

# Corporate Finance Alert

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## Earnings Guidance

Public companies are not required by any law, rule or regulation of the Securities and Exchange Commission (SEC) or any stock exchange to issue earnings guidance. However, investors and analysts often expect to receive earnings guidance, especially for companies in certain industries. Should a company give earnings guidance? If so, how often should it do so? When, if ever, should it update previously issued guidance outside of its normal financial reporting schedule? What kind of guidance should companies give?

These questions raise difficult issues for public companies, and the current challenging economic environment has made these issues even more difficult to address.

### The Decision Whether to Give Guidance, How Often and How Much

#### The Pros and Cons

Supporters of issuing earnings guidance believe that it benefits investors and companies. Proponents argue that earnings guidance provides securities analysts with a reliable data point to assist them in evaluating their own projections regarding a company's results. Providing such information also may reduce investor uncertainty by providing investors with better information to evaluate a company and may help prevent volatility in securities prices. Companies that issue earnings guidance hope that by doing so they will benefit from higher valuations, lower share price volatility and improved liquidity for their securities. Companies also hope that these benefits will result in fewer shareholder lawsuits.

But there are many critics who believe that issuing earnings guidance is a bad practice. The critics believe that providing guidance wastes management's time, encourages short-term thinking, creates significant short-term pressure to achieve the earnings targets, and creates complex and challenging disclosure issues for companies. Critics argue that corporate decisions should not be made based on meeting the short-term expectations and goals that earnings guidance encourages. Instead, the focus for companies and for the investment community should be on longer-term stockholder value and corporate goals. Critics of earnings guidance also argue that, rather than furthering its intended purpose of increasing transparency, earnings guidance may actually decrease transparency and distort investors' perceptions of a company.

Because of the potential complexities associated with providing earnings guidance, many public companies do not provide it. Some have never provided guidance and others provided it at some point and subsequently made the decision to stop.

During the recent financial crisis, many companies that previously issued guidance discontinued or otherwise modified their practices. Many companies have determined that it is impractical or even irresponsible to issue earnings guidance quarterly or at all.

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Companies found it more difficult to estimate cash flows, predict customer demand and draw on credit lines, making short-term estimates, such as quarterly earnings forecasts, too difficult to make accurately. More recent concerns about the eurozone crisis and possible slowing growth in emerging markets have led to further concerns about the prudence of issuing earnings guidance for many companies. As a result of these circumstances, companies that are dependent on foreign sales may be particularly cautious with respect to forward-looking earnings information.

In 2007, the Commission on the Regulation of U.S. Capital Markets in the 21st Century (the 21st Century Commission) — an independent, bipartisan commission established by the U.S. Chamber of Commerce — recommended that public companies stop issuing earnings guidance or, at a minimum, move away from providing quarterly earnings per share guidance as a point estimate to providing annual guidance as a range of earnings per share numbers.<sup>1</sup> The 21st Century Commission believed that quarterly earnings per share guidance caused companies to focus too much on short-term performance and the pressure for companies to meet short-term estimates created “adverse incentives to forgo value-added investments in long-term projects.” Furthermore, the 21st Century Commission found that while a few companies meeting their quarterly earnings estimates made the decision to stop providing the quarterly estimates, many companies stopped the practice only after missing their earnings targets. Consequently, a decision to stop providing quarterly earnings targets is viewed negatively by the market. The 21st Century Commission believed that its recommendation to stop providing quarterly earnings guidance, or to at least reduce the frequency and specificity of such guidance, would remedy these problems.

In 2008, the Aspen Institute, an educational and policy studies organization, made similar recommendations that public companies shift the focus of their communications toward long-term strategic plans and use quarterly communications to focus analysts and investors on information that is key to the long-term health of the company.<sup>2</sup> It expressed the view that the effort to produce and then meet quarterly estimates wasted management’s time, led management to focus on short-term expectations at the expense of long-term growth and distorted incentives to meet quarterly estimates, encouraging activities bordering on the unethical or illegal, among other negative consequences.

