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SEC Moves to Enforce "Equal or Greater Prominence" in Financial Disclosures Containing Non-GAAP Information

January 24, 2019 | In December 2018, the Securities and Exchange Commission (SEC) announced it had entered into a settlement with ADT Inc. after finding the company had emphasized non-GAAP financial measures above comparable GAAP measures in two earnings releases. The Commission imposed a $100,000 fine for violation of Section 13(a) of the Securities Exchange Act of 1934, which, through application of Regulation S-K, requires GAAP financial measures to have "equal or greater prominence" as non-GAAP information within a company's filings.

Public companies often include non-GAAP financial information in their earnings reports and operational results. Non-GAAP financial figures – such as earnings before interest and taxes (EBIT) and earnings before interest, taxes, depreciation, and amortization (EBITDA) – can be beneficial in sharing a comprehensive picture of company performance with investors and shareholders. However, SEC-issued guidance requires companies to a) reconcile GAAP and non-GAAP disclosures; and b) disclose its rationale for presenting non-GAAP figures. Further, Item 10(e) of Regulation S-K requires that comparable GAAP information be presented with "equal or greater prominence" as non-GAAP information.

The ADT settlement signals a turning point for SEC enforcement of the "equal or greater prominence" measure. In the past, the Commission has typically used comment letters to address noncompliance related to non-GAAP disclosures. Now, it appears, the SEC is prepared to bring enforcement actions – up to and including fines – to companies who fail to meet disclosure standards.

The recent settlement should serve as a reminder for companies to review the SEC-issued guidance on non-GAAP disclosures and consider how the guidance may apply to other reporting and compliance efforts, as well.

The complete ruling can be found here.

For questions or more information on SEC reporting compliance, please contact Fairchild Morgan Law online (www.fairchildmorgan.com) or by phone (312) 788-2655.