

[Section 102. Item 10\(e\) of Regulation S-K, Securities and Exchange Commission](#)

SEC Compliance and Disclosure Interpretations

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¶21,010 [“Funds from Operations” Defined]

Question 102.01

Question: What measure was contemplated by "funds from operations" in footnote 50 to [Exchange Act Release No. 47226](#), Conditions for Use of Non-GAAP Financial Measures, which indicates that companies may use "funds from operations per share" in earnings releases and materials that are filed or furnished to the Commission, subject to the requirements of [Regulation G](#) and [Item 10\(e\) of Regulation S-K](#)?

Answer: The reference to "funds from operations" in footnote 50, or "FFO", refers to the measure defined as of January 1, 2000, by the National Association of Real Estate Investment Trusts (NAREIT). NAREIT has revised and clarified the definition since 2000. The staff accepts NAREIT's definition of FFO in effect as of May 17, 2016 as a performance measure and does not object to its presentation on a per share basis.

Reference: [Regulation G](#); [Item 10\(e\) of Regulation S-K](#).

History: Issued January 11, 2010; Modified May 17, 2016.

¶21,015 [Funds from Operations Calculation]

Question 102.02

Question: May a registrant present FFO on a basis other than as defined by NAREIT as of May 17, 2016?

Answer: Yes, provided that any adjustments made to FFO comply with [Item 10\(e\) of Regulation S-K](#) and the measure does not violate [Rule 100\(b\)](#) of Regulation G. Any adjustments made to FFO must comply with the requirements of [Item 10\(e\) of Regulation S-K](#) for a performance measure or a liquidity measure, depending on the nature of the adjustments, some of which may trigger the prohibition on presenting this measure on a per share basis. See [Section 100](#) and [Question 102.05](#).

Reference: [Rule 100\(b\)](#) of Regulation G; [Item 10\(e\) of Regulation S-K](#).

History: Issued January 11, 2010; Modified May 17, 2016.

¶21,020 [Non-Recurring and Similar Events]

Question 102.03

Question: [Item 10\(e\) of Regulation S-K](#) prohibits adjusting a non-GAAP financial 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. Is this prohibition based on the description of the charge or gain, or is it based on the nature of the charge or gain?

Answer: The prohibition is based on the description of the charge or gain that is being adjusted. It would not be appropriate to state that a charge or gain is non-recurring, infrequent or unusual unless it meets the specified criteria. The fact that a registrant cannot describe a charge or gain as non-recurring, infrequent or unusual, however, does not mean that the registrant cannot adjust

for that charge or gain. Registrants can make adjustments they believe are appropriate, subject to [Regulation G](#) and the other requirements of [Item 10\(e\) of Regulation S-K](#). See [¶Question 100.01](#).

Reference: [Regulation G](#); [Item 10\(e\) of Regulation S-K](#).

History: Issued January 11, 2010; Modified May 17, 2016.

¶21,025 [Use of Non-GAAP Measures]

Question 102.04

Question: Is the registrant required to use the non-GAAP measure in managing its business or for other purposes in order to be able to disclose it?

Answer: No. [Item 10](#)(e)(1)(i)(D) of Regulation S-K states only that, "[t]o the extent material," there should be a statement disclosing the additional purposes, "if any," for which the registrant's management uses the non-GAAP financial measure. There is no prohibition against disclosing a non-GAAP financial measure that is not used by management in managing its business.

Reference: [Regulation G](#); [Item 10\(e\) of Regulation S-K](#)

History: Issued January 11, 2010.

¶21,030 [Per Share Non-GAAP Measures]

Question 102.05

Question: While [Item 10](#)(e)(1)(ii) of Regulation S-K does not prohibit the use of per share non-GAAP financial measures, the adopting release for [Item 10](#)(e), [Exchange Act Release No. 47226](#), states that "per share measures that are prohibited specifically under GAAP or Commission rules continue to be prohibited in materials filed with or furnished to the Commission." In light of Commission guidance, specifically Accounting Series Release No. 142, *Reporting Cash Flow and Other Related Data*, and Accounting Standards Codification 230, are non-GAAP earnings per share numbers prohibited in documents filed or furnished with the Commission?

