The Duties to Correct and Update: A Web of Conflicting Case Law and Principles

By Bruce Mendelsohn and Jesse Brush[*]

Plaintiffs in securities litigation may wish that issuers were required to disclose material information at all times, but the securities laws do not impose a continuous disclosure duty.[1] Instead, a panoply of narrower legal requirements governs disclosure issues. These disclosure requirements have grown over time from line items in Exchange Act reports and disclosure required to avoid deceptive and manipulative conduct[2] to an array of laws, regulations and court decisions covering selective disclosure, insider trading and an expanded list of matters that must be described in current reports.[3] In light of these complex disclosure requirements and a lack of clarity in the case law, many companies simply err on the side of prompt disclosure of material events.[4]

A special situation arises, however, when an issuer has made a prior disclosure that is no longer accurate. In these circumstances, a company subject to the reporting obligations of the Exchange Act may be hesitant to supplement the prior disclosure before next required in a periodic report. These concerns are often heightened when the company made an error in disclosure about a historical event, an event has not unfolded as projected in a forward-looking statement or an unanticipated development has occurred. Company representatives may fear that the new disclosure would call undue attention to the inaccuracy or reduce the company's flexibility in continuing negotiations with a third party.

In certain circumstances, the company would be required to disclose the new information promptly under its normal disclosure duties, such as when the company is trading its own securities, the development triggers an 8-K requirement or the company has selectively disclosed the information to a securities market participant. If none of these specific affirmative disclosure duties apply, courts have developed the concepts of a "duty to correct" and a "duty to update" to address whether a company is required to revise prior disclosure that may no longer be accurate in advance of the next periodic report. Unfortunately, the duty to correct and the duty to update are often

---

[*]Bruce Mendelsohn, Partner, Akin Gump Strauss Hauer & Feld LLP. Jesse Brush, Counsel, Akin Gump Strauss Hauer & Feld LLP. The authors would like to thank Lindsey Smith for her invaluable research assistance.

confused,[5] but it is important to understand the distinction between these duties because they carry different obligations and liability risks and involve somewhat different legal considerations: a duty to correct may apply if the disclosure was *materially false at the time it was made*, and a duty to update may be triggered if the disclosure *became materially false as a result of new developments*.[6]

Courts are generally more receptive to the concept of a duty to correct statements based on false historical information, except when the original statement is vague or the newly discovered contrary information is unreliable.[7] With the major exception of the Seventh Circuit, which has not recognized any duty to update, many courts also address the principle of a duty to update if a statement remains "alive" in the minds of reasonable investors and concerns a fundamental change to the company.[8] Although courts discuss these doctrines in concept, they usually have been hesitant to find companies liable for failure to correct or update in the specific circumstances of cases before them. Furthermore, the academic literature has questioned the analytical basis for both duties in the absence of other legal duties to disclose.[9] Nevertheless, investors continue to bring claims (and the SEC can initiate investigations) based on these duties, and companies should be mindful of circumstances in which either duty might arise.[10]

This article briefly addresses the broader disclosure duties that may require companies to publicly release new information, but focuses on court decisions addressing the more specific duties to correct and update that courts have considered when other disclosure duties are inapplicable. Section I of this article discusses legal defenses for forward-looking statements under current securities laws, which may preclude certain claims based on the duty to correct or duty to update. Section II addresses general disclosure requirements, with a focus on requirements to disclose new developments. Section III explores the duty to correct and key considerations to determine whether a correction is required. Section IV discusses the duty to update, to the extent it exists, and factors that weigh for and against imposition of this duty. Finally, Section V concludes with a discussion of practical implications for issuers and securities law practitioners.

I. Forward-Looking Statements

Claims based on the duty to correct and duty to update often arise in the context of forward-looking statements, because these statements are necessarily uncertain at the time they are made. As recently as the early 1970s, the SEC generally did not permit forward-looking disclosure in company filings (particularly financial projections).[11] However, later developments, including prevailing guidance on trend disclosure in Management's Discussion and Analysis,[12] virtually require certain such statements. Indeed, Regulation S-K "encourages the use . . . of management's projections of future economic performance."[13]

In the spirit of promoting this type of disclosure, the Private Securities Reform Act of 1995 (PSLRA) provides a safe harbor defense in private securities actions for forward-looking statements by certain issuers as long as the statement is identified and accompanied by meaningful cautionary language.[14] The PSLRA safe harbor is not available to issuers conducting an initial public offering, other companies that are not subject to reporting requirements under sections 13(a) or 15(d) of the Exchange Act, companies conducting tender offers and certain issuers subject to "bad boy" events, among others.[15]

The PSLRA explicitly does not impose a duty to update,[16] but courts and commentators have not reached a consensus about whether it allows issuers to avoid liability for disclosures that would otherwise be required by duty to correct and duty to update case law. At least one court has interpreted the PSLRA to absolve issuers from liability in private lawsuits for failing to update disclosure.[17] Another court remarked that the PSLRA "limit[s]" and "seemingly act[s] in tension with" the duty to update, but the court later "assum[ed] that there is no [superseding] duty to update."[18] A 2000 law review article on the duties to correct and update discussed this issue at length and ultimately acknowledged uncertainty in the effect of the PSLRA on the duty to update.[19] Given this ambiguity, there is a risk that the PSLRA could be interpreted to protect an issuer from liability for the initial forward-looking statement, but not from liability for a later failure to update as otherwise required under duty to update case law.[20] Under this conservative reading of the PSLRA, an issuer might also risk liability for failure to correct a forward-looking statement (such as a forward-looking statement based on a historical "fact" that was untrue).[21]

The "bespeaks caution" doctrine provides similar safeguards for forward-looking statements that are accompanied by adequate risk disclosure. This defense is particularly relevant when the PSLRA is unavailable (such as IPOs, tender offers and SEC investigations). Although similar to the PSLRA, the "bespeaks caution" defense was created and fashioned by courts, and thus its applicability may require a more involved analysis of case law than the explicit safe harbor provided by the PSLRA. As discussed below in Section IV.A.4, some courts deciding whether a duty to update applies have looked to bespeaks caution case law or otherwise considered cautionary language accompanying forward-looking statements.

In effect, the PSLRA and bespeaks caution doctrine provide a measure of protection from liability in private lawsuits based on forward-looking statements that are accompanied by non-boilerplate cautionary language. This risk disclosure may also provide issuers with some measure of protection from liability for failure to update these statements. Nevertheless, the duty to correct and duty to update remain relevant when risk disclosure is inadequate, and are particularly relevant when the PSLRA safe harbor is unavailable.

II. The Duty to Disclose

As a general matter, issuers must make disclosures in current and periodic reports required under the Exchange Act, under Regulation Fair Disclosure (Reg FD) prohibitions against selective disclosure, to prevent other disclosures from being misleading and when the company or its insiders trade in the company's securities.[22] When new information arises that could render past statements inaccurate, issuers should preliminarily consider whether and when the new information must be disclosed under one of these general disclosure duties before even reaching the question of whether the narrower duties to correct or update apply.

The Exchange Act requires section 12 registrants and section 15(d) reporting issuers to file annual and quarterly reports on Form 10-K and Form 10-Q, respectively, with deadlines that vary based on whether the issuer is a large accelerated filer, an accelerated filer or a non-accelerated filer. These periodic reports include extensive line items that may require disclosure of material developments. Furthermore, issuers must include, "[i]n addition to information expressly required to be included in a statement or report . . . such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made not misleading."[23] Even if further disclosure is not specifically required by the line items or to prevent other contemporaneous disclosure from being misleading, it is generally considered best practices to include material updates about previously disclosed matters in periodic reports. Indeed, in *Higginbotham v. Baxter International, Inc.*, Judge Easterbrook explained that updated disclosure was not needed prior to the 10-Q, but implied that disclosure may be required when the next 10-Q is due:

> As for the contention that Baxter should have disclosed the news in June 2004 or the first half of July, rather than on July 22: what rule of law requires 10-Q reports to be updated on any cycle other than quarterly? That's what the "Q" means. Firms regularly learn financial information between quarterly reports, and they keep it under their hats until the time arrives for disclosure.[24]

In addition, issuers must file current reports on Form 8-K within four business days after a triggering event, in a range of circumstances that greatly expanded in the 2004 amendments to Form 8-K.[25] Accordingly, developments that trigger 8-K reporting obligations must be reported on Form 8-K even outside of situations where a duty to correct or a duty to update might apply.[26]

Furthermore, Exchange Act reporting companies must comply with Reg FD, which generally prohibits selective disclosure. Reg FD violations are not actionable in private securities actions but may be the basis for SEC investigations. In general, under Reg FD, when a company intentionally discloses material nonpublic information to securities market professionals or shareholders who may trade on the information, the company must simultaneously publicly disclose the same information.[27] In the event a company unintentionally discloses material nonpublic information, it must promptly make a public disclosure of the information (and in no event after the later of 24 hours or the start of the next day's trading).[28] In other words, if a company official provides an update to an analyst or investor that constitutes material nonpublic information, Reg FD requires public disclosure of the same update.