Any decision to alter the frequency of or discontinue the practice of issuing earnings guidance must be managed carefully. Many companies that currently issue earnings guidance are reluctant to stop, fearing adverse reactions from investors and analysts. Consideration must be given as to whether discontinuing the issuance of guidance, or modifying guidance practices in any way, will send an unfavorable signal to the market. Many companies believe that, even with the best intentions, changes in guidance practices, especially changes that deviate from industry practice, will signal that the company is uncertain of its performance or has a negative short-term outlook. Companies deciding to discontinue the practice of issuing earnings guidance should be well-served if they emphasize that the change in practice reflects the company’s primary focus on the long-term performance of the company.

### **The Frequency and the Extent**

If a company issues earnings guidance, should it give guidance quarterly or annually, and how far in advance should a company provide such guidance? There is no one correct answer for every company.

*Quarterly vs. Annual Guidance:* The more stable and predictable earnings and results are for a company, the easier it is to provide earnings guidance quarterly. In contrast, it may be less prudent for companies with unpredictable, inconsistent earnings to provide quarterly guidance. As a result, companies with unpredictable earnings more often provide only annual earnings guidance or provide guidance as a range instead of quarterly point estimates. In addition, as a result of the recent increased volatility in the equity markets, many other companies have chosen to provide only annual earnings guidance, and/or guidance as a range, as opposed to quarterly point estimates.

*One Year vs. Further Guidance:* Most companies that issue earnings guidance do not consider it prudent to provide earnings guidance, particularly earnings per share guidance, beyond the current year, although there are some companies that have predictable business models that may allow

for this and are therefore comfortable doing so. Some companies that elect to provide long-term guidance do so in the form of more subjective goals and forecasts for a few years into the future. For example, rather than providing earnings per share guidance beyond one year, some companies provide information about their long-term strategic initiatives, such as their plans to increase customers served or stores opened by a date in the future or to increase revenue or profit margins by some amount by a future date or over the next several years. Companies must focus on their specific circumstances in determining whether issuing any kind of guidance beyond the current year or otherwise would be prudent.

### **Type of Guidance to Give**

The types of guidance companies issue can vary widely. Although companies typically provide guidance on earnings per share, some companies give only revenue guidance. Many companies also provide projections regarding adjusted net income or adjusted EBITDA. Often, these adjusted measures of operating performance may be easier to predict since they are unaffected by many of the income statement items that affect earnings per share. Some guidance may focus on other operating data. For longer-term guidance, companies may provide more subjective goals and forecasts. The type of guidance companies provide depends on the type of company, the industry and comparable guidance provided by its peers, and on the particular facts and circumstances of each individual company.

Current market conditions, where earnings are less predictable and it is harder to forecast accurately, may support a move away from earnings per share and other similar guidance toward guidance focused on other measures, such as long-term performance, key developments, strategy and risks. Under those circumstances, investors can benefit from increased information and enhanced transparency without the complexities and issues associated with forecasting earnings and operating a business with the short-term goal of meeting those estimates.

### **Liability for Forward-Looking Guidance Statements**

Various provisions of the federal securities laws impose liability for forward-looking statements, such as earnings guidance. Rule 10b-5 under the Securities Exchange Act of 1934 (Exchange Act) imposes liability on issuers, their officers and directors for misstatements of a material fact or omissions of a material fact necessary to make the statements made not misleading. Rule 10b-5 applies to statements made in periodic reports, press releases and day-to-day communications with analysts and investors, as well as statements made in connection with securities offerings. Sections 11 and 12 of the Securities Act of 1933 (Securities Act) impose liability on issuers, their officers and directors and underwriters in a public offering for oral or written misstatements or omissions of facts necessary to make the statements made not misleading.

