M&A DUE DILIGENCE AND DISCLOSURE CONSIDERATIONS IN THE POST- SARBANES-OXLEY ENVIRONMENT

James M. Lurie
Holland & Knight LLP

January 9, 2006
M&A DUE DILIGENCE CONSIDERATIONS IN THE POST-SARBANES-OXLEY ENVIRONMENT

**General.** The Sarbanes-Oxley Act ("SOX") and the related SEC and SRO rules have significantly impacted the nature and scope of the M&A due diligence process. In conducting due diligence on a target, public company buyers must consider a number of SOX related matters.

When the target is a public company, a public company buyer can draw some comfort given that the target has been subject to SOX prior to closing. However, SOX compliance must still be carefully examined and, as necessary, documented. Where the target is a private company (or a foreign public company that has not entered the U.S. market), difficult issues are likely to arise since the target probably will have no significant history of SOX compliance. Moreover, its reporting and internal controls are likely to be less rigorous and informal at best and ad hoc or absent at worst. In either case, the combined entity’s compliance with SOX after the acquisition is consummated must be carefully planned from a substantive and timing standpoint. Integrating the acquired company for SOX purposes has thus become an important element of M&A focus.

A private equity buyer engaged in the leveraged acquisition of a public or private company will also need to consider the implications of SOX if either an initial public offering of the acquired company is considered likely in the relatively near future or if the acquisition financing includes a tranche of Rule 144A high-yield debt which is to be registered with the SEC in an Exxon Capital (A/B) exchange offer following the consummation of the acquisition. In the latter situation, the acquired company will become an “issuer” subject to some of the requirements of SOX a few months after the closing upon the filing of the registration statement for the A/B exchange offer.

The required M&A due diligence investigation resulting from SOX and the related SEC and SRO rules will also have a significant effect on deal documents, effecting the target’s (and in a stock transaction, the buyer’s) representations and warranties, post-signing/pre-closing covenants, closing conditions and material adverse effect or change clauses.
Areas of M&A Due Diligence Focus

The acquiror must, among other things, increase its normal due diligence procedures to assess the internal control and disclosure control environment of the target company and the manner in which the target's internal and disclosure controls will be integrated with the acquiror's own control structure.

- **Disclosure Controls.** Does the target have effective disclosure controls and procedures in place to capture all information required to be disclosed under the Exchange Act? Have the disclosure controls and procedures been followed consistently in crafting the seller’s public disclosures?
  
  - Does the seller have a Disclosure Committee and, if so, what function has it played in reviewing the seller’s public disclosures? Does the Disclosure Committee have governing principles or a charter to guide its operations? Are minutes or memoranda of committee meetings kept?
  
  - What is the role of the General Counsel?
  
  - What is the target’s outside auditor’s role in the process? More and more buyers are insisting on having their outside auditors evaluate the seller’s financial statements and communicate with the seller’s outside auditors, without seller management present.
  
  - Has the target’s Audit Committee overseen the operation of the target’s disclosure controls and procedures? What do the minutes of the committee meetings reflect, if anything, in this regard?
  
  - Have the target’s disclosure controls and procedures been appropriately adapted to capture all the new disclosures required by the Amendments to Form 8-K.
  
  - If the target’s disclosure controls and procedures are deficient, the buyer will need to assess the human and financial costs of establishing the appropriate level of controls and procedures by the next quarterly certification date.

- **Internal Controls.** Does the target maintain effective internal control over financial reporting ("ICOFR")?
The target’s ICOFR must be assessed to detect any significant deficiencies or material weaknesses. As required by SOX §404 and SEC implementing rules, “accelerated filers” with fiscal years ending after November 15, 2004 (July 15, 2005 in the case of non-accelerated filers and foreign private issuers), must include in their 2004 Form 10-Ks a management’s report on ICOFR confirming management’s responsibility for establishing and maintaining ICOFR and its conclusions about the effectiveness of the ICOFR, including any changes and corrective actions. Further, the public company’s outside auditor will be required to attest to, and report on, the assessment of these matters. The acquisition diligence process must be sufficient to provide a basis for these disclosures and the acquisition of an entity with weak or non-existent ICOFR must be carefully analyzed in light of these requirements.

What is the process for management assessing ICOFR? Has it been consistently followed? Is appropriate documentation in place? Have ICOFR been appropriately tested?

What ICOFR problems have been discovered and have they been adequately addressed.

