NOTE

UPDATING THE DUTY TO UPDATE: HARMONIZING A CONTINUOUS DUTY WITH A PERIODIC DISCLOSURE REGIME

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For decades, courts have struggled to determine whether and when public companies are obligated to update prior disclosures that, although true when made, become misleading as a result of a subsequent event. Prior to 2020, a lack of urgency coupled with an increasingly periodic disclosure regime furthered obscured the role and relevance of this dubious obligation, otherwise known as the duty to update. However, with the paradigmatic subsequent event of COVID-19 still permeating through every aspect of life nearly two years after its onset, the duty to update—and all of its uncertainties—has come into the fore once again.

This Note suggests three recommendations to the duty to update in light of its renewed relevance. First, the framework for identifying a statement subject to the duty should be streamlined. Second, courts should adopt a consistent materiality test when evaluating potential violations of the duty. Finally, and most importantly, the SEC should utilize its rulemaking power to clarify its calls for more continuous disclosures in the wake of the pandemic. Only then will the duty to update claim its appropriate role in the grand scheme of securities regulation.

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I. INTRODUCTION

In the current climate of economic uncertainty propelled by the ongoing global pandemic, regulatory guidance carries heightened importance for public companies seeking to comply with federal securities laws, rules, and regulations. However well-intentioned this guidance might be, significant issues may arise in practice when the legal bases for certain recommendations are unclear to both courts and litigants. One area in which such issues may emerge is liability based on a public company's purported duty to update prior disclosures that, although true when made, become misleading because of a subsequent event.[1]

[1] *See* ANN C. KIM ET AL., SEC ENFORCEMENT AND LITIGATION RISKS AMID THE COVID-19 PANDEMIC 2–4 (Apr. 22, 2020) (on file with the Columbia Business Law Review),

The Securities and Exchange Commission (SEC) invoked an idea similar to this duty on March 25, 2020, when its Division of Corporation Finance (CF Division) released its first major guidance on corporate disclosures and other securities law obligations related to the COVID-19 pandemic.[2] Among its recommendations was a non-exhaustive list of questions companies should consider when assessing and disclosing the impact of COVID-19 and related risks on their present and future operations.[3] Specifically, the CF Division "encourage[d] companies to provide disclosures that allow investors to evaluate the current and expected impact of COVID-19 through the eyes of management, and [to] proactively revise and update disclosures as facts and circumstances change."[4] The CF Division further suggested that companies should, in order to refrain from trading prior to the dissemination of material non-public information, "consider whether [they] may need to revisit, refresh, or update previous disclosure to the extent that the information becomes materially inaccurate."[5]

While nothing in the CF Division's guidance has legal force,[6] the emphasis on updating disclosures raises two questions: whether companies have a duty to update and, if so, when this duty arises. Initial reactions to the guidance have suggested that it may increase the potential for civil claims based on the duty to update, and, thus, some have recommended that companies should be cautious about providing more robust forward-looking statements about COVID-19's impact.[7] Unfortunately for interested parties, the guidance remains unclear. A duty to update is not expressly

https://www.hoganlovells.com/~/media/hogan-lovells/pdf/2020-pdfs/2020_04_22_sec_covid_19_enforcement_litigation_article.pdf.

[2] Div. of Corp. Fin., SEC, *CF Disclosure Guidance: Topic No. 9*, U.S. SEC. & EXCH. COMM'N (Mar. 25, 2020), https://www.sec.gov/corpfin/coronavirus-covid-19 [https://perma.cc/YGN4-ACSD].

[3] *Id.*

[4] *Id.*

[5] *See id.* (noting also the risks of improper selective disclosure).

[6] *Id.*

[7] *See, e.g.*, KIM ET AL., *supra* note 1, at 4.

codified by any securities law.[8] Instead, the contours of the duty, to the extent that it is recognized, have developed in courtrooms, and the courts' inconsistent treatment of the duty to update has resulted in confusing and contradictory standards.[9]

This Note argues that the duty to update still has a place in securities regulation, not only in protecting investors when making their personal investment decisions but also in promoting the efficiency of our capital markets more broadly. Part II discusses the purpose and current state of the United States disclosure regime, including the duty to disclose in general and the closely related, and oft-confused, duties to correct and update. Part III discusses the positions various circuit courts have taken on the duty to update and the muddiness they have created.

