income.⁹ Regulation G also requires registrants to provide quantitative reconciliation of forward-looking non-GAAP financial measures such as a schedule or other presentation detailing the differences between the forward-looking non-GAAP financial measure and the appropriate forward-looking GAAP financial measure. If the most directly comparable GAAP financial measure is not available on a forward-looking basis, the registrant must disclose that fact, explain why it is not available on a forward-looking basis, provide any reconciling information that is available without an unreasonable effort and disclose its probable significance.¹⁰

When using non-GAAP financial measures and presenting the required Regulation G information, registrants must be mindful that, under Regulation G's anti-fraud requirements, a registrant or a person acting on its behalf may not disclose a non-GAAP financial measure, which taken together with the required accompanying information, misstates a material fact or omits 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.¹¹

Regulation G applies to the use of non-GAAP financial measures in all written and oral public disclosures by registrants, including SEC-filed reports, earnings releases, earnings calls, webcasts and broadcasts, investor presentations and other materials posted to websites. When using non-GAAP financial measures in public communications, a registrant can comply with the Regulation G requirements by:

- Providing the Regulation G required information on the registrant's website at the time the non-GAAP financial measure is made public; and
- Making public the location of the website in the same presentation in which the non-GAAP financial measure is made public.¹²

With respect to non-GAAP financial measures that are verbally presented, such as in an earnings call, these non-GAAP financial measures do not need to be reconciled in the earnings call itself, but must (if not reconciled in the earnings call) be reconciled in materials presented along with the earnings call, such as in an earnings release or investor deck presentation.

Item 10(e) of Regulation S-K

Item 10(e) applies to disclosure of non-GAAP financial measures in SEC filings made by the registrant under the Securities Act of 1933, as amended (the "Securities Act") and the Exchange Act, including registration statements, annual reports on Form 10-K, quarterly reports on Form 10-Q, free writing prospectuses (if included in an Exchange Act filing, or included or

⁸ Regulation G, Rule 100(a).

⁹ See C&DI Question 103.02.

¹⁰ See SEC Release No. 33-8176, *supra* note 6. See also C&DI Question 102.10.

¹¹ Regulation G, Rule 100(b).

¹² Note 1 to Regulation G, Rule 100.



incorporated by reference into a registration statement),¹³ proxy statements, and current reports on Form 8-K. Instruction 2 of Item 2.02 “Results of Operations and Financial Condition” of Form 8-K (“Item 2.02”) specifically references the requirements under Paragraph (1)(i) of Item 10(e), which requires the presentation of non-GAAP financial measures to be presented with equal or greater prominence as the most directly comparable GAAP financial measure.

When using non-GAAP financial measures in SEC filings, registrants must provide the following to comply with Item 10(e):

- a presentation, with equal or greater prominence, of the most directly comparable financial measure or measures calculated and presented in accordance with GAAP;
- a quantitative reconciliation (by schedule or other clearly understandable method) of the differences between the disclosed non-GAAP financial measure and the most directly comparable GAAP financial measure;
- a statement explaining the basis for which the registrant’s management believes that the presentation of the non-GAAP financial measure would be useful to investors in understanding the registrant’s financial condition and results of operations; and
- to the extent material, a statement disclosing the purpose, if any, for which the registrant’s management uses the non-GAAP financial measure.¹⁴

The SEC has been reminding registrants of the importance of the “equal or greater prominence” requirement. On December 26, 2018, the SEC issued a cease and desist order and imposed a \$100,000 civil penalty on a company for including non-GAAP financial measures (such as adjusted EBITDA, adjusted net income and free cash flow before special items) in two earnings releases without giving equal or greater prominence to the most directly comparable GAAP financial measures. The SEC’s order specifically noted that the earnings releases’ headlines presented a non-GAAP financial measure without mentioning the comparable GAAP financial measure. The order also pointed out that the bullet points in the highlights section on the first page of one of the earnings releases contained non-GAAP financial measures but did not include the comparable GAAP financial measures. According to the SEC order, although the comparable GAAP financial measures were contained later in the body of the earnings release, the failure to include them in the headlines and the highlights that contained the non-GAAP financial measures constituted a violation of the Exchange Act and the applicable rules thereunder.¹⁵

In addition to the prohibition on giving greater prominence to non-GAAP financial measures mentioned above, Item 10(e) also contains a number of specific prohibitions as set forth below:

- 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 other than EBIT and EBITDA;
- 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 within two years or there was a similar charge or gain within the prior two years;
- 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; and

¹³ See C&DI Question 102.08.

¹⁴ Regulation S-K, Item 10(e)(1)(i).

¹⁵ See <https://www.sec.gov/litigation/admin/2018/34-84956.pdf>.



- 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.

Item 10(e) requirements are intended to be more extensive and detailed than those of Regulation G according to the SEC Releases.

Regulation G and Item 10(e) Exceptions

Proposed Business Combinations

Regulation G and Item 10(e) do not apply to non-GAAP financial measures included in disclosure relating to proposed business combinations, the entity resulting therefrom or an entity that is a party thereto, if the disclosure is contained in a communication that is subject to the SEC's communication rules applicable to business combination transactions.¹⁶ The SEC Releases noted that non-GAAP financial measures included in proposed business combination disclosures are already subject to a separate set of SEC rules (e.g., Exchange Act Rules 14a-12 and 14d-2, Rules 165 and 425 under the Securities Act and Item 1015 of Regulation M-A under the Securities Act ("Regulation M-A")).

In October 2017 and April 2018, the Staff issued four additional C&DIs on the use of non-GAAP financial measures in business combination transactions clarifying the following:

- Financial measures provided to a financial advisor, a company's board of directors or board committee, including financial measures in forecasts used in connection with a business combination transaction, would be excluded from the definition of non-GAAP financial measures, and therefore not subject to Item 10(e) and Regulation G, if and to the extent: (A) the financial measures are included in forecasts provided to the financial advisor for the purpose of rendering an opinion that is materially related to the business combination transaction; and, (B) the forecasts are being disclosed in order to comply with Item 1015 of Regulation M-A or requirements under state or foreign law, including case law, regarding disclosure of the financial advisor's analyses or substantive work. Such guidance should provide comfort to M&A deal participants that the disclosure of management projections in merger registration statements, proxy statements and tender offer statements would not be subject to Item 10(e) and Regulation G.
- If a registrant determines that to comply with the anti-fraud and other liability provisions of the federal securities laws forecasts exchanged between parties in a business combination transaction are material and disclosure of such forecasts is required, such financial measures included in such forecasts would be excluded from the definition of non-GAAP financial measures and therefore not subject to Item 10(e) and Regulation G.
- The exemption from the requirements under Item 10(e) and Regulation G that applies to non-GAAP financial measures disclosed in communications relating to a business combination transaction do not extend to the same non-GAAP financial measures disclosed in registration statements, proxy statements and tender offer statements.

Special Purpose Acquisition Companies (SPACs)

On January 24, 2024, the SEC adopted final rules addressing SPAC IPOs and de-SPAC transactions to enhance disclosures around, among other things, the use of non-GAAP measures in financial projections.¹⁷ The rules update and expand Item 10(b) of Regulation S-K for all SEC filings: if projections include a non-GAAP financial measure, the registrant must clearly define or explain the measure, describe the most directly comparable GAAP measure, and explain why the non-GAAP measure is used instead of a GAAP measure. For de-SPAC transactions specifically, new Item 1609 of Regulation S-K also requires disclosure of the purpose of the projections, who prepared them, all material bases and assumptions, and whether they reflect the current views of the SPAC or target's board or management as of the most recent practicable date.

¹⁶ Regulation G, Rule 100(d); Regulation S-K, Item 10(e)(6).

¹⁷ See SEC Release No. 33-11265 (Jan. 24, 2024), *supra* note 4 and Regulation S-K, Item 10(b) and Item 1609.



Registered Investment Companies

Regulation G and Item 10(e) also do not apply to investment companies registered under Section 8 of the Investment Company Act of 1940, as amended (the "Investment Company Act")¹⁸ and the SEC Releases note that registered investment companies are excluded from the application of Regulation G and Item 10(e) because Section 405 of the Sarbanes-Oxley Act exempts investment companies registered under Section 8 of the Investment Company Act from Section 401 of the Sarbanes-Oxley Act and any rules adopted by the SEC under Section 401 of the Sarbanes-Oxley Act.