If the target is an accelerated filer and the acquisition will not be consummated prior to the seller filing its Form 10-K, will target’s management be able to give a “clean” internal control assessment? Will target receive a “clean” audit from its independent auditors? Has the target received indications from its auditors that there are deficiencies in its ICOFR that will preclude the auditor from giving a “clean” assessment. What disclosure will be made, at a minimum, in the target’s pre-closing Form 10-Qs and 10-Ks regarding possible control deficiencies identified during the due diligence process?

What will it take to integrate the target’s ICOFR with the buyer’s?

The SEC staff has recognized that it may not always be possible to conduct an assessment of an acquired company’s ICOFR within the period between the consummation of the acquisition and the date the buyer’s management must make
its own internal-control assessment of the combined company. See Questions 3 and 9 of the Division of Corporation Finance’s Frequently Asked Questions: Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports (revised October 6, 2004), which allows buyer’s management, subject to certain conditions and required disclosures, to defer reporting on the seller’s ICOFR. The period for which management may omit an assessment of an acquired business’s ICOFR from its own internal-control assessment may not extend beyond one year from the date of acquisition. The FAQ is available at www.sec.gov/info/accountants/controlfaq1004.htm.

- **Certifications.** Have the CEO and CFO of public targets provided the Section 302 and 906 certifications required by SOX? Will the CEO and CFO of the buyer be in a position to make the required certifications concerning the combined company following consummation of the acquisition. The buyer’s CEO and CFO must understand the disclosure controls and procedures and ICOFR in place at the target so that changes can be made to integrate the target’s system with that of the acquired company’s in order to facilitate the buyer’s CEO and CFO ability to make the required certifications.

- As suggested above, a target which is a private company will have to create these processes and procedures well before an acquisition is consummated so that integration into the public company’s disclosure controls and procedures and ICOFR is seamless.

- **Financial Due Diligence.** While extensive financial due diligence has always been an important part of M&A due diligence, the necessity of transparent financial reporting for public companies can no longer be questioned in view of SOX and the related SEC rulemaking. Accordingly, financial due diligence of the target is of even greater importance in the aftermath of SOX. There are several specific areas of focus that arise out of SOX and related SEC and SRO rulemaking.

- What “off balance sheet” transactions or arrangements has the target entered into?
What are the target’s critical accounting policies and estimates and how do they align with the buyer’s? What alternative treatments have been discussed with target’s management and what treatment was preferred by target’s auditors? What changes to the target’s critical accounting policies will be necessitated following the acquisition?

What schedule of unadjusted differences was provided to target by its auditors?

Are there any issues relating to the target’s financial statements that are significant enough to interfere with the ability of the buyer’s CEO and CFO to make their §302 and 906 certifications following consummation of the acquisition?

What “related-party” transactions has the target entered into? Have they been appropriately disclosed in the target’s periodic reports? Has the target’s audit committee appropriately reviewed and approved such transactions? Will any new “related party” transactions occur in connection with or as a result of the acquisition?

Have any whistleblower complaints been received by the target’s audit committee or general counsel and, if so, how were they handled and by whom? Buyer should request access to logs and other documentation relating to treatment of such complaints. This is obviously critically important when the complaints relate to financial, accounting and auditing matters and/or possible CEO/CFO code of ethics violations.

- **Corporate Governance Principles.** If the target is listed on the NYSE, AMEX or Nasdaq, are its corporate governance practices sufficient under the enhanced SRO governance listing standards? If the target is not listed but files periodic Exchange Act reports has it adopted the Code of Ethics required by SOX §406 and otherwise adopted appropriate corporate governance practices?

  Have there been any violations or recent waivers of or amendments to the target’s code of ethics under SOX §406? If the target’s stock is listed has the seller established the broad-based code of ethics and corporate governance princi-
pals called for by the exchanges or? Are the codes being enforced?

- A post-SOX due diligence investigation will require the buyer to assess the strength of the target’s corporate governance policies and practices, and whether the target is actually following those policies and procedures. This due diligence investigation will assist the acquiring company in its determination of whether the target will assimilate easily into the buyer’s corporate governance environment.

- The due diligence process should attempt to gain an understanding of the fundamental culture of the target and its senior executives. Have the target’s executives set the “appropriate tone at the top” or is there evidence of questionable integrity, corner-cutting, revenue manipulation or earnings management.

- **Application of Attorney Conduct Rules.** Have there been any reports of violations of securities laws, breach of fiduciary duty or similar violation by company, officers, directors, employees or agents? If yes, how have they been handled, and how were the reports resolved?

