



SEC Staff Issues New C&DIs Regarding Non-GAAP Measures in Business Combination Context

Oct 24, 2017

Reading Time : **2 min**

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In business combination transactions, companies often include non-GAAP projections and forecasts in SEC filings to satisfy their duty of disclosure under state law, to comply with specific SEC disclosure requirements or to avoid material omission claims. At the same time, Item 10(e)(5) of Regulation S-K and Rule 101(a)(3) of Regulation G exclude from their purview any non-GAAP financial measures that are required to be disclosed by GAAP, SEC rules, or regulations of a government or self-regulatory organization applicable to the registrant. This exclusion allows a registrant to disclose non-GAAP measures without having to also include additional disclosures otherwise required by Item 10(e) of Regulation S-K and Regulation G. For example, a registrant relying on this exclusion may consider an omission of the most directly comparable GAAP measure, a reconciliation of the non-GAAP measure to the comparable GAAP measure or an explanation of the reason that its management believes that the non-GAAP financial measure provides investors with useful information.

Prior to the issuance of this new guidance, however, uncertainty existed as to whether this exemption applied to disclosures of non-GAAP projections to a financial advisor for the purpose of rendering a fairness opinion on a business combination. This uncertainty resulted in inconsistencies among registrants when it came to making such disclosures, as well as inconsistent responses from the SEC Staff to such disclosures. In C&DI 101.01, the SEC Staff clarifies that financial measures provided to a financial advisor in a business combination transaction are excluded from the definition of non-GAAP measures (and are therefore not subject to Item 10(e) of Regulation S-K and Regulation G) if the following conditions are met: (1) the financial measures are included in forecasts provided to the financial advisor for the

purpose of rendering an opinion that is materially related to the business combination transaction; and (2) the forecasts are being disclosed in order to comply with Item 1015 of Regulation M-A, which generally requires a summary of any fairness opinion received in connection with the transaction, or requirements under state or foreign law, including case law, regarding disclosure of the financial advisor's analyses or substantive work.

Additionally, the SEC Staff revised C&DI 101.02 (previously Question 101.01) to delete certain language made unnecessary in light of the new C&DI 101.01. In C&DI 101.02, the SEC Staff makes it clear that the exemption from Regulation G and Item 10(e) of Regulation S-K for non-GAAP financial measures that are disclosed in business combination-related communications subject to Securities Act Rule 425 and Exchange Act Rules 14a-12, 14d-2(b)(2) and 14d-9(a)(2) do not extend to the same non-GAAP financial measures disclosed in registration statements, proxy statements and tender offer statements (which are only exempt in such filings under the conditions described in C&DI 101.01).

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