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July 29, 2019

Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: Council of Institutional Investors Petition for Rulemaking Regarding Disclosures on Use of Non-GAAP Financials in Proxy Statement CD&As

Dear Madam Secretary:

On April 29, 2019, the Council of Institutional Investors (CII) submitted a petition to the Securities and Exchange Commission (Commission or SEC) requesting that the Commission:

1) Initiate a rule change to amend Item 402(b) of Regulation S-K [17 CFR 229.402(b)] under the Securities Act of 1933 (Securities Act) to eliminate Instruction 5; and

2) Revise the Division of Corporation Finance's Compliance & Disclosure Interpretations on "Non-GAAP Financial Measures" consistent with the aforementioned amendment and to provide that all non-GAAP financial measures presented in the proxy statement Compensation Discussion & Analysis (CD&A) be subject to the requirements of Regulation G [17 CFR 244.101-102] and Item 10(e) of Regulation S-K [17 CFR 10(c)] and that the required reconciliation shall be included within the proxy statement or made accessible through a hyperlink in the CD&A.

We are writing to support CII's petition to the Commission. CFA Institute[1] is comprised of more than 160,000 investment professional members, including portfolio managers, investment analysts, and advisors, worldwide. CFA Institute seeks to promote fair and transparent global capital markets and to advocate for investor protections. An integral part of our efforts toward meeting those goals is ensuring that corporate financial reporting and disclosures provided to investors and other end users is of high quality. It is in that capacity that we are writing to express our support.

[1] With offices in Charlottesville, New York, Washington D.C., Hong Kong, London, Brussels, Mumbai, Beijing and Abu Dhabi, CFA Institute is a global, not-for-profit professional association of more than 166,000 investment analysts, portfolio managers, investment advisors, and other investment professionals in 162 markets, of whom more than 160,000 hold the Chartered Financial Analyst® (CFA®) designation. The CFA Institute membership also includes 154 member societies in 74 markets.

The Use of Non-GAAP Measures: A Key Concern to Our Global Investor Members

The issue of non-GAAP measures is one of the most important to our members and investors because of the manipulation of such measures to portray more positive results than GAAP (generally accepted accounting principles) measures. As the CII letter rightly points out:

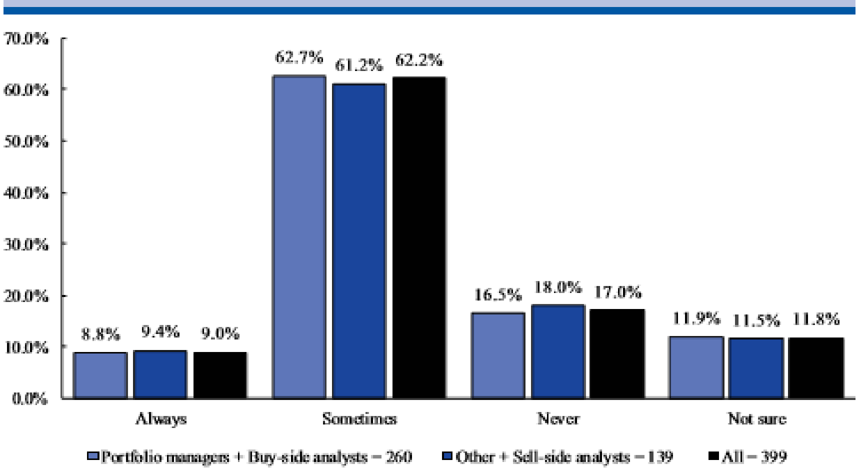
> *The use of non-GAAP or "adjusted" earnings in earnings reports is widespread and on the rise. Research by The Analyst's Accounting Observer found that 386 companies in the S&P 500 index reported "adjusted" earnings in 2016, up from 264 in 2009. In both years, "adjusted earnings" were on average about one third higher than reported GAAP earnings. Exclusions included costs of equity grants, asset impairments, intangible amortization and restructurings.*

Because of our member interest and concern with the issue of non-GAAP measures, in 2016 we issued a two-part publication exploring our investor members views on the uses, expectations and concerns on non-GAAP measures and how to ensure effective reporting of these performance measures as follows:

