



STEER CLEAR

To prevent running aground, learn how to navigate the complex earnings disclosure laws.

By Jim O'Bannon and Larry Cannon

Recent enforcement actions by the Securities and Exchange Commission underscore that investor relations practitioners must carefully navigate federal securities laws when disclosing earnings. After almost five years of no formal action, within the past year the SEC has filed two complaints alleging violations of Regulation FD, which prohibits selective

disclosure of material nonpublic information. The SEC also recently brought its first enforcement action under Regulation G, which regulates disclosure of non-GAAP financial measures.

Complying with securities laws when your company discloses earnings has become increasingly complex. In addition to Reg FD and Reg G, companies must comply with Form 8-K when publicly dis-

closing financial results and Section 21E of the Securities Exchange Act of 1934, which provides a safe harbor for forward-looking statements. To help you navigate these requirements, following is a step-by-step guide to the earnings disclosure process, accompanied by a table describing each step and the corresponding federal securities laws. Of course, this summary is not to be construed as legal advice and is

Guide to the Earnings Disclosure Process

not a substitute for your careful review of applicable securities laws and regulations as they pertain to your company.

Before the Earnings Call

Generally, it's best to begin the earnings disclosure process one to two weeks before the earnings call by issuing a press release detailing the date and time of the call, how to access the call and the location on your company's Web site where financial and statistical information to be discussed will be available. This is a critical step because material nonpublic information disclosed during a conference call or webcast *that has been properly noticed* will not be regarded as selective disclosure under Reg FD.

Next, issue the earnings release and file it with the SEC on Form 8-K. Do not issue the earnings release more than 48 hours prior to the earnings call. Federal securities laws require that any public announcement regarding results of operations or financial condition for a completed quarter or year be disclosed on Form 8-K. Keep in mind that a separate Form 8-K of a transcript of the earnings call is *not* required if your company files the earnings release on Form 8-K and publicly issues the earnings release no more than 48 hours prior to the call.

Finally, post on your company's Web site the financial and other information that it intends to disclose during the call, including any reconciliations of non-GAAP financial measures not included in the earnings release. This is typically accomplished by posting the earnings release and any additional information the company plans to disclose on the call. Form 8-K and Reg G require this information to be posted when the company publicly discloses material information (including non-GAAP financial measures) at an investor conference or by phone, webcast or similar means. ►

ACTIONS	SECURITIES LAWS AND REGULATIONS
I. Before the Earnings Call	
A. Issue press release several days in advance to announce the upcoming earnings call.	Reg FD, Form 8-K—Item 2.02(b)
B. Issue the earnings release no more than 48 hours prior to the earnings call.	Form 8-K—Item 2.02(b)
C. Submit the earnings release to the SEC on Form 8-K prior to the earnings call.	Form 8-K—Item 2.02(a), (b)
D. Post on the company's Web site the financial and other information (including information related to any non-GAAP financial measures) that the company intends to disclose during the earnings call.	Form 8-K—Item 2.02(b), Reg G
II. Earnings Release	
A. Include the following information: <ul style="list-style-type: none"> • the date and time of the earnings call, • how to access the call, and • the location on the company's Web site where financial and other statistical information to be discussed during the call will be available. 	Form 8-K—Item 2.02(b)
B. Provide the location on the company's Web site for the replay or transcript of the earnings call and the length of time it will be available after the earnings call (recommended).	Reg FD
C. Include a safe-harbor statement.	Exchange Act—Section 21E
D. Provide information regarding each non-GAAP financial measure.	Reg G, Form 8-K—Item 2.02, Reg S-K—Item 10(e)
III. Earnings Call	
A. Inform participants about forward-looking statements.	Exchange Act—Section 21E
B. If you plan to discuss non-GAAP financial measures on the earnings call, inform participants of the location on the company's Web site where information related to any non-GAAP financial measures can be found.	Reg G
IV. Post-Earnings Call	
A. Post a replay or transcript of the earnings call on the company's Web site for two to four weeks after the call (recommended).	Reg FD
B. Archive financial and other information (including information related to any non-GAAP financial measures) related to the earnings call on the company's Web site for 12 months after the call (recommended).	Form 8-K, Reg G



SEC Renews Enforcement Efforts

Reg FD: The complaint filed by the SEC in connection with the most recent case regarding Regulation FD, *SEC v. Presstek*, 1:10-CV-10406 (D. Mass. March 9, 2010), is available at <http://sec.gov/litigation/litreleases/2010/lr21443.htm>. The complaint for the other recent case, *SEC v. Black*, Case No. 09-CV-0128 (S.D. Ind. Sept. 24, 2009), is available at <http://sec.gov/litigation/litreleases/2009/lr21222.htm>.

Reg G: The SEC's first enforcement action regarding Regulation G, *SEC v. SafeNet, et. al.*, Civil Action No. 09-2117 (D.D.C. Nov. 12, 2009), is available at <http://sec.gov/litigation/litreleases/2009/lr21290.htm>.

Earnings Release

In your company's earnings release, include the date and time of the earnings call, how to access the call, and the location on your company's Web site where financial and other statistical information that will be discussed can be found. Also include the location on the Web site where a replay or transcript of the call will be available. This will help ensure that earnings information is fully disseminated to the public.

To comply with Section 21E of the Exchange Act, also include in the earnings release a safe-harbor statement that expressly identifies any forward-looking statements. Avoid so-called boilerplate disclosure. To take advantage of the safe harbor, include meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those included in the forward-looking statements.

If the earnings release includes non-GAAP financial measures, additional information must be included to comply with

Reg G. First, disclose with equal or greater prominence the most directly comparable GAAP measure. Second, provide a reconciliation to the applicable GAAP measure. These two disclosures will satisfy your Reg G obligations. If non-GAAP financial measures are included in an SEC report, such as a Form 8-K, you must also explain why your company's management believes that the non-GAAP measures are useful to investors and any material purposes for which management uses the non-GAAP measures.

In April 2010, Google announced that all future announcements regarding its financial performance, including earnings releases, would be made exclusively through its investor relations Web site. With this action, Google joined Expedia, Marathon Oil and several other companies. While this approach does not impact the content required to be included in earnings releases or the obligation to file earnings releases with the SEC on Form 8-K, the emergence of this approach will be interesting to follow.

Earnings Call

At the beginning of the earnings call, inform participants that certain statements will be forward-looking. Also point out that the factors that could cause actual results to differ materially from those forward-looking-statements can be found in the earnings release and in your company's SEC filings. If you plan to discuss non-GAAP financial measures on the call, direct participants to the reconciliations of these measures included in the earnings release or additional information posted on the company's Web site.

Post-Earnings Call

The SEC recommends taking several steps after the earnings call is complete.

- As described earlier, post a replay or transcript of the earnings call on your company's Web site for two to four weeks after the call. This will help ensure that the information provided during the call was not selectively disclosed.
- Archive information related to the earnings call on your company's Web site for 12 months after the call. This step will help ensure that investors have sufficient time to review information disclosed in the call.

The SEC's rules regarding earnings disclosures can sometimes prove challenging to navigate for even an experienced investor relations practitioner. The SEC's recent enforcement actions underscore the importance of staying vigilant in your company's compliance with these requirements. Understanding the rules related to the earnings disclosure process will help you steer clear of trouble and ensure that you satisfy your company's legal disclosure obligations. **IRU**

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