Foreign Private Issuers

Although Regulation G generally applies to FPIs, there are limited exceptions. Use of non-GAAP financial measures by FPIs are not subject to Regulation G if the following conditions are satisfied:

- The FPI's securities are listed or quoted on a non-U.S. securities exchange or inter-dealer quotation system;
- The non-GAAP financial measure is not derived from or based on a measure calculated and presented in accordance with GAAP; and
- The disclosure is made by or on behalf of the FPI, or is included in a written communication that is released by or on behalf of the FPI outside the United States.¹⁹

The Regulation G exemption for FPIs still applies in any of the following circumstances:

- The FPI releases a written communication in and outside of the United States and such communication is released in the United States contemporaneously with or after the release outside the United States and is not otherwise targeted at persons located in the United States;
- Foreign and U.S. journalists or other third parties have access to the information;
- Following the release or disclosure, the information appears on one or more websites maintained by the FPI, so long as the websites, taken together, are not available exclusively to, or targeted at, persons located in the United States; or
- Following the disclosure or release of the information outside the United States, the information is included in a submission by the registrant to the SEC on a current report on Form 6-K.²⁰

In addition, the term "GAAP" as used in Regulation G and Item 10(e), for FPIs also includes the following:

- in the case of FPIs whose primary financial statements are prepared in accordance with non-U.S. GAAP or IFRS, "GAAP" shall refer to the principles under which those primary financial statements are prepared; and
- in the case of FPIs that include a non-GAAP financial measure derived from a measure calculated in accordance with U.S. GAAP, "GAAP" shall refer to GAAP for purposes of the application of the requirements of Regulation G or Item 10(e), as applicable, to the disclosure of that measure.

While Item 10(e) is also applicable to FPIs, if an FPI uses a non-GAAP financial measure in a Form 20-F filing that is otherwise prohibited by Item 10(e), such use would be permissible if the measure was expressly permitted under GAAP used in the FPI's primary financial statements and was included in its annual report or financial statements used in its home country jurisdiction or market. In addition, a non-GAAP financial measure that would otherwise be prohibited by Item 10(e) will be permitted in a Form 20-F filing if:

¹⁸ Regulation G, Rule 101(c); Regulation S-K, Item 10(e)(7).

¹⁹ Regulation G, 100(c).

²⁰ See The SEC Releases, *supra* note 6.



- The non-GAAP financial measure relates to the GAAP used in the registrant's primary financial statements included in its filing with the SEC;
- The non-GAAP financial measure is required or expressly permitted by the standard-setter that is responsible for establishing the GAAP used in such financial statements; and
- 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 for distribution to its security holders.²¹

Additionally, the SEC clarified in Question 106.04 of the C&DIs that neither Regulation G nor Item 10(e) applies to use of non-GAAP financial measures by Canadian issuers in annual reports on Form 40-F under the Multi-Jurisdictional Disclosure System.

SEC Guidance: The C&DIs

The C&DIs last updated by the Staff in 2022 provide insight into what the Staff considers to be misleading use of non-GAAP financial measures and unacceptable prominence of a non-GAAP financial measure presentation. These C&DIs can be generally grouped into four main areas: (1) potentially misleading non-GAAP financial measure practices; (2) impermissible prominence of non-GAAP financial measures; (3) prohibitions on per share presentations of non-GAAP financial measures; and (4) income tax effects of adjustments.

Potentially Misleading Non-GAAP Financial Measure Practices

C&DIs Questions 100.01 through 100.06 address violations of the prohibition on misleading non-GAAP financial measures contained in Rule 100(b) of Regulation G ("Rule 100(b)"). Although the term "misleading" is not defined or discussed in Regulation G or in its 2003 adopting release, these C&DIs provide examples of what the SEC could deem to be "misleading." Whether a particular adjustment results in a misleading non-GAAP measure depends on a company's individual facts and circumstances.²²

C&DI Question 100.01 makes it clear that, even if certain adjustments are not explicitly prohibited by Regulation G, they can result in a non-GAAP financial measure that is misleading and therefore a violation of Rule 100(b). To illustrate this point, this C&DI states that the presentation of a non-GAAP performance measure that excludes normal, recurring, cash operating expenses necessary to operate a company's business is an example that could be misleading. Question 100.01 explains that (a) "normal, operating expense" is determined by considering the nature and effect of the non-GAAP adjustment and how it relates to the company's operations, revenue generating activities, business strategy, industry and regulatory environment and (b) a "recurring" operating expense is one that occurs repeatedly or occasionally, including at irregular intervals. The Staff cross-references this C&DI in C&DI Question 102.03, which discusses Item 10(e)'s prohibition on adjusting non-GAAP measures to eliminate or smooth out non-recurring items that are likely to reoccur or have occurred within two years.

C&DI Question 100.02 specifies that a non-GAAP measure can be misleading if it is presented inconsistently between periods, such as a measure that adjusts a particular charge or gain in the current period when other, similar charges or gains were not also adjusted in prior periods. According to this C&DI, depending on the significance of the change, it may be necessary to recast prior measures to conform to the current presentation and place the disclosure in the appropriate context. According to the Staff, a non-GAAP financial measure can be misleading if it excludes charges but does not exclude gains.

C&DI Question 100.03 notes that Rule 100(b) may be violated if a non-GAAP measure is adjusted only for non-recurring charges when non-recurring gains occurred during the same period.

²¹ Note to paragraph (e) under Item 10(e) of Regulation S-K.

²² See C&DI question 100.01.



C&DI Question 100.04 advises that if a revenue- or expense-related non-GAAP financial measure has the effect of changing the recognition and measurement principles prescribed by GAAP, it would be considered individually tailored and its presentation could violate Rule 100(b) for being misleading. According to this C&DI, the Staff may consider the following, among others, to be misleading: (i) changing the pattern of recognition, such as including a non-GAAP performance measure that is adjusted to accelerate revenue recognized ratably over time in accordance with GAAP as though it earned the revenue when customers are billed, (ii) presenting a non-GAAP measure of revenue in gross or net, contrary to what is required by GAAP and (iii) changing the basis in accounting for revenues or expenses from accrual to cash basis. The Staff has stated that it would not object to a non-GAAP financial measures that adjusts revenue to reflect an upcoming change in revenue recognition accounting standards, and which help bridge old GAAP revenue measures with the new GAAP revenue measures allowing investors to understand the transition from the old to the new accounting standard.²³

C&DI Question 100.05 advises that a non-GAAP measure can be misleading to investors and would violate Rule 100(b) if such non-GAAP measure and/or any adjustment made to it are not appropriately labeled and clearly described. This C&DI cites as misleading a company's failure to identify a financial measure as non-GAAP and its presentation of a non-GAAP measure using a label that does not reflect its true nature (e.g., labelling as "net revenue" a contribution margin that is calculated as GAAP revenue less certain expenses; using a common GAAP account name in denoting a non-GAAP measure such as labelling a non-GAAP measure as "gross profit" or "sales;" or calling a non-GAAP measure as "pro forma" even if not consistent with the pro form requirements of Article 11 of Regulation S-X).

C&DI Question 100.06 clarifies that a non-GAAP measure can still be misleading and violate Rule 100(b) even if accompanied by disclosure about the nature and effect of each adjustment made to the most directly comparable GAAP measure.

Impermissible Prominence of Non-GAAP Financial Measures

While noting that whether a non-GAAP financial measure presentation is more prominent than the comparable GAAP measure depends on the facts and circumstances in which the disclosure is made, revised C&DI Question 102.10(a) provides the following seven examples of presentations in which the Staff would consider the non-GAAP disclosures to be impermissibly prominent:

- Presenting an income statement of non-GAAP measures;
- Presenting a non-GAAP measure before the most directly comparable GAAP measure or omitting the comparable GAAP measure altogether, including in an earnings release headline or caption that includes non-GAAP measures;
- Presenting a ratio where a non-GAAP financial measure is the numerator and/or denominator without also presenting the ratio calculated using the most directly comparable GAAP measure(s) with equal or greater prominence;
- Presenting a non-GAAP measure using a style of presentation (e.g., bold, larger font) that emphasizes the non-GAAP measure over the comparable GAAP measure;
- Describing a non-GAAP measure as, for example, "record performance" or "exceptional" without at least an equally prominent descriptive characterization of the comparable GAAP measure;
- Providing charts, tables or graphs of non-GAAP financial measures without presenting greater or equally prominent charts, tables or graphs of the comparable GAAP measures, or omitting the comparable GAAP measures altogether; and

²³ See "Non-GAAP Disclosures: The SEC Speaks!" (July 6, 2016), a webcast sponsored by [TheCorporateCounsel.net](http://www.thecorporatecounsel.net), where Mr. Kronforst, speaking in his personal capacity and not for the SEC nor for the Staff, answered specific questions regarding the C&DIs. A copy of the transcript and an audio archive for the webcast are available at http://www.thecorporatecounsel.net/member/Webcast/2016/07_06/transcript.htm (subscription required).