PART 1	**PART 2**
 Investor Uses, Expectations and Concerns on Non-GAAP Financial Measures	 Bridging the Gap: Ensuring Effective Non-GAAP and Performance Reporting

In Section 5.4 of Part 1, *Investor Uses, Expectations and Concerns on Non-GAAP Financial Measures*, we highlight investor views on the linkage of non-GAAP financial measures (NGFM) to executive compensation. Approximately 9% of respondents indicated non-GAAP financial measures should always be linked to executive compensation and 62% of respondents felt non-GAAP financial measures should sometimes be linked to executive compensation. Only 17-18% of respondents indicated non-GAAP

Figure 5.9. Views on Whether NGFM Should Be Linked to Executive Compensation



financial measures should never be used for executive compensations. As we highlight in Section 6.3 of Part 2, *Bridging the Gap: Ensuring Effective Non-GAAP and Performance Reporting*:

> ***Boards of directors should also ensure that executive compensation is not linked to rosier than-warranted NGFMs in a manner that incentivizes executive management to take disproportionate risks, as discussed in Part 1 of this publication****. Corporate governance mechanisms, including performance-based compensation, aim to align managers' interests with those of shareholders.* ***Executive compensation within companies, however, is often based on adjusted performance metrics, and as noted, these metrics can be positively biased and do not always faithfully reflect the reporting entity's economic performance.***

Because investors see the merit in using such measures but are concerned with their potential abuse, it is essential that investors are able to understand and analyze the use and impact of non-GAAP measures on the determination of executive compensation. The CII's petition would facilitate this understanding and ensure the alignment of management's interests and compensation with shareholder's interests and returns.

Summary of CII's Analysis and Position

The CII letter makes several key points in articulating their position including:

1) *Many Non-GAAP Measures Depict More Favorable Results Than GAAP Measures* – As we note above, and as CII notes in its petition, the vast majority of non-GAAP measures are more favorable than GAAP measures and are frequently used as the measure of executive compensation. Accordingly, understanding the adjustments and why such measures are more meaningful measures of evaluating executive performance is essential.
2) *Compensation Based Non-GAAP Measures May Differ, or Appear to Differ, from Non-GAAP Measures Disclosed Elsewhere – But Reconciliation & Contextualization is Insufficient* – CII notes that companies use executive compensation targets based on non-GAAP financial measures and are currently not required to adequately disclose how those measures relate to GAAP. CII rightly highlights this information should be presented in proper context, within the proxy statement CD&A and that this is clearly not being done by many companies using non-GAAP or "adjusted" earnings and other non-GAAP measures to help determine how executives are paid. CII also illustrates certain companies are including the use or discussion of non-GAAP measures that do not appear to be the same as those included in other Form 8-Ks, 10-Qs, or 10-Ks. Where the same measurement, a hyperlink to the other reconciliation would suffice. The clear, simple acknowledgement that they are the same or how such measurements are different from other non-GAAP measures is essential.