Answer: No. [Item 10](#)(e) recognizes that certain non-GAAP per share performance measures may be meaningful from an operating standpoint. Non-GAAP per share performance measures should be reconciled to GAAP earnings per share. On the other hand, non-GAAP liquidity measures that measure cash generated must not be presented on a per share basis in documents filed or furnished with the Commission, consistent with Accounting Series Release No. 142. Whether per share data is prohibited depends on whether the non-GAAP measure can be used as a liquidity measure, even if management presents it solely as a performance measure. When analyzing these questions, the staff will focus on the substance of the non-GAAP measure and not management's characterization of the measure.

Reference: [Regulation G](#); [Item 10\(e\) of Regulation S-K](#)

History: Issued January 11, 2010; Modified May 17, 2016.

¶21,035 [Comparable GAAP Measures]

Question 102.06

Question: Is [Item 10](#)(e)(1)(i) of Regulation S-K, which requires the prominent presentation of, and reconciliation to, the most directly comparable GAAP financial measure or measures, intended to change the staff's practice of requiring the prominent presentation of amounts for the three major categories of the statement of cash flows when a non-GAAP liquidity measure is presented?

Answer: No. The requirements in [Item 10\(e\)\(1\)\(i\)](#) are consistent with the staff's practice. The three major categories of the statement of cash flows should be presented when a non-GAAP liquidity measure is presented.

Reference: [Regulation G](#); [Item 10\(e\) of Regulation S-K](#)

History: Issued January 11, 2010.

¶21,040 [Free Cash Flow]

Question 102.07

Question: Some companies present a measure of "free cash flow," which is typically calculated as cash flows from operating activities as presented in the statement of cash flows under GAAP, less capital expenditures. Does [Item 10\(e\)\(1\)\(ii\)](#) of Regulation S-K prohibit this measure in documents filed with the Commission?

Answer: No. The deduction of capital expenditures from the GAAP financial measure of cash flows from operating activities would not violate the prohibitions in [Item 10\(e\)\(1\)\(ii\)](#). However, companies should be aware that this measure does not have a uniform definition and its title does not describe how it is calculated. Accordingly, a clear description of how this measure is calculated, as well as the necessary reconciliation, should accompany the measure where it is used. Companies should also avoid inappropriate or potentially misleading inferences about its usefulness. For example, "free cash flow" should not be used in a manner that inappropriately implies that the measure represents the residual cash flow available for discretionary expenditures, since many companies have mandatory debt service requirements or other non-discretionary expenditures that are not deducted from the measure. Also, free cash flow is a liquidity measure that must not be presented on a per share basis. See [¶Question 102.05](#).

Reference: [Item 10\(e\) of Regulation S-K](#)

History: Issued January 11, 2010; Modified May 17, 2016.

¶21,045 [Free Writing Prospectuses]

Question 102.08

Question: Does [Item 10\(e\) of Regulation S-K](#) apply to filed free writing prospectuses?

Answer: Regulation S-K applies to registration statements filed under the Securities Act, as well as registration statements, periodic and current reports and other documents filed under the Exchange Act. A free writing prospectus is not filed as part of the issuer's registration statement, unless the issuer files it on [Form 8-K](#) or otherwise includes it or incorporates it by reference into the registration statement. Therefore, [Item 10\(e\) of Regulation S-K](#) does not apply to a filed free writing prospectus unless the free writing prospectus is included in or incorporated by reference into the issuer's registration statement or included in an Exchange Act filing.

Reference: [Regulation G](#); [Item 10\(e\) of Regulation S-K](#)

History: Issued January 11, 2010.

¶21,050 [Adjusted EBITDA]

Question 102.09

Question: [Item 10\(e\)\(1\)\(ii\)\(A\)](#) of Regulation S-K prohibits "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 the measures earnings before interest and taxes (EBIT) and earnings before interest, taxes, depreciation and amortization (EBITDA)." A company's credit agreement

contains a material covenant regarding the non-GAAP financial measure "Adjusted EBITDA." If disclosed in a filing, the non-GAAP financial measure "Adjusted EBITDA" would violate [Item 10\(e\)](#), as it excludes charges that are required to be cash settled. May a company nonetheless disclose this non-GAAP financial measure?

