

Earnings Releases, Non-GAAP Financial Measures and SEC Enforcement: Pay Attention to Your Headings and Bullet Points

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On December 26, 2018, the Securities and Exchange Commission (“SEC”) entered a Cease-and-Desist Order (see [here](#)) against ADT Inc. (“ADT”) pursuant to Section 21C of the Securities Exchange Act of 1934 (the “Exchange Act”) based on ADT’s failure to give equal or greater prominence to comparable GAAP financial measures in two of its earnings releases containing non-GAAP financial measures.

Specifically, in its FY 2017 and Q1 2018 earnings releases, ADT provided non-GAAP financial measures, such as adjusted EBITDA, adjusted net income, and free cash flow before special items, without giving equal or greater prominence to the comparable GAAP financial measures. The non-GAAP financial measures were presented in the earnings releases’ headlines and in bullet points in the “Highlights” sections on the top of the first page. ADT did not include comparable GAAP financial measures in the headlines or the bullet points.

As noted in the Order, Item 10(e)(1)(i)(A) of Regulation S-K requires an issuer, when including a non-GAAP financial measure in a filing with the SEC, to include a presentation, with equal or greater prominence, of the most directly comparable financial measure or measures calculated and presented in accordance with GAAP. Instruction 2 of Item 2.02 of Form 8-K states that the “requirements of paragraph (e)(1)(i) of Item 10 of Regulation S-K . . . shall apply to disclosures under this Item 2.02.”

As a result of its conduct, ADT agreed to pay a civil penalty of \$100,000 and to cease and desist from committing or causing any violations or future violations of Section 13(a) of the Exchange Act and Rule 13a-11. Although the penalty was not significant, this is a reminder that the SEC is continuing to police disclosures of non-GAAP financial measures and that the use of such measures in earnings release headlines or bullet points is not exempt from the “equal or greater prominence” requirement.

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