The Supreme Court has repeatedly reaffirmed the principle that section 10(b) of the Exchange Act and Rule 10b-5 thereunder require disclosure when necessary to make "statements made, in the light of circumstances under which they were made, not misleading."[29] In *Matrixx Initiatives, Inc. v. Siracusano*, for example, the court held that under the facts alleged by the plaintiffs, a company was under a duty to disclose material information about reports that the company's products had impaired customers' ability to smell—even though there was no statistically significant correlation between product use and sense of smell—in light of statements about safety that the company made during the period it received the reports.[30] Accordingly, in making disclosures, it is important to consider whether any statements in those disclosures could be considered materially misleading because of an omitted fact. If so, the company must disclose the necessary information to cure the misleading statement.

Finally, when a company or its insiders seek to trade in the company's securities, they must disclose material nonpublic information or abstain from trading.[31] For example, the Second Circuit recently held that a minority shareholder could pursue antifraud claims on the basis that insiders of the issuer conducted a tender offer for unregistered securities without disclosing information about the issuer's financial state.[32] Likewise, companies conducting share repurchases—other than in accordance with a 10b5-1 trading plan that was established when the company did not have material nonpublic information—must promptly disclose material developments or halt trading.

Sometimes developments occur that do not clearly fall under the affirmative disclosure duties described above, such as where no 8-K requirement is triggered, no periodic report is due, no selective disclosure has occurred and the company is not currently speaking on related matters or trading in its own securities. In these circumstances, it may be necessary to consider whether the development must be disclosed prior to the next periodic report under the more specific duties to correct and update.[33]

III. The Duty to Correct

An issuer may have a duty to correct a prior disclosure if it was untrue when made.[34] In the typical duty to correct scenario, the company discovers contradictory information that existed at the time of the initial disclosure.[35] Even in these circumstances, a court may not impose a duty to correct if the original statement is vague or indefinite or the newly found information is unreliable. Furthermore, courts are hesitant to apply the duty to correct in cases involving forward-looking statements unless the forward-looking statements were based on untrue historical information.

The recent *Facebook* multidistrict litigation provides a typical set of circumstances where plaintiffs asked a court to find a duty to correct. According to the pleadings, NASDAQ representatives had made various statements regarding the speed, scale and reliability of the company's trading platform. Plaintiffs asserted that NASDAQ subsequently conducted a series of tests on its technology, which revealed system limitations and design deficiencies that threatened its reliability. Under the facts alleged by the plaintiffs, despite these findings, NASDAQ failed "to correct flawed information about its technology capabilities that could have impacted Plaintiffs' decision to participate in Facebook's Offering and ability to trade during that Offering"[36] and "continued making untrue statements" even after testing revealed potential problems with high-volume trading.[37] Based on these alleged circumstances, the court refused to dismiss claims that NASDAQ had made material omissions about its capabilities.

A. Vague Statements

Courts are somewhat more hesitant to impose a duty to correct when original false statements are vague or indefinite. For example, in *Grossman v. Novell, Inc.*, the issuer had made the optimistic statement that a merger would not "dilute future earnings." Although the merger ultimately did result in lower earnings, the Tenth Circuit ruled that the defendant issuer's forward-looking statement was "too vague and indefinite to give rise to such a duty to disclose."[38] While the court relied on this rationale, it also described two other factors that militated against a duty to correct: the plaintiffs had not alleged facts that the statement was false based on information known when the statement was made and the company had provided warnings about fluctuations in earnings.[39] (These other rationales, of course, further demonstrate that courts are often reluctant to impose a duty to correct, especially when appropriate risks have been identified.)

The *Facebook* case addressed, and ultimately rejected for motion to dismiss purposes, a defense that NASDAQ's statements were too vague or indefinite to be actionable under the duty to correct. The court ruled that NASDAQ's alleged statements "were not vague, forward-looking statements of optimism," but instead "involved the representation of existing facts" concerning NASDAQ's capability and reliability, "which were readily capable of verification."[40] This reasoning reveals tension between the general nature of NASDAQ's statements and the evidence plaintiffs alleged to be contradictory.

In *In re Yahoo! Inc. Securities Litigation*, the court rejected a duty to correct "expressions of enthusiasm" about an investment in Alibaba Group.[41] The court acknowledged, however, that more specific optimistic statements, including that Alibaba's strategy on its Alipay service was "fantastic" and that Alipay was "creating a lot of value" for Alibaba "gave rise to a duty to correct" when Yahoo learned that a major investor in Alibaba had terminated Alibaba's and Yahoo's control rights over Alipay prior to such statements.[42] Nevertheless, the court did not allow the duty to correct claims to proceed because it found that Yahoo corrected these statements "in a reasonable time period."[43] In sum, a vague statement is less likely to trigger a duty to correct, but courts may be unwilling to dismiss duty to correct claims in the absence of other factors weighing against application of the duty.

B. Contradictory Information Unreliable

Courts may also be reluctant to impose a duty to correct if information that contradicts the initial disclosure is unreliable. For example, in *In re HealthCare Compare Corp. Securities Litigation*, the issuer had publicly agreed with analysts' revenue and earnings per share estimates. Less than two months later, the company issued a press release that suggested its revenues and earnings per share would be significantly lower, which led to a single-day decline in stock prices of more than 30 percent. In the intervening weeks, an internal memorandum had raised considerable doubt about the original statements of agreement with analysts.[44] Plaintiffs argued that the issuer had a duty to correct because the facts underlying the memorandum arose before the original statements.[45] The court declined to find a duty to correct because the internal memorandum was insufficiently reliable, explaining, "firms need not disclose tentative internal estimates, even though they conflict with published estimates, unless the internal estimates are so certain that they reveal the published figures as materially misleading."[46]

C. Forward-Looking Statements

Finally, the Third Circuit has suggested that the duty to correct forward-looking statements is limited to circumstances in which the forward-looking statement is based on incorrect historical information.[47] Then-Judge Alito explained in *In re Burlington Coat Factory Securities Litigation* that the duty to correct could apply to a projection if "[s]ubsequently, the company discovers that it misread a vital piece of data that went into its forecast."[48] In these circumstances, the issuer has implicitly represented that the information underlying the forecast is accurate as of the time the statement is made. In that case, although forecasts had not been accurate (in the sense of predicting results), the plaintiffs had not properly stated a duty to correct claim because they had not alleged errors that existed at the time of the initial disclosure that resulted in the incorrect forecasts.

Accordingly, even if the PSLRA and bespeaks caution doctrine do not protect an issuer from a duty to correct claim, it would seem that the claim is unlikely to survive without mistakes of historical facts underlying the forward-looking statement. This extremely narrow approach to the duty to correct in the context of projections is consistent with the trend toward encouraging forward-looking disclosure.

