

The background of the slide is a blurred image of a financial market data screen. It features green text on a dark background, including stock prices and green upward-pointing arrows. The text is slightly out of focus, creating a sense of depth and activity in the financial markets.

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# **PUBLIC COMPANY ACADEMY**

## **EARNINGS RELEASES, INVESTOR PRESENTATIONS, REG. FD AND FORM 8-K**

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# **EARNINGS RELEASES AND MEETINGS – THE REGULATORY SCHEME**

## Key Provisions

- Regulation FD
- Form 8-K Item 2.02 – Disclosure of Earnings Releases and Announcement of Earnings Calls
- NYSE Requirements
- Regulation G – Non-GAAP Financial Information

# Regulation FD

- History – Selective Disclosure to Analysts
  - One-on-one conferences with analysts
  - Nonpublic earnings calls
- General Provisions
  - Whenever an issuer, or any person acting on its behalf, discloses any material nonpublic information regarding that issuer or its securities to any broker-dealer, investment adviser, investment company, or security holder, if circumstances indicate they are likely to trade, the issuer shall make public disclosure of that information as provided in §243.101(e):
    - (1) Simultaneously, in the case of an intentional disclosure; and
    - (2) Promptly, in the case of a nonintentional disclosure.
  - Does not apply to MNPI given in confidence such that trading would be illegal.
- Releases and earnings calls are subject to Regulation FD and addressed through Item 2.02 disclosure of Form 8-K

# Form 8-K – Disclosure of Earnings Releases

- Relationship to Regulation FD
  - Item 7 Submissions of MNPI
  - Not exclusive. SEC Guidance Re: Public Disclosure via Website Postings and Use of Social Media (August 2008 and April 2013)
- Item 2.02 – Results of Operations and Financial Condition
  - Disclosure and Filing of Earnings Releases
    - If a registrant, or any person acting on its behalf, makes any public announcement or release (including any update of an earlier announcement or release) disclosing MNPI regarding the registrant’s results of operations or financial condition for a completed quarterly or annual fiscal period, the registrant shall disclose the date of the announcement or release, briefly identify the announcement or release and include the text of that announcement or release as an exhibit.
- Form 8-K Filing Not Required if Earnings Disclosed Solely in Form 10-Q/10-K
- Information disclosed under Item 7 or 2.02 is not deemed “filed” for liability purposes, but the disclosures is subject to the non-GAAP provisions of Item 10(e) applicable to Commission filings. Item 8 of Form 8-K is used if incorporation by reference is desired.

## Form 8-K – Announcement of Earnings Calls

- A Form 8-K is not required to be furnished to the Commission under Item 2.02 in the case of disclosure of MNPI that is disclosed orally, telephonically, by webcast, by broadcast, or by similar means on an earnings call if:
  - (1) the information is provided as part of a presentation that is complementary to, and initially occurs within 48 hours after, a related, written announcement or release that has been furnished on Form 8-K pursuant to Item 2.02 prior to the presentation;
  - (2) the presentation is broadly accessible to the public by dial-in conference call, by webcast, by broadcast or by similar means;
  - (3) the financial and other statistical information contained in the presentation is provided on the registrant's website, together with any information that would be required under 17 CFR 244.100; and
  - (4) 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 registrant's website where the information would be available.

# NYSE Requirements for Earnings Releases

- Audit committees must:
  - Discuss the listed company's earnings press releases, as well as financial information and earnings guidance provided to analysts and rating agencies.
    - Commentary: An audit committee's responsibility to discuss earnings releases, as well as financial information and earnings guidance, may be done generally (i.e., discussion of the types of information to be disclosed and the type of presentation to be made). The audit committee need not discuss in advance each earnings release or each instance in which a listed company may provide earnings guidance.
  - Review the type and presentation of information to be included in earnings press releases (paying particular attention to any use of "pro forma," or "adjusted" non-GAAP, information), as well as any financial information and earnings guidance provided to analysts and rating agencies.

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# **NON-GAAP FINANCIAL INFORMATION**

# Regulation G

- Applies to use of “non-GAAP financial measures” in any public disclosure or public release of material information, whether in writing or orally
  - Press releases/earnings releases
  - Company website disclosures
  - Investor calls (such as earnings calls)
  - Registration Statements
  - Free writing prospectuses
- Rule 100(b) of Regulation G prohibits disclosure of a non-GAAP financial measure that, together with disclosures accompanying the non-GAAP financial measure, contains an untrue statement of a material fact or omits to state a material fact necessary in order to make the non-GAAP financial measure not misleading.

