



## 608: Understanding the New Financial Reporting Rules

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## Faculty Biographies

### J. Scott Enright

J. Scott Enright is vice president, associate general counsel, and secretary of Emmis Communications Corporation and its subsidiaries in Indianapolis. Emmis is a diversified media firm with award-winning radio broadcasting, television broadcasting, and magazine publishing operations. At Emmis, Mr. Enright focuses on corporate and securities law issues, as well as merger, acquisition, and financing activities. In addition, he manages the day-to-day activities of Emmis' legal department.

Prior to joining Emmis, Mr. Enright was a partner in the Indianapolis law firm of Bose McKinney & Evans and served as an assistant in the Office of Indiana's Lt. Governor John M. Mutz.

Professionally, Mr. Enright has served on the executive committee of the sports and entertainment law section of the Indianapolis Bar Association, as well as being a member of the American Society of Corporate Secretaries and ACC. He is a founder of the United States Knarling Association. In the community, Mr. Enright serves as a deacon at the Second Presbyterian Church, is active with the Carmel Dad's Club, and serves as general counsel of The Milton and Rose D. Friedman Foundation Inc.

Mr. Enright graduated with a BA from St. Olaf College in Northfield, Minnesota and received an MBA and JD from Indiana University-Bloomington's Kelley School of Business and School of Law.

### Stacey K. Geer

Stacey K. Geer is the chief securities counsel of BellSouth Corporation in Atlanta. At BellSouth, she is responsible for SEC filings and securities law compliance, disclosure issues, and public and private financing arrangements.

Prior to that, she was a member of the corporate team, the banking and finance team, and a partner at King & Spalding.

She currently is an active member of the securities law committee of the American Society of Corporate Secretaries and ACC and she serves as secretary of the American Society of Corporate Secretaries. She is a director of the Girl Scout Council of Northwest Georgia.

Ms. Geer received a BS from the Wharton School of the University of Pennsylvania.

She obtained her JD from the UCLA School of Law.


### Thomas L. Riesenberg

Thomas L. Riesenberg is associate general counsel for Ernst & Young, the accounting and professional services firm. He handles a variety of litigation, regulatory, and SEC-related matters for the firm.

Prior to joining Ernst & Young, he served as an assistant general counsel at the U.S. Securities and Exchange Commission, where he primarily worked on appellate and Supreme Court litigation. He received the Manuel F. Cohen Outstanding SEC Younger Lawyer Award. He previously served as a law clerk to U.S. District Judge Barrington D. Parker in Washington, DC, as an attorney at the U.S. Department of Justice, and as an associate at the Washington, DC firm of Arnold & Porter.

Mr. Riesenbergr taught securities law as an adjunct professor of law at the Georgetown University Law Center in Washington, DC, and he has written numerous articles on securities law topics. He is the chair of the law and accounting committee of the ABA business law section, a member of the advisory board of the BNA *Securities Regulation and Law Report*; and chair of the executive council of the Federal Bar Association securities law committee.

He is a graduate of Oberlin College, where he graduated Phi Beta Kappa, and of the New York University School of Law, where he was a member of the *Law Review* and a Root-Tilden Scholar.




**Understanding the New Financial Reporting Rules – Session 608**

**Stacey K. Geer**  
**J. Scott Enright**  
**Thomas L. Riesenber**

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**Agenda**

- MD&A
- PCAOB
- Internal Controls Rulemaking
- Form 8-K
- Non-GAAP Financial Information
- SEC Comment Letters

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## **Introduction to MD&A**

- Item 303 Reg. S-K
- 1989 Interpretative Release
- Plain English
- Fortune 500 Review Process
- December 2003 Interpretative Release

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## **Presentation of MD&A**

- Executive overview
- Tables
- Descriptive headings
- “Layered” approach

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## Content

- Consider: What do Analysts want to know?
- Material trends and uncertainties
  - Identify
  - Explain
  - Project
- Key indicators
  - Financial
  - Non-Financial

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## Liquidity & Capital Resources

- Cash requirements
- Sources and uses of cash
- Debt instruments and covenants
- Cash management

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## Critical Accounting Estimates

- SEC proposed rules
- Identify and project

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## Public Company Accounting Oversight Board

- Overview of organization
- Summary of rulemaking process and initiatives

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## **Registration of Accounting Firms**

