CAQ Alert 2023-01:

Updates to SEC Non-GAAP Financial Measures Compliance and Disclosure Interpretations (C&DIs)

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On December 13, 2022, the SEC's Division of Corporation Finance posted an update to Non-GAAP Financial Measures Compliance & Disclosure Interpretations (C&DI) Questions 100.01, 100.04 – 100.06, and 102.10(a)(b)(c). The updates, the first since 2016 when the C&DIs were last significantly expanded, reflect the staff's views that have been communicated in comment letters in recent years. The updates emphasize the staff's position that the determination of whether an adjustment results in a misleading non-GAAP measure depends on a company's individual facts and circumstances. The purpose of this alert is to provide an overview of the updates as well as a detailed comparison of the previous and new C&DIs.

OVERVIEW OF THE UPDATES

Question 100.01 (Updated)

+ Emphasizes the staff's view that presenting a non-GAAP performance measure that excludes normal, recurring, cash operating expenses necessary to operate a registrant's business could be considered misleading.

+ Notes that when evaluating what is a normal, operating expense, the staff considers the nature and effect of the non-GAAP adjustment and how it relates to the company's operations, revenue generating activities, business strategy, industry and regulatory environment.

+ Specifies that the staff would view an operating expense that occurs repeatedly or occasionally, including at irregular intervals, as recurring.

Question 100.4 (Updated/New)

+ Emphasizes that non-GAAP adjustments that have the effect of changing the recognition and measurement principles required to be applied in accordance with GAAP would be considered as an individually tailored accounting principle (ITAP) and may cause the presentation of a non-GAAP measure to be misleading.

+ Provides an expanded list of ITAPs that the staff may consider misleading, beyond the revenue adjustments emphasized in the staff's previous Question 100.4 (see detailed list below).

Question 100.05 (New)

+ Clarifies that a non-GAAP measure can be misleading if it, and/or any adjustment made to the GAAP measure, is not appropriately labeled and clearly described.

+ Provides specific examples of disclosures that would violate Rule 100(b) of regulation G (see detailed list below).

Question 100.06 (New)

+ Expresses the staff's view that a non-GAAP measure can be misleading, and violate Rule 100(b) of Regulation G, even if it is accompanied by disclosure about the nature and effect of each adjustment made to the most directly comparable GAAP measure.

Question 102.10 (Updated)

Question 102.10(a)

+ Provides examples of non-GAAP measures that the staff would consider to be more prominent than the comparable GAAP measures (see detailed list below).

Question 102.10(b)

+ Provides examples of disclosures that would cause the non-GAAP reconciliation required by Item 10(e)(1)(i)(B) of Regulation S-K to give undue prominence to a non-GAAP measure (see detailed list below).

Question 102.10(c)

+ States that the staff considers the presentation of a non-GAAP income statement, alone or as part of the required non-GAAP reconciliation, as giving undue prominence to non-GAAP measures.

+ Clarifies that the staff considers a non-GAAP income statement to be one that is comprised of non-GAAP measures and includes all or most of the line items and subtotals found in a GAAP income statement.

DETAILED COMPARISON OF UPDATES TO PREVIOUS C&DIs

Question 100.01

Question: Can certain adjustments, although not explicitly prohibited, result in a non-GAAP measure that is misleading?

Answer: Yes. Certain adjustments may violate Rule 100(b) of Regulation G because they cause the presentation of the non-GAAP measure to be misleading. ~~For example, presenting a~~ Whether or not an adjustment results in a misleading non-GAAP measure depends on a company's individual facts and circumstances.

Presenting a non-GAAP performance measure that excludes normal, recurring, cash operating expenses necessary to operate a registrant's business is one example of a measure that could be misleading.

When evaluating what is a normal, operating expense, the staff considers the nature and effect of the non-GAAP adjustment and how it relates to the company's operations, revenue generating activities, business strategy, industry and regulatory environment.

The staff would view an operating expense that occurs repeatedly or occasionally, including at irregular intervals, as recurring. [December 13, 2022]

Question 100.04

Question: ~~A registrant presents a non-GAAP performance measure that is adjusted to accelerate revenue recognized ratably over time in accordance with GAAP as though it earned revenue when customers are billed. Can this measure be presented in documents filed or furnished with the Commission or provided elsewhere, such as on company websites?~~ Can a non-GAAP measure violate Rule 100(b) of Regulation G if the recognition and measurement principles used to calculate the measure are inconsistent with GAAP?

Answer: ~~No. Non-GAAP measures that substitute individually tailored revenue recognition and measurement methods for those of GAAP could violate Rule 100(b) of Regulation G. Other measures that use individually tailored recognition and measurement methods for financial statement line items other than revenue may also violate Rule 100(b) of Regulation G.~~ Yes. By definition, a non-GAAP measure excludes or includes amounts from the most directly comparable GAAP measure. However, non-GAAP adjustments that have the effect of changing the recognition and measurement principles required to be applied in accordance with GAAP would be considered individually tailored and may cause the presentation of a non-GAAP measure to be misleading. Examples the staff may consider to be misleading include, but are not limited to:

+ changing the pattern of recognition, such as including an adjustment in a non-GAAP performance measure to accelerate revenue recognized ratably over time in accordance with GAAP as though revenue was earned when customers were billed;

+ presenting a non-GAAP measure of revenue that deducts transaction costs as if the company acted as an agent in the transaction, when gross presentation as a principal is required by GAAP, or the inverse, presenting a measure of revenue on a gross basis when net presentation is required by GAAP; and

+ changing the basis of accounting for revenue or expenses in a non-GAAP performance measure from an accrual basis in accordance with GAAP to a cash basis. [December 13, 2022]

Question 100.05 (New)

Question: Can a non-GAAP measure be misleading if it, and/or any adjustment made to the GAAP measure, is not appropriately labeled and clearly described?

