

INSIGHTS

SEC Penalizes Issuer for Presenting Non-GAAP Financial Measures Without Giving Equal Prominence to GAAP Measures

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In a cease-and-desist order dated December 26, 2018, the Securities and Exchange Commission enforced rules regarding the disclosure of non-GAAP financial measures, resulting in a \$100,000 penalty to the violating issuer. With earnings season approaching, this enforcement action provides a timely reminder that the Commission remains focused on disclosure of non-GAAP financial measures.

Item 10(e)(1)(i)(A) of Regulation S-K provides that an issuer, when including a non-GAAP financial measure in a filing with the Commission, must include a presentation, with equal or greater prominence, of the most directly comparable financial measure or measures calculated and presented in accordance with GAAP.

The Commission found that the issuer failed to satisfy this “prominence” requirement in two of its earnings releases:

- In the headline of an earnings release, the issuer presented its adjusted EBITDA (a non-GAAP financial measure) for the fiscal year and stated that adjusted EBITDA was up 8% year-over-year, without mentioning the issuer’s net income or loss (the comparable GAAP financial measure) in the headline;
- In the headline of a subsequent quarterly earnings release, the issuer presented its adjusted EBITDA for the quarter and stated that adjusted EBITDA was up 7% year-over-year, without mentioning the issuer’s net income or loss in the headline; and
- In its quarterly earnings release, the issuer listed “FIRST QUARTER 2018 HIGHLIGHTS,” including bullet points noting (with dollar amounts) that adjusted EBITDA was up 7%, adjusted net income was up 26%, and adjusted net income per share was up 10%, without providing comparable GAAP financial measures for net income or loss in the HIGHLIGHTS section.

It is worth noting that there was no suggestion in the Commission’s order that the issuer formulated any non-GAAP measure in a misleading manner, or used it inconsistently.

The full text of the Commission’s enforcement action is available [here](#).