- Providing discussion and analysis of a non-GAAP measure without a similar discussion and analysis of the comparable GAAP measure in a location with equal or greater prominence.

These example presentations are consistent with Item 10(e)(1)(i)(A) of Regulation S-K's requirement to present the most directly comparable GAAP measure with equal or greater prominence when a registrant presents a non-GAAP measure, particularly when presented in documents filed with the SEC and in earnings releases furnished under Item 2.02 of Form 8-K.

C&DI Question 102.10(b) provides further sample disclosures that the Staff would consider to cause the non-GAAP reconciliation required by Item 10(e)(1)(i)(B) of Regulation S-K to give undue prominence to non-GAAP measures:

- Starting the reconciliation with a non-GAAP measure;
- Presenting a non-GAAP income statement when reconciling non-GAAP measures to the most directly comparable GAAP measures; and
- When presenting a forward-looking non-GAAP measure, quantitative reconciliation may be excluded if the registrant is relying on the exception provided by Item 10(e)(1)(i)(B) of Regulation S-K. A measure would be considered more prominent than the comparable GAAP measure if it is presented without disclosing reliance upon the exception, identifying the information that is unavailable, and its probable significance in a location of equal or greater prominence.

For purposes of the above examples, C&DI Question 102.10(c) clarified that the Staff would consider a non-GAAP income statement to be one that is comprised of non-GAAP measures and includes all or most of the line items and subtotals found in a GAAP income statement.

Prohibitions on Per Share Presentations of Non-GAAP Financial Measures

C&DI Question 102.05 confirms that certain non-GAAP earnings per share measures may be permissible if they are performance measures that are reconciled to GAAP earnings per share but emphasizes that a non-GAAP liquidity measure that measures cash generated must not be presented on a per share basis in documents filed with or furnished to the SEC. This C&DI states that when the Staff analyzes the question of whether a financial measure can be reported on a per share basis, it will focus on the substance of whether the non-GAAP measure could be used as a liquidity measure and not management's characterization of it solely as a performance measure.

The Staff also clarified and updated C&DI Questions 102.07 and 103.02 in light of revised C&DI Question 102.05. C&DI Question 102.07 specifies that free cash flow is a liquidity measure that must not be presented on a per share basis. The Staff also updated C&DI Question 103.02, which discusses the GAAP performance measure to which EBIT or EBITDA should be reconciled, to specify that EBIT and EBITDA must not be presented on a per share basis. The C&DIs also address per share presentations in the context of FFO per share as a non-GAAP measure in earnings releases and materials that are filed with or furnished to the SEC. C&DI Question 102.01 accepts the FFO definition of the National Association of Real Estate Investment Trusts ("NAREIT") that was in effect as of May 17, 2016, as a performance measure and does not object to a per share FFO presentation when FFO is presented based on the NAREIT definition. While C&DI Question 102.02 recognizes that FFO can be presented other than as defined by NAREIT, adjustments for such an FFO presentation must comply with the requirements of Item 10(e) for a performance measure or a liquidity measure, and some of those adjustments may trigger the prohibition on presenting this measure on a per share basis.

Income Tax Effects of Adjustments

C&DI Question 102.11 specifies that companies should provide income tax effects on non-GAAP measures depending on the nature of the measures. For example, if a measure is a liquidity measure that includes income taxes, the C&DI specifies that it might be acceptable to adjust GAAP taxes to show taxes paid in cash. The C&DI indicates that if a measure is a performance measure, the company should include current and deferred income tax expense commensurate with the non-



GAAP measure of profitability. C&DI Question 102.11 provides that adjustments to arrive at a non-GAAP measure should not be presented “net of tax.” Rather, income taxes should be shown as a separate adjustment and clearly explained.

Segment Reporting

In November 2023, the Financial Accounting Standards Board (the “FASB”) released ASU 2023-07 requiring new segment disclosures. The new standard, which became effective for issuers with fiscal years beginning after December 15, 2023, permits preparers to report multiple measures of segment profit or loss, as long as one of the measures reported is the measure that is most consistent with GAAP. This means that additional measures of segment profit and loss could appear in the notes to financial statements. Since ASU 2023-07 only mandates that one measure be provided, at the *2023 AICPA & CIMA Conference on Current SEC and PCAOB Developments*, the Staff stated that they will consider any additional measures of segment profit or loss voluntarily disclosed and that are not determined in accordance with GAAP to be non-GAAP financial measures, despite such measures being permitted by ASU 2023-07. While C&DI Question 104.01 permits the use of “measures of profit or loss and total assets for each segment required to be disclosed in accordance with GAAP,” the Staff has indicated that additional non-GAAP measures are not “required or expressly permitted” and therefore are not subject to this exception, and will be subject to the rules and regulations governing non-GAAP financial measures, including that they not be misleading and should comply with the presentation and disclosure requirements of such rules.

What are the principal areas of concern identified in SEC comment letters?

The Staff’s ongoing focus on the use of non-GAAP financial measures is clear from comment letters issued by the Staff since the December 2022 release of the updated C&DIs. The following areas of concern (in order of relative frequency) have been emphasized in the Staff’s comment letters to public companies:

1. Potentially misleading non-GAAP financial measures
2. Undue prominence of non-GAAP financial measures compared with GAAP measures
3. Explaining why the use of a non-GAAP financial measure is helpful to investors
4. Reconciliation to the most directly comparable GAAP measure
5. Liquidity versus performance measures
6. Income tax effects of non-GAAP adjustments

Below, we discuss these common areas of concern in further detail.

Potentially Misleading Non-GAAP Financial Measures

Staff comments have asked registrants to show that certain non-GAAP financial measures they used or particular adjustments they adopted were not misleading, in light of the examples cited in Questions 100.01 through 100.06 and Question 101.03 of the C&DIs. The following are examples of potentially misleading practices relating to the use of non-GAAP measures on which the Staff has commented.

Adjustments for Non-Recurring, Infrequent, or Unusual Items

Presenting a non-GAAP performance measure that excludes normal, recurring, cash operating expenses necessary to operate a registrant’s business is an example of a measure that could be misleading. The Staff views an operating expense that occurs repeatedly or occasionally, including at irregular intervals, as recurring. Further, if a registrant includes a reconciling item with a vague description such as “Other,” it can expect to receive an SEC comment asking for further detail of what is contained in that line item unless that line item is clearly immaterial. Transparency is key with respect to all disclosures, but particularly for line items described as “Other.”



At the 2024 AICPA & CIMA Conference on Current SEC and PCAOB Developments held in December 2024, the Staff also emphasized that “normal, recurring, and cash” are just examples of factors and not all three need to be present for the exclusion of the expense to be misleading. For example, a write-down of inventory as an adjustment may not be a “cash” item, but it may still be both normal and recurring; therefore, exclusion of the write-down could be considered misleading.

Further, the Staff noted that adjustment to non-GAAP financial measures must be appropriately labelled and described to provide investors with the information they need to clearly understand the nature of the measure or adjustment, and why the adjustment is being made. Therefore, if a registrant includes a reconciling item with a vague description such as “Other,” it can expect to receive an SEC comment asking for further detail of what is contained in that line item (unless that line item is clearly immaterial). Transparency is key with respect to all disclosures, but particularly for line items described as “Other.”