- **Director Independence.** If any of the target’s directors or officers will serve on the acquiring company’s board of directors, are there any independence issues from the buyer’s perspective under applicable NYSE, AMEX or Nasdaq independence standards?

  - All relationships (including current and historical business, charitable, familial and personal relationships) between each person who will become a director of the acquiring company and the acquiring company will need be explored to determine whether such person will qualify as an independent director of the buyer.

  - It will also be necessary to explore relationships between the independent directors of the acquiring company and the target to determine if the acquisition might change the independence status of acquiring company’s directors.

  - Audit Committee independence standards must also be separately examined.
• **Officer and Director Loans.** Are there any loans or extensions of credit to the target’s executive officers and directors in violation of SOX §402(a)? With respect to officers and directors of the target who will become executive officers and directors of the acquiring company following the acquisition, the buyer will also want to assure itself that will not be violating SOX §402(a) by continuing such a loan in effect.

- Acquisitions of private companies may present the greatest problem since a loan made after July 30, 2002 (and thus proper until the closing of the acquisition) will become unlawful if it remains in effect when the borrower becomes an executive officer or director of the acquiring public company.

- In addition, a private equity buyer must consider SOX §402(a) in structuring loans to target company management (generally used to facilitate equity investments) if high-yield debt financing is a component of the acquisition financing to be followed by an SEC registered A/B exchange offer.

**M&A DISCLOSURE CONSIDERATIONS IN THE POST-SARBANES-OXLEY ENVIRONMENT**

**The New Form 8-K Requirements**

**General.** The expanded Form 8-K filing requirements have a direct impact on M&A disclosure obligations. Under the expanded rules, public companies are required to report on Form 8-K within four business days of the date that they enter into a material definitive agreement providing for an M&A transaction. Under the old rules, companies were not required to file a report until the transaction actually closed. The 8-K amendments also impose other reporting requirements that may be relevant in the M&A context.

In connection with an M&A transaction, practitioners must analyze how the new Form 8-K filing requirements mesh with filing obligations under (i) Rule 425 of the Securities Act which requires that filings be made in connection with certain preliminary written communications related to business combination, (ii) Rule 14a-12 which requires that filings be made with respect to proxy soliciting materials used in connection with a merger before a definitive proxy is available, and Rule 14d-2(b) which requires that filings be made in
connection with pre-commencement tender offer communications pursuant to a tender offer. Thus, the first public announcement of an M&A transaction that must be filed for Regulation M-A purposes, also triggers a reporting obligations under the expanded Form 8-K reporting scheme (e.g., Rule 425 filings). The SEC has determined that the filing of a Form 8-K can satisfy relevant M&A filing requirements, so long as the Form 8-K also satisfies the substantive requirements of the relevant rules—that is, the line-item requirements of Regulation. M-A as well as the requirements of Form 8-K. Companies using Form 8-K to satisfy these other filings obligations must check appropriate boxes on the cover page of the Form 8-K.

In response to numerous comments on the SEC’s original proposal which would have required that non-binding letters of intent relating to M&A transactions be filed, in the Form 8-K rules as adopted, the SEC expressly decided not to require a report when a company enters into a non-binding letter of intent regarding a proposed transaction. Accordingly, non-binding letters of intent need not be reported on a Form 8-K unless material binding provisions included in the letter of intent. Examples of binding provisions that generally would not be considered material are confidentiality or exclusivity provisions. However, if a standstill provision or a no-shop provision is included in the letter of intent, the reporting company must decide if this element is material enough to make the agreement reportable and thus trigger an Form 8-K filing.

Possible Form 8-K Disclosure Triggers In Connection With An M&A Transaction. A number of the expanded Form 8-K disclosure items are or potentially are applicable to a M&A transaction and practitioners need to carefully consider the new rules throughout the M&A transaction. Set forth below is a summary of how the expanded list of Form 8-K items will or may be applicable in the M&A context. Practitioners must carefully review the specific disclosure requirements relating to each item which are only summarized below.

- Under Item 1.01, a Form 8-K needs to be filed when a company enters into a material definitive agreement relating to an M&A transaction, whether a merger, a stock purchase, the purchase of a subsidiary or business division or the purchase of assets. (The exception for material agreements entered into in the ordinary course of business is unlikely to apply in the M&A context.) The report should set forth, among other matters, (i) the parties to the agreement, (ii) any relationship
between the filing company’s significant stockholders, directors or officers and the other party to the transaction (i.e. where a director or officer of a target is to become an employee of the acquiring company or where the acquiring company is controlled by members of target management or a significant stockholder of the target); (iii) any significant terms such as the assets or business being sold or acquired, the purchase price and other important economic arrangements, and (iv) any significant conditions to completion of the transaction, such as a financing contingency, a regulatory approval requirement or a provision giving a party the right to terminate if there is a “material adverse change” in the financial condition, results of operation or business of the other party.

