



# EARNINGS RELEASES: SECURITIES LAW CONSIDERATIONS

The release of earnings has become an increasingly complex exercise, given the various regulations that are implicated under the federal securities laws. While companies are not required to release earnings, almost all public companies choose to do so. As a result, these companies must consider the federal securities laws, including:

- Regulation FD, which seeks to prevent selective disclosure of material nonpublic information;
- Regulation G, which regulates disclosure of non-GAAP financial measures;
- Section 21E of the Exchange Act, which provides a safe harbor for forward-looking statements; and
- the Form 8-K disclosure requirements.

To ensure continued compliance with the federal securities laws, public companies may find it useful to consider the actions taken in connection with the release of earnings and how each of those actions serves to satisfy the applicable federal securities law requirements. By understanding how each action functions as a step in the earnings release process,

companies will hopefully be better positioned when things do not go as planned.

The table that follows summarizes the key actions involved in the release of operating results for a completed quarterly or annual fiscal period and the key securities law requirements that each action is intended to address. While there is more than one way to satisfy some of the applicable securities law requirements, the table focuses on the actions typically taken by public companies in connection with the earnings release process. To highlight when certain actions should occur, the table divides the key actions in the earnings release process into four phases: pre-earnings call, earnings release, earnings call, and post-earnings call.

Please note that this summary is not a substitute for a review of the applicable securities laws and related regulations as they may apply to specific circumstances. Special circumstances may warrant different or additional actions in order to comply with the rules and regulations of the federal securities laws.

ACTIONS	SECURITIES LAW REQUIREMENTS
<b>I. Pre-Earnings Call</b>	
<p>A. Issue a press release several days in advance of the earnings call (e.g., one to two weeks) announcing:</p> <ul style="list-style-type: none"> <li>• the date and time of the call;</li> <li>• how to access the call; and</li> <li>• the location on the company's web site where financial and other statistical information to be discussed during the call will be available.</li> </ul>	<p><i>Regulation FD.</i> Material nonpublic information publicly disclosed during a conference call or webcast that has been properly noticed will not be regarded as selective disclosure.</p> <p><i>Form 8-K—Item 2.02(b).</i> A Form 8-K related to the content of the earnings call will not be required if the registrant announces the call by a widely disseminated press release and satisfies the other requirements of Item 2.02(b).</p>
<p>B. Issue the earnings release no more than 48 hours prior to the earnings call.</p>	<p><i>Form 8-K—Item 2.02(b).</i> A Form 8-K related to the content of the earnings call will not be required if the registrant issues the earnings release within 48 hours prior to the earnings call and satisfies the other requirements of Item 2.02(b).</p>
<p>C. Submit the earnings release to the SEC on Form 8-K prior to the earnings call.</p>	<p><i>Form 8-K—Item 2.02(a).</i> A registrant must furnish on Form 8-K any public announcement or release of material nonpublic information regarding its results of operations or financial condition for a completed quarterly or annual period.</p> <p><i>Form 8-K—Item 2.02(b).</i> A Form 8-K related to the content of the earnings call will not be required if the registrant furnishes the earnings release on Form 8-K prior to the call and satisfies the other requirements of Item 2.02(b).</p>
<p>D. Post the financial and other information (including information related to any non-GAAP financial measures) that the company intends to disclose during the earnings call on the company's web site.</p>	<p><i>Form 8-K—Item 2.02(b).</i> A Form 8-K related to the content of the earnings call will not be required if the registrant posts this information on its web site and satisfies the other requirements of Item 2.02(b).</p> <p><i>Regulation G.</i> A registrant that publicly discloses material information that includes non-GAAP financial measures orally, telephonically, by webcast, or by similar means must post this information on its web site and disclose during the presentation the location of the information on its web site.</p>
<b>II. Earnings Release</b>	
<p>A. Include the following information:</p> <ul style="list-style-type: none"> <li>• the date and time of the earnings call;</li> <li>• how to access the call; and</li> <li>• the location on the company's web site where financial and other statistical information to be discussed during the call will be available.</li> </ul>	<p><i>Form 8-K—Item 2.02(b).</i> A Form 8-K related to the content of the earnings call will not be required if the registrant includes this information in a widely disseminated press release and satisfies the other requirements of Item 2.02(b).</p>
<p>B. Provide the location on the company's web site of the replay or transcript of the earnings call and the length of time it will be available after the earnings call.</p>	<p><i>Regulation FD.</i> The SEC recommends (but does not require) that a registrant post a replay or transcript of the earnings call on its web site for a "reasonable period of time" after the call.</p>