Below are some sample comments on this topic:

- *Please explain why sales and marketing expense is excluded from your calculation of non-GAAP recurring profit margin as this expense, or at least a portion thereof, appears to be normal, recurring cash operating expenses necessary to operate your subscription business.*
- *We note your non-GAAP measure, Adjusted EBITDA, excludes management fees and transaction Fees/IPO Readiness costs. Given the historical occurrence of these costs, please explain why you believe their removal reflects a more accurate depiction of your ongoing operations.*
- *In regard to the adjustment for Non-routine legal expenses, please tell us the specific nature of the expenses you excluded and explain to us how you identify routine and non-routine legal expenses. Although legal expenses may vary period to period, it appears to us they are a normal operating expense necessary to operate your business. Please more fully explain to us why you believe adjusting non-GAAP performance measures for cash operating costs that are necessary to operate your business is appropriate based on the guidance in Question 100.01 of the C&DIs.*
- *We note your presentation of several non-GAAP measures that remove the “impact of legal expenses relating to litigation matters.” Since legal expenses appear to represent normal, recurring, cash operating expenses necessary to operate your business, please remove the adjustment from future filings. Refer to Question 100.01 of the C&DIs.*
- *We note you consider Adjusted Operating Income and Adjusted Net Income as performance measures. Please tell us why there are cash-based adjustments, such as corporate expenses, in the calculation of a performance measure. Refer to the guidance in Question 100.01 of the non-GAAP C&DIs which indicates the exclusion of normal, recurring, cash operating expenses necessary to operate your business from a non-GAAP performance measure may be misleading. Please provide us with the revised disclosures.*
- *You state you adjust for Other (income) expense, net in total in your reconciliation of Adjusted EBITDA because the entire line item represents non-operating activity. Please revise to present and quantify each non-GAAP adjustment included within this line item separately in the reconciliation or in a detailed footnote to the reconciliation. In addition, explain how you determined that each component of Other (income) expense, net do not relate to your operations.*
- *Please tell us and expand your disclosures for the transaction, legal and other costs adjustment to your various non-GAAP performance measures to clearly explain and quantify each component.*
- *Please explain in detail to us each adjustment to arrive at Adjusted EBITDA and Adjusted Net Income. Explain why the adjustments do not result in a non-IFRS measure that could be considered misleading. Refer to Questions 100.01 and 100.04 of the Non-GAAP Financial Measures Compliance and Disclosure Interpretations. We remind you that the*



company and its management are responsible for the accuracy and adequacy of their disclosures, notwithstanding any review, comments, action or absence of action by the staff.

- *We note your adjustment for “loss from securities, net” included in your non-GAAP financial measure of adjusted pre-tax net income for the three and nine months ended September 30. We also note that you include a similar adjustment for all periods presented in your measure of core efficiency ratio on page 19. Please tell us how you determined that the measure of adjusted pre-tax net income is not misleading given the adjustment for the “loss from securities, net” appears to be inconsistently presented between periods, considering the guidance in Rule 100(b) of Regulation G and Question 100.02 of the C&DIs, and revise future filings as applicable.*

Individually Tailored Recognition and Measurement Methods

The SEC considers non-GAAP financial measures to be individually tailored if they change the recognition and measurement principles required by GAAP, which is not permitted as it could cause the presentation of the non-GAAP financial measure to be misleading (C&DI 100.04). The guidance, however, does not say that individually tailored accounting principles are always considered misleading. The following are examples of adjustments commonly considered to be misleading:

- **Cash vs. accrual basis:** presenting a financial measure that is presented on an accrual basis under GAAP to a cash or modified basis of accounting (i.e., presenting cash receipts as a proxy for revenue for a subscription-based business that recognizes revenue over time rather than as cash comes in)
- **Partial adjustments:** Making adjustments that reflect only part of the accounting concept (i.e., adjusting a performance measure for the cash portion of income tax expense but not for the non-cash portion)
- **Lease adjustments:** adjusting the presentation of lease expenses from ASC 842—Right of Use (“ROU”) model, where lease expense is recognized based on the amortization of the lease asset over time (i.e., non-cash lease expense), to a cash-basis based on actual cash payments made on the lease
- **Inconsistent adjustments:** Inconsistently applying adjustments across different periods or comparable items (i.e., adjusting net income for certain expenses in one period, but not in a comparable period)

The following are examples of recent comments related to individually tailored recognition and measurement methods:

- *Please tell us how you determined that excluding the accelerated ASC 842 amortization of operating lease ROU asset does not substitute an individually tailored recognition and measurement method for those of GAAP.*
- *Your purchase accounting adjustment appears to be tailored accounting because it reverses the fair value GAAP accounting required in business combinations. Your sales-type lease adjustment appears to be tailored because your adjustment changes the recognition of those amounts to cash basis. Please revise your presentation in future filings to remove these adjustments or tell us further why you believe they are not individually tailored recognition methods.*
- *In regard to the non-GAAP adjustment related to the impact of the call spread overlay that you present to determine your non-GAAP financial measure, Adjusted diluted income per share, please specifically address the following:*
 - *You previously stated you do not believe your presentation of Adjusted diluted income per share has the effect of changing the recognition and measurement principles required to be applied in accordance with GAAP. Explain in greater detail why you believe the non-GAAP adjustment for the impact of the call spread overlay does not result in an individually tailored non-GAAP financial measure that is inconsistent with the guidance in Question 100.04 of the C&DIs. In this regard, we note your non-GAAP financial measure results in you presenting diluted income per share without applying the if-converted method, which is required by GAAP.*



- We note you present a non-GAAP financial measure you identify as Adjusted diluted income per share. We also note this non-GAAP financial measure includes an adjustment that represents the dilution of your convertible notes, which is economically offset by a call spread overlay that was put in place upon issuance, since as a result of your adoption of ASU 2020-06, the convertible notes are now assumed to be converted into common stock at the beginning of the reporting period, and interest expense is excluded, both of which impact the calculation of GAAP diluted earnings per share. It is not clear to us why you believe this adjustment is appropriate since it appears this adjustment essentially results in a measure that disregards your required adoption of ASU2020-06 and the related requirements. Please more fully explain to us how you determined this adjustment is appropriate and specifically address how you considered Question 100.04 of the C&DIs in making your determination.
- We note from your response to our prior comment that your Non-Cash Acquisition Amortization and Depreciation adjustment in both 2023 and 2022, includes an amount related to the depreciation of the purchase accounting adjustment to step-up acquired PP&E to its fair value. It appears to us that this results in presenting a non-GAAP measure that substitutes individually tailored recognition and measurement methods given that it adjusts for partial depreciation expense. Please revise your non-GAAP measures to remove this adjustment in future filings. Refer to Question 100.04 of the C&DIs.
- Please tell us how you calculated the income tax adjustments related to the non-GAAP financial measures. It appears your non-GAAP adjustment for deferred tax valuation allowance removes the effects of the valuation allowance from your GAAP tax provision and appears to change your income taxes recognition method, resulting in an individually tailored accounting. Please remove this adjustment from your reconciliation. Refer to Question 100.04 of the C&DIs.
- We note your disclosure of the non-GAAP measures of net income (loss) excluding the impact of the newly adopted FASB fair value accounting rules and net income (loss) per share excluding the impact of the newly adopted FASB fair value accounting rules. The non-GAAP adjustments to these measures have the effect of changing the recognition and measurement principles required to be applied in accordance with GAAP. Please revise to refrain from presenting these individually tailored non-GAAP measures. Refer to Question 100.04 of the C&DIs.
- Please address the following: Revise to remove the adjustment for changes in the fair market value of your investment fund from your computation of non-GAAP measures. In this regard, we note your explanation that the adjustment is due to the fundamentally different accounting for your self-mined bitcoin and because the amount can vary significantly from period-to-period. Refer to Question 100.04 of the C&DIs.
- As noted in Question 104.05 of the C&DIs, revenue amounts adjusted in any manner are considered non-GAAP financial measures. The bundled offerings adjustment reverses the allocation of hardware revenue that is required to be recognized at a point in time under ASC 606. This adjustment appears to have the effect of changing the measurement and the pattern of revenue recognition, which is inconsistent with the guidance in Question 100.04 of the C&DIs. Please remove this adjustment from all non-GAAP measures in future filings.

Use of Non-GAAP Financial Measures with Titles or Descriptions that are the Same as, or Confusingly Similar to, GAAP Financial Measures

- Refer to your presentation of "Free Cash Flow" throughout the filing. Since free cash flow is typically calculated as cash flows from operating activities as presented in the statement of cash flows under GAAP, less capital expenditures, and your calculation includes an additional adjustment, please revise your computation accordingly or revise the title of this measure to be "adjusted free cash flow". Refer to Question 102.07 of the C&DIs. Please also apply this comment to your earnings release presentation on future Form 8-K.
- We note you present a non-IFRS measure you identify as ROIC; however, the numerator of this measure appears to be a non-IFRS measure and you do not present a measure based on the most directly comparable IFRS measure with



equal or greater prominence. Please revise the title of the measure you present and fully comply with Item 10(e)(1)(i)(A) of Regulation S-K in future Form 20-Fs.