### **Defenses to Liability for Forward-Looking Statements**

*The “Bespeaks Caution” doctrine.* Prior to the enactment of the Private Securities Litigation Reform Act of 1995 (PSLRA) discussed below, the “bespeaks caution” doctrine was developed through case law. This doctrine provides that statements that include projections and expectations about a company’s prospects are not misleading if they are accompanied by adequate disclosure to caution readers about specific risks that may materially affect the forecasts. The cases generally teach that while boilerplate cautionary language may not be sufficient, with appropriate risk disclosure that is tailored to the particular facts and circumstances, companies can mitigate or eliminate the risk of liability for forward-looking statements or guidance, even where the forecasts are not achieved.

*The Private Securities Litigation Reform Act of 1995.* The PSLRA provides a safe harbor from Exchange Act and Securities Act liability for forward-looking statements in SEC filings, press releases, investor presentations and other public statements, so long as such statements are identified as “forward-looking statements” and are accompanied by “meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement.” The PSLRA does not create a duty to update and explicitly states that “nothing in this section shall impose upon any person a duty to update a forward-looking statement.”

While the safe harbor of the PSLRA was modeled after the bespeaks caution doctrine, Congress did not intend for the safe harbor provisions to replace the bespeaks caution doctrine or to prevent further development of that doctrine by the courts. As a result of the similarities, some courts have used bespeaks caution doctrine-based decisions and standards as precedent for claims brought under the PSLRA. In some cases, companies have raised both the bespeaks caution doctrine and PSLRA safe harbor defenses. In these cases, courts have applied both the doctrine and safe harbor and found the same result under both.

## Updating Earnings Guidance

### The Duty to Update

There is no federal securities law, rule or regulation expressly imposing a duty to update a forward-looking statement. However, courts have analyzed the possible duty under Exchange Act Section 10(b) and Rule 10b-5. Courts are divided as to whether or not a duty to update exists for a forward-looking statement that becomes inaccurate or misleading after the passage of time.

Courts that recognize a duty to update a forward-looking statement generally have found that such a duty arises when a company makes a statement that remains “alive” in the minds of reasonable investors as a continuing representation (for example, disclosure that a company has been “put in play” by a hostile suitor).<sup>3</sup> When a statement remains alive in the minds of investors, there may be an implicit representation that the company will update the statement if there is a material change in the underlying facts. While many courts seem to agree that a duty to update may exist for specific forward-looking statements that relate to a fundamental change in the company in question (such as expectation of a takeover, merger or liquidation)<sup>4</sup> or that constitute specific future intentions (such as an intention to maintain a specific debt-to-capitalization ratio<sup>5</sup> or an intention to enter into strategic alliances to raise capital and reduce debt<sup>6</sup>), courts generally have not found a duty to update soft, qualitative guidance or “puffery.”<sup>7</sup> In two recent federal court of appeals cases, the courts have attempted to clarify and limit the boundaries of a duty to update forward-looking statements; however, neither case involved earnings guidance. The U.S. Court of Appeals for the Third Circuit has suggested that the duty to update is a narrow duty that only applies to cases where subsequent events produce an “extreme or radical change” in the continuing validity of the initial statement.<sup>8</sup> The court further noted that “the duty to update is a narrow duty because of the potential to create a sweeping continuing obligation for corporations when they disclose information.”<sup>9</sup> The U.S. Court of Appeals for the Second Circuit has held that there was no duty to update statements in a press release where the statements were accompanied by specific cautionary language and the company specifically cautioned that there was “no guarantee” that the circumstances described in the forward looking statements would occur (the press release discussed amendments to key agreements that were ultimately not made).<sup>10</sup> This case illustrates the importance of having meaningful cautionary language that accompanies earnings guidance and other forward-looking statements.