Answer: Yes. Non-GAAP measures are not always consistent across, or comparable with, non-GAAP measures disclosed by other companies. Without an appropriate label and clear description, a non-GAAP measure and/or any adjustment made to arrive at that measure could be misleading to investors. The following examples would violate Rule 100(b) of regulation G:

+ Failure to identify and describe a measure as non-GAAP.

+ Presenting a non-GAAP measure with a label that does not reflect the nature of the nonGAAP measure, such as:

  - a contribution margin that is calculated as GAAP revenue less certain expenses, labeled “net revenue”;

  - non-GAAP measure labeled the same as a GAAP line item or subtotal even though it is calculated differently than the similarly labeled GAAP measure, such as “Gross Profit” or “Sales”; and

  - a non-GAAP measure labeled “pro forma” that is not calculated in a manner consistent with the pro forma requirements in Article 11 of Regulation S-X. [December 13, 2022]

Question 100.06 (New)

Question: Can a non-GAAP measure be misleading, and violate Rule 100(b) of Regulation G, even if it is accompanied by disclosure about the nature and effect of each adjustment made to the most directly comparable GAAP measure?

Answer: Yes. It is the staff’s view that a non-GAAP measure could mislead investors to such a degree that even extensive, detailed disclosure about the nature and effect of each adjustment would not prevent the non-GAAP measure from being materially misleading. [December 13, 2022]

Question 102.10

Question 102.10(a): Item 10(e)(1)(i)(A) of Regulation S-K requires that when a registrant presents a non-GAAP measure it must present the most directly comparable GAAP measure with equal or greater prominence. This requirement applies to non-GAAP measures presented in documents filed with the Commission and also earnings releases furnished under Item 2.02 of Form 8-K. Are there examples of disclosures that would cause a non-GAAP measure to be more prominent?

Answer: ~~Yes. Although whether~~ Yes. This requirement applies to the presentation of, and any related discussion and analysis of, a non-GAAP measure. Whether a non-GAAP measure is more prominent than the comparable GAAP measure generally depends on the facts and circumstances in which the disclosure is made~~, the~~. The staff would consider the following to be examples of ~~disclosure of~~ non-GAAP measures ~~as~~ that are more prominent than the comparable GAAP measures:

+ Presenting ~~a full~~ an income statement of non-GAAP measures ~~or presenting~~. See Question 102.10(c).

+ Presenting a ~~full~~ non-GAAP ~~income statement when reconciling non-GAAP measures to~~ measure before the most directly comparable GAAP ~~measures;~~ measure or omitting the comparable GAAP measure altogether, including in an earnings release headline or caption that includes a non-GAAP measure.

+ ~~Omitting comparable GAAP measures from an earnings release headline or caption that includes non-GAAP measures;~~

+ Presenting a ratio where a non-GAAP financial measure is the numerator and/or denominator without also presenting the ratio calculated using the most directly comparable GAAP measure(s) with equal or greater prominence.

+ Presenting a non-GAAP measure using a style of presentation (e.g., bold, larger font~~)~~, etc.) 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.

+ ~~Providing tabular disclosure~~ Presenting charts, tables or graphs of non-GAAP financial measures without ~~preceding it with an equally prominent tabular disclosure~~ presenting charts, tables or graphs of the comparable GAAP measures ~~or including~~ with equal or greater prominence, or omitting the comparable GAAP measures ~~in the same table;~~ altogether.

+ ~~Excluding a quantitative reconciliation with respect to a forward-looking non-GAAP measure in reliance on the "unreasonable efforts" exception in Item 10(e)(1)(i)(B) without disclosing that fact and identifying the information that is unavailable and its probable significance in a location of equal or greater prominence; 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. [December 13, 2022]

Question 102.10(b): Are there examples of disclosures that would cause the non-GAAP reconciliation required by Item 10(e)(1)(i)(B) of Regulation S-K to give undue prominence to a non-GAAP measure?

Answer: Yes. The staff would consider the following examples of disclosure of non-GAAP measures as more prominent than the comparable GAAP measures:

+ Starting the reconciliation with a non-GAAP measure.

+ Presenting a non-GAAP income statement when reconciling non-GAAP measures to the most directly comparable GAAP measures. See Question 102.10(c).

+ When presenting a forward-looking non-GAAP measure, a registrant may exclude the quantitative reconciliation if it is relying on the exception provided by Item 10(e)(1)(i)(B) of Regulation S-K. A measure would be considered more prominent than the comparable GAAP measure if it is presented without disclosing reliance upon the exception, identifying the information that is unavailable, and its probable significance in a location of equal or greater prominence. [December 13, 2022]

Question 102.10(c): The staff considers the presentation of a non-GAAP income statement, alone or as part of the required non-GAAP reconciliation, as giving undue prominence to non-GAAP measures. What is considered to be a non-GAAP income statement?

Answer: The staff considers a non-GAAP income statement to be one that is comprised of non-GAAP measures and includes all or most of the line items and subtotals found in a GAAP income statement. [December 13, 2022]

ADDITIONAL INFORMATION

The following additional resources on Non-GAAP measures that can be found on the CAQ's website:

+ Questions on Non-GAAP Measures: A Tool for Audit Committees
+ Non-GAAP Financial Measures: Continuing the Conversation
+ Non-GAAP Measures: A Roadmap for Audit Committees
+ The Role of Auditors in Non-GAAP Financial Measures and Key Performance Indicators: Present and Future