IV. The Duty to Update

Perhaps the most difficult inquiry in this area is whether a duty to update might apply if disclosure becomes inaccurate after it is made.[49] Some courts have questioned whether this type of duty exists at all,[50] including Judge Easterbrook, who explained:

> Much of plaintiffs' argument reads as if firms have an absolute duty to disclose all information material to stock prices as soon as news comes into their possession. Yet that is not the way the securities laws work. We do not have a system of continuous disclosure. Instead firms are entitled to keep silent (about good news as well as bad news) unless positive law creates a duty to disclose.[51]

A number of other courts, however, have accepted the existence of some formulation of a duty to update.[52] But even courts that accept the duty in concept have often stated that it does not apply to the circumstances of the case at bar. Taken together, duty to update cases suggest that the key considerations are whether the original statement is still "alive" in the sense of being relied on by reasonable investors and whether the statement relates to a "fundamental change" to the issuer.[53]

A. "Alive" Statements

For a duty to update to apply, courts that recognize such a duty have required that the initial statement still be "alive." Although this is a somewhat nebulous concept, a few courts have suggested that statements are "alive" as long as reasonable investors rely on them. For example, in *Burlington Coat Factory*, the Third Circuit explained that determining whether a statement is "alive" "is a function of what a reasonable investor expects."[54] The Second Circuit similarly stated that no duty to update applies if an original statement is not forward looking and does not "contain some factual representation that remains 'alive' in the minds of investors as a continuing representation."[55] The First Circuit in *Backman v. Polaroid Corp.* espoused a similar principle that further disclosure may be necessary when clear previous statements "have a forward intent and connotation upon which parties may be expected to rely."[56] This background principle of reliance on statements that are "alive" underlies some of the more specific considerations discussed below—whether the duty applies to financial projections, vague or optimistic statements, historical statements and statements accompanied by specific cautionary language.

1. Financial Projections

Burlington Coat Factory addressed when specific financial projections remain "alive." According to the court, a reasonable investor's expectations arise out of the background regulatory structure and market practice, in which there is no general duty to disclose material information as it becomes known, no implicit representation in historical information that trends would continue, and protection from liability for forward-looking statements. On the basis of these factors, the court concluded that reasonable investors would not expect companies to update "ordinary" financial projections.[57] A number of other courts have similarly concluded that a duty to update does not apply for earnings forecasts.[58] These cases provide some comfort that traditional earnings guidance need not be updated, but it remains important to consider whether investors might continue to rely on any of the qualitative statements provided at the same time as financial projections (especially in circumstances where the PSLRA and bespeaks caution doctrine may not apply).

2. Vague Statements and Puffery

Courts have also been wary of imposing a duty to update statements that are vague or optimistic. Although not always explicit in court opinions, these cases can be framed in terms of the statements being "alive": they effectively establish that it is not reasonable for investors to continually rely on ambiguous or puffing statements. In a seminal duty to update case, the Second Circuit held that Time Warner's statements regarding "serious" discussions of strategic alliances "lack the sort of definite positive projections that might require later" updates and "suggest only the hope of any company, embarking on talks with multiple partners, that the talks would go well."[59]

Similarly, in *Burlington Coat Factory*, the Third Circuit reasoned that a company's statements that it believed it could continue improving net earnings faster than sales, and a statement by one of its officers that he was comfortable with analyst projections, were "general, non-specific statements of optimism or hope that a trend will continue" that are not subject to a duty to update. The court noted that "[c]laims that these kinds of vague expressions of hope by corporate managers could dupe the market have been almost uniformly rejected by the courts."[60] In *San Leandro Emergency Medical Group Profit Sharing Plan, et al. v. Philip Morris, Inc.*, the Second Circuit ruled that a company's statement that it would emphasize profit over market share was "[a] single, vague statement" that "cannot have led any reasonable investor to conclude that [the company] had committed itself to a particular marketing strategy and had foreclosed all alternatives" and thus need not be updated.[61]

Two recent cases explore the limits of the vague statement exception. In *Edinburgh v. Pfizer, Inc*., a representative of the issuer had said the company could advance directly to Phase 3 testing of an Alzheimer's drug in the first half of 2007, but only if interim Phase 2 results were "spectacular."[62] In May 2007, the company issued a press release announcing the initiation of Phase 3 trials, which plaintiffs claimed led them to believe the Phase 2 results were excellent. The court held that "[t]here is no duty to update vague and general statements such as 'spectacular.' "[63]

In contrast, in *Finnerty v. Stiefel Laboratories*, the Eleventh Circuit ruled that even an apparently vague statement may give rise to a duty to update if historical disclosures suggest it is better interpreted as an assurance about future actions. In this case, the plaintiff, a former employee, elected to receive an employee stock distribution and " 'put' the stock to [Stiefel Laboratories] at the then-effective fair market value" while the company was in undisclosed merger negotiations.[64] The court relied on the context surrounding apparently vague statements about the company's privately held status to decide that evidence was sufficient to support a jury verdict against the company. In the court's view, the company's corporate culture of pride in its privately held status gave "special significance to the statements that [Stiefel Laboratories] 'will continue to be privately held.' "[65] The company did not update this statement when it began engaging in merger negotiations. The court reasoned that in light of the company's longstanding corporate philosophy, employees of the company such as the plaintiff "could reasonably have understood the . . . statements to be assurances that [Stiefel Laboratories] remained unavailable for acquisition" even if an unaffiliated investor would have considered the statements to be vague.[66]

Although the Eleventh Circuit framed the disclosure requirement in *Finnerty v. Stiefel Laboratories* as a "duty to update," the outcome of the case may be better explained by disclosure duties arising out of the company's trades in its own securities. Unlike many of the other duty to update cases in which no separate duty to disclose applies, a company trading in its own securities would trigger an obligation to disclose material information. Nevertheless, it is conceivable that the opinion's reasoning regarding apparently vague statements could be applied in other duty to update circumstances. Accordingly, it is important to consider how a statement may be viewed in light of previous disclosures before concluding that it is too vague to require an update.

Both of these recent cases also touched on how to cut off any duty to update that may apply. In *Edinburgh v. Pfizer, Inc*., the court remarked that if a duty to update had applied, a statement in the May 2007 press release that "investors should draw no conclusion about the Phase 2 interim results" would have been sufficient to "cut off any such duty."[67] This reasoning suggests that a withdrawal of an earlier statement, even without an explicit update, may make it unreasonable for investors to rely on the earlier statement. Similarly, in *Finnerty v. Stiefel Laboratories*, the court stated that the issuer "was under no obligation to disclose the existence or the status of its merger negotiations . . . it could merely have said that a sale of the company was under consideration."[68] The company was obligated only to provide a sufficient update to make its previous "statements not misleading."[69] In other words, when a duty to update applies, the issuer need only provide enough of an update that the previous statement is no longer "alive" in the minds of reasonable investors.

3. Historical Statements

The duty to update generally does not apply to historical statements. In *Shaw v. Digital Equipment Corp.*, the First Circuit explained that "accurate reports of past successes do not themselves give rise to a duty to inform the market whenever present circumstances suggest that the future may bring a turn for the worse."[70] The company had made a statement that "[s]ervice revenues have continued to grow"; the court described that statement as a "historical fact not alleged to be false" which therefore "does not provide the basis for a duty to update."[71] Similarly, the Eleventh Circuit recently stated that the duty to update "attaches only to forward-looking statements."[72] Nevertheless, it should be noted that *Backman v. Polaroid Corp.* raised the possibility in dicta that the duty to update may be applicable to a historical statement that had a "forward intent and connotation" that parties relied upon.[73]

4. Cautionary Language

A few courts have declined to require issuers to update statements that are qualified by cautionary language. The Second Circuit has treated cautionary language as a separate basis for declining to find a duty to update under the bespeaks caution doctrine,[74] while an earlier case in the First Circuit addressed cautionary language as part of the discussion of whether the statement is "alive."[75] In the former approach, as discussed in Section I, courts may rely on the PSLRA or bespeaks caution doctrine to decline to find an issuer liable for failure to update. In the latter approach, reasonable investors would not continue to rely on forward-looking statements that are accompanied by cautionary language about factors that could result in a different outcome.