While some lower courts have found a duty to update hard, quantitative revenue and earnings per share guidance,<sup>11</sup> several appellate courts have not.<sup>12</sup> Because of the inconsistent court decision addressing a duty to update, and the heavy reliance on the specific facts and circumstances of each case, it can be very challenging for a company to determine whether it has a duty to update its earnings guidance in any particular situation. At a minimum, a public release containing earnings guidance should be identified as a forward-looking statement and should be accompanied by meaningful cautionary language that warns investors that there is a risk that the guidance may not be achieved, specifically setting forth factors that affect the achievability of the targeted guidance, and a statement to the effect that the company expressly disclaims any obligation or undertaking to release publicly any updates or revisions to any forward-looking statements contained therein.

## Regulation FD Considerations

Regulation FD (Fair Disclosure), which addresses selective disclosure of information by SEC-reporting companies, provides that when an issuer discloses material nonpublic information to certain individuals or entities — generally, securities market professionals, such as stock analysts, or holders of the issuer’s securities who may trade on the basis of the information — the issuer must make public disclosure of that information simultaneously, in the case of intentional disclosures, and promptly, in the case of unintentional disclosures. Regulation FD prohibits “selective disclosure” of material nonpublic information. Violators of Regulation FD are subject to SEC enforcement actions, but there is no liability under Rule 10b-5 for failure to make a public disclosure required by Regulation FD. The SEC has issued guidance stating that Regulation FD does not change existing law with respect to any duty to update.<sup>13</sup> In other words, Regulation FD does not create a duty to update forward-looking guidance information, but it does create important considerations for companies that issue earnings guidance. Any decisions to provide guidance or to update earnings guidance (or to respond to direct or indirect inquiries that address future earnings results) must be made with sensitive consideration to Regulation FD. In addition, companies must be careful not to selectively share any material information that affects previously issued guidance, which may create a duty to update where there was no prior duty.

### Regulation FD and Indirect Guidance — the Office Depot Case

In October 2010, the SEC brought an enforcement action under Regulation FD against Office Depot, Inc., its CEO and its former CFO charging the company and company executives with improper disclosures to analysts. The CEO and CFO directed investor relations personnel to place a series of private calls to analysts in advance of the release of quarterly earnings to notify those analysts that the company would not meet consensus earnings estimates.<sup>14</sup> While the investor relations personnel did not explicitly state that the company would not meet estimates, they made statements that would enable an analyst to make the inference, such as reminding analysts of prior cautionary statements made by company officials about the effect of the slowing economy on the company’s earnings. After the telephone calls but before the negative information was made public, analysts lowered their earnings estimates. By the time the company publicly announced six days later that its earnings would be negatively affected by economic conditions, the price of the company’s stock had already fallen 7.7 percent. This announcement was made approximately one month in advance of the company’s quarterly earnings release. Office Depot agreed to settle the SEC’s charges and pay a \$1 million penalty, and the CEO and CFO each agreed to settle and pay a \$50,000 penalty.

The Office Depot case provides an important lesson regarding Regulation FD’s applicability to earnings guidance. In the SEC’s view, by sharing information with analysts that effectively updated information on which previously issued guidance was based, the company had a duty to update the public.

### Should Previously Issued Guidance Be Updated?

There are several factors that should be considered in determining whether previously issued guidance should be updated.

First, when the company issued the prior guidance, did the company specifically state that it would not update that guidance more often than quarterly or annually? Or did the company state that it would update guidance more often if a material corporate transaction was consummated? Was the company silent with respect to its intentions to update guidance going forward? Consider the precedential effect of updating guidance outside the company’s routine schedule.

Next, consider the facts and circumstances that have changed since the prior guidance was issued. If the original guidance had a clear explanation of the assumptions used, has the current event or events been publicly disclosed in such a way that the investment community can reasonably recognize that one or more of those assumptions are no longer correct?

Consider whether analysts and the street have already updated their estimates. Consider whether the company will be able to truthfully speak to analysts and the investment community in the interim if it does not update its guidance.

Always consider the company's ongoing activities, such as a securities offering, share repurchase program, pending acquisition or insider sales of securities. Regardless of a company's policy on updating guidance, at any time that a company is purchasing or selling its own securities, a company has an obligation to disclose all material information before it engages in such activity.

