

# INSIGHTS

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## SECURITIES DISCLOSURE

### Practical Strategies for Effective Management of Earnings Calls

*Careful planning is important to see that the annual and quarterly earnings calls that accompany a public company's earnings press release comply with legal requirements and adhere to public company best practices. A number of considerations, including the evolving use of social media and the communication of forward-looking guidance, should be front of mind for company counsel in preparations for earnings season.*

**By Andrew L. Fabens and Sean Sullivan**

While historical financial information is not required to be disseminated by public companies until the deadline for the corresponding period's periodic report,<sup>1</sup> most public companies announce selected financial information<sup>2</sup> to the market prior to that time, triggering a Current Report on Form 8-K (Form 8-K) under Item 2.02.<sup>3</sup> Many also hold an earnings call to discuss the company's historical financial performance, and in some cases, give forward-looking guidance.

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In preparing for the earnings call and the related earnings press release, company counsel should consider the economic and financial backdrop against which the company's performance will be viewed on the earnings call. Every quarter, company counsel should be actively involved in the review and refinement of the earnings press release and the earnings call script to oversee the clarity and accuracy of the information presented.<sup>4</sup> Many companies also prepare responses to potential questions management could be asked in the question and answer period during the earnings call. Those companies that plan to use social media to convey information during the earnings call should prepare hyperlinks to relevant legends and cautionary statements in advance. In circumstances in which revenue or earnings are expected to be significantly higher or lower than previous periods or previously issued forward-looking guidance, special care should be given to see that the disclosures in the earnings press release and on the earnings call are clear and accurate, and that the disclosure dissemination process is properly observed, given that investor interest and litigation risk could be heightened.<sup>5</sup>

In some circumstances, such as a pending securities offering or management participation in an industry conference, a company may elect to pre-release its earnings results. However, this practice generally should be avoided in the absence of a compelling reason to deviate from a company's

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established timing for dissemination of forward-looking guidance.

## **Starting the Cycle: The Announcement Press Release and Earnings Call Preparation**

The anticipated date of the earnings press release and the earnings call should be announced a few weeks in advance, using a method that complies with the broad dissemination requirements of Regulation FD. The announcement press release should include:

- specific instructions for how to access the earnings call or view the webcast;<sup>6</sup>
- the location on the company's website of any accompanying materials, including the slides to be presented during the webcast; and
- the time period during which a rebroadcast of the webcast or replay of the call will be available on the company's website.

While an earnings call can occur at any time during the day, nearly all companies hold calls outside of market trading hours to ensure the information disclosed on the call is fully disseminated before any trading in the company's shares occurs. While the Internet allows for nearly real-time dissemination of information disclosed on earnings calls, as a practical matter, nearly all companies hold their earnings call before or after the trading day to lessen the possibility that a trader or investor listening to the earnings call could buy or sell the company's securities before those not listening to the call become aware of the company's disclosures.

On or before the day the earnings press release is disseminated, the company must file or furnish its Form 8-K,<sup>7</sup> attaching the earnings release as an exhibit. The dial-in information and webcast viewing instructions for the earnings call and the location of any accompanying materials to be discussed on the earnings call should be clearly noted in the earnings press release. Working in

conjunction with the company's investor relations staff, company counsel should see that the earnings press release is finalized for timely dissemination over the wires and on the company's website, and that the Form 8-K is filed prior to the earnings call.

## **During the Earnings Call: Disclosures Made by Management**

Once preparations are complete, the focus of company counsel turns to the call earnings itself and supporting the members of the management team speaking on the earnings call. Company counsel should be standing by prior to and during the earnings call for any last minute questions that may arise.

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### ***Social media practices in the context of the earnings call are evolving.***

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The location on the company's website of the earnings call rebroadcast and accompanying materials should be announced by management during the earnings call. Oral disclosures made during an earnings call generally do not trigger the requirement that an additional Form 8-K be filed or furnished, as long as the earnings press release has been filed or furnished within the 48 hours prior to the earnings call. Item 2.02 of Form 8-K provides a safe harbor for this information. To the extent that supplemental financial or other information is to be discussed on the earnings call but is not included in the earnings press release, this information should be made available on the company's website, along with the slides that management will present.<sup>8</sup>

Any presentation of non-GAAP financial metrics in an earnings press release must be accompanied by a reconciliation of these metrics to the most closely comparable GAAP figure.<sup>9</sup> Similarly, any disclosure of a non-GAAP metric orally in an earnings call that is not disclosed in

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the earnings press release requires reconciliation to the most closely comparable GAAP figures, which must be posted to the company's website prior to the commencement of the earnings call.