- Item 1.01 also requires the filing of a Form 8-K in the event of material amendments to a material definitive agreement relating to an M&A transaction.

- Under Item 1.02, the unexpected or early termination of a material M&A agreement, such as through the operation of MAC’s or MAE’s or by mutual agreement of the parties, will require a Form 8-K filing. In contrast, if the agreement terminates automatically because the transaction does not close before a specified “drop dead” date, no Form 8-K is necessary.

- Under Item 2.01 (essentially Item 2 of the old Form 8-K), completion of an acquisition or disposition of a “significant” amount of assets requires the filing of a Form 8-K. Securities transactions that incidentally involve significant asset acquisitions and dispositions will be triggered by this Form 8-K item. “Significance” continues to be measured using the bright-line tests set forth in Rule 11-01(b) of Regulation S-X.):

- Item 9.01 of Form 8-K (Financial Statements and Exhibits) requires the buyer to provide (i) financial statements for the business acquired or sold and (ii) pro forma financial statements showing the impact of the transaction on the reporting company. The new rules explain that the financial statements required to be filed subsequent to an acquisition reported under Item 2.01 are due 71 days after the date the initial report on Form 8-K is required to be filed.
Item 2.03 requires disclosure of specified information if as a result of, or in connection with, the M&A transaction the acquiring company becomes subject to a material direct financial obligation or if the company becomes directly or contingently liable for an obligation that is material to the company as a result of an off-balance sheet arrangement (as defined in Item 303(a)(4)(ii) of Regulation S-K). Thus, for example, if the acquiring company (i) issues long-term debt or enters into an off-balance sheet arrangement as part of the financing for the M&A transaction or (ii) assumes or otherwise becomes liable for debt or off-balance sheet arrangements of a target company as a result of an M&A transaction, it must consider whether disclosure is required under this item.

Item 2.04 would requires an acquirer or target to file a Form 8-K if the M&A transaction causes a material increase in or acceleration of a direct financial obligation of the company, or an obligation under an off-balance sheet arrangement.

Under Item 2.05 a decision by the board or senior management of a company to commit to the sale of one or more businesses would require the filing of a Form 8-K describing the plan, the expected completion date, the types of costs associated with the plan, and an estimate of the costs or range of costs (or if a good faith estimate of the costs or range of costs can not be made at the time of the initial report, a new Form 8-K when the company is able to make this estimate).

Item 2.06 requires the filing of a Form 8-K when a company’s board or senior management conclude that a material charge for impairment to one or more of its assets, including securities and goodwill, is required under GAAP. Thus, material charges generated by impairment of goodwill associated with an acquisition would require the filing of a report on Form 8-K.

Item 3.01 requires a company to file a Form 8-K if as a result of or in connection with an M&A transaction a class of the company’s common equity is delisted from a national securities exchange or the NASDAQ.

Under Item 3.02, a Form 8-K is required if the acquiring company issues unregistered securities as part of or in connection with the M&A transaction, such as to the stockholders of the
target as part of the transaction consideration or in a financing transaction.

- Under Item 3.03, material modifications to the rights of security holders must be disclosed on a Form 8-K. Recapitalizations by the buyer or target could thus trigger the filing requirement.

- Item 5.01 (like former Item 1) requires the filing of a Form 8-K if a change in control of a company occurs as a result of an M&A transaction.

- Item 5.02 requires the filing of a Form 8-K if in the M&A transaction a company appoints new principal officer(s) or director(s).

- Item 5.03 requires the filing of a Form 8-K if in the M&A transaction changes in the surviving company's articles of incorporation or bylaws occur unless they were proposed in a previously filed proxy or information statement or proxy/prospectus.

Preliminary Merger Negotiations. The expanded Form 8-K rules do not change the general 10b-5 analysis with respect to disclosure of preliminary merger negotiations. Such merger negotiations only have to be disclosed if (i) they are material (determined by balancing the magnitude and probability of the transaction), and (ii) a duty to disclose otherwise arises. See Basic Inc. v. Levinson, 485 US 224 (1988). With regard to the second prong, companies have a duty to update and correct misleading or incorrect prior disclosure which could require disclosure of negotiations if the company has previously indicated that it is not in merger discussions and companies may also have a duty to disclose when information about discussions has been the subject of leaks from inside the company. Also a duty to disclose the discussions could arise when the company is in the market to purchase its own securities, or is selling its securities.