- Non-U.S. firm registration issues
- New development: foreign countries requiring U.S. accounting firms to register

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## **Audit Documentation Rule**

- Significant changes from rule proposal to final rule
- How the rule impacts issuers

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## **Inspections**

- Results of 2003 inspections
- 2004 inspection process

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## **What to Expect in Future Months:**

- New restrictions on tax services?
- Other rule proposals/enforcement activities

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## **Section 404 Internal Control Developments**

- Overview of PCAOB rule
- Proposed SEC rule suspending for one year the acceleration of Form 10-K filing deadlines

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## **Progress and Level of Effort**

- Where are most companies in the process?
- What is the level of effort on initial implementation and compliance?

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## Documentation

- How much to document?
- What is the appropriate mix of external specialist assistance and resources?
- What is the most common approach to controls at service organizations?
- How will companies manage significant events occurring at year-end?

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## Testing

- How much testing is necessary?
- Who is doing the testing?

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## Ongoing Compliance

- What are the emerging trends?

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## Some of the Major Concerns Voiced by the Accounting Firms

- Market reaction to “material weaknesses”
- Expectation gap re: internal control reports

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## Form 8-K

- New rule became effective August 23, 2004
- Added 8 new disclosure items
- Requires filing within four business days
- SOX Section 409 requires “rapid and current” disclosure in plain English of material changes in financial condition or operations
- Limited safe harbor

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## “Financial” Form 8-K Items

- 1.01/1.02 – Material definitive agreement
- 2.02 – “Earnings” announcements
- 2.03 – Creation of direct financial obligation or off-balance sheet obligations
- 2.04 – Triggering events that accelerate obligations
- 2.05 – Exit or disposal activities
- 2.06 – Material impairments
- 4.02 – Non-reliance on financial statements

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## 1.01/1.02 – Material definitive agmts

- Requires disclosure of material definitive agmts outside of the ordinary course
- Ties to Reg S-K Item 601
- Need not file until subsequent 10-Q/10-K
- Open questions/issues
  - Letters of intent
  - Stock option grants
  - Revolving credit agreements
  - Termination provisions and cure periods

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## 2.02 – “Earnings” announcements

- Requires filing of a press release that announces a company’s results of operations
- Unchanged from prior requirements, as set forth in the Regulation G release
- Open questions/issues
  - Furnished v. filed
  - Incorporation by reference

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## 2.03 – Direct financial/off-balance sheet oblig

- Requires disclosure of a company becoming obligated under a direct financial obligation that is material to the company
- Exception for public debt offering
- See footnote 66 for off-balance sheet example
- Open questions/issues
  - Credit facility with no borrowing
  - Credit facilities with multiple draws
  - Definition of “materiality”

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## 2.04 – Events that accelerate obligations

- Requires disclosure of the occurrence of a triggering event that:
  - Increases or accelerates a direct financial or off-balance sheet obligation
  - Causes a contingent obligation under an off-balance sheet arrangement to become a direct financial obligation
- Open questions/issues
  - Receipt of notice of acceleration
  - Effect of cure period

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## 2.05 – Exit or disposal activities

- Requires disclosure when the board, board committee or authorized officer(s) commit the company to an exit or disposal plan
- Open questions/issues
  - When has the company “committed”
  - Paper trail of process
  - Inability to make good faith estimate of amount

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## 2.06 – Material impairments

- Requires disclosure when the board, board committee or authorized officer(s) conclude that a material charge for impairment is required under GAAP
- Exception if conclusion is in connection with quarterly or annual financial stmts
- Open questions/issues
  - When has the company “concluded”
  - Paper trail of process
  - Inability to make good faith estimate of amount

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## 4.02 – Non-reliance on financial stmts

- Requires disclosure if:
  - The board, board committee or authorized officer(s) concludes that any of the company's previously issued financial stmts should no longer be relied upon because of an error
  - The company is advised by or receives notice from independent accountant that it is necessary to prevent future reliance on a previously issued audit report or completed interim review related to previously issued financial stmts

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## Non-GAAP Financial Information

- Regulation G
- Item 10 of Reg. S-K (Form 20-F)
- Form 8-K

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## Regulation G: Required Disclosure

- Directly comparable GAAP measure
- Quantitative reconciliation
- No misleading non-GAAP measures