### **After the Earnings Call: Access on the Company Website**

Following the call, because most companies provide for a rebroadcast of the earnings call via recorded webcast or recorded audio on their websites, company counsel will be faced with the decision of when to remove website access to the rebroadcasts or move the webcast or recorded call to an archive part of the website.<sup>10</sup> A best practice is to allow access to earnings call rebroadcasts for one or two weeks after the earnings call before removing access permanently or moving it to an archive section of the website. A rebroadcast period of this duration allows for full dissemination of the information, but is short enough that it should not result in the company maintaining forward-looking guidance about a given period on its website many weeks into that period. Absent special circumstances, the duration should be consistent from quarter to quarter.

### **Best Practices for Social Media Use in Connection with the Earnings Call**

A small but growing number of companies are using social media platforms, such as Twitter, to "live Tweet" earnings calls.<sup>11</sup> Given the requirements of the securities laws discussed above, the use of the social media in this manner should be considered carefully before implementation. As a starting point, a company should consider its social media communication to be akin to any other disclosure it makes and should see that the disclosure complies with all SEC rules regarding the qualification of such disclosures. However, character-limited social media platforms, like Twitter, present a unique challenge for companies because it is often not possible to fit all required information, legends or disclaimers into a single Tweet. While the SEC has not issued specific

guidelines regarding company communications on character-limited social media with respect to financial information, it has issued guidance in another context: disclosures in connection with business combinations in which character-limited social media prevents the full inclusion of a required legend. In recently released guidance with respect to Rule 165 of the Securities Act of 1933, the SEC staff stated that a hyperlink to a legend on a character-limited social media platform that is noted as important to the reader is sufficient to meet the Rule's legend requirement, provided that the destination of the hyperlink prominently conveys the mandated information.<sup>12</sup> By analogy, a company that elects to Tweet financial information during an earnings call could view this guidance as instructive in developing its practices.

Social media practices in the context of the earnings call are evolving. For example, during the earnings call, a company is likely to Tweet three primary types of information: (1) historical GAAP financial information and operational data; (2) historical non-GAAP financial information; and (3) forward-looking guidance. Each category of Tweet warrants different considerations with respect to how the transmitted information is qualified and the type of cautionary language included.<sup>13</sup>

- For historical GAAP financial information and operational data, suggested practice is the insertion of a hyperlink to the earnings report as a whole.
- For historical non-GAAP financial information, the company should specify that the metric is non-GAAP, include the corresponding GAAP financial metric, and insert a hyperlink directly to the reconciliation contained in the earnings release, which would satisfy the requirements of Regulation G.<sup>14</sup>
- For forward-looking guidance, the company should specify that a statement or series of statements is "forward-looking" at the beginning of the Tweet or series of Tweets and insert a hyperlink directly to the

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forward-looking guidance disclaimer in the earnings release.

Company counsel should prepare hyperlinks to the relevant information prior to the call for use by the company's investor relations staff.

Companies currently use a variety of practices, as standards in this area are evolving. For example, some companies, such as GM, Boingo, and notably, Twitter itself, place relevant legends and cautionary language in a Tweet at the beginning and/or end of the series of Tweets disseminated during the earnings call. This approach may be based on the view that a series of Tweets relating to and disseminated during the earnings call should be treated as a single communication intended to be read in its entirety. It also reflects the practical reality that inclusion of relevant legends and cautionary language in each Tweet often will leave insufficient room for the information the company seeks to convey. To bolster the "single communication" argument, some of these companies include "hashtags" to distinguish Tweets disseminated during the earnings call, and conclude each of these Tweets with "#XYZearnings" (where XYZ is the company's stock ticker). Another approach, which has been used by companies such as LinkedIn and eBay, is to include a hyperlink to the earnings report in every Tweet disseminated during the earnings call. This practice, however, significantly reduces the number of characters available for conveying information in each Tweet.

The small number of companies currently using limited-character social media communications during their earnings calls may be due, in part, to the regulations governing the dissemination of information and the absence of more specific guidance from the SEC. An added complexity for consideration is that individual Tweets can be "Retweeted," effectively removing them from their original context and from the accompanying Tweets in a series that may contain legends and cautionary language. As a guiding principle,

companies seeking to use character-limited social media during earnings calls should balance inclusion of legends and disclaimers relating to the information presented with the practical limitations of the platform as they consider the use and placement of hyperlinks to legends and cautionary language in their Tweets.