Answer: Yes. The prohibition in [Item 10\(e\)](#) notwithstanding, because MD&A requires disclosure of material items affecting liquidity, if management believes that the credit agreement is a material agreement, that the covenant is a material term of the credit agreement and that information about the covenant is material to an investor's understanding of the company's financial condition and/or liquidity, then the company may be required to disclose the measure as calculated by the debt covenant as part of its MD&A. In disclosing the non-GAAP financial measure in this situation, a company should consider also disclosing the following:

- the material terms of the credit agreement including the covenant;
- the amount or limit required for compliance with the covenant; and
- the actual or reasonably likely effects of compliance or non-compliance with the covenant on the company's financial condition and liquidity.

Reference: [Regulation G](#); [Item 10\(e\) of Regulation S-K](#)

History: Issued January 11, 2010.

¶21,055 [Full Non-GAAP Income Statements]

Question 102.10

Question: [Item 10\(e\)\(1\)\(i\)\(A\)](#) of Regulation S-K requires that when a registrant presents a non-GAAP measure it must present the most directly comparable GAAP measure with equal or greater prominence. This requirement applies to non-GAAP measures presented in documents filed with the Commission and also earnings releases furnished under Item 2.02 of Form 8-K. Are there examples of disclosures that would cause a non-GAAP measure to be more prominent?

Answer: Yes. Although whether a non-GAAP measure is more prominent than the comparable GAAP measure generally depends on the facts and circumstances in which the disclosure is made, the staff would consider the following examples of disclosure of non-GAAP measures as more prominent:

- Presenting a full income statement of non-GAAP measures or presenting a full non-GAAP income statement when reconciling non-GAAP measures to the most directly comparable GAAP measures;
- Omitting comparable GAAP measures from an earnings release headline or caption that includes non-GAAP measures;
- 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;
- A non-GAAP measure that precedes the most directly comparable GAAP measure (including in an earnings release headline or caption);
- 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 tabular disclosure of non-GAAP financial measures without preceding it with an equally prominent tabular disclosure of the comparable GAAP measures or including the comparable GAAP measures in the same table;
- Excluding a quantitative reconciliation with respect to a forward-looking non-GAAP measure in reliance on the "unreasonable efforts" exception in [Item 10\(e\)\(1\)\(i\)\(B\)](#) without disclosing that fact and identifying the information that is unavailable and its probable significance in a location of equal or greater prominence; 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.

Reference: [Regulation G](#); [Item 10\(e\) of Regulation S-K](#)

History: Issued January 11, 2010; Modified May 17, 2016.

¶21,060 [Tax Effects]

Question 102.11

Question: How should income tax effects related to adjustments to arrive at a non-GAAP measure be calculated and presented?

Answer: A registrant should provide income tax effects on its non-GAAP measures depending on the nature of the measures. If a measure is a liquidity measure that includes income taxes, it might be acceptable to adjust GAAP taxes to show taxes paid in cash. If a measure is a performance measure, the registrant should include current and deferred income tax expense commensurate with the non-GAAP measure of profitability. In addition, 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.

Reference: [Regulation G](#); [Item 10\(e\) of Regulation S-K](#)

History: Issued January 11, 2010; Modified May 17, 2016.

¶21,063 [Information Prepared in Accordance with Official Guidance]

Question 102.12

Question: A registrant discloses a financial measure or information that is not in accordance with GAAP or calculated exclusively from amounts presented in accordance with GAAP. In some circumstances, this financial information may have been prepared in accordance with guidance published by a government, governmental authority or self-regulatory organization that is applicable to the registrant, although the information is not required disclosure by the government, governmental authority or self-regulatory organization. Is this information considered to be a "non-GAAP financial measure" for purposes of Regulation G and [Item 10 of Regulation S-K](#)?

Answer: Yes. Unless this information is *required* to be disclosed by a system of regulation that is applicable to the registrant, it is considered to be a "non-GAAP financial measure" under Regulation G and Item 10 of Regulation S-K. Registrants that disclose such information must provide the disclosures required by Regulation G or Item 10 of Regulation S-K, if applicable, including the quantitative reconciliation from the non-GAAP financial measure to the most comparable measure calculated in accordance with GAAP. This reconciliation should be in sufficient detail to allow a reader to understand the nature of the reconciling items.

Reference: [Regulation G](#); [Item 10\(e\) of Regulation S-K](#)

History: Issued April 24, 2009.