3) *Examples & Supporting Research Provided* – CII demonstrates the importance of this topic with research and examples as follows:
   a. 2015 Pozen research that highlights situations where compensation committees used different definitions of adjusted earnings in determining compensation than were provided in other filings subject to Regulation G.
   b. 2016 Pozen and Kothari research that shows most companies with substantial differences between GAAP and non-GAAP numbers use the generally higher non-GAAP numbers to determine annual cash and long-term stock awards of executives.
   c. 2018-2019 proxy statement examples that highlight lack of clarity on the nature of adjusted earnings measurements utilized in determination of compensation.
4) *Measures May Be Useful: Don't Eliminate, Reconcile and Explain* – CII notes in their petition – as does CFA Institute research – that non-GAAP measures can be a reasonable basis for incentivizing prudent executive decisions benefiting long-term investors and for making compensation decisions. CII reiterates – and CFA Institute acknowledges – they not asking that companies be prevented from using non-GAAP financial criteria for awarding compensation. CII does, however, make clear that GAAP is the standard, and deviations need to be clear and put in context. CII rightly notes that this is as true for proxy statements as it is for 8-Ks, 10-Ks and earnings releases and that clarity is especially appropriate in the CD&A context because shareholders cast advisory votes on executive compensation regularly – every year at most public companies.
5) *Minimal Cost Solution to Prevent Potentially Misleading Investors* – The SEC's Regulation G requirements provide an important investor protection against misleading information about performance. Excluding the CD&A disclosures on compensation targets from the Regulation G requirements results in CD&A references to non-GAAP financial measures that are not always clear and may mislead investors. For that reason, CII states the SEC should fix this anomaly in its guidance on use of non-GAAP financial measures. We agree with CII when it indicates there is not a reasonable basis for excluding executive pay targets as disclosed in the CD&A from what the SEC deems elsewhere to be necessary disclosures on adjusted financial measures. Textual and quantitative reconciliation of the differences between adjusted earnings and GAAP is clearly feasible in the CD&A. The CD&A is the most important source used by investors in evaluating executive compensation, and in deciding how to vote on advisory votes on executive compensation mandated by the Dodd–Frank Wall Street Reform and Consumer Protection Act. The CD&A also informs investor understanding of a corporation's governance more generally, and in voting on election of directors. We reiterate CII's concerns regarding the complexity in executive pay structures, and challenges in understanding compensation and its links to performance and their view that it is imperative that the SEC require at least the level of transparency in proxy statement CD&As as in other corporate documents.

CFA Institute Statement of Support of CII Analysis and Position
We believe CII has provided a thoughtful analysis and compelling evidence of the need to address this issue and we support the position that CII has set forth in their petition. For that reason, we would encourage the SEC to take action to:

1) Initiate a rule change to amend Item 402(b) of Regulation S-K [17 CFR 229.402(b)] under the Securities Act of 1933 (Securities Act) to eliminate Instruction 5; and

2) Revise the Division of Corporation Finance's Compliance & Disclosure Interpretations on "Non-GAAP Financial Measures" consistent with the aforementioned amendment and to provide that all non-GAAP financial measures presented in the proxy statement Compensation Discussion & Analysis (CD&A) be subject to the requirements of Regulation G [17 CFR 244.101-102] and Item 10(e) of Regulation S-K [17 CFR 10(c)] and that the required reconciliation shall be included within the proxy statement or made accessible through a hyperlink in the CD&A.

With limited SEC rulemaking and no additional cost to registrants, we believe this proposal would prevent any potentially misleading information to investors and serve to facilitate enhanced investor understanding of executive compensation and how it links to financial performance.

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We would be happy to discuss our support of CII's petition. If you have any questions, please contact Kurt Schacht at kurt.schacht@cfainstitute.org or Sandra J. Peters at sandra.peters@cfainstitute.org.

Sincerely,

/s/ Kurt N. Schacht

Kurt N. Schacht
Managing Director, Advocacy
CFA Institute

/s/ Sandra J. Peters

Sandra J. Peters, CPA, CFA
Head, Global Financial Reporting Policy
CFA Institute

cc:
The Honorable Jay Clayton, Chairman, U.S. Securities and Exchange Commission
The Honorable Commissioner Robert J. Jackson, Jr., U.S. Securities and Exchange Commission
The Honorable Commissioner Hester M. Peirce, U.S. Securities and Exchange Commission
The Honorable Commissioner Elad L. Roisman, U.S. Securities and Exchange Commission
The Honorable Commissioner Allison Herren Lee, U.S. Securities and Exchange Commission
Mr. William H. Hinman, Director, Division of Corporation Finance,
U.S. Securities and Exchange Commission

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Mr. Rick Fleming, Investor Advocate, U.S. Securities and Exchange Commission
Ms. Anne Sheehan, Chairman, SEC Investor Advisory Committee
Mr. Sagar Teotia, Chief Accountant, Office of Chief Accountant,
U.S. Securities and Exchange Commission
Kyle Moffatt, Chief Accountant, Division of Corporation Finance,
U.S. Securities and Exchange Commission