### **Alternative Ways to Communicate With Investors and Analysts**

In lieu of issuing earnings guidance, there are alternative ways to communicate with investors and analysts that will not sacrifice transparency. Instead of providing pure quantitative quarterly earnings guidance, companies could focus more on providing qualitative information regarding business fundamentals, the drivers affecting those fundamentals, results, trends, market forces, the general business climate, and the company's intermediate and long-term goals. The rules and regulations of the SEC similarly require that management discuss in its public filings the known trends and uncertainties that have impacted historical results and are likely to impact future periods. Provided properly, this enhanced qualitative disclosure should increase transparency and provide analysts and investors with the information they need while not placing undue and arguably misplaced pressure on companies to make forecasts and then meet these short-term estimates and goals, perhaps at the expense of long-term goals, in an often uncertain, fluctuating short-term environment.

### **Practice Considerations**

Public companies should carefully consider whether the perceived benefits of issuing earnings guidance outweigh the possible detriments. Every public company that makes the decision to issue earnings guidance should have a policy on guidance that is the subject of careful thought and that suits individual circumstances. What may be a proper policy for one company may not be a proper policy for another. Below are some important considerations for a company that has decided to issue earnings guidance notwithstanding the difficulties that may arise therefrom:

- Establish and maintain clear guidance policies so that investors know what to expect. In this way, short of extraordinary circumstances, a company may mitigate any obligation to update prior guidance outside of the scheduled intervals.
- Give guidance consistently and according to a planned schedule. Guidance should not depend on whether the company has good or bad news.
- Consider industry peer guidance practices.
- Don't release overly conservative guidance hoping to beat estimates.
- Any decisions to provide guidance or to update previously issued earnings guidance must be made with Regulation FD in mind.
- All guidance should be accompanied by appropriate, thoughtfully tailored disclosure discussing the risks that may affect the company's current expectations. Specific disclosure regarding the assumptions made in the guidance is important. Disclosures should be balanced.
- Guidance is best delivered quarterly or annually in company earnings releases and on company earnings calls. These calls are available to the public and replays are typically available on company websites, which mitigate any Regulation FD concerns. Both the release and the call should contain appropriate forward-looking statement disclaimers.
- Do not comment on or redistribute analyst reports.
- Guidance must be constantly re-evaluated in the context of a securities offering or repurchase or when insiders may be buying or selling company securities. All material information must be

disclosed prior to engaging in such transactions. As a result, information that may affect previously issued guidance may need to be disclosed prior to the time the company would otherwise disclose the information.

- Involve legal counsel in the process of deciding what, if any, guidance to provide and when possible updates to previously issued guidance should be made. While finance and investor relations personnel are typically primarily responsible for guidance, legal counsel can help evaluate the benefits and risks associated with a particular course of action.

## Conclusion

A decision to issue earnings guidance and determinations as to how often, what type, how much specificity and when to update previously issued guidance, can be critical decisions for public companies. Companies need to manage expectations and maintain credibility, while sharing material information with the investing community at the appropriate time. While carefully crafted and disclosed guidance might be beneficial to companies and their investors, the complexities associated with forecasting earnings can create challenging disclosure issues for companies that may take a great deal of management time and focus away from where that time and focus could better serve both the companies and their investors — the companies' long-term goals. Quantitative guidance should not be the only alternative.

