Non-GAAP Financial Measures in Advertising

Pursuant to Regulation S-K, financial statements must be prepared in accordance with generally accepted accounting principles (GAAP). However, issuers also commonly advertise their offerings by using other financial measures, often referred to as "non-GAAP" measures. For example, real estate investment trusts might publish advertising that discloses their Net Asset Value, Cash Available for Distribution, and Modified Funds from Operations, among others. Each of these is a non-GAAP measure.

Both Regulation G and Item 10(e) of Regulation S-K require issuers to accompany non-GAAP measures with the most directly comparable GAAP financial measure, and a quantitative reconciliation of the non-GAAP measure to its GAAP counterpart. Many, including SEC enforcement officials and the Canadian Securities Administrator, have recently emphasized the importance of similar reconciliation requirements.

While the Division reviews offerings and related sales material using its own standard and not the SEC rules,[1] it agrees with the SEC regarding the reliability and usefulness of GAAP measures and the importance of independent auditors. Accordingly, issuers submitting offering material to the Division using non-GAAP financial measures should expect comments requiring them to accompany such non-GAAP measures with the most directly comparable GAAP financial measure and a reconciliation between the two.

Disclosure of Select Financial Information

Additionally, the Division believes it is misleading to advertise select (as opposed to complete) GAAP financial information, or to exaggerate the prominence of certain financial measures (which usually paint a favorable picture) while downplaying other relevant measures. While the Division reviews advertising material on a case-by-case basis, it will comment on advertising that employs the potentially misleading practices described above. For example, the Division would issue an objection to an issuer that prominently advertises its growth in total assets but refrains from disclosing the growth largely corresponds to an increase in its leverage, or an issuer that discloses an increase in its revenue without revealing it also incurred net losses, or significant expenses.

[1] The Division may suspend a registration (or refuse to grant an application to register) by coordination if it finds the proposed offer or disposition is on grossly unfair terms or the plan of issuance and sale of securities would defraud or deceive, or tend to defraud or deceive, purchasers. See Ohio Revised Code Sections 1707.01(Q)(3), 1707.09, 1707.091, and 1707.13.