Part IV demonstrates why the debate surrounding the duty to update has been revived by the global pandemic. It then argues that courts should still impose the duty to update in certain circumstances, contrary to the decades-long trend of limiting the duty as a byproduct of confusing judicial development. In order to fill its proper role in the disclosure regime while also eliminating frivolous or unsubstantiated claims, the duty to update analysis needs three adjustments. First, the framework for identifying an original statement subject to the duty should be streamlined. Second, courts should take a two-step approach to assess materiality in duty to update cases: both the original statement and the newly-discovered information should be material for the duty to arise. Finally, the SEC must create a regulatory scheme that addresses whether and when issuers should update prior disclosures rendered materially misleading by subsequent events. These adjustments align with the purpose of

[8] Jeffrey A. Brill, Note, *The Status of the Duty to Update*, 7 CORNELL J.L. & PUB. POL'Y 605, 608 (1998).

[9] *See* 3C HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, SECURITIES AND FEDERAL CORPORATE LAW § 18:23, Westlaw (database updated Mar. 2021) ("It would be an understatement of major proportions to say that the federal courts are not in agreement as to whether federal securities law imposes a 'duty to update.'").

disclosure-based securities regulation and provide a readily available set of procedures for both courts and litigants alike.

II. THE PURPOSE AND CURRENT STATE OF THE UNITED STATES' DISCLOSURE REGIME

Any discussion of the duty to update and the potential impact of COVID-19 upon it must be understood through the lens of the United States' disclosure regime, which has been the bedrock of securities regulation since the New Deal. This Part clarifies when disclosure is mandatory, when it is required because of an implied duty to disclose, and how the duties to correct and update are distinct.

A. Disclosure's History and Purpose

Congress undertook a sweeping overhaul of securities regulation following "rampant abuses in the securities industry [that] led to the 1929 stock market crash and the Great Depression."[10] A critical factor Congress "perceived" to have caused these abuses was a "lack of information" in the investing community.[11] In an attempt to remedy this problem, Congress enacted two principal regulatory safeguards: the Securities Act of 1933[12] (Securities Act) and the Securities Exchange Act of 1934[13] (Exchange Act).[14] Congress's purpose

[10] *See* Kokesh v. SEC, 137 S. Ct. 1635, 1639–40 (2017).

[11] *See* Daniel C. Rowe, *Periodic Reporting in a Continuous World: The Correlating Evolution of Technology and Financial Reporting*, 13 DUKE L. & TECH. REV. 248, 249 (2015).

[12] Securities Act of 1933 (Securities Act), Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a–77mm (2018)).

[13] Securities Exchange Act of 1934 (Exchange Act), Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a–78qq).

[14] *See, e.g.*, Nathan Lee, *The Extraterritorial Reach of United States Securities Actions After* Morrison v. National Australian Bank, 13 RICH. J. GLOB. L. & BUS. 623, 623 (2015) ("In the aftermath of Black Tuesday, the infamous Wall Street crash of 1929, Congress enacted the Securities Act of 1933 and the Securities Exchange Act of 1934. These two Acts sought to ensure legitimacy in the securities market by, among other things, regulating and preventing deceptive conduct in securities transactions." (footnote omitted)).

in enacting these statutes was to "promote investor confidence" in the securities markets[15] by "substitut[ing] a philosophy of full disclosure for the philosophy of *caveat emptor*."[16] Congress recognized that "the hiding and secreting of important information obstructs the operation of the markets as indices of real value."[17]

In general terms, the Securities Act regulates the initial distribution of securities, and the Exchange Act regulates secondary trading.[18] The Securities Act registration system specifies mandatory disclosure documents—namely the prospectus and registration statement—when offering securities.[19] "Registration is intended to provide such disclosure of material facts concerning the company and the securities it proposes to sell, to enable investors to make a realistic appraisal of the merits of the securities and then exercise informed judgment in determining whether to purchase them."[20] Registration requires, in general, "a description of the company's properties and business; a description of the security to be offered for sale; information

[15] SEC v. Zandford, 535 U.S. 813, 819 (2002) (internal quotation marks omitted) (quoting United States v. O'Hagan, 521 U.S. 642, 658 (1997)).