- We note that in the Free Cash Flow reconciliation, you have included an adjustment for payments of certain acquisition costs. In light of the fact that the adjustment for acquisition costs is not considered in the typical definition of Free Cash Flow, please revise the title of your measure in future filings to Adjusted Free Cash Flow or something similar. See Question 102.07 of the C&DIs.
- You present the non-GAAP measure "Operating Profit." As the title of this measure is confusingly similar to a GAAP measure, please retitle this measure accordingly. Refer to Item 10(e)(1)(ii)(E) of Regulation S-K.
- As your measure of "EBITDA" is adjusted for additional items other than interest, taxes and depreciation and amortization, revise your disclosure to retitle this measure. Please see Question 103.01 of the C&DIs for guidance.

Undue prominence of non-GAAP financial measures compared with GAAP measures

Issues with non-GAAP financial measures receiving greater prominence than GAAP measures continue to generate a substantial number of Staff comments. The Staff's comments address the content, formatting, sequence or ordering and labeling of non-GAAP financial measures disclosed in registrants' public disclosures. The Staff also addresses this topic in Question 102.10 of the C&DIs, where non-GAAP financial measures may be considered to be more prominent than comparable GAAP financial measures. One item that often gets flagged in this area are non-GAAP income statements (as noted above and in C&DI Question 102.10(c), a non-GAAP income statement is one that is comprised of non-GAAP measures and includes all or most of the line items and subtotals found in a GAAP income statement).

Below are some sample comments regarding this topic:

- Your presentation of the reconciliation of U.S. GAAP to non-GAAP financial measures gives the appearance of a full non GAAP income statement. Please note that the presentation of a full non-GAAP income statement, or a presentation that gives the appearance of one, may place undue prominence on the non-GAAP information. Under Question 102.10(c) of the C&DIs, a non-GAAP income statement is considered to be one that is comprised of non-GAAP measures and includes all or most of the line items and subtotals found in a GAAP income statement. Confirm to us that you will not present full non-GAAP consolidated income statements or their equivalents in future filings.
- We note you provide a discussion of consolidated adjusted EBITDA without a similar discussion of the comparable GAAP measure of net income. You also discuss the percentage change in free cash flow and the basis point change in adjusted operating margin in your executive summary, without providing a similar discussion for the comparable GAAP measures net cash provided by operating activities and operating income. Please revise to present all GAAP measures and discussions of such measures with equal or greater prominence to non-GAAP measures. Refer to Question 102.10.
- We note you present and discuss adjusted EBITDA before you present and discuss the most directly comparable GAAP measure. Please revise the order of your disclosures to present GAAP measures with equal or greater prominence as required by Item 10(e)(1)(i)(A) of Regulation S-K and Question 102.10 of the C&DIs.
- When providing a discussion and analysis of a non-GAAP measure, please ensure such disclosure is accompanied by a similar discussion and analysis of the corresponding GAAP measure with equal or greater prominence. For example, you disclose the decrease in segment Adjusted EBITDA YoY and Q4 over Q3 fiscal 2023 without providing similar information for the corresponding GAAP measure. In addition, you disclose total adjusted EBITDA for Q3 fiscal 2023 and Q4 fiscal 2022 without providing similar GAAP information for net income. Refer to Item 10(e)(1)(i)(A) of Regulation S-K and Question 102.10(a) of the C&DIs.



- Please present the most directly comparable GAAP measures with equal or greater prominence to your non-GAAP measures. For example, you discuss Adjusted OIBDA and Adjusted OIBDA in constant currency; however there is no discussion of GAAP operating income (loss). Refer to Item 10(e)(1)(i)(A) of Reg. S-K and Question 102.10 of the C&DIs.
- We note that you present Key Metrics and non-GAAP measures prior to your discussion of GAAP results and financial condition. Please revise MD&A to balance the presentation to discuss GAAP measures prior to your discussion of Key Metrics and Non-GAAP measures. See the C&DI Question 102.10(a) for guidance.
- In your earnings release dated May 14, 2024, you discuss the changes in Adjusted Operating Income, a non-GAAP measure, without a discussion of the changes in its most directly comparable GAAP measure. Please tell us how you considered the guidance in Rule 100(a) of Regulation G and Question 102.10(a) of the C&DIs.
- In regard to the prominence of certain non-GAAP financial measures you present, we note the following:
 - You present and discuss Adjusted EBITDA for multiple periods in a Non-GAAP Financial Measure section before you disclose and discuss GAAP results of operations; and
 - You present Adjusted EBITDA as a % of net revenues but do not present the most directly comparable GAAP measure, Net income as a % of net revenues, with equal or greater prominence. Please revise future filings to disclose and discuss GAAP results of operations before you present and discuss non-GAAP financial measures. In addition, for each non-GAAP financial measure you present, revise future filings to present the most directly comparable GAAP measure with equal or greater prominence. Refer to Item 10(e)(1)(i)(A) of Regulation S-K and Question 102.10 of the C&DIs regarding prominence.

Explaining why the use of a non-GAAP financial measure is helpful to investors

There was a considerable increase in Staff comments requesting an explanation as to why a registrant's management believed the use of non-GAAP measures were useful to investors in understanding the registrant's financial condition and results of operations. The Staff commented that boilerplate statements and generic disclosures that the financial measures are useful to analysts should be replaced with more substantive and concise discussion specific to the circumstances addressing how non-GAAP financial measures were useful to investors and any additional purposes for which management uses the non-GAAP financial measures.

Below are some sample Staff comments addressing this topic.

- Please tell us and disclose in future filings the reasons why management believes that the presentation of certain non-GAAP financial measures (e.g., Cash NOI, Pro-Rata Cash NOI, Same-Store NOI, EBITDA and Adjusted EBITDA) provides useful information to investors regarding the registrant's financial condition and results of operations. Refer to Item 10(e)(1)(i)(C) of Regulation S-K.
- Tell us what the Adjusted EBITDA measure reflects compared to GAAP cash flows provided by (used in) operating activities and net income and how this measure is useful to investors in evaluating your on-going operations, considering also that the measure does not exclusively include or exclude cash and/or non-cash activity.
- We note your disclosure that management uses non-GAAP results to assist in comparing business trends from period to period on a consistent basis in communications with the board of directors, stockholders, analysts, and investors concerning our financial performance. You believe that these non-GAAP measures are useful to investors and other users of your condensed consolidated financial statements as an additional tool for evaluating operating performance and trends. However, this reason appears to be a general statement that applies to all Non-GAAP financial measures disclosed in your Form 8-K. Please revise future filings to provide for each non-GAAP measure, the specific reason(s) why management believes the presentation of such non-GAAP financial measure provides useful information to investors regarding your financial condition and results of operations. Management's reason should be specific to the



individual non-GAAP financial measure and avoid the use of overly generic boilerplate language. See guidance in Item 10(e)(1)(i)(C) of Regulation S-K.

- We note your disclosure of Segment income on a consolidated basis. Please note a segment measure of profitability not considered your segment measure of profitability under ASC 280 is considered a non-GAAP financial measure and subject to the guidance in Reg G and Item 10(e) of Regulation S-K. In this regard, please reconcile the differences between the non-GAAP financial measure and the comparable GAAP measure, tell us how management uses this measure, and revise to disclose why management believes this measure is useful to investors.

