

October 18, 2017

SEC Issues Guidance on Non-GAAP Financial Measures in Business Combination Projections

On October 17, 2017, the SEC's Division of Corporation Finance issued new guidance clarifying the circumstances under which financial forecasts included in registration statements, proxy statements or tender offer statements relating to a business combination are not subject to Item 10(e) of Regulation S-K or Regulation G.

Target corporations in M&A transactions frequently disclose management projections upon which a target corporation's board and financial advisor have relied. Corporations often include these forecasts in M&A disclosure documents to satisfy directors' duty of candor under state law.

Prior to the issuance of this new guidance, the application of Item 10(e) of Regulation S-K and Regulation G to non-GAAP financial projections disclosed in business combinations was unclear. The staff's new guidance notes that both Item 10(e) and Regulation G exclude from the definition of non-GAAP financial measure any financial measures required to be disclosed by GAAP, SEC rules, or a system of regulation of a government or governmental authority or self-regulatory organization that is applicable to the registrant. The guidance further states that financial measures provided to a financial advisor are not non-GAAP financial measures, if and to the extent: (1) the financial measures are included in forecasts provided to the financial advisor for the purpose of rendering an opinion that is materially related to the business combination transaction; and (2) the forecasts are being disclosed in order to comply with Item 1015 of Regulation M-A or requirements under state or foreign law, including case law, regarding disclosure of the financial advisor's analyses or substantive work. Thus, so long as these two conditions are satisfied, the guidance should provide comfort to M&A deal parties that the disclosure of management projections in merger registration statements, proxy statements and tender offer statements would not be subject to Item 10(e) of Regulation S-K and Regulation G. Although the guidance will most frequently be used for the disclosure of target company projections, it could apply as well to a buyer's projections provided to its financial advisor for purposes of obtaining a fairness opinion it disclosed to its stockholders.

The full text of the new and revised C&DIs (Questions 101.01 and 101.02) is available [here](#).