[16] Kokesh v. SEC, 137 S. Ct. 1635, 1640 n.1 (2017) (alteration in original) (internal quotation marks omitted) (quoting SEC v. Cap. Gains Rsch. Bureau, Inc., 375 U.S. 180, 186 (1963)).

[17] Basic Inc. v. Levinson, 485 U.S. 224, 246 (1988) (internal quotation marks omitted) (quoting H.R. REP. NO. 73-1383, at 11 (1934)).

[18] *See* Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 171 (1994) (citing Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 752 (1975)).

[19] 15 U.S.C. § 77e (2018); *see also Blue Chip Stamps*, 421 U.S. at 728 ("The 1933 Act was described as an Act 'to provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes.'" (quoting Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74, 74)).

[20] Shelby D. Green, *To Disclose or Not To Disclose? That Is the Question for the Corporate Fiduciary Who Is Also a Pension Plan Fiduciary Under ERISA: Resolving the Conflict of Duty*, 9 U. PA. J. LAB. & EMP. L. 831, 834 (2007).

about the management of the company; and financial statements certified by independent accountants."[21]

The Exchange Act "was described as an Act 'to provide for the regulation of securities exchanges and of over-the-counter markets operating in interstate and foreign commerce and through the mails, to prevent inequitable and unfair practices on such exchanges and markets, and for other purposes.'"[22] The Exchange Act also created the SEC,[23] the most important player in the development of the United States' disclosure regime. From its inception, the SEC has touted investor protection as one of its foundational principles.[24] To implement this principle, the SEC possesses the authority to require the disclosure of information that allows investors to make informed investment and voting decisions.[25] "Such information makes it possible for investors to evaluate companies and have the confidence to invest and, as a result, allows[s] [the country's] capital markets to flourish."[26]

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[21] *The Laws That Govern the Securities Industry*, U.S. SEC. & EXCH. COMM'N (bullet points omitted), https://www.sec.gov/answers/about-lawsshtml.html [https://perma.cc/EF97-E3XL] (last modified Oct. 1, 2013).

[22] *Blue Chip Stamps*, 421 U.S. at 728 (quoting Securities Exchange Act of 1934 (Exchange Act), Pub. L. No. 73-291, 48 Stat. 881, 881).

[23] Exchange Act § 4(a).

[24] *What We Do*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/about/what-we-do [https://perma.cc/FGZ9-74Q7] (last modified Dec. 18, 2020). In addition to investor protection, the SEC's other primary concerns when engaging in rulemaking in the public interest are the promotion of "efficiency, competition, and capital formation." 15 U.S.C. § 77b(b) (2018).

[25] Mary Jo White, Chair, U.S. Sec. & Exch. Comm'n, The Path Forward on Disclosure (Oct. 15, 2013), https://www.sec.gov/news/speech/spch101513mjw [https://perma.cc/E98Z-3YKH] ("[O]ne of the most meaningful powers that [the SEC has] to wield on behalf of investors is [its] authority to require companies to tell investors about the things that matter to them. . . . Without proper disclosure, investors would be unable to make informed decisions.").

[26] *Id.*; *cf. also* SEC v. Tex. Gulf Sulphur Co., 401 F.2d 833, 858 (2d Cir. 1968) (en banc) ("The dominant congressional purposes underlying the Securities Exchange Act of 1934 were to promote free and open public securities markets and to protect the investing public from suffering inequities in trading, including, specifically, inequities that follow from

By enacting the Securities Act and the Exchange Act, and by granting the SEC broad authority to regulate the securities industry,[27] Congress created an integral scheme to provide investors with various types of protections.[28] By increasing investor confidence in the marketplace, proper disclosure fosters growth and innovation[29] and increases share price accuracy, which reduces risks and boosts market efficiency.[30] Thus, the disclosure regime benefits not only investors but also issuers and the public at large.[31] This is particularly true during and after times of crisis, for when markets become unreliable or more illiquid "the cost of capital increases, and, in theory, investment decreases," harming all

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trading that has been stimulated by the publication of false or misleading corporate information releases.").