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## GAAP vs. Non-GAAP

- Non-GAAP financial measures
- “Directly comparable” GAAP measures
- Non-financial measures
- Ratios
- Tables
- Business combination disclosures
- Foreign private issuer disclosure
- Consequences of violating Reg. G

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## Item 10 of Reg. S-K (Form 20-F)

- Applies to “filings with the SEC”
- Equal or greater prominence
- Quantitative reconciliation
- Disclose why non-GAAP measure is useful
- Disclose management’s use of non-GAAP measure

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## Item 10: Prohibitions

- Excluding charges/liabilities settled in cash from Non-GAAP liquidity measure
- Adjusting performance measure for “nonrecurring” items
- Presenting non-GAAP measures on face of financials or notes
- Presenting non-GAAP measure on face of pro formas
- Misleading titles/description of non-GAAP measures

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## **Item 10 “Potpourri”**

- EBIT & EBITDA
- Non-GAAP measures in MD&A

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## **Item 12 of Form 8-K**

- Disclosure of financial information for completed period
  - Earnings releases
  - Earnings calls
  - Investor presentations
- Furnished vs. filed
- Non-GAAP financial measures


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Regulation G: Any public statement containing NGFMs	8-K filing requirements: Any release or announcement of historical earnings	SEC filings containing NGFMs
<ul style="list-style-type: none"> <li>• Comparable GAAP measure</li> <li>• Reconciliation to the comparable GAAP measure</li> </ul>	<p>File an 8-K within 5 days, and if contains a NGFM, add:</p> <ul style="list-style-type: none"> <li>• Comparable GAAP measure of equal or greater prominence</li> <li>• Reconciliation to the comparable GAAP measure</li> <li>• Statement as to reasons why management believes NGFM is useful</li> <li>• Statement as to additional uses of NGFM, if any (together with the prior item, the "Statements")</li> </ul> <p>Safe Harbor for additional info:</p> <ul style="list-style-type: none"> <li>• Earnings released furnished on an 8-K before the call</li> <li>• Call occurs with 48 hours after 8-K is furnished</li> <li>• Call broadly accessible</li> <li>• Information discussed on the call, plus Regulation G disclosure, is posted on web site</li> <li>• Call announced in a press release with information as to how to access call and location of web site posting of information described in preceding item</li> </ul>	<ul style="list-style-type: none"> <li>• Comparable GAAP measure of equal or greater prominence</li> <li>• Reconciliation to the comparable GAAP measure</li> <li>• Statement as to reasons why management believes NGFM is useful</li> <li>• Statement as to additional uses of NGFM, if any</li> <li>• Prohibitions:                         <ul style="list-style-type: none"> <li>• Excluding charges or liabilities that are cash settled from a liquidity measure</li> <li>• Adjusting a performance measure for a nonrecurring measure that is reasonably likely to recur</li> </ul> </li> <li>• Presenting NGFM on face of financials</li> <li>• Presenting NGFM on face of pro formas</li> <li>• Misleading titles or descriptions of NGFMs</li> </ul>

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Press release without NGFMs	If historical earnings are addressed	File on an 8-K within 5 days after release
Press release with NGFMs	If historical earnings are addressed	Comply with Regulation G (though this is superseded by the items covered in the next sentence) File release on an 8-K, and comply with rules for NGFMs with reconciliations in the release (required by Regulation G) and the other items (the Statements) addressed in the release or in the body of the 8-K
Earnings call	If any material information will be covered that is not addressed in the earnings release	Choice: File transcript on an 8-K within 5 days after the call <b>Before the call, file the earnings release on an 8-K and post the NGFM and any other new information (not in the release) on the web site (assuming other elements of the Safe Harbor are met). If a NGFM is addressed inadvertently, post on the web site immediately after call</b>
Earnings call	If nothing new will be covered and the earnings release was filed before the call	Nothing more needs to be done. If a NGFM or other material information is addressed inadvertently, file an 8-K with the information. At this point it is too late to rely on the Safe Harbor
Press release without NGFM	If future guidance	Do nothing
Press release with NGFM	If future guidance	Comply with Regulation G (no need to file it on an 8-K)

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## **SEC Comment Letters**

- Public availability
  - GSI Online
  - SEC website
- Recent areas of emphasis