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***Inclusion of relevant legends and cautionary language in each Tweet often will leave insufficient room for the information the company seeks to convey.***

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### **Forward-Looking Guidance in the Context of the Earnings Call**

A slowly declining, but substantial majority of public companies provide some form of forward-looking guidance,<sup>15</sup> and many present that information on their earnings call. There are many arguments with respect to whether, and to what extent, a company should issue forward-looking guidance on earnings calls and/or in the earnings press release. Forward-looking guidance proponents argue that by providing this guidance, companies increase transparency and reduce uncertainty with respect to future financial results. Companies that provide forward-looking guidance face specific challenges in managing and appropriately qualifying such disclosures, and it is critical that a company adopt and adhere to a policy that addresses key items, including:

- the scope of forward-looking guidance to be provided (financial, non-financial or both);
- the timing and frequency of forward-looking guidance (quarterly or annual);
- the qualification of forward-looking guidance by citing specific trends or events that could affect the accuracy of the forward-looking guidance;

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- the review of the earnings press release and/or earnings call script, including careful review of the “forward-looking statements disclaimer;” and
  - the circumstances under which the company will update guidance.

Forward-looking guidance encompasses more than just numerical statements with respect to projected financial performance. Descriptions of future business and industry trends, progress on company strategic initiatives and quotations or commentary discussing the state of the company that are made on the earnings call or in the earnings press release also can be covered by the safe harbor for forward-looking statements.<sup>16</sup> In reviewing each proposed earnings call script, careful thought should be given to any statement that may be construed as forward-looking in nature to see that it is properly presented and that the forward-looking guidance disclaimer is properly tailored to the statements that will be included in that particular earnings call script.

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***Forward-looking guidance encompasses more than just numerical statements.***

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Companies take differing views with respect to the method by which they provide disclosure of forward-looking guidance to the market. Some view the written press release as the clearest and most permanent method of presenting this information, and therefore present the forward-looking guidance in the earnings release and restate the information on the earnings call. Other companies provide forward-looking guidance only orally on the earnings call. However, because the earnings call is available on the company’s website for some period of time, and a number of commercial sites and transcription services sell written call transcripts,<sup>17</sup> oral guidance, like written guidance, is readily available long after the earnings call. A best practice is to include forward-looking guidance in the earnings

press release, at least in summary form, so that investors, the press and the general public can easily locate the information at the time of the earnings release and in the future.

## **Updating Forward-Looking Guidance**

While the earnings press release and earnings call are the primary avenues of communication of the company with the broader investment community, there are occasions in which a company’s management may refine or revise guidance that has been previously provided. As a general rule, a company does not have a duty to update forward-looking statements that it has previously made; however, when a company’s previous forward-looking statement becomes clearly misleading or inaccurate, a company should consider whether disclosure correcting, revising or updating the prior forward-looking guidance is warranted.<sup>18</sup> Generally, a company may need to evaluate whether to correct or update forward-looking guidance where the company:

- plans to offer securities;
- plans to repurchase its securities or engage in a going-private transaction;
- desires to enable insiders to trade in its securities, subject to the company’s insider trading policy and trading windows; or
- desires to manage investor expectations in order to maintain credibility and mitigate unpleasant surprises and litigation risk.

Although court decisions have not consistently identified factors that render forward-looking guidance updates unnecessary, the following circumstances may support a conclusion that no update of the original forward-looking guidance is required or advisable:

- it has not become materially inaccurate;
- it was clearly presented as a forward-looking statement and was accompanied by meaningful cautionary language that identified the risk that caused the guidance to become inaccurate;



- it was clearly phrased to speak only as of the date given;
- a publicly disclosed event, such as a large acquisition or a significant industry development, makes it clear that no reasonable investor would believe that the original forward-looking guidance continues to apply; or
- it explained the assumptions on which it was based, and information widely available to market participants makes clear that the assumptions have not come to pass.

Any update to guidance should be disseminated in a manner that is compliant with Regulation FD and should be filed on Form 8-K as well.

## Conclusion

A company's earnings call, and the related earnings release, is one of the most high-profile avenues available to a company to communicate important information to its investors and the public. Careful planning of the earnings call, a thoughtful approach to related social media communications and the proper presentation of forward-looking guidance disseminated on the earnings call can contribute substantially to the smooth and effective execution of the earnings calls.