In *Illinois State Board of Investment v. Authentidate Holding Corp*, the Second Circuit addressed whether a company had a duty to update statements regarding upcoming amendments to key agreements after it became clear that the amendments would not occur. The Second Circuit found that the statements were not too vague for a duty to update to apply, but the bespeaks caution doctrine precluded a duty to update claim because the statements were accompanied by specific cautionary language that there was "no guarantee" an agreement would be reached.[76] In contrast, a boilerplate statement at the beginning of a conference call that forward-looking statements were subject to risks and uncertainties (without identifying such risks and uncertainties) was not sufficient to dismiss a duty to update claim.[77]

In *Glassman v. Computervision Corp.,* the First Circuit addressed whether "mild statements of hope" that a new product would attract customers and be used in tandem with an existing product could be subject to a duty to update when the statements were "couched in strongly cautionary language" that the product "might not be accepted by the market and might need further enhancements."[78] The court concluded that a duty to update did not apply because statements with these characteristics "cannot be said to have become materially misleading."[79] In other words, it would not be reasonable for investors to rely on the statements as a certainty in light of the optimistic nature of the statements and the cautionary language that accompanied them.

B. Fundamental Changes

Even if a prior disclosure remains "alive," courts generally have been unwilling to impose a duty to update unless the statement relates to a fundamental change to the issuer. This distinction appears to arise out of courts' attempts to balance a system of non-continuous disclosure with the interests of investors when significant developments occur related to previously released plans for major transactions. Courts have largely followed dicta in *Burlington Coat Factory* that "the duty to update, to the extent it might exist, would be a narrow one to update the public as to extreme changes in the company's originally expressed expectation of an event such as a takeover, merger or liquidation."[80]

In *In re Time Warner Securities Litigation*, the Second Circuit considered a duty to update where Time Warner had made statements about one possible approach to resolve major debt problems and ultimately took a different approach. Time Warner had stated that it was exploring strategic alliances; when those talks failed, the company pursued a dilutive equity offering without announcing the alternative approach. The court held that Time Warner need not update the status of the strategic alliance discussions because the statements about those discussions were not "definite positive projections."[81] Nevertheless, the issuer may have been under a duty to disclose the possibility of an equity offering; the court explained that where "a corporation is pursuing a specific business goal and announces that goal as well as an intended approach for reaching it, it may come under an obligation to disclose other approaches to reaching the goal when those approaches are under active and serious consideration."[82] In effect, the court imposed a duty to update the prior statement about a proposed solution to the fundamental debt problems to the extent that other approaches were being actively explored.

In *Weiner v. Quaker Oats Co.*, the court decided not to dismiss a duty to update claim when an undisclosed merger allegedly caused a prior forward-looking statement that was "alive" to become untrue. The issuer had disclosed a projected debt-equity ratio in multiple documents and implied that it would continue to comply with the ratio.[83] An impending merger significantly altered the expected ratio, but the company did not announce the merger or update its ratio projection in light of the possible merger. The court concluded that the statements could have led a reasonable investor to conclude the issuer would announce "any anticipated significant change."[84]

More recently, in *United States v. Schiff*, the Third Circuit declined to impose a duty to update statements regarding the issuer's sales volumes, suggesting that such statements were not fundamental enough to trigger a duty to update. The court explained that a duty to update applies only in a "narrow range" of circumstances involving a statement about a fundamental corporate change "such as a merger, liquidation or takeover attempt," and "when subsequent events produce an 'extreme' or 'radical change' in the continuing validity of that initial statement."[85]

In the context of potential fundamental change transactions, issuers should be especially sensitive to their possible obligations to update disclosure. In particular, an update may be required when the company explores a different approach than previously disclosed or the upcoming transaction would cause a prior forward-looking statement to become untrue.

V. Conclusion

The question of whether to disclose a new development outside of normal periodic reporting is often difficult and requires both business and legal judgments. As a business matter, management may resist disclosure that will disrupt ongoing negotiations or disappoint the market. When business considerations weigh against disclosure, it is helpful to discuss with legal counsel whether the development is "material" or meets other criteria for disclosure in a current report on Form 8-K, under Reg FD, or while the company or its insiders are trading in the company's securities. Even if the company need not disclose the development immediately, it will often be subject to an affirmative duty to disclose the material event in its next periodic report.

When the development concerns an event that was previously disclosed or would otherwise cause previous disclosure to become untrue, legal counsel should also consider whether disclosure is required prior to the next periodic report under the duty to correct or the duty to update. Although a review of court decisions suggests that these duties apply in limited circumstances (especially the duty to update), investors continue to bring actions alleging securities fraud under these theories. In addition, companies may have to endure SEC investigations even where the better reading of the case law might support that there was no duty. And even if the company would ultimately prevail on the merits, lawsuits and investigations often lead to negative press reports and can be a distraction from core businesses.

In light of these risks, issuers should be mindful of correcting initial disclosure that was materially false at the time it was made. Courts are more likely to impose a duty to correct if the original statement was specific rather than vague and the new information is reliable. In the event the original false statement was forward looking, courts are unlikely to impose a duty to correct unless the statement was based on incorrect historical information. Accordingly, when prior specific historical statements are found to be materially false, issuers should promptly revise the statements to avoid claims that a duty to correct applies (as well as limit damages for any antifraud liability arising out of the initial misstatement).

The case law as to the existence of a separate duty to update is somewhat muddled, and litigants often conflate the concept with the duty to correct. However, where it might be argued that a duty to update applies, there is no such duty if the statement is no longer "alive" in the sense of engendering reasonable reliance. Most courts addressing whether a duty to update applies to financial projections have concluded that reasonable investors would not rely on them as continuing representations. In addition, vague or optimistic statements, statements that are accompanied by cautionary language and historical statements generally do not require update. Courts are also unlikely to impose a duty to update statements that do not involve a "fundamental change" to the company, such as a merger or other major transaction.

To protect against duty to update claims, it is important to take steps both at the time of any forward-looking statements and once developments occur. Initially, companies should include meaningful and specific cautionary language along with any forward-looking statements. This risk disclosure may protect issuers under the PSLRA, the bespeaks caution doctrine, or by reducing the chance that a court would consider the statement to be "alive." After an issuer has disclosed a possible fundamental change transaction or made other forward-looking statements that would be affected by a significant transaction, it is often advisable to update the market as major changes occur. Despite the better approach of a number of courts that protect forward-looking statements and do not impose continuous disclosure duties, public statements regarding significant developments are often warranted to mitigate risks of litigation and investigations.

NOTES:

[1]Supreme Court decisions have repeatedly reaffirmed that issuers have no general duty to disclose material information, and under Exchange Act Rule 10b-5, silence is not misleading unless a duty to disclose exists. *See Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1321-22, 179 L. Ed. 2d 398, Fed. Sec. L. Rep. (CCH) ¶ 96249, 62 A.L.R. Fed. 2d 737 (2011) (citing *Basic Inc. v. Levinson*, 485 U.S. 224, 239, 108 S. Ct. 978, 99 L. Ed. 2d 194, Fed. Sec. L. Rep. (CCH) ¶ 93645, 24 Fed. R. Evid. Serv. 961, 10 Fed. R. Serv. 3d 308 (1988)).

[2]*See* Donald M. Feuerstein, The Corporation's Obligations of Disclosure Under the Federal Securities Laws When It Is Not Trading in Its Stock, XV New York Law Forum 385 (1969).

[3]J. Robert Brown, Jr., Regulation of Corporate Disclosure § 3.04[1] (2012-2 Supp.).

[4]Before adoption of the Sarbanes-Oxley Act, then-SEC commissioner Harvey Pitt advocated in the Senate for requirements to have "complete, clear, and timely" disclosure. Accounting and Investor Protection Issues Raised by Enron and Other Public Companies: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs, 107th Cong. (Mar. 21, 2002) (statement of Harvey L. Pitt, Chairman, Securi-

ties and Exchange Commission), *available at* http://www.banking.senate.gov/02_03hrg/032102/pitt.htm. Consistent with this testimony, section 409 of the Sarbanes-Oxley Act mandated that reporting issuers "disclose to the public on a rapid and current basis such additional information concerning material changes in the financial condition or operations of the issuer, in plain English, which may include trend and qualitative information and graphic presentations, as the Commission determines, by rule, is necessary or useful for the protection of investors and in the public interest." Exchange Act § 13(l); Sarbanes-Oxley Act § 409. When the SEC ultimately expanded the list of reportable events on Form 8-K (as initially proposed prior to the passage of Sarbanes-Oxley), the adopting release stated that the amendments "further the goals of Section 409." Final Rule: Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date, SEC Release Nos. 33-8400, 34-49424 (Aug. 23, 2004), *available at* http://www.sec.gov/rules/final/33-8400.htm.

