

# GRAUBARD MILLER

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## MEMORANDUM

April 22, 2003

**TO:** Clients and Friends

**FROM:** Graubard Miller

**SUBJECT:** New SEC Rules relating to Non-GAAP Financial  
Information and New 8-K Reporting Requirements

As required by Section 401(b) of the Sarbanes-Oxley Act of 2002 (“Act”), the SEC adopted a new set of rules (Regulation G under the Securities Exchange Act) which governs disclosure of non-GAAP financial information. The following is a description of these new rules.

### Disclosure Obligations

Regulation G applies to all public disclosures of non-GAAP financial information (i.e., written or oral) and requires:

- Any presentation of a non-GAAP financial measure to be accompanied by the most directly comparable GAAP measure; together with
- A reconciliation between the non-GAAP measure and the comparable GAAP measure utilized. The reconciliation can be done by schedule or other clearly understandable method. The reconciliation must be quantitative for historic measures and, to the extent possible without unreasonable efforts, for prospective measures.

In addition, Regulation G prohibits misstatements or omissions that would make the presentation of a material non-GAAP financial measure, under the circumstances in which it is made, misleading.

In situations where the disclosure of a non-GAAP financial measure is made orally, such as in a telephonic conference or webcast, the issuer may provide the required accompanying GAAP measure and reconciliation by posting it on its website and disclosing the location and availability of such information during the oral presentation.

## **New Item 10 in Periodic Reports**

Issuers must also comply with the additional requirements that have just been added to Item 10 of Regulations S-K and S-B. Item 10 now requires:

- a statement of the reasons issuer's management believes that presentation of the non-GAAP financial measures provides useful information to investors regarding the issuer's financial condition and results of operations; and
- to the extent material, a statement regarding the additional purposes, if any, for using the non-GAAP financial measures.

Item 10 also will prohibit each of the following types of disclosures in Exchange Act filings:

- presenting a non-GAAP financial measure in a manner that would give it greater authority or prominence than the comparable GAAP financial measure;
- 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 (although companies may present EBITDA subject to the other requirements of Item 10);
- adjusting a non-GAAP performance measure to eliminate or temper 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;
- presenting non-GAAP financial measures on the face of the company's financial statements prepared in accordance with GAAP or in the accompanying notes;
- presenting non-GAAP financial measures on the face of any pro forma financial information required to be disclosed by Article 11 of Regulation S-X; and
- using titles or descriptions of non-GAAP financial measures that are the same as, or confusingly similar to, titles or descriptions used for GAAP financial measures.

## **Definition of a “non-GAAP financial measure”**

A “non-GAAP financial measure” is generally defined as a numerical measure of a company’s historical or future financial performance, financial position or cash flow that:

- excludes certain amounts, or is subject to adjustments that have the effect of excluding certain amounts, that would otherwise be included in the most directly comparable measure calculated and presented in accordance with GAAP in the statement of income, balance sheet or statement of cash flows (or equivalent statements) of the company; or
- includes certain amounts, or is subject to adjustments that have the effect of including certain amounts, that would otherwise be excluded from the most directly comparable measure so calculated and presented.

Examples of non-GAAP financial measures include presentation of EBITDA, which could be calculated using elements derived from GAAP financial presentations but, in any event, is not presented in accordance with GAAP, and operating or net income exclusive of “non-recurring” expenses. Non-GAAP financial measures, however, do not include operating and statistical measures (such as unit sales, number of subscribers and similar information), or ratios or measures that are derived using only (i) GAAP financial measures and (ii) operating or other measures that are not non-GAAP financial measures.

## **Forms 8-K and New Item 12**

The SEC has amended Form 8-K to add a new Item 12, “Disclosure of Results of Operations and Financial Condition,” in order to implement Section 409 of the Act. The addition of Item 12 to Form 8-K will bring earnings information within the current reporting system by requiring companies to furnish to the SEC all releases or announcements disclosing material non-public financial information about completed annual or quarterly fiscal periods. New Item 12 does not require that companies issue earnings releases or similar announcements. However, such releases and announcements will trigger the requirements of Item 12.

Item 12 requires companies to furnish to the SEC a Form 8-K within five business days of any public announcement or release disclosing material non-public information regarding a company’s results of operations or financial condition for an annual or quarterly fiscal period that has ended. The requirements of Item 12 will apply regardless of whether the release or announcement includes disclosure of a non-GAAP financial measure. Item 12 requires the company to identify briefly the announcement or release and include the announcement or release as an exhibit to the Form 8-K.

Item 12 includes an exception from its requirements where non-public information is disclosed orally, telephonically, by webcast, broadcast, or by similar means in a presentation that is complementary to, and occurs within 48 hours after, a related, written release or announcement that triggers the requirements of Item 12. In this

situation, Item 12 would not require the company to furnish an additional Form 8-K with regard to the information that is disclosed orally, telephonically, by webcast, broadcast, or by similar means if:

- the related, written release or announcement has been furnished to the SEC on Form 8-K pursuant to Item 12 prior to the presentation;
- the presentation is broadly accessible to the public by dial-in conference call, web cast or similar technology;
- the information in the web cast is posted on the company's web site, together with any information that would be required under Regulation G; and
- the presentation was announced by a widely disseminated press release that included instructions as to when and how to access the presentation and the location on the company's web site where the information would be available.

The new Item 12 requirements apply to earnings releases and similar announcements made after March 28, 2003.

### **Additional Information**

If you have any questions, please call Brian Ross at (212) 818-8610 or Marci J. Frankenthaler at (212) 818-8892. We intend to provide updates to this memorandum and our previous memoranda regarding the implementation of the provisions of the Sarbanes-Oxley Act of 2002 as warranted at our website [www.graubard.com](http://www.graubard.com). When visiting our website for updates, please review the section entitled "Articles."