## Disclosure Requirements

- Disclosure accompanying a “non-GAAP financial measure” must include:
  - the most directly comparable GAAP financial measure (*financial measures relating to liquidity should be compared to cash flow amounts and financial measures relating to performance should be compared to net income or income from continuing operations*)
  - quantitative reconciliation of the difference between the non-GAAP financial measure and the most directly comparable GAAP financial measure.

## Method of Disclosure

- For earnings release: Provide required GAAP information and reconciliation
  - in the same written public disclosure, or
  - on the company's website at the same time it discloses the non-GAAP measure (*SEC recommends information remain on website for at least 12 months*) and publicizing the company's website address.
- For earnings call: Provide required GAAP information and reconciliation
  - on the company's website before the call begins,
  - stating during the call that the information is on the website, and
  - providing the website address on the call.

## Misleading Non-GAAP Financial Measures

- Exclusion of normal, recurring, cash operating expenses necessary to operate a company's business
- Inconsistent presentations from period to period
- Exclusion of nonrecurring charges but not nonrecurring gains
- Presentation of revenue in any way that is not consistent with GAAP
- Characterization of a charge or gain that is being eliminated as "non-recurring, infrequent or unusual" when the nature of the charge or gain is reasonably likely to recur within two years or there was a similar charge or gain within the prior two years.

# Presentation of Non-GAAP Financial Information

- No full income statement
- Prominence requires:
  - comparable GAAP measure in headline or caption
  - comparable style of presentation (bold, font)
  - GAAP before non-GAAP
  - use of equally prominent descriptive language
  - presence of equally prominent tabular presentation of comparable GAAP measures or of comparable GAAP measures in the same table when non-GAAP measures are presented in a table
  - MD&A discussion about a non-GAAP measure must be accompanied with a comparable GAAP measure discussion in a location with equal or greater prominence

## **Presentation of Non-GAAP Financial Information (cont'd)**

- Include reasons why management believes the presentation of the non-GAAP financial measure provides useful information to investors about the company's financial condition and results of operations.
- Include any additional purposes for which management uses the non-GAAP financial measure that are not otherwise disclosed.

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# **GUIDANCE**

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# Prevalence of Guidance

- Guidance Boom After 1995
  - Private Securities Litigation Reform Act of 1995 (PSLRA)
    - Safe harbor provisions in both 1933 Act and 1934 Act
    - For forward-looking statements (1) identified as such, and (2) accompanied by “meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement.”
  - Guidance continually increased until financial crisis of 2010-2012
  - Returned to highest levels after financial crisis
- National Investor Relations Institute (NIRI) 2016 Survey
  - 94% provide some sort of guidance (407 companies responded)
  - 33% financial only; 9% nonfinancial only; 58% both

# What Is Guidance

- Public companies are not required to give guidance by rules of SEC, NYSE or NASDAQ
- Guidance takes many forms
  - Financial: revenues, net income or EPS, EBITDA or adjusted EBITDA, capital expenditures, and operating expenses/margins
  - Nonfinancial: market and industry conditions, trends and growth, key operating performance measures, and estimated factors that may drive earnings
  - “Comfortable with analysts’ consensus”
- Guidance policy and procedure
  - Best practice is clear guidance policy on what, when, and how and updates
  - Follow careful internal approval procedure for setting guidance; audit committee involvement
  - Disclose guidance in controlled environment; no talking down analysts

## Non-GAAP Financial Guidance

- Non-GAAP guidance often preferable to GAAP guidance
  - Non-GAAP metrics such as adjusted net income or adjusted EBITDA exclude the impact of nonrecurring, noncash, and/or unusual items
  - Adjusted metrics can be easier to project than EPS because they are “normalized” performance measures that are unaffected by such non-recurring items
- Interplay of Reg. FD and Reg. G
  - Public disclosure of forward-looking non-GAAP projections will need to include appropriate disclosure under Reg. G of reconciliation to GAAP numbers
  - However, reconciliation of non-GAAP to GAAP not required by Reg. G if non-GAAP measure is forward-looking and the comparable GAAP measure is not reasonably available

# What and When?

- What and when?
  - Annual guidance - given once at beginning of fiscal year
  - Annual guidance - updated each quarter
  - Quarterly guidance - given for next quarter
  - Annual and quarterly guidance - updated each quarter and given for next quarter
  - Long-term guidance
- NIRI 2016 Study
  - 67% annual; 29% quarterly; 20% long term
- Precautions
  - Carefully tailored cautionary statements
  - Providing a range (NIRI 2016 Study - 62% provided ranges)
  - Material assumptions underlying guidance

