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Reminder: SEC Interpretation on Reconciliation for Use of Non-GAAP Measures in CD&As

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As companies are in the midst of preparing their proxy statements, some may have forgotten an interpretation that the SEC Staff issued last summer regarding the use of non-GAAP financial measures in CD&As that could affect your disclosure. **The CDI in Question 118.08** indicates that if the non-GAAP financial measure is not a target level that is subject to exemption from the non-GAAP disclosure rules, but rather, included in CD&A or other parts of the proxy statement to perhaps explain the company's results in relation to compensation paid, then some form of GAAP reconciliation is necessary.

While the company could include the GAAP reconciliation in the CD&A itself, the Staff appeared to recognize that could prove cumbersome and distracting, and therefore the Staff is permitting companies to, in this particular circumstance:

- Include the required GAAP reconciliation and other information in an annex to the proxy statement and provide a prominent cross-reference to the annex; or
- If the non-GAAP financial measures are the same as those included in the Form 10-K that is incorporating Part III information from the proxy statement, provide a prominent cross-reference to the pages of the Form 10-K containing the GAAP reconciliation and other information.

Merely referring to the company's website, earnings release or the Form 10-K generally is not sufficient.

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.

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