Reconciliation to the Most Directly Comparable GAAP Measure

Issues related to reconciliation to the most directly comparable GAAP measure have also generated a large number of Staff comments. In this regard, the Staff commented on registrants' practice of using non-GAAP financials in their disclosures without a presentation of the most directly comparable GAAP financial measure or the required quantitative reconciliation. These comments focus on the lack of or incorrect reconciliation and the need for separate presentation of each non-GAAP adjustment in the reconciliations. With respect to the "unreasonable efforts" exception for forward-looking guidance, the Staff has stated that it was never its intention to audit registrants, question the assertion of the "unreasonable efforts" exception or insist that a quantitative reconciliation was required. Rather, the Staff is focused on reminding registrants of the rule and where a registrant relies on this exception, it must both disclose the fact that such GAAP financial measure is not accessible on a forward-looking basis, and identify the information that is unavailable and its probable significance in a location of equal or greater prominence.²⁴

Below are some sample comments on this topic:

- We note you provide a range of forward-looking adjusted EBITDA loss and non-GAAP EPS loss without providing reconciliations to the most directly comparable GAAP measures or a statement that providing such reconciliations requires unreasonable efforts. In future filings, please provide reconciliations to the most directly comparable GAAP measures. If all of the information necessary for the reconciliations is not available without unreasonable efforts, identify and disclose the information that is unavailable and its probable significance. Also present the most directly comparable GAAP measures with equal or greater prominence. Refer to Item 10(e)(1)(i) of Regulation S-K and Questions 102.10(a), 102.10(b), and 103.02 of the C&DIs.
- Although you quantify your operational effective tax rate and identify it as a non-GAAP measure, we do not note a reconciliation to the most comparable GAAP measure. Please revise future filings to provide a reconciliation in accordance with Item 10(e)(1)(i)(B) of Regulation S-K.
- Please reconcile the non-GAAP measure "adjusted gross profit" to the most directly comparable GAAP measure which is a fully-loaded GAAP gross profit that must be presented even if one is not depicted on your statements of operations. In addition, as you are presenting your adjusted gross margin on a percentage basis, please revise your disclosure to include your fully-loaded GAAP gross margin. Refer to Item 10(e)(1)(i)(A) of Regulation S-K.
- We note you present "Gross Margin" as a non-GAAP measure and define it as total revenue less cost of sales (excluding depreciation and amortization). We also note that you reconcile this measure to net income. Please revise your reconciliation of this non-GAAP measure to gross margin as defined by GAAP, the most directly comparable GAAP measure in accordance with Item 10(e)(1)(i)(B) of Regulation S-K. If you do not believe gross margin that includes depreciation and amortization is the most directly comparable GAAP measure, please tell us why in your response. In addition, retitle this measure throughout your filings, including similar segment measures mentioned in Note 29 and information provided in your press releases, to avoid confusion with the GAAP measure of gross margin.

²⁴ Id.



- *You present non-IFRS measures in the PowerPoint slides furnished in conjunction with your earnings call held on November 16, 2023 for the fourth quarter ended October 1, 2023. Please present the most directly comparable GAAP or IFRS measure for these non-IFRS measures and reconcile the non-IFRS measures to the most directly comparable GAAP or IFRS measures. In addition, please explain the purpose of presenting the IFRS adjusted measures on a comparative basis with the non-GAAP measures for Adjusted EBITDA Margin, Net Service Revenue, and EBITDA margin as a percentage of NSR and why this is appropriate. Refer to Question 103.02 of the C&DIs.*

Liquidity versus Performance Measures

Whether a non-GAAP measure is a performance versus a liquidity measure is an important distinction as a non-GAAP financial measure that is used as a liquidity measure cannot be presented on a per-share basis, and cannot exclude charges or liabilities that require, or will require, cash settlement, or would have required cash settlement absent an ability to settle in another manner. In analyzing whether a financial measure is a performance measure or a liquidity measure, the C&DIs provide that the Staff would focus on the substance of the non-GAAP financial measure and not on management's characterization of the measure.²⁵ In the Staff's comments addressing this topic, the Staff observed that registrants' characterization of non-GAAP financial measures as performance measures were actually used by registrants as liquidity measures. In such a case, the registrant was prohibited from presenting such measure on a per-share basis and should have presented such measure as a liquidity measure. The Staff also has noted the inconsistencies in registrants' disclosures with respect to characterization of the use of the non-GAAP financial measure as a performance measure or a liquidity measure.

Below are some sample Staff comments addressing the mischaracterization of non-GAAP measures.

- *We note that in your earnings calls you quantify free cash flow per share, which you also discuss in your investor day presentation on your website and in exhibit 99.1 to Form 8-K furnished on September 20, 2023. Please discontinue the presentation and discussion of this measure as non-GAAP liquidity measures that measure cash generated must not be presented on a per share basis. Refer to Rule 100(b) of Regulation G.*
- *We note your measure of free cash flow includes an adjustment for cash paid in excess of tax provision for R&D law adoption change. Please tell us how you considered the guidance in Item 10(e)(1)(ii)(A) of Regulation S-K, which prohibits excluding charges that will require cash settlement from a non-GAAP liquidity measure, or remove from future filings.*
- *Given your disclosure indicating DCF is utilized not only as a performance measure but also in measuring and estimating the ability of your assets to generate cash earnings that could be used for discretionary purposes, also considering your disclosure of DCF per share and dividends per share on page 44, and the associated commentary in your earnings releases, it appears that DCF is being utilized as a non-GAAP liquidity measure. We believe that you would need to provide a reconciliation from operating cash flows as the most comparable GAAP based measure and remove the DCF per share metric, consistent with the answer to C&DI Question 102.05.*
- *We refer you to the reconciliation of Free Cash Flow on page 10. Please clarify why you view Free Cash Flow as a measure of operating performance rather than a measure of liquidity. Include your consideration of Question 102.07 of the C&DIs. If this is a liquidity measure, revise to reconcile to cash flow from operating activities and, to the extent it includes cash-based adjustments other than capital expenditures, change the title to adjusted free cash flows.*

²⁵ See C&DI Question 102.05.



Income Tax Effects on Non-GAAP Adjustments

The Staff has commented on the prohibition of “net of tax” adjustments to arrive at a non-GAAP financial measure.²⁶ In such comments, registrants were required to revise their disclosures and tabular presentations to separately present the income tax impact of their non-GAAP adjustments.

Below are some sample Staff comments addressing this topic:

- *Adjustments to arrive at a non-GAAP measure should not be presented net of tax as presented in this schedule. Rather, income taxes should be shown as a separate adjustment and clearly explained. Refer to Question 102.11 of the C&DIs.*
- *We note your adjustment for “tax-related special items” includes adjustments related to tax return versus tax provision, tax exam impacts, tax law change impacts, excess tax benefits/losses and other discrete tax adjustments. Please provide us with a breakdown of each item included in this adjustment along with additional information regarding the nature of such amounts and why they are included in your non-GAAP measures of adjusted net income and adjusted earnings per share. Also, clarify how this adjustment reflects current and deferred income tax expenses commensurate with your non-GAAP measure of profitability. Refer to Item 102.11 of the non-GAAP C&DIs.*
- *We note the table presents the tax impact of your non-GAAP adjustments. Please revise future filings to provide a brief explanation as to how the tax impact of the non-GAAP adjustments were computed. Refer to C&DI Question 102.11.*

Liability for Misuse of Non-GAAP Financial Measures and SEC Enforcement Actions

Neither the requirements of Regulation G nor a person’s compliance or non-compliance with the requirements of Regulation G in itself affects any person’s liability under Section 10(b) of the Exchange Act (“Section 10(b)”) or SEC Rule 10b-5 under the Exchange Act (“Rule 10b-5”).²⁷ However, the Staff noted in the SEC Releases that Regulation G disclosure that is materially deficient may, in addition to violating Regulation G, give rise to a violation of Section 10(b) or Rule 10b-5 anti-fraud provisions where the use of non-GAAP financial measures that, taken together with the information accompanying 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.²⁸ The Staff also references Section 3(b) of the Sarbanes-Oxley Act, which provides that a violation of the Sarbanes-Oxley Act or the SEC’s rules thereunder shall be treated as a violation of the Exchange Act and any failure to comply with Regulation G will subject an issuer and/or the person acting on its behalf to SEC enforcement action alleging violations of Regulation G. Additionally, if the facts and circumstances warrant, the SEC could bring an action under both Regulation G and Rule 10b-5.²⁹

With respect to SEC enforcement in general, while there was a decrease in SEC enforcement activity in 2024, the total monetary penalties in that year were the highest since 2021. According to a recent study, in 2024, the SEC initiated 45 accounting and auditing enforcement actions representing a 54% decrease from 2023, but imposed more than \$770 million in total monetary penalties representing a 44% increase over 2023, with a median penalty of \$4.45 million representing a 27% increase over 2023.³⁰ 2024 was the last fiscal year with Gary Gensler as SEC Chair. In 2025, under new SEC Chair Paul Atkins, many expect enforcement activity will not increase. However, this does not mean that companies can afford to become complacent or assume that aggressive accounting practices and non-GAAP presentations will escape regulatory

²⁶ See C&DI Question 102.11.