# How?

- How to provide guidance?
  - Earnings press release, furnished under Item 2.02 of Form 8-K
  - What about Item 7.01 of Form 8-K?
  - Script – orally on earnings call with no written version
    - Statement in earnings press release that guidance will be given on earnings call
  - Why not in Forms 10-Q and 10-K?
- Investor decks – clear statement that guidance is as of the specific date it was initially provided
  - Quarterly slides in connection with earnings release
    - Maintaining previously posted materials on company’s website is not deemed a reissuance of the information in the materials, and imposes no duty to update
  - Interim period presentations, such as at an investor conference
    - Make clear that guidance was issued as of prior date, and company is not reaffirming
    - Risk of being viewed as reaffirming; delete if not on track; consider deleting if late in quarter

## Updating Prior Guidance – Considerations

- Duty to update?
  - No affirmative duty to update prior guidance under the federal securities law
  - Unclear under case law; consider materiality of new events and whether they render prior guidance materially misleading or inaccurate
- What did company say about updating when the guidance was originally issued?
  - Does it have a clear policy and practice of not updating off cycle?
  - Were assumptions provided?
- What facts have transpired since the original guidance was given?
  - Changes impacting the industry
  - Material change in company performance, positive or negative
  - Unanticipated events: M&A, share repurchase program, litigation settlement
- Are there external events driving the reasons for updating?
  - Upcoming public offering, investor conference, trading by insiders

## Updating Prior Guidance – Specific Situations

- Mid-quarter: company is going to badly miss its previously issued guidance
- Completed quarter before earnings: company exceeds/misses its guidance
  - File under Item 2.02 of Form 8-K
- Before presenting at conference: company wants to prerelease guidance update
- Public offering after guidance update
  - Rule 168 safe harbor for regularly released factual business information or forward-looking statements
- Material M&A or other transaction
- Effect on trading by insiders

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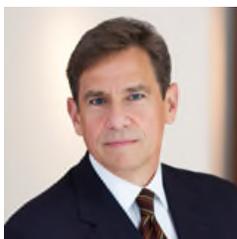
# **SPECIAL SITUATIONS**

## Special Instructions

- Pre-releasing
- Public Offering
  - Rule 168 safe harbor
- Context of M&A Transaction
- Investor Presentations/NonDeal Road Shows
- SEC Review of Earnings Releases
- Reminder – Say on Frequency 8-K Disclosure

**QUESTIONS?**

# Biography



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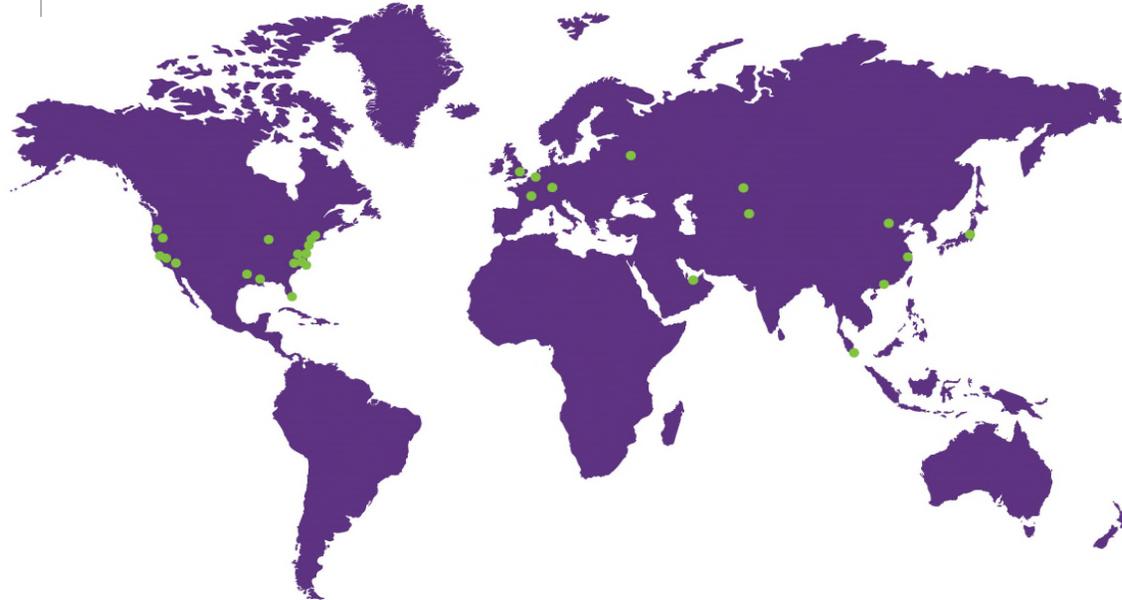
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## Our Global Reach

Africa  
Asia Pacific  
Europe  
Latin America  
Middle East  
North America

## Our Locations

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