[5]*See* Joni S. Jacobsen, Jennifer C. Ryan & Laura A. Brake, Disclosure Duties Arising under Section 10(b): When to Correct or Update, PLI Sec. Litig. & Enforcement Inst. 2011 n.79 and accompanying text (2011). Parties' briefs also often misuse or conflate these terms, perhaps in hopes that courts will be more willing to accept a claim premised on a duty to correct. In response, courts have recharacterized claims as based on a duty to update or addressed both duties even if plaintiffs pursued only one of the theories. *See, e.g.*, *Gallagher v. Abbott Laboratories*, 269 F.3d 806, 810, Fed. Sec. L. Rep. (CCH) ¶ 91613 (7th Cir. 2001) (noting that amending an annual report to show new results "would *update* the report, not *correct* it"); *In re International Business Machines Corporate Securities Litigation*, 163 F.3d 102, 109, Fed. Sec. L. Rep. (CCH) ¶ 90328 (2d Cir. 1998) ("Although plaintiffs phrase their claim as a duty to correct, we believe plaintiffs are alleging a violation of a duty to update."); *In re Burlington Coat Factory Securities Litigation*, 114 F.3d 1410, 1430, Fed. Sec. L. Rep. (CCH) ¶ 99485, 38 Fed. R. Serv. 3d 557 (3d Cir. 1997) ("[T]he duty to correct is analytically different from the duty to update, although litigants, as appears to be the case here, often fail to distinguish between the two." (citing *Stransky v. Cummins Engine Co., Inc.*, 51 F.3d 1329, 1331, Fed. Sec. L. Rep. (CCH) ¶ 98668 (7th Cir. 1995)).

[6]*See Stransky*, 51 F.3d at 1331-33 (describing the difference between the duties but declining to find a duty to update); *Backman v. Polaroid Corp.*, 910 F.2d 10, 16-18, Fed. Sec. L. Rep. (CCH) ¶ 95389 (1st Cir. 1990) (en banc).

[7]*See infra* Section III.

[8]*See infra* Section IV. As discussed *infra* notes 50-51 and accompanying text, multiple panels of the Seventh Circuit and certain other courts have questioned or rejected the duty to update.

[9]See *infra* note 33.

[10]Of course, issuers should also consider whether they are otherwise required to disclose the developments and relevant timing (i.e., before trading their own securities, contemporaneously with an intentional selective disclosure, promptly after an unintentional selective disclosure or in the next periodic report). In the event that an issuer need not make a disclosure under these general disclosure duties prior to the next periodic report, but the duty to correct or duty to update apply, the Third Circuit has suggested that the update or correction should be disclosed "in a timely fashion and preferably by using the same medium" as the initial statement. *U.S. v. Schiff*, 602 F.3d 152, 171 n.24, Fed. Sec. L. Rep. (CCH) ¶ 95715 (3d Cir. 2010). Nevertheless, the Seventh Circuit has been sympathetic to the need to investigate before issuing a correction, noting that "[t]aking the time necessary to get things right is both proper and lawful." *Higginbotham v. Baxter Intern., Inc.*, 495 F.3d 753, 760, Fed. Sec. L. Rep. (CCH) ¶ 94479 (7th Cir. 2007).

[11]*See* Safe Harbor Release, [1994-95 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85436, 85779.

[12]*See* Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations, SEC Release Nos. 33-8350, 34-48960 (December 19, 2003), *available at* http://www.sec.gov/rules/interp/33-8350.htm.

[13]Regulation S-K Item 10(b).

[14]Exchange Act § 21E(c)(1)(A)(i), (c)(2).

[15]*Id.* § 21E(a), (b)

[16]*Id.* § 21E(d).

[17]*In re FoxHollow Technologies, Inc., Securities Litigation*, 2008 WL 2220600, *18 (N.D. Cal. 2008); *see also In re Advanta Corp. Securities Litigation*, 180 F.3d 525, 536-37, Fed. Sec. L. Rep. (CCH) ¶ 90499, 44 Fed. R. Serv. 3d 136 (3d Cir. 1999) (stating that a valid PSLRA defense would preclude a duty to update claim), *abrogated on other grounds by Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 127 S. Ct. 2499, 168 L. Ed. 2d 179, Fed. Sec. L. Rep. (CCH) ¶ 94335 (2007); *Eisenstadt v. Centel Corp.*, 113 F.3d 738, 746, Fed. Sec. L. Rep. (CCH) ¶ 99458 (7th Cir. 1997) (suggesting that the PSLRA may preclude duty to update claims).

[18]*Bonomo v. Nova Financial Holdings, Inc.*, 2012 WL 2196305, **6, 8 (E.D. Pa. 2012)). Similarly, the Sixth Circuit has interpreted the PSLRA as not "impos[ing] a duty to update," but the court did not "decide today whether such an obligation exists." *Helwig v. Vencor, Inc.*, 251 F.3d 540, 561, Fed. Sec. L. Rep. (CCH) ¶ 91445, 2001 FED App. 0179P (6th Cir. 2001).

[19]Gregory S. Porter, What Did You Know and When Did You Know It?: Public Company Disclosure and the Mythical Duties to Correct and Update, 68 Fordham L. Rev. 2199, 2248-2251 (2000).

[20]*Id.* at 2249.

[21]*See infra* Section III.C.

[22]Although legal disclosure duties generally arise out of the specific statutory and regulatory obligations discussed in this article, the New York Stock Exchange and NASDAQ listing rules do require companies to promptly disclose material information. New York Stock Exchange Listed Company Manual §§ 202.05-202.06(A); NASDAQ Rule 5250(b)(1). Failure to comply with these rules (absent a legal duty to disclose) cannot be the basis for liability in a private lawsuit or SEC enforcement action, but may lead to disciplinary action by the exchange. Both the NYSE and NASDAQ have broad disciplinary powers, including delisting of noncompliant registrants.

[23]Exchange Act Rule 12b-20.

[24]*Higginbotham v. Baxter Intern., Inc.*, 495 F.3d 753, 760, Fed. Sec. L. Rep. (CCH) ¶ 94479 (7th Cir. 2007).

[25]*See supra* note 4.

[26]For example, the following 8-K reporting items may relate to developments about prior disclosures: the termination of a material definitive agreement (Item 1.02), completion of acquisition or disposition of a significant amount of assets (Item 2.01), a triggering event that accelerates a direct financial obligation and has material consequences for the issuer (Item 2.04), and material impairments to assets (Item 2.06).

[27]Regulation FD Rule 100(a)(1).

[28]Regulation FD Rule 100(a)(2).

[29]*Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1321, 179 L. Ed. 2d 398, Fed. Sec. L. Rep. (CCH) ¶ 96249, 62 A.L.R. Fed. 2d 737 (2011) (citing Exchange Act Rule 10b-5).

[30]*Id.* at 1324.

[31]*Chiarella v. U. S.*, 445 U.S. 222, 227, 100 S. Ct. 1108, 63 L. Ed. 2d 348, Fed. Sec. L. Rep. (CCH) ¶ 97309 (1980).

[32]*See Steginsky v. Xcelera Inc.*, 741 F.3d 365, 371, Fed. Sec. L. Rep. (CCH) ¶ 97797 (2d Cir. 2014).

[33]Arguably, the duty to correct and duty to update are not independent from the more general disclosure duties described above, and instead represent courts' interpretations of when the general disclosure duties apply to information that arises after an initial disclosure. One commentator has called both the duty to correct and duty to update "mythical" and argued that any required disclosure can be traced back to the more general principles, such as to the obligation to prevent other disclosure from being misleading. Porter, *supra* note 19, at 2199-2202.

Similarly, a well-regarded treatise questions the analytical basis for both duties, positing that

> [t]here is no inherent reason why, under the federal securities laws, a statement must be corrected if false at the time issued. As long as the incorrect statement was made without scienter, no violations of the antifraud rules occurred. Thereafter, the statement is no different in practice from one that became false as a result of subsequent developments. The basis for requiring the correction of one but not the other remains obscure.

Brown, *supra* note 3, at § 3.04[3].

