LUSE GORMAN

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SEC Guidance and Non-GAAP Measures

The U.S. Securities and Exchange Commission ("SEC") Division of Corporation Finance recently issued a set of new and revised Compliance and Disclosure Interpretations ("C&DI") regarding the use of non-GAAP financial measures in SEC filings and earnings releases. Regulation G and Section 10(e) of Regulation S-K currently require reporting companies to present the most directly comparable GAAP measure with equal or greater prominence when presenting a non-GAAP measure. In the new C&DI, the SEC enumerated several examples of uses of a non-GAAP measure that would cause a non-GAAP measure to be more prominent:

- Omitting comparable GAAP measures from an earnings release headline or caption that includes non-GAAP measures;
- Presenting a non-GAAP measure using a style of presentation (e.g., bold, larger font) that emphasizes the non-GAAP measure over the comparable GAAP measure;
- A non-GAAP measure that precedes the most directly comparable GAAP measure (including in an earnings release headline or caption);
- Describing a non-GAAP measure as, for example, "record performance" or "exceptional" without at least an equally prominent descriptive characterization of the comparable GAAP measure;
- Presenting a full income statement of non-GAAP measures or presenting a full non-GAAP income statement when reconciling non-GAAP measures to the most directly comparable GAAP measures;
- Providing tabular disclosure of non-GAAP financial measures without preceding it with an equally prominent tabular disclosure of the comparable GAAP measures or including the comparable GAAP measures in the same table; and
- Providing discussion and analysis of a non-GAAP measure without a similar discussion and analysis of the comparable GAAP measure in a location with equal or greater prominence.

The C&DI also discuss certain adjustments that may cause non-GAAP measures to be misleading, in violation of SEC regulations, including:

- Presenting a performance measure that excludes normal, recurring, cash operating expenses necessary to operate a registrant's business;

- Inconsistently presenting a measure between periods, such as adjusting a particular charge or gain in the current period and for which other, similar charges or gains were not also adjusted in prior periods;

- Presenting a measure that excludes non-recurring charges, but does not exclude non-recurring gains that occurred during the same period; and

- Substituting individually tailored revenue recognition and measurement methods for those of GAAP.

In connection with earnings releases and quarterly reports for the quarter ending June 30, 2016 and thereafter, reporting companies need to take into consideration the views of the SEC, as reflected in the revised C&DI, when presenting non-GAAP financial measures.

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Luse Gorman, PC is a Washington, D.C based law firm specializing in the representation of financial institutions. We advise clients located throughout the nation, ranging in size from small community based financial institutions to multinational banks. We are recognized as a national leader in capital offerings, mergers and acquisitions and restructuring transactions. In this regard, we have been consistently ranked in the "Top 10" law firms nationally in merger and acquisition transactions and we were ranked Number 1 in 2015, 2012, 2011 and 2009. Please contact any of our attorneys below if you would like to discuss this article.

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