ACTIONS	SECURITIES LAW REQUIREMENTS
<p>C. Include a safe harbor statement that:</p> <ul style="list-style-type: none"> <li>• expressly identifies any forwarding-looking statements; and</li> <li>• provides meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statements.</li> </ul>	<p><i>PSLRA / Exchange Act—Section 21E.</i> A registrant will not be liable with respect to any forward-looking statement in a private action based on an untrue statement or omission of a material fact necessary to make the statement not misleading if the registrant provides an appropriate safe harbor statement and satisfies the other requirements of Section 21E.</p>
<p>D. Provide the following information for each non-GAAP financial measure:</p> <ul style="list-style-type: none"> <li>• with equal or greater prominence, the most directly comparable GAAP measure;</li> <li>• a reconciliation to the GAAP measure;</li> <li>• a statement disclosing why management believes the non-GAAP measure is useful to investors; and</li> <li>• a statement disclosing the additional material purposes for which management uses the non-GAAP measure.</li> </ul>	<p><i>Regulation G.</i> Any public disclosure of material information that includes a non-GAAP financial measure must be accompanied by the information set forth in the first two bullet points to the left.</p> <p><i>Form 8-K—Item 2.02 and Regulation S-K—Item 10(e).</i> A non-GAAP financial measure included in a report furnished with the SEC pursuant to Item 2.02 of Form 8-K must be accompanied by the information set forth in all four bullet points to the left.</p>
<b>III. Earnings Call</b>	
<p>A. Inform participants that:</p> <ul style="list-style-type: none"> <li>• certain statements will be forward-looking;</li> <li>• actual results may differ materially from those in the forward-looking statements; and</li> <li>• the factors that could cause actual results to differ materially can be found in specified SEC filings of the company (e.g., Form 10-K).</li> </ul>	<p><i>PSLRA / Exchange Act—Section 21E.</i> A registrant will not be liable with respect to any oral forward-looking statement in a private action based on an untrue statement or omission of a material fact necessary to make the statement not misleading if the oral statements are accompanied by this information and the registrant satisfies the other requirements of Section 21E.</p>
<p>B. Inform participants of the location on the company's web site where the earnings release and other information (including information related to any non-GAAP financial measures) to be discussed during the earnings call can be found.</p>	<p><i>Regulation G.</i> A registrant that publicly discloses material information that includes non-GAAP financial measures orally, telephonically, by webcast, or by similar means must post this information on its web site and disclose during the presentation the location of the information on its web site.</p>
<b>IV. Post-Earnings Call</b>	
<p>A. Post a replay or transcript of the earnings call on the company's web site for two to four weeks after the call.</p>	<p><i>Regulation FD.</i> The SEC recommends (but does not require) that a registrant post a replay or transcript of the earnings call on its web site for a "reasonable period of time" after the call.</p>
<p>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.</p>	<p><i>Form 8-K and Regulation G.</i> The SEC recommends (but does not require) that any financial and other information related to an earnings call remain on a registrant's web site for at least 12 months after the call.</p>

## LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at [www.jonesday.com](http://www.jonesday.com).

**Larry D. Cannon**

+1.214.969.3637

[ldcannon@jonesday.com](mailto:ldcannon@jonesday.com)

**Thomas C. Daniels**

+1.216.586.7017

[tcdaniels@jonesday.com](mailto:tcdaniels@jonesday.com)

**Charles T. Haag**

+1.214.969.5148

[chaag@jonesday.com](mailto:chaag@jonesday.com)

**Mark L. Hanson**

+1.404.581.8573

[mlhanson@jonesday.com](mailto:mlhanson@jonesday.com)

**Christopher M. Kelly**

+1.212.326.3438

[ckelly@jonesday.com](mailto:ckelly@jonesday.com)

**Timothy J. Melton**

+1.312.269.4154

[tmelton@jonesday.com](mailto:tmelton@jonesday.com)

**James E. O'Bannon**

+1.214.969.3766

[jeobannon@jonesday.com](mailto:jeobannon@jonesday.com)

**W. Stuart Ogg**

+1.213.243.2365

[sogg@jonesday.com](mailto:sogg@jonesday.com)

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