Other M&A Disclosure Considerations

General. Buyers and sellers must consider a number of other disclosure obligations in the M&A context, including Regulation M-A, Regulation FD and Regulation G. Specifically, buyers and sellers must comply with the SEC’s communication rules in the M&A context, whether a hostile or friendly transaction. All written communications
relating to the transaction must be filed with the SEC on the date of first use. Material, non-public information regarding the transaction must not be selectively disclosed in cash tender offers and mergers, exempt stock mergers and exempt debt exchange offers—there is a “duty” to make widespread public disclosure before or simultaneous with a selective disclosure of material, non-public information to an investor or analyst. Use of non-GAAP financial measures in public communications regarding the transaction is permitted, but must be carefully considered in light of the new requirements governing disclosure of such measures in transactional documents.

**Regulation M-A.** Written communications made in connection with or relating to a registered exchange offer or merger that are made public, or otherwise provided to persons who are not parties to the transaction, must be filed with the SEC in accordance with Rule 425 under the Securities Act on the date the communications are first used or distributed. The communication must also contain a prominent legend that, among other things, urges stockholders to read relevant SEC documents before making their tender or voting decisions.

- In addition to the parties to the business combination or other extraordinary transaction, communications constraints affect agents of the parties (i.e.: a dealer manager acting on behalf of the buyer).

- A “written communications” is broadly defined to include all information disseminated, other than information communicated orally, such as press releases and other public statements in writing; scripts and slides used for analyst presentations, conferences and other, similar meetings; Q&As and other transaction-related materials, developed internally, but used to respond to questions from stockholders, employees or customers; internal e-mail correspondence with employees; statements in news bulletins; materials posted on the website (including links to news articles and web re-broadcasts of analyst and investor calls); and scripts used to create messages for information hotlines and similar “mass-communication” means of solicitation.

- Information communicated orally and that is not otherwise made available in a manner that would cause the communication to become a “writing” and/or a “broadcast” (for example, via “replay” on the web), does not need to be reduced to writ-
ing and publicly filed. However, the substance of such presentations will need to be documented and filed in the event of republication.

- These SEC rules also do not apply to the release of business information that is purely factual in nature, relates solely to ordinary business matters and merely refers to the business combination in a completely non-substantive way.

- Written communications that could not reasonably be viewed as (i) an “offer to sell” or a “solicitation of an offer to buy” a security, and (ii) a communication that could result in the giving, withholding or revocation of a proxy or tender, also need not be filed.

- Internal written communications provided solely to the parties to the business combination, or other persons who are authorized to act on behalf of the parties to the business combination, including legal counsel and financial and other advisors, need not be filed.

- It is generally not necessary to refile identical communications that are filed initially and used more than once. However, if there are substantive changes (i.e.: other than correcting minor typographical errors or stylistic changes) refiling will be necessary.

- Written communications submitted to government agencies may need to be filed under the rules. However, written material provided to a governmental agency in connection with a governmental review or approval process (i.e.: materials submitted to the Department of Justice and/or the Federal Trade Commission in connection with seeking antitrust clearance under Hart-Scott-Rodino), and the filing will remain confidential, or there is no reasonable expectation that the filing will be made public, an SEC filing and legend should not be required. If provided to a governmental employee but not in connection with a governmental review or approval process, a filing and legend will generally be required unless there is an understanding with the recipient that the materials that it will not be made public. In any event if the written material is provided for publication or widespread distribution in any form, a filing and legend will be required.
Oral and written communications remain subject to applicable antifraud provisions under both the Securities Act and the Exchange Act and, if quoted or republished by third-parties, may be deemed written materials attributable to a deal participant that must be filed.

The new communications rules adopted by the SEC in the Securities Offering Reform Release and effective December 1, 2005 are generally not applicable to business combinations. Thus the new rules do not affect the regulatory framework applicable to business combinations and exchange offers. See SEC Rules 162, 165, 166 and 425.

Regulation FD. Public companies and persons acting on their behalf are prohibited from making selective disclosure of material, non-public information to securities professionals and investors. However, there is limited exemption for registered offerings made for capital-raising or M&A purposes. Accordingly, business combinations involving only cash or unregistered, exempt securities as consideration are subject to Regulation FD.