## Notes

1. The Annual Report on Form 10-K is due 60 to 90 days after the end of the corresponding quarter; the Quarterly Report on Form 10-Q is due 40 to 45 days after the end of the corresponding quarter.
2. The release of this material non-public information about the company's financial performance, whether by press release, webcast or conference call, triggers Item 2.02 of Form 8-K.
3. While the Current Report on Form 8-K must be filed or furnished with the SEC within four business days, the market practice for most public companies is to promptly file or furnish it after the announcement of the earnings information.
4. Most companies observe a blackout period, during which officers, directors and certain other insiders cannot trade in company's stock, because these individuals may be in possession of material non-public information about the company and its financial performance. These blackout periods generally end 24 to 48 hours after the company files the periodic report for that period.
5. All parties with knowledge of or access to the draft earnings release, or the financial information and forward-looking guidance contained therein, should be regularly reminded of the importance of maintaining the confidentiality of the information, pursuant to applicable insider trading policies.
6. To satisfy the concept of broad accessibility under Regulation FD with respect to the earnings call, companies typically make the earnings call available in multiple formats, including conference call and webcast.
7. In many circumstances, a company can elect to either file or furnish its Form 8-K with the SEC. When a Form 8-K is filed, the information is incorporated into any Rule 415 shelf registration statements of the company, although incorporation by reference of a furnished Form 8-K is permitted by including a specific reference in the offering document. Absent specific reasons to file Forms 8-K, companies typically furnish them.
8. If *unrelated* material information that would otherwise be required to be disclosed on a Form 8-K is disclosed orally on an earnings call and is not included in either the earnings press release or the materials posted to the company's website in advance of the earnings call, the company should promptly file or furnish that information on Form 8-K.
9. The use of non-GAAP metrics is governed by Regulation G and Item 10(e) of Regulation S-K.
10. Companies often move a webcast or recorded call to an archive portion of their website to maintain the availability of the information in a centralized location while also signaling that the information is dated and does not speak as of the time it is accessed through the archive portion of the website.
11. Twitter is a social media platform in which users can convey messages of up to 140 characters.
12. The SEC issued this Compliance and Disclosure Interpretation (C&DI) on April 21, 2014. CD&Is are available at <http://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm>.
13. Under Section 21E of the Securities and Exchange Act of 1934, as amended, forward-looking guidance in the earnings press release and/or the earnings call should be qualified as forward-looking and meaningful cautionary language should be included with respect to the factors that could cause actual results to materially differ from the forward-looking guidance. The Private Securities Litigation of Reform Act of 1995 (15 U.S.C. § 78u-5) provides a safe harbor for forward-looking statements on condition that the company concurrently supplies such qualifying language. While some companies may use a "boilerplate" formulation of the "forward-looking statements disclaimer," the law requires that the cautions be specifically tailored to the forward-looking statements. Company counsel should review each earnings press release and earnings call script and include tailored and precise disclaimer language.

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14. When a company communicates a non-GAAP financial metric, Regulation G requires the company to disclose the corresponding GAAP financial metric and the reconciliation of the two metrics in the same communication.

15. According to NIRA Analytics' *Guidance Practices and Preferences 2012 Survey Report*, 88 percent of 2012 survey respondents provide some form of guidance (either financial, non-financial or both), compared to 90 percent in 2010 and 93 percent in 2009. 76 percent of survey respondents report providing financial guidance in 2012, compared to 81 percent in 2010 and 85 percent in 2009.

16. See endnote 13.

17. While transcription of earnings calls is common and generally accurate, inaccuracies can occur, including with respect to forward-looking

guidance. Company counsel should consider discussing with the company's investor relations staff whether and how it conducts reviews of transcripts of earnings calls.

18. Some courts recognize a duty to correct, where guidance is discovered to have been based on incorrect information, and a duty to update, where circumstances have changed but the guidance has nonetheless remained "alive" in the minds of reasonable investors. See *In re Burlington Coat Factory Sec Litig.*, 114 F.3d 1410, 1432 (3d Cir. 1997) (stating a duty to update may arise if "the projection contained an implicit factual representation that remained 'alive' in the minds of investors as a continuing representation"); see also *In re International Business Machines Corp. Sec. Litig.*, 163 F.3d 102, 110 (2d Cir. 1998); *Winnick v. Pac. Gateway Exch., Inc.*, No. 02-16060, 2003 U.S. App. LEXIS 17030 (9th Cir. August 15, 2003).

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