²⁷ Regulation G, Rule 102.

²⁸ *Id.*

²⁹ See The SEC Releases, *supra* note 6.

³⁰ See Cornerstone Research’s “SEC Accounting and Auditing Enforcement Activity—Year in Review: FY 2024” (March 12, 2025) available at <https://www.cornerstone.com/wp-content/uploads/2025/03/SEC-Accounting-and-Auditing-Enforcement-Activity-FY-2024.pdf>



scrutiny. On the contrary, at the SEC Speaks Conference in May 2025, the SEC made clear that enforcement will be a continued commitment of the agency, with a greater focus on traditional enforcement priorities such as accounting and disclosure fraud, market manipulation, and other matters that harm retail investors.

In fact, over the past several years, the SEC has actively investigated and brought enforcement actions related to non-GAAP disclosures and executive liability. Recent enforcement actions highlight how the SEC focuses enforcement actions on issuers and executives who use non-GAAP metrics or aggressive revenue-recognition practices to present an unduly optimistic picture of corporate performance. For example, in September 2023, the SEC announced charges against a public Georgia-based consumer products company and its former CEO for misleading investors by inflating the company's core sales growth, a non-GAAP financial measure that the company disclosed to explain its underlying sales trends. The SEC alleged that, in addition to premature revenue recognition practices, the former CEO described the company's sales numbers as "strong" and "solid," while internally describing them as "a massive miss."³¹ In a press release regarding the enforcement action, Mark Cave, Associate Director of the SEC's Enforcement Division stated that "Senior executives of public companies hold positions of trust, and they risk abusing the duties attendant to their offices when they reach into a company's accounting control processes as a way of making up for performance shortfalls."³² The matter was ultimately settled whereby the company and its former CEO agreed to cease and desist any further violations of the securities laws and to pay civil penalties of \$12.5 million and \$110,000, respectively. In another example, in November 2022, the SEC announced settled charges against an issuer for failing to disclose material information about two non-GAAP financial measures the company highlighted regarding its debt reduction efforts, namely, net debt and net leverage ratio. The company announced in press release it had met its debt reduction goals. However, it did not disclose that to achieve these targets, the company delayed making material amounts of overdue payments to its vendors, making its prior disclosures misleading. The SEC imposed a civil penalty of \$1.3 million on the issuer and found that it had violated the antifraud provision of the federal securities laws, including Rule 100(b) of Regulation G.³³ These recent enforcement actions underscore the importance of applying accounting judgments conservatively, vetting non-GAAP metrics, and maintaining robust disclosure controls.

These enforcement actions are not new. Following the release of the original C&DIs in May 2016, the SEC's Enforcement Division conducted a widely-noticed sweep of non-GAAP disclosures and earnings releases, contacted a number of registrants regarding their historical non-GAAP financial disclosures requesting documents and other information to determine if they may have violated Regulation G or Item 10(e). In September 2016, the SEC charged the former chief financial officer and chief accounting officer of a publicly traded real estate investment trust and alleged violations of Section 10(b) and Rule 10b-5, among other causes of action, for including in the registrant's 10-Q and 8-K filings purposely inflated AFFO, a key non-GAAP financial measure used by analysts and investors to assess the registrant. The SEC alleged in its complaint that the officers employed an improper hybrid method of calculating AFFO and AFFO per share despite repeated concerns raised by their accounting staff about the impropriety of the calculation method. The U.S. Attorney's Office for the Southern District of New York brought a parallel criminal action against the officers. The chief accounting officer eventually pled guilty to securities fraud and related charges and a federal jury convicted the chief financial officer of one count of conspiracy to commit securities fraud and other offenses, one count of securities fraud, two counts of making false filings with the SEC, and two counts of submitting false certifications along with required filings with the SEC. The securities fraud, false filings charges, and false certification charges each carry a maximum prison term of 20 years and the charge of conspiracy carries a maximum prison term of five years. In January 2017, the SEC brought an enforcement action for failure to comply with Item 10(e) against a registrant that presented a metric called "organic revenue growth." The metric represented the company's growth in revenue excluding the reconciling effects of acquisitions and foreign exchange impacts. However, from the second quarter of 2012 to the 2013 year end, the registrant adjusted for a third reconciling item into its calculation of the metric, which resulted in higher "organic revenue growth" results and failed to disclose the

³¹ See <https://www.sec.gov/files/litigation/admin/2023/33-11251.pdf>.

³² See the SEC Press Release (September 9, 2023) available at <https://www.sec.gov/newsroom/press-releases/2023-210>.

³³ See the SEC order here <https://www.sec.gov/files/litigation/admin/2022/33-11129.pdf> and the related SEC press release here <https://www.sec.gov/enforcement-litigation/administrative-proceedings/33-11129-s>.



change to investors. In addition, despite repeated promises to the Staff that it would do so, the registrant also failed to give the GAAP metrics equal or greater prominence to its non-GAAP financial measures (e.g., EBITDA, EBITDA margin, and free cash flow) in its earnings releases. The registrant was ordered and agreed to cease and desist from such practices and paid a civil monetary penalty.

As discussed above, on December 26, 2018, the SEC issued a cease and desist order and imposed a civil penalty on a company for including non-GAAP financial measures in two earnings releases without giving equal or greater prominence to the most directly comparable GAAP financial measures.

Addressing the Use of Non-GAAP Financial Measures

Senior members of the Staff have emphasized that registrants should consider and establish appropriate and effective disclosure controls and procedures relating to the use of non-GAAP financial measures. Given the SEC's focus on the use of non-GAAP financial measures, companies should take certain measures to ensure compliance with Regulation G and Item 10(e). Below are some practical considerations.

Oversight by the Audit Committee

A company should have its audit committee carefully oversee and monitor the use of non-GAAP financial measures and disclosures. A company's audit committee should include as a regular topic for discussion with the auditors the company's use of non-GAAP financial measures and ask management to explain the utility of non-GAAP financial measures in the company's public disclosures. The audit committee's charter should also expressly reference such responsibilities. Senior members of the Staff have continued to emphasize the importance of proper disclosure controls and procedures, particularly with respect to increasing audit committee involvement and dialogue with stakeholders regarding the use of non-GAAP financial measures. As early as December 2016, Wesley R. Bricker, then SEC Deputy Chief Accountant, speaking at the American Institute of Certified Public Accountants ("AICPA") conference in Washington, D.C., highlighted that the audit committee members play an important "critical gatekeeper" role in ensuring credible, reliable financial reporting and that the oversight of management's activities is crucial for investor protection.³⁴ Mr. Bricker stated that audit committee members should seek to understand management's judgments in the design, preparation, and presentation of non-GAAP financial measures and how those measures might differ from other registrants in the same sector.

In September 2020, the Center for Audit Quality ("CAQ"), a non-profit public policy organization affiliated with the AICPA, issued an overview of what non-GAAP financial measures and key performance indicators ("KPIs") are, and how they are used, and key questions audit committee members should ask as they discuss this information with management and auditors, as well as questions investors may want to consider as they use non-GAAP financial measures and KPIs to make decisions.³⁵ The CAQ noted that while the requirements are limited for auditor involvement in non-GAAP financial measures and KPIs, audit committees and management may consider leveraging the external auditors as a resource when evaluating non-GAAP financial measures or KPIs.³⁶ The sample discussion questions were aimed to promote the transparency, consistency, and comparability of non-GAAP financial measures and to assist audit committees in assessing whether management is complying with SEC rules and related interpretations with respect to non-GAAP financial measures.³⁷ The

³⁴ See Wesley R. Bricker, then Deputy Chief Accountant, Securities and Exchange Commission, *Working Together to Advance High Quality Information in the Capital Markets* (Dec. 5, 2016), available at <https://www.sec.gov/news/speech/keynote-address-2016-aicpa-conference-working-together.html>

³⁵ See Center for Audit Quality, *The Role of Auditors in Non-GAAP Financial Measures and Key Performance Indicators: Present and Future* (September 2020), available at https://thecaqprod.wpengine.com/wp-content/uploads/2020/09/2020_09_caq-role-of-the-auditor-non-gaap-and-kpis.pdf (hereinafter, "CAQ December 2020 Paper"). See also Center for Audit Quality, *Non-GAAP Financial Measures: Continuing the Conversation* (Dec. 5, 2016), available at <http://thecaq.org/non-gaap-financial-measures-continuing-conversation> (hereinafter, "CAQ December 2016 Paper") and Center for Audit Quality, *Non-GAAP Measures: A Tool for Audit Committees* (June 28, 2016), available at <http://www.thecaq.org/questions-non-gaap-measures-tool-audit-committees> (hereinafter, "CAQ June 2016 Paper").

