



Important CD&A Reminder:

Use of Non-GAAP Performance Measures

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Another quick reminder about proxy disclosure and the use of non-GAAP performance measures in your CD&A.

In July of last year, the SEC staff issued a Compliance and Disclosure Interpretation (C&DI) covering the disclosure in the CD&A of “non-GAAP” financial measures. When the non-GAAP measure is disclosed as the target level of performance for an incentive plan, disclosure must be provided as to how the number is calculated from audited financial statements. However, if a non-GAAP measure is disclosed in the CD&A and is not a target measure (for example it is used in the CD&A or other parts of the proxy to explain the relationship between pay and performance or justify certain levels or amounts of pay), then disclosure of the non-GAAP measure is subject to the more onerous requirements of Regulation G and Item 10(e) of Regulation S-k.

Under these requirements, public companies that disclose or release such non-GAAP financial measures are required to include, in that disclosure or release, a presentation of the most directly comparable GAAP financial measure and a reconciliation of the disclosed non-GAAP financial measure to the most directly comparable GAAP financial measure. The SEC staff has indicated that in these limited pay-related instances this disclosure is not required to be included in the CD&A itself. Alternatively the reconciliation can be included in a cross-referenced annex to the proxy or, if already disclosed in the 10-k that incorporates the proxy, a specific page cross reference should suffice. General reference to the 10-k, company website, or earnings release will not suffice.

A possible disclosure of a non-GAAP financial measure should be discussed with General Counsel to determine the appropriate course of action for your company’s specific circumstances.

ABOUT THE AUTHOR

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