## END NOTES

- 1 Report and Recommendations, Commission on the Regulation of U.S. Capital Markets in the 21st Century, Mar. 2007 at 7 (available at [http://www.uschamber.com/sites/default/files/reports/0703capmarkets\\_full.pdf](http://www.uschamber.com/sites/default/files/reports/0703capmarkets_full.pdf)).
- 2 Operating and Investing for the Long-Term: Best Practices in Communications, Guidance and Incentive Structures to Create Value for the Long-Term, Aspen Institute, Nov. 2008 (available at [http://www.aspeninstitute.org/sites/default/files/content/docs/bsp/OPERATING\\_AND\\_INVESTING\\_FOR\\_THE\\_LT\\_EG\\_SYMP\\_FINAL.PDF](http://www.aspeninstitute.org/sites/default/files/content/docs/bsp/OPERATING_AND_INVESTING_FOR_THE_LT_EG_SYMP_FINAL.PDF)). Participants in the working group responsible for the Aspen Institute paper include The Aspen Institute Business and Society Program, Business Roundtable Institute for Corporate Ethics, CFA Institute Centre for Financial Market Integrity, Committee for Economic Development (CED) and U.S. Chamber of Commerce Center for Capital Markets Competitiveness.
- 3 *See In re Burlington Coat Factory Sec Litig.*, 114 F.3d 1410, 1432 (3rd Cir. 1997) (in order for a duty to update to arise, a forward looking statement must contain an implicit factual representation that remains "alive" in the minds of investors as a continuing representation). *See also Backman v. Polaroid Corp.*, 910 F.2d 10, 17 (1st Cir. 1990); *In re International Business Machines Corp. Sec. Litig.*, 163 F.3d 102, 110 (2d Cir. 1998).
- 4 *See Burlington Coat Factory*, 114 F.3d at 1433 (in finding no duty to update an ordinary earnings projection, the court distinguished this case as "vastly different" from two prior cases in which a duty to update was found because the prior cases involved events "that could fundamentally change the natures of the companies involved." "Where the initial disclosure relates to the announcement of a fundamental change in the course the company is likely to take, there may be room to read in an implicit representation by the company that it will update the public with news of any radical change in the company's plans — e.g., news that the merger is no longer likely to take place." *Id.* at 1433-34).
- 5 *See Weiner v. Quaker Oats*, 129 F.3d 310 (3d Cir. 1997) (court noted that the company may have a duty to update a publicly disclosed intention to maintain a debt-to-capitalization ratio in the upper 60 percent range once it became clear that a likely merger would force the company to take on sufficient debt to raise the ratio far higher than the upper 60 percent range initially disclosed).
- 6 *See In re Time Warner Inc. Secs. Litig.*, 9 F.3d 259 (2d Cir. 1993) (court held that when a company announces that it is pursuing a specific business goal and announces an approach for reaching that goal, such as Time Warner's intention to find strategic partners to infuse capital to reduce Time Warner's debt, it may come under an obligation to disclose other approaches for reaching that goal when they are under active and serious consideration, such as Time Warner's consideration of and eventual stock offering that substantially diluted the rights of existing shareholders).
- 7 *See Grossman v. Novell, Inc.*, 120 F.3d 1112, 1117, 1125 (10th Cir. 1997) ("vague, optimistic statement[s]" regarding a recent merger, such as that Novell has experienced "substantial success" in integrating the sales forces of the two companies, that the merger was moving "faster than we thought" and that "[b]y moving rapidly to a fully integrated sales force, we are leveraging our combined knowledge of the expanding scope of network solutions," were not definite positive projections giving rise to a duty to update) (internal quotations and citation omitted).
- 8 *See United States v. Schiff*, 602 F.3d 152 (3d Cir. 2010) (citing *Burlington*, 114 F.3d at 1430-34) (although the government waived its duty to update argument, the court stated that company officials' public statements about increased sales to its wholesalers, which led to increased earnings by the company, but which did not reference incentive programs that caused temporarily inflated sales (and earnings), did not "come close to fitting within the narrow range of this duty [to update]." *Id.* at 170).

