

# 6/20/16 Corporate News Update: SEC's Updated Guidance Regarding Non-GAAP Financial Measures, 11th Circuit's Ruling on SEC Ability to Seek Disgorgement, PCAOB Reproposed Auditing Standard and Law Firm Whitepaper on Indenture Amendment Legal Opinions

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CATEGORY:  
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by [Jeanne R. Solomon](#), [Sheri M. Yano](#) and [Clinton Jang](#). This week's Corporate news roundup includes information regarding the SEC's updated guidance to its *Compliance and Disclosure Interpretations on non-GAAP financial measures*, the 11th Circuit Court of Appeals' holding restricting the SEC's ability to seek declaratory relief and civil disgorgements to a five-year statute of limitations, the PCAOB's reproposal of an auditing standard that would increase audit reports' transparency, and law firms' issuance of a *Trust Indenture Act* white paper providing guidance on legal opinion practice following two recent U.S. federal court decisions severely limiting opinions as to permitted indenture amendments: **SEC UPDATES GUIDANCE AS TO USE OF NON-GAAP FINANCIAL MEASURES** The SEC recently updated its Compliance and Disclosure Interpretations (C&DIs) on non-GAAP financial measures. The C&DIs clarify that certain adjustments may violate Regulation G because they may cause the non-GAAP measure presentation to be misleading, such as presenting a performance measure that excludes normal, recurring, cash operating expenses necessary to operate the business, presenting a non-GAAP inconsistently between periods, excluding charges but not gains, or substituting individually tailored recognition and measurement methods revenue or other line items in place of GAAP methods. The SEC stated that whether per share data is prohibited depends on whether the non-GAAP measure can be used as a liquidity measure, even if management presents it solely as a performance measure (and when analyzing these questions, the SEC will focus on the substance of the non-GAAP measure and not management's characterization of the measure). The C&DIs clarify that free cash flow is a liquidity measure that must not be presented on a per share basis. The SEC also included examples of disclosures that would cause a non-GAAP measure to be more prominent than the most directly comparable GAAP measure in violation of Regulation S-K Item 10(e)(1)(i)(A). For more information, [click here](#) (C&DIs) and [here](#) marked to show recent changes). **COURT RESTRICTS SEC'S ABILITY TO SEEK DECLARATORY RELIEF AND CIVIL DISGORGEMENT TO A FIVE-YEAR STATUTE OF LIMITATIONS** In late May 2016, a United States federal circuit court held in *SEC v. Graham* that SEC claims for declaratory relief, disgorgement and penalties are subject to a five-year statute of limitations under a federal law (28 U.S.C. § 2462) that applies to all actions brought by the United States government and its agencies, including the SEC. Because the SEC has historically sought disgorgement for periods beyond five years, this case will impact future [Securities Act](#), [Exchange Act](#) and [Foreign Corrupt Practices Act](#) enforcement actions, at least in the Eleventh Circuit. Because the holding constitutes a split with circuits such as the D.C. Circuit and the Ninth Circuit, and a D.C. Circuit case is pending, more guidance may be forthcoming in this area. In the meantime, the SEC may seek tolling agreements or avoid the Eleventh Circuit for certain proceedings. For more information on the *SEC v. Graham* case, [click here](#). **PCAOB REPROPOSES AUDITING STANDARD THAT WOULD INCREASE AUDIT REPORT TRANSPARENCY** In May 2016, the [Public Company Accounting Oversight Board](#) an auditor reporting standard, *The Auditor's Report on an Audit of Financial Statements When the Auditor Expresses an Unqualified Opinion*, following comments received to [its original 2013 proposal](#). The reproposal would require additional information about critical audit matters. Critical audit matters are matters that are communicated (or are required to be communicated) to the audit committee that relate to accounts or disclosures that are material to the financial statements and involved especially challenging, subjective or complex auditor judgment. Auditors also would need to disclose their considerations leading to a determination that a matter was a critical audit matter. The critical audit matter disclosure would supplement the traditional "pass/fail model" in which the auditor opines on whether the financial statements are fairly presented or not. Changes from the original 2013 proposal include a limitation of the source of potential critical audit matters to matters communicated (or required to be communicated) to the audit committee and a limitation on the critical audit matter definition to those with a materiality component. For more information, [click here](#). **LAW FIRMS ISSUE WHITE PAPER PROVIDING GUIDANCE ON INDENTURE AMENDMENT LEGAL OPINIONS IN WAKE OF RECENT TRUST INDENTURE ACT CASES** Two recent U.S. federal court decisions extended the [Trust Indenture Act's](#) prohibition on indenture amendments that change payment terms, to reach exit consent-related changes that impair the issuer's ability to repay the bonds being exchanged. Indentures generally require opinions of counsel that amendments are permitted, and the cases have had the effect of severely limiting the ability of issuers' counsel to give those opinions, creating the potential to limit indenture amendments in the distressed-issuer context even if approved by a majority of the debt holders. In the wake of those cases, over two dozen law firms issued a white paper offering guidance on legal opinion practice. The white paper advises that, absent unusual circumstances, law firms may give an unqualified opinion to a trustee in connection with an amendment to non-core indenture terms that are either outside the debt restructuring context or are within the debt restructuring context where the opining firm has received satisfactory evidence that the issuer likely will be able to make all future payments of principal and interest to non-consenting noteholders when due, after giving effect to related transactions. For additional information, [click here](#). To subscribe to our weekly Corporate e-newsletter and receive future news updates, please [click here](#).