Despite this reasoning, many courts have continued to address duty to correct and duty to update claims (excluding the Seventh Circuit and certain other courts, which as discussed *infra* in Section IV, have rejected or questioned the concept of a duty to update). In light of the continuing vitality of these concepts in case law, it is prudent for companies and securities law practitioners to carefully consider these duties in deciding whether further disclosure is appropriate.

[34]*Backman v. Polaroid Corp.* stated that the duty to correct applies "if a disclosure is in fact misleading when made, and the speaker thereafter learns of this." *Backman v. Polaroid Corp.*, 910 F.2d 10, 16-17, Fed. Sec. L. Rep. (CCH) ¶ 95389 (1st Cir. 1990) (en banc). In *Stransky v. Cummins Engine Co.,* the Seventh Circuit explained that the duty to correct applies to statements that "were unreasonable when made or were not made in good faith." *Stransky v. Cummins Engine Co., Inc.*, 51 F.3d 1329, 1336, Fed. Sec. L. Rep. (CCH) ¶ 98668 (7th Cir. 1995).

[35]*See, e.g.*, *In re International Business Machines Corporate Securities Litigation*, 163 F.3d 102, 109, Fed. Sec. L. Rep. (CCH) ¶ 90328 (2d Cir. 1998); *Oran v. Stafford*, 226 F.3d 275, 286, Fed. Sec. L. Rep. (CCH) ¶ 91205, 55 Fed. R. Evid. Serv. 872 (3d Cir. 2000) (citing *In re Burlington Coat Factory Securities Litigation*, 114 F.3d 1410, 1431, Fed. Sec. L. Rep. (CCH) ¶ 99485, 38 Fed. R. Serv. 3d 557 (3d Cir. 1997)).

[36]*In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 2013 U.S. Dist. LEXIS 177051, at *92, Fed. Sec. L. Rep. (CCH) ¶ 97769 (S.D.N.Y. Dec. 11, 2013). For another example of a court holding that a duty to correct applies for a material misstatement discovered after the statement was made, *see In re MobileMedia Securities Litigation*, 28 F. Supp. 2d 901, 923 (D.N.J. 1998).

[37]*Facebook*, 2013 U.S. Dist. LEXIS 177051, at *91-*92.

[38]*Grossman v. Novell, Inc.*, 120 F.3d 1112, 1125, Fed. Sec. L. Rep. (CCH) ¶ 99507

 © 2015 Thomson Reuters

(10th Cir. 1997) (citing *Grossman v. Novell, Inc.*, 909 F. Supp. 845, 849 n.5, Fed. Sec. L. Rep. (CCH) ¶ 99006 (D. Utah 1995)).

[39]*Id*.

[40]*Facebook*, 2013 U.S. Dist. LEXIS 177051, at *88. The court further explained that even opinions or predictions "may be actionable if they are worded as guarantees or are supported by specific statements of fact, or if the speaker does not genuinely or reasonably believe them." *Id.* at *87 (citing *Raab v. General Physics Corp.*, 4 F.3d 286, 290, Fed. Sec. L. Rep. (CCH) ¶ 97713 (4th Cir. 1993); *In re Time Warner Inc. Securities Litigation*, 9 F.3d 259, 266, Fed. Sec. L. Rep. (CCH) ¶ 97824, 27 Fed. R. Serv. 3d 1005 (2d Cir. 1993)).

Relatedly, circuit courts have split on Securities Act section 11 liability standards for materially false statements based on honest belief. The Tenth Circuit recently joined the Second, Third, and Ninth Circuits in refusing to find liability for a statement of belief unless the speaker knew it was false at the time it was made. *See MHC Mut. Conversion Fund, L.P. v. Sandler O'Neill & Partners, L.P.*, 761 F.3d 1109, Fed. Sec. L. Rep. (CCH) ¶ 98121 (10th Cir. 2014); *Fait v. Regions Financial Corp.*, 655 F.3d 105, 110, Fed. Sec. L. Rep. (CCH) ¶ 96517 (2d Cir. 2011); *Rubke v. Capitol Bancorp Ltd*, 551 F.3d 1156, 1165, Fed. Sec. L. Rep. (CCH) ¶ 95042 (9th Cir. 2009); *In re Donald J. Trump Casino Securities Litigation-Taj Mahal Litigation*, 7 F.3d 357, 368, Fed. Sec. L. Rep. (CCH) ¶ 97789, 130 A.L.R. Fed. 633 (3d Cir. 1993). In contrast, the Sixth Circuit interprets Section 11 to impose strict liability for a materially false statement regardless of honest belief. *See Indiana State Dist. Council of Laborers and HOD Carriers Pension and Welfare Fund v. Omnicare, Inc.*, 719 F.3d 498, 505-506, Fed. Sec. L. Rep. (CCH) ¶ 97502 (6th Cir. 2013).

The Supreme Court granted cert in *Omnicare*, and heard oral argument in November 2014. *Omnicare, Inc. v. Laborers Dist. Council Const. Industry Pension Fund*, 134 S. Ct. 1490, 188 L. Ed. 2d 374 (2014). Although it is often difficult to predict how the Court will rule, based on oral argument the justices appeared inclined to affirm the Sixth Circuit's decision that the plaintiffs stated a cause of action under section 11, but to reject the appellate court's strict liability approach. The justices considered a middle-ground alternative proposed by the U.S. Solicitor General, in which "executives can be held liable for statements of opinion . . . if they lacked a 'reasonable basis' under the circumstances, even if their opinion was genuinely held." Stephanie Russell-Kraft, *Omnicare Clings to Narrow Liability in Supreme Court Args*, Law 360 (Nov. 3, 2014), http://www.law360.com/securities/articles/589880; *see also* Eric C. Scheiner, Jennifer Quinn Broda & David J. Grycz, Omnicare: The Other Securities Case To Be Worried About, Law360 (June 6, 2014), http://www.law360.com/articles/545254/omnicare-the-other-securities-case-to-be-worried-about. The Court's decision is expected later this term.

[41]*In re Yahoo! Inc. Securities Litigation*, Fed. Sec. L. Rep. (CCH) ¶ 96968, 2012 WL 3282819, *17 (N.D. Cal. 2012).

[42]*Id.* at *16-*19 (citing *Warshaw v. Xoma Corp.*, 74 F.3d 955, 959, Fed. Sec. L. Rep. (CCH) ¶ 99013, 34 Fed. R. Serv. 3d 502 (9th Cir. 1996)).

[43]*Id.* at *22-*23.

[44]*In re HealthCare Compare Corp. Securities Litigation*, 75 F.3d 276, 278-79, Fed. Sec. L. Rep. (CCH) ¶ 99012 (7th Cir. 1996).

[45]*Id.* at 282.

[46]*Id.* at 283 (citing *Wielgos v. Commonwealth Edison Co.*, 892 F.2d 509, 516, Fed. Sec. L. Rep. (CCH) ¶ 94809, 15 Fed. R. Serv. 3d 412, 119 A.L.R. Fed. 639 (7th Cir. 1989); *Panter v. Marshall Field & Co.*, 646 F.2d 271, 291-93, Fed. Sec. L. Rep. (CCH)

¶ 97929, 1981-1 Trade Cas. (CCH) ¶ 63971 (7th Cir. 1981)). The recent *In re Longtop Financial Technologies Ltd. Securities Litigation* posed a similar question of duty to correct an audit opinion when a competitor's CFO and market rumors suggested the company had previously engaged in financial misconduct. The court ruled that auditors did not have a duty to correct after learning about this contrary information because the sources were "less than reliable." *In re Longtop Financial Technologies Ltd. Securities Litigation*, 939 F. Supp. 2d 360, 385, Fed. Sec. L. Rep. (CCH) ¶ 97376 (S.D.N.Y. 2013).

[47]*In re Burlington Coat Factory Securities Litigation*, 114 F.3d 1410, 1431-1432, Fed. Sec. L. Rep. (CCH) ¶ 99485, 38 Fed. R. Serv. 3d 557 (3d Cir. 1997) (Alito, J.).

[48]*Id.* at 1431.