- 9 See *Schiff*, 602 F.3d at 170 (citing *Burlington Coat Factory*, 114 F.3d at 1433-34).
- 10 See *Ill. State Bd. of Inv. v. Authentidate Holding Corp.*, 369 F. App'x. 260, 263 n.2 (2d Cir. 2010) (court noted that there is no duty to update when there is no forward-looking statement that would "remain 'alive' in the minds of reasonable investors." The court distinguished between "vague statements of optimism," which would not require updating, and "definite positive projections," which would require updating once intervening events cause them to become misleading. The court concluded that although Authentidate's press release contained a forward-looking statement that was likely to remain "alive" in the minds of reasonable investors, it did not require subsequent updating because it had been accompanied by appropriate cautionary language indicating that the anticipated amendment discussed in a forward-looking statement was not guaranteed. However, the court distinguished the statements made on a conference call, which were not similarly accompanied by appropriate cautionary language that would negate liability. The court noted that, as a result of subsequent events, the statements had become misleading, and a boilerplate warning made at the beginning of the conference call did not adequately describe the specific risk to investors).
- 11 See *Rand v. M/A-Com, Inc.*, 824 F. Supp. 242, 258-59 (D. Mass. 1992) (court held that a projection of future earnings was not false or misleading when made and could not support a securities fraud action but noted that a company may have had a duty to update specific earnings per share projections for the year made in a public statement if such projections became misleading in light of a revised mid-year estimate distributed to senior management predicting dramatically lower earnings per share than predicted earlier in the year). See also *Kirby v. Cullinet Software, Inc.*, 721 F. Supp. 1444, 1450 (D. Mass. 1989) (defendant may have had a duty to update optimistic statements predicting future financial results when it realized such results were materially misleading in light of subsequent events).
- 12 See *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1432 (3rd Cir. 1997) (the court found no duty to update when Burlington released annual earnings of \$1.12 per share 10 months after its chief accounting officer had affirmed estimates of \$1.20 to \$1.30 per share. The court found it unreasonable that a single, ordinary earnings forecast would contain the implication that the forecast would continue to hold good even as circumstances change). See also *In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 536-37 (3rd Cir. 1999) (company representatives made statements and earnings forecasts indicating increased revenues, which did not materialize due to decisions made by company executives with respect to a customer promotion, which led to losses by the company. The court found that the company had no duty to update the prior statements once it realized that its publicly disclosed projected revenue increases would not materialize because there was no evidence of wrongdoing or recklessness); *Stransky v. Cummins Engine Co.*, 51 F.3d 1329, 1333 n.9 (7th Cir. 1995), as amended (Apr. 7, 1995) (shareholder brought a securities fraud class action against a company and its directors under Rule 10b-5, alleging that the directors suppressed news of problems in a new product design, while continuing to make positive predictions about meeting profit margins and other targets for the product. The court found that there is no duty to update the forward-looking statements merely because changing circumstances had proven the statements wrong); *Hillson Partners Ltd. P'ship v. Adage, Inc.*, 42 F.3d 204, 219 (4th Cir. 1994) (company issued quarterly reports and press releases indicating expected revenue increases and record profits and expected improvements to its facilities, which did not materialize as predicted. Court found no duty to update the statements on the basis of subsequent events because such comments were immaterial vague predictions); *Grassi v. Info. Res., Inc.*, 63 F.3d 596, 599 (7th Cir. 1995) (where a company's earnings projections turned out to be inaccurate as a result of a decision to treat an acquisition of an affiliated company as good will instead of writing off the investment as worthless, the court found no duty to update forward-looking statements once circumstances proved those statements to be incorrect because the company's decision to treat the acquisition as good will was based on an Accounting Principle Board rule and the financial statements were approved by the company's outside auditors).
- 13 SEC Regulation FD, CD&Is, Question 101.02, Aug. 14, 2009.
- 14 *SEC v. Office Depot, Inc.*, No. 9:10-cv-81239 (S.D. Fla. Oct. 21, 2010); *In re Office Depot, Inc.*, Exchange Act Release No. 63152 (Oct. 21, 2010); *In re Odland*, Exchange Act Release No. 63153 (Oct. 21, 2010); *In re McKay*, Exchange Act Release No. 63154 (Oct. 21, 2010).



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