

SEC Finds Violation of “Equal or Greater Prominence” Requirement of the Non-GAAP Disclosure Rules

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The SEC instituted a [cease-and-desist proceeding](#) in a fairly straightforward enforcement action that nonetheless emphasizes the importance of the requirement that GAAP measures must be provided with “equal or greater prominence” when a company discloses non-GAAP measures.

The SEC found that a company provided non-GAAP financial measures, such as adjusted EBITDA, adjusted net income and free cash flow before special items, without giving equal or greater prominence to the comparable GAAP measures.

In the headline for the FY 2017 earnings release, the company presented its adjusted EBITDA for the fiscal year and stated that it was up 8% year-over-year, without mentioning its net income or loss (the comparable GAAP financial measure) in the headline.

Similarly, in the headline for the Q1 2018 earnings release, the company presented its adjusted EBITA for the first quarter of 2018 and stated that it was up 7% year-over-year, without mentioning its net income or loss (the comparable GAAP financial measure) in the headline. On the top of the first page, in a section called “Highlights,” the company then listed nine bullet points about the first quarter, including bullet points that provided adjusted EBITDA, adjusted net income and adjusted net income per share. These three non-GAAP financial measures were not accompanied by comparable GAAP measures in the same section. The GAAP measures were instead reported in the second and sixth full paragraphs of the earnings release.

As a result, the Commission found that the company violated Section 13(a) of the Exchange Act and ordered a civil penalty as well as a cease-and-desist order.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

Ning Chiu

+1 212 450 4908

ning.chiu@davispolk.com

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