[49]*See Backman v. Polaroid Corp.*, 910 F.2d 10, 17, Fed. Sec. L. Rep. (CCH) ¶ 95389 (1st Cir. 1990) (en banc) (describing the duty to update as potentially applying "if a prior disclosure 'becomes materially misleading in light of subsequent events' " (quoting *Greenfield v. Heublein, Inc.*, 742 F.2d 751, 758, Fed. Sec. L. Rep. (CCH) ¶ 91642 (3d Cir. 1984)); *Stransky v. Cummins Engine Co., Inc.*, 51 F.3d 1329, 1332, Fed. Sec. L. Rep. (CCH) ¶ 98668 (7th Cir. 1995) (explaining that the duty, if it exists, may arise when a "forward looking statement . . . because of subsequent events becomes untrue").

[50]*See Higginbotham v. Baxter Intern., Inc.*, 495 F.3d 753, 760, Fed. Sec. L. Rep. (CCH) ¶ 94479 (7th Cir. 2007) (rejecting duty to update before next quarterly report); *Gallagher v. Abbott Laboratories*, 269 F.3d 806, 808-11, Fed. Sec. L. Rep. (CCH) ¶ 91613 (7th Cir. 2001) (explaining that securities laws do not require continuous disclosure); *Eisenstadt v. Centel Corp.*, 113 F.3d 738, 746, Fed. Sec. L. Rep. (CCH) ¶ 99458 (7th Cir. 1997) (rejecting duty to update forward-looking statements that have become incorrect due to changing circumstances); *see also In re FoxHollow Technologies, Inc. Securities Litigation*, 359 Fed. Appx. 802, 804, Fed. Sec. L. Rep. (CCH) ¶ 95542 (9th Cir. 2009) (declining to decide if a duty to update exists); *Helwig v. Vencor, Inc.*, 251 F.3d 540, 561, Fed. Sec. L. Rep. (CCH) ¶ 91445, 2001 FED App. 0179P (6th Cir. 2001) (same); *Hillson Partners Ltd. Partnership v. Adage, Inc.*, 42 F.3d 204, 219, Fed. Sec. L. Rep. (CCH) ¶ 98474 (4th Cir. 1994) (ruling that if "there can ever be a duty to update" no such duty applies for statements that were immaterial).

[51]*Gallagher v. Abbott Laboratories*, 269 F.3d 806, 808, Fed. Sec. L. Rep. (CCH) ¶ 91613 (7th Cir. 2001) (Easterbrook, J.).

[52]*See, e.g., City of Edinburgh Council v. Pfizer, Inc.*, 754 F.3d 159, Fed. Sec. L. Rep. (CCH) ¶ 97988 (3d Cir. 2014); *Burlington Coat Factory*, 114 F.3d at 1431; *Rubinstein v. Collins*, 20 F.3d 160, 170 n.41, Fed. Sec. L. Rep. (CCH) ¶ 98195 (5th Cir. 1994); *In re Time Warner Inc. Securities Litigation*, 9 F.3d 259, 267, Fed. Sec. L. Rep. (CCH) ¶ 97824, 27 Fed. R. Serv. 3d 1005 (2d Cir. 1993); *Polaroi*d, 910 F.2d at 17-18.

[53]Although the considerations discussed in this Section are helpful in analyzing the possible applicability of a duty to update, in 1998 one commentator lamented the conflicting case law and called for further clarity:

> As a result of intercircuit inconsistency and the SEC's and Congress's failure to provide clarification, the precise contours of the duty to update remain uncertain. The bewildering case law is in dire need of clarification and consistency, which will come only from further legislative action or a Supreme Court decision that directly addresses whether and when a company has a duty to update . . . . In the interim, companies remain uncertain of their duties with respect to updating prior disclosures, and will remain reluctant to make forward looking statements.

Jeffrey A. Brill, Note: The Status of the Duty to Update, 7 Cornell J.L. & Pub. Pol'y 605, 677 (1998).

[54]*Burlington Coat Factory*, 114 F.3d at 1432. *See infra* Section IV.A.1 for a discussion of the regulatory structure the court thought relevant to a reasonable investor's expectations about earnings projections.

[55]*In re International Business Machines Corporate Securities Litigation*, 163 F.3d 102, 110, Fed. Sec. L. Rep. (CCH) ¶ 90328 (2d Cir. 1998).

[56]*Backman v. Polaroid Corp.*, 910 F.2d 10, 17, Fed. Sec. L. Rep. (CCH) ¶ 95389 (1st Cir. 1990) (en banc). In this case, the court reasoned that even if a brief statement that expenses had made a product's "earnings negative" was still alive, the statement "remained precisely correct" after it became clear that the product's problems were worse than initially expected. *Id.*

[57]*Burlington Coat Factory*, 114 F.3d at 1432-33.

[58]*See In re Advanta Corp. Securities Litigation*, 180 F.3d 525, 536-37, Fed. Sec. L. Rep. (CCH) ¶ 90499, 44 Fed. R. Serv. 3d 136 (3d Cir. 1999) (focusing on a lack of evidence of wrongdoing or recklessness); *Stransky v. Cummins Engine Co., Inc.*, 51 F.3d 1329, 1333, Fed. Sec. L. Rep. (CCH) ¶ 98668 (7th Cir. 1995) (suggesting that "a projection can lead to liability under Rule 10b-5 only if it was not made in good faith or was made without a reasonable basis"); *Grassi v. Information Resources, Inc.*, 63 F.3d 596, 599, Fed. Sec. L. Rep. (CCH) ¶ 98834, 33 Fed. R. Serv. 3d 486 (7th Cir. 1995); *In re Duane Reade Inc. Securities Litigation*, 2003 WL 22801416, *7 (S.D.N.Y. 2003); *In re AT&T Corp. Securities Litigation*, Fed. Sec. L. Rep. (CCH) ¶ 92213, 2002 WL 31190863, *22 (D.N.J. 2002); *see also Cement Masons & Plasterers Joint Pension Trust v. Equinix, Inc.*, Fed. Sec. L. Rep. (CCH) ¶ 96757, 2012 WL 685344 (N.D. Cal. 2012) (rejecting duty to update financial projections "where a forecast varies by only one or two percentage points").

Although courts generally do not impose a duty to update financial projections, a couple of earlier duty to update cases at the district court level did reach the opposite conclusion. *See Rand v. M/A-Com, Inc.*, 824 F. Supp. 242, 258-59, Fed. Sec. L. Rep. (CCH) ¶ 97794 (D. Mass. 1992); *Kirby v. Cullinet Software, Inc.*, 721 F. Supp. 1444, 1450, Fed. Sec. L. Rep. (CCH) ¶ 94849 (D. Mass. 1989). In addition, the First Circuit's en banc opinion in *Backman v. Polaroid Corp.* explored the possibility that a duty to update might apply to financial projections, but ultimately did not reach the issue because it concluded the statements had not become materially misleading. *Backman v. Polaroid Corp.*, 910 F.2d 10, 17-18, Fed. Sec. L. Rep. (CCH) ¶ 95389 (1st Cir. 1990) (en banc).

[59]*In re Time Warner Inc. Securities Litigation*, 9 F.3d 259, 267, Fed. Sec. L. Rep. (CCH) ¶ 97824, 27 Fed. R. Serv. 3d 1005 (2d Cir. 1993).

[60]Burlington Coat Factory, 114 F.3d at 1427-28; *see also* IBM, 163 F.3d at 110 (holding that IBM had no duty to update statements that the company had no plans to cut the company's dividend because these were "vague expressions of opinion which are not sufficiently concrete, specific or material to impose a duty to update"); *In re Advanta*, 180 F.3d at 538 ("Vague and general statements of optimism constitute no more than puffery and are understood by the reasonable investor as such."). In addition, the First Circuit has held that a statement about "significant orders" did not give rise to a duty to update because it "falls in the category of vague and loosely optimistic statements that this court has held nonactionable as a matter of law." *Gross v. Summa Four, Inc.*, 93 F.3d 987, 995, Fed. Sec. L. Rep. (CCH) ¶ 99290, 35 Fed. R. Serv. 3d 1157 (1st Cir. 1996).