- Regulation FD does not apply to disclosures in connection with registered mergers and acquisitions. Therefore, companies can continue to use one-on-one communications with large investors or road shows with a limited audience during these transactions. However, regular communications made by a company, such as quarterly analyst conference calls or other private conversations, are still subject to Regulation FD.

- Transactions that are not registered, such as cash mergers and tender offers, remain subject to Regulation FD.

- Regulation FD does not prohibit companies from privately disclosing confidential information to potential merger partners if the potential partner expressly agrees to keep the information confidential.

- When there is overlap between Regulation FD and Regulation M-A, the more restrictive rule generally will prevail.

- Even though communications relating to Regulation M-A transactions are not subject to Regulation FD, this exception is not available until the commencement of the transaction (i.e.: the first public announcement of the transaction).
Thus, companies still need to cover their communications by an express agreement of confidentiality before the public announcement of a merger for Regulation FD purposes.

- Although Regulation M-A provides a safe harbor for material oral communications to analysts or stockholders before a cash tender offer is announced, a company arguably has to provide such information in writing and broadly distribute it under Regulation FD.

- While Regulation M-A permits company management and investment bankers to make selective oral disclosures in roadshows and one-on-one meetings relating to unregistered offerings or cash M&A deals, Regulation FD does not. As a result, traditional “closed” roadshows attended by a few analysts and large investors are effectively precluded in unregistered deals unless the company and its investment banker are careful not to disclose material, non-public information or the company makes FD-compliant disclosure of the information either prior to, or contemporaneously with, the roadshow’s “selective” disclosures.

- An oral webcast becomes a “writing” and/or “broadcast” from the SEC’s perspective if posted for replay on the web—even if the replay is only an audiocast. While Regulation FD does not require that material, non-public information communicated during the webcast be filed with the SEC if the webcast was properly noticed and accessible to all investors, a filing would be necessary under these circumstances because Regulation M-A requires almost all written communications to be filed. Transcripts must be filed in the case of video and/or audio-cast presentations.

- Although registered business combinations are not subject to Regulation FD, if material nonpublic information (such as earnings estimates and other types of soft financial information) is disclosed during regular communications, the same information should also be disclosed in the transaction’s prospectus or proxy—either directly or through a Form 8-K that is incorporated by reference, or as free writing under Rule 425. Otherwise, the company will likely have made a material omission from the transaction’s disclosure documents.
**Regulation G.** If a company uses a non-GAAP financial measure in public disclosure, it must also disclose the most directly comparable GAAP measure and include a reconciliation of the non-GAAP financial measure to this GAAP measure. If a non-GAAP financial measure is included in an SEC periodic report or a registration statement under the Securities Act, stricter rules apply which prohibit the use of non-GAAP financial measures entirely, except for EBIT and EBITDA, and require the disclosure of the reasons for the use of the non-GAAP financial measure. However, Regulation G will not apply to a non-GAAP financial measure included in disclosure relating to a proposed business combination, the entity resulting therefrom or an entity that is a party thereto if the disclosure is contained in a communication that is subject to SEC rules applicable to business combination transactions;

- There is an exemption from Regulation G (and Item 10(e) of Regulation S-K) for disclosure of non-GAAP financial measures made in communications relating to business combinations that are subject to Rules 425, 14a-12 or 14d-2(b)(2) and this exemption also is intended to apply to communications subject to Rule 14d-9(a)(2). However, this exemption does not extend beyond communications that are subject to those rules. Accordingly, if the same non-GAAP financial measure that was included in a communication filed under one of those rules, or orally communicated in a live presentation or simulcast not available for replay, is also disclosed in a Securities Act registration statement or an Exchange Act proxy statement or tender offer statement, the exemption would be inapplicable to that disclosure.

- There also is an exemption from Regulation G (and Item 10(e) of Regulation S-K) for disclosure of non-GAAP financial measures made in any disclosure that is subject to Item 1015 of Regulation M-A (Reports, Opinions, Appraisals from Outside Parties). In contrast to the exemption discussed in the previous paragraph, the exemption for disclosure of non-GAAP financial measures subject to Item 1015 of Regulation M-A is not limited to pre-commencement communications and, accordingly, the exemption would also be available for Item 1015 disclosure found in registration statements, proxy statements and tender offer statements.
• Where reconciliation of a non-GAAP financial measure is required and the most directly comparable measure is a "pro forma" measure prepared and presented in accordance with Article 11 of Regulation S-X, companies may use that measure for reconciliation purposes, in lieu of a GAAP financial measure.