³⁶ See CAQ December 2020 Paper, *supra* note 34, at 12.

³⁷ See CAQ June 2016 Paper, *supra* note 34, at 1.



CAQ noted that the audit committee has an important responsibility on behalf of investors and other company stakeholders to oversee the financial reporting process and the external audit. The audit committee can act as a bridge between management and investors and assess management's reasons for presenting non-GAAP financial measures and KPIs, as well as the transparency, comparability, and consistency of the disclosures. The audit committee can assess management's basis for presenting non-GAAP financial measures, evaluate whether these measures present a fair and balanced view of the company, and assess how the non-GAAP financial measures are used by analysts and reported by the financial press to the broader public.³⁸

Reporting and Disclosure Practices

Companies should revisit the applicable rules and C&DIs to assess their approach or views on the presentation and use of non-GAAP financial measures. Senior SEC Staff have noted that good reporting practices place a premium on audit committee members' understanding of the company's non-GAAP policies, procedures, and controls. As an added measure, a disclosure committee should also review the company's public filings for non-GAAP financial measures. Below are some important considerations for use or disclosure of non-GAAP financial measures:

- Non-GAAP financial measures should supplement not substitute for GAAP measures and in light of enforcement action in this area, registrants should take extra care in presenting GAAP financial measures with equal or more prominence than the non-GAAP financial measures. Companies should also consider some of the examples given in the C&DI Question 102.10 and take care to avoid the following:
 - Omitting the comparable GAAP measures from or presenting a non-GAAP measure that precedes the most directly comparable GAAP measure such as in an earnings release headline or caption that includes non-GAAP measures;
 - Presenting a non-GAAP measure in a format such as bold or larger font size to highlight the non-GAAP measure over the comparable GAAP measure; or
 - Using prominent descriptive characterization for non-GAAP measure such as "record performance" or "exceptional" without at least an equally prominent descriptive characterization of the comparable GAAP measure.
 - Providing charts, tables or graphs of non-GAAP financial measures without presenting greater or equally prominent charts, tables or graphs of the comparable GAAP measures, or omitting the comparable GAAP measures altogether; and
 - Providing discussion and analysis of a non-GAAP measure without a similar discussion and analysis of the comparable GAAP measure in a location with equal or greater prominence.
- Businesses operate in uncertain environments. If non-GAAP adjustments replace a business reality with smooth earnings over time, accelerate unearned revenues, or defer incurred expenses, those adjustments and disclosures should be evaluated closely under the C&DIs.
- Management should monitor the use of non-GAAP financial measures by comparable companies.
- Members of the law department, accounting, investor relations and public relations teams should be familiar with the applicable requirements relating to non-GAAP financial measures.
- Ensure that the use of non-GAAP financial measures is neither misleading nor otherwise prohibited by the rules.

³⁸ See CAQ December 2020 Paper, *supra* note 34, at 14. See also Center for Audit Quality, *A Roadmap for Audit Committees* (March 16, 2018) available at <https://www.thecaq.org/wp-content/uploads/2019/03/caq-non-gaap-measures-roadmap-audit-committees-2018-03.pdf>.



- Understand and articulate the reasons for the use of non-GAAP financial measures and how such measures help investors better understand the company.
- Accurately define, describe, and label each non-GAAP financial measure and reconcile each non-GAAP financial measure to the directly comparable GAAP measure.
- Ensure that there is a reasonable basis for any adjustment being made to arrive at a non-GAAP financial measure and consider whether, although not necessarily dispositive, such adjustment is customary among peer companies to avoid the appearance of misleading presentation such as apparent cherry picking adjustments within a non-GAAP measure, adjustments to remove normal, cash operating expenses, and use of individually tailored accounting principles to calculate non-GAAP earnings. In addition, the presentation of non-GAAP financial measures are balanced and that there are adjustments for both non-recurring expenses and non-recurring gains. Companies should remember that presentation of the non-GAAP financial measure that can be misleading may violate Rule 100(b) of Regulation G even if such adjustments are not explicitly prohibited.
- Regulation G applies to all public disclosures, whether made orally or in writing. If a non-GAAP financial measure is made public orally, telephonically, by webcast or broadcast, Regulation G requires registrants to post the required non-GAAP presentation and reconciliation on their website at the time the non-GAAP financial measure is made public and announce the location of their website in the same presentation in which the non-GAAP financial measure is made public. Companies must pay close attention to presentation of non-GAAP financial measures in all public disclosures, including press releases, webcasts, investor presentations, earnings releases, conference calls, and other disclosures and should pay particular attention to earnings calls and scripts.
- Consider whether a non-GAAP financial measure is a performance measure or a liquidity measure. The Staff has said that it will focus on the substance of the non-GAAP measure and not management's characterization when reviewing non-GAAP financial measures as a performance versus liquidity measure.

In Summary

The effective functioning of the capital markets requires consistent, transparent, and credible disclosures by registrants. Registrants can use non-GAAP financial measures to properly convey information to investors that they believe are relevant, meaningful, and useful in understanding their financial performance, financial position, or liquidity. The broad acceptance of non-GAAP financial measures and the use and attention accorded to such measures by the financial and business community, including analysts, rating agencies and financial professionals, demonstrate that non-GAAP measures have a legitimate, meaningful, and relevant purpose. However, the SEC has repeatedly noted that the use of non-GAAP financial measures is prone to misuse and abuse and can become tools to distort the truth of a company's actual performance and financial condition, confuse investors and be a means of outright fraud. The Staff has provided guidance on the proper use of non-GAAP financial measures through the C&DIs and other updated guidance. The important concept that the Staff has reminded registrants of is that non-GAAP financial measures should only supplement, and not substitute for, GAAP financial measures. Registrants should implement internal controls and measures to avoid use of misleading or prohibited non-GAAP financial measures in their disclosures and have their audit committees play a strong role in such internal controls. In addition, a company's management should have a reasonable basis for the use of such measures in the company's disclosures and disclose such basis in a specific and concise manner avoiding boilerplate or generic descriptions. Given the SEC's and SEC Staff's focus, companies also should consider the use of key performance indicators, the calculation of such key performance indicators, the usefulness to investors of such information, and the internal process undertaken in connection with verifying such amounts.



Authors

Ryan Castillo

New York

T +1 212 506 2645

E rcastillo@mayerbrown.com**Ali Perry**

New York

T +1 212 506 2514

E akperry@mayerbrown.com

Mayer Brown is a global legal services provider advising many of the world's largest companies, including a significant portion of Fortune 100, FTSE 100, CAC 40, DAX, Hang Seng and Nikkei index companies and more than half of the world's largest banks. Our legal services include banking and finance; corporate and securities; litigation and dispute resolution; antitrust and competition; US Supreme Court and appellate matters; employment and benefits; environmental; financial services regulatory and enforcement; government and global trade; intellectual property; real estate; tax; restructuring, bankruptcy and insolvency; and private clients, trusts and estates.

Please visit www.mayerbrown.com for comprehensive contact information for all Mayer Brown offices.

Mayer Brown is a global legal services provider comprising associated legal practices that are separate entities, including Mayer Brown LLP (Illinois, USA), Mayer Brown International LLP (England & Wales), Mayer Brown Hong Kong LLP (a Hong Kong limited liability partnership) and Tauil & Chequer Advogados (a Brazilian law partnership) (collectively, the "Mayer Brown Practices"). The Mayer Brown Practices are established in various jurisdictions and may be a legal person or a partnership. PK Wong & Nair LLC ("PKWN") is the constituent Singapore law practice of our licensed joint law venture in Singapore, Mayer Brown PK Wong & Nair Pte. Ltd. More information about the individual Mayer Brown Practices and PKWN can be found in the [Legal Notices](#) section of our website.

"Mayer Brown" and the Mayer Brown logo are the trademarks of Mayer Brown.

© 2025 Mayer Brown. All rights reserved. Attorney advertising. Prior results do not guarantee a similar outcome.

On point.