[61]*San Leandro Emergency Medical Group Profit Sharing Plan v. Philip Morris*

Companies, Inc., 75 F.3d 801, 810, Fed. Sec. L. Rep. (CCH) ¶ 99017, 34 Fed. R. Serv. 3d 530 (2d Cir. 1996).

[62]*City of Edinburgh Council v. Pfizer, Inc.*, 754 F.3d 159, Fed. Sec. L. Rep. (CCH) ¶ 97988 (3d Cir. 2014).

[63]*Id.* at *14 (citing In re Advanta, 180 F.3d at 538).

[64]*Finnerty v. Stiefel Laboratories, Inc.*, 756 F.3d 1310, 1315, 58 Employee Benefits Cas. (BNA) 2641, Fed. Sec. L. Rep. (CCH) ¶ 98010 (11th Cir. 2014).

[65]*Id*. at 1318. Stiefel Laboratories sought en banc review of this ruling, claiming that it "expands the duty to update far beyond any precedent" and leaves companies "uncertain as to the scope of the disclosure duty," but the Eleventh Circuit declined to rehear the appeal. Brandon Lowry, 11th Circ. Won't Rehear Stiefel Appeal in $1.5M Share Fight Law, Law360 (Sept. 9, 2014), http://www.law360.com/securities/articles/575665.

[66]*Finnerty v. Stiefel Labs.,* 756 F.3d at 1318. The SEC also pursued enforcement action against Stiefel Laboratories for omissions of information in stock buybacks. *See* SEC Charges GlaxoSmithKline Subsidiary and Former CEO With Defrauding Employees in Stock Plan (Dec. 12, 2011), *available at* http://www.sec.gov/news/press/2011/2011-261.htm. Stiefel Laboratories faced other lawsuits based on the same circumstances, including a recent case by a former chief financial officer of the company in which "a jury found the company and its ex-CEO did not commit securities fraud by persuading him to sell back his stock at artificially low prices" ahead of the acquisition. Carolina Bolado, Stiefel Escapes Bid for New Trial in $2M Securities Suit, Law360 (Sept. 23, 2014), http://www.law360.com/securities/articles/579763.

[67]2014 WL 2535383 at *14.

[68]756 F.3d at 1319.

[69]*Id.*

[70]*Shaw v. Digital Equipment Corp.*, 82 F.3d 1194, 1202, Fed. Sec. L. Rep. (CCH) ¶ 99217, 35 Fed. R. Serv. 3d 55 (1st Cir. 1996); *see also In re Convergent Technologies Securities Litigation*, 948 F.2d 507, 513-14, 516, Fed. Sec. L. Rep. (CCH) ¶ 96211 (9th Cir. 1991) (reasoning that an announcement of a past trend did not imply that the trend would continue or require update in a quarterly report that did not have a similar line item requirement).

[71]*Shaw*, 82 F.3d at 1219 n.33.

[72]Finnerty v. Stiefel Labs., 756 F.3d at 1317; *see also In re Sanofi-Aventis Securities Litigation*, 774 F. Supp. 2d 549, 562 (S.D.N.Y. 2011) (holding that there is no duty to update statements about product safety that were not forward-looking); *In re Yahoo! Inc. Securities Litigation*, Fed. Sec. L. Rep. (CCH) ¶ 96968, 2012 WL 3282819, *21 (N.D. Cal. 2012) (rejecting duty to update claim because statements in question were historical, nonspecific and optimistic).

[73]*Backman v. Polaroid Corp.*, 910 F.2d 10, 17, Fed. Sec. L. Rep. (CCH) ¶ 95389 (1st Cir. 1990) (en banc); *cf. Banc One Capital Partners Corp. v. Kneipper*, 67 F.3d 1187, 1193, Fed. Sec. L. Rep. (CCH) ¶ 98935, 33 Fed. R. Serv. 3d 949 (5th Cir. 1995) (holding that "facts which affect contingent events" must be updated in the course of an "all or none" offering).

[74]*Illinois State Bd. of Inv. v. Authentidate Holding Corp.*, 369 Fed. Appx. 260, 263 (2d Cir. 2010); *see also Grossman v. Novell, Inc.*, 120 F.3d 1112, 1119, 1122-23, Fed. Sec. L. Rep. (CCH) ¶ 99507 (10th Cir. 1997) (ruling that forward-looking statements were nonactionable because risk factor disclosure "bespoke caution" about the

statements).

[75]*See Glassman v. Computervision Corp.*, 90 F.3d 617, 635-36, Fed. Sec. L. Rep. (CCH) ¶ 99278, 35 Fed. R. Serv. 3d 1494 (1st Cir. 1996).

[76]*Authentidate*, 369 F. App'x at 263.

[77]*Id.* at 263-64. The court analyzed sufficiency of the cautionary language under the bespeaks caution doctrine, but the PSLRA arguably provides a lower bar for oral forward-looking statements to be nonactionable: they need only include disclosure that the company can provide forward-looking information, actual results may materially differ, and factors that could cause a difference are explained in the risk factors sections of the company's SEC filings. Exchange Act § 21E(c)(2).

[78]*Glassman v. Computervision Corp.*, 90 F.3d 617, 635-36, Fed. Sec. L. Rep. (CCH) ¶ 99278, 35 Fed. R. Serv. 3d 1494 (1st Cir. 1996).

[79]*Id.*; *see also Seaman v. California Business Bank*, Fed. Sec. L. Rep. (CCH) ¶ 97919, 2014 WL 1339649 (N.D. Cal. 2014) (declining to impose a duty to update statements in a private placement memorandum about a bank's tier 1 capital in part because of "cautionary language" in the offering document).

[80]*In re Burlington Coat Factory Securities Litigation*, 114 F.3d 1410, 1432-33, Fed. Sec. L. Rep. (CCH) ¶ 99485, 38 Fed. R. Serv. 3d 557 (3d Cir. 1997). *Burlington Coat Factory*'s holding relied on the principle that earnings projections were not "alive," but the court nevertheless distinguished the case from prior cases that explored a duty to update on the basis that statements about fundamental changes may carry an implicit promise that they will be updated, while a "simple earnings forecast . . . if anything, contains a clear implication that circumstances underlying it are likely to change." *Id.* at 1433-34; *see also In re Phillips Petroleum Securities Litigation*, 881 F.2d 1236, 1239, 1245, Fed. Sec. L. Rep. (CCH) ¶ 94538, R.I.C.O. Bus. Disp. Guide (CCH) ¶ 7278 (3d Cir. 1989) (declining to require update to a statement about a takeover attempt because plaintiffs did not produce evidence of a subsequent change of intent); *Greenfield v. Heublein, Inc.*, 742 F.2d 751, 758-59, Fed. Sec. L. Rep. (CCH) ¶ 91642 (3d Cir. 1984) (recognizing that a duty to update may apply to a statements about takeover attempts, but ruling that disclosure is not required because the company had not made any prior statements on the subject that could have generated a duty to update).

[81]*In re Time Warner Inc. Securities Litigation*, 9 F.3d 259, 267, Fed. Sec. L. Rep. (CCH) ¶ 97824, 27 Fed. R. Serv. 3d 1005 (2d Cir. 1993).

[82]*Id.* at 268. *But see Clay v. Riverwood Intern. Corp.*, 157 F.3d 1259, 1268-69, Fed. Sec. L. Rep. (CCH) ¶ 90297 (11th Cir. 1998) (ruling that the issuer had no duty to update a press release about searching for merger partners when the issuer narrowed its search to a single purchaser).

[83]*Weiner v. Quaker Oats Co.*, 129 F.3d 310, 312-13, Fed. Sec. L. Rep. (CCH) ¶ 99563, 39 Fed. R. Serv. 3d 464 (3d Cir. 1997).

[84]*Id.* at 317.

[85]*U.S. v. Schiff*, 602 F.3d 152, 170, Fed. Sec. L. Rep. (CCH) ¶ 95715 (3d Cir. 2010).

Copyright 2015 by Thomson Reuters. All rights reserved. The Duties to Correct and Update: A Web of Conflicting Case Law and Principles, by Bruce Mendelsohn and Jesse Brush, is reprinted from Securities Regulation Law Journal, Volume 43, Issue 1, with the permission of Thomson Reuters/West.