[27] *See The Laws That Govern the Securities Industry*, *supra* note 21.

[28] Elisabeth Keller & Gregory A. Gehlmann, Introductory Comment, *A Historical Introduction to the Securities Act of 1933 and the Securities Exchange Act of 1934*, 49 OHIO ST. L.J. 329, 329–30 (1988). Within the same decade, Congress enacted several other statutes to bolster this nascent regulatory regime. *See id.* at 329, 330 & nn.7–10 (discussing the Public Utilities Holding Company Act of 1935, the Trust Indenture Act of 1939, the Investment Company Act of 1940, and the Investment Advisers Act of 1940).

[29] Hillary A. Sale & Robert B. Thompson, *Market Intermediation, Publicness, and Securities Class Actions*, 93 WASH. U. L. REV. 487, 530 (2015).

[30] *See* Merritt B. Fox, *Why Civil Liability for Disclosure Violations When Issuers Do Not Trade?*, 2009 WIS. L. REV. 297, 312 (2009); *cf. also* White, *supra* note 25 ("Without proper disclosure, investors . . . . would not know about the financial condition of the company they are investing in. Nor would they know about how the company operates, who its board members are or what business, operational or financial risks the company faces, let alone may face in the future."). On the other hand, there are arguments against an expansive disclosure regime. *See, e.g.*, Edmund W. Kitch, *The Theory and Practice of Securities Disclosure*, 61 BROOK L. REV. 763, 856 (1995) (observing that "innovation and risk-taking would occur less frequently" under a disclosure regime requiring firms to disclose all "the thoughts and plans" of management).

[31] Hillary A. Sale, *Disclosure's Purpose*, 107 GEO. L.J. 1045, 1046 (2019).

three groups.[32] As will be argued later, the duty to update should account for this trickle-down effect.

B. The Duty To Disclose

In crafting the first major federal securities laws, "Congress . . . attempt[ed] to thread the needle and devise a regulatory regime that would . . . protect investors without impeding corporate access to the capital markets."[33] The result of this balancing act was a disclosure-based regime.[34] Public issuers are now subject to a variety of disclosure obligations through which the buying and selling of securities are regulated.[35] While mandatory disclosure obligations are grounded in the statutory framework of the Securities Act and the Exchange Act, courts have elaborated the circumstances in which a duty to disclose can and should be imposed.[36]

In general, "the SEC requires that the information provided" in accordance with the securities laws "be accurate, [but] it does not guarantee it."[37] Further, its "disclosure regime does not prevent risky products from being sold."[38] "[T]he traditional rule of . . . disclosure has long been that corporations have no general duty to disclose information simply because that information is material."[39] Without a duty to disclose, liability for non-disclosure, including any violation

[32] *See id.* at 1051 (footnote omitted) (drawing on the example of "the 2008-2009 financial crisis"). Presumably, disclosure is also important in the face of today's pandemic-related challenges.

[33] Ronald J. Colombo, *Merit Regulation via the Suitability Rules*, 12 J. INT'L BUS. & L. 1, 3–4 (2013).

[34] *Id.* at 5.

[35] *See* J. Robert Brown, Jr., *Corporate Communications and the Federal Securities Laws*, 53 GEO. WASH. L. REV. 741, 741–46 (1985) (summarizing disclosure regulation).

[36] *See, e.g.*, TSC Indus. v. Northway, Inc., 426 U.S. 438, 449 (1976) (defining the threshold of "materiality" determining when disclosure must be made).

[37] *The Laws That Govern the Securities Industry*, *supra* note 21.

[38] Sale, *supra* note 31, at 1048.

[39] 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, 2199–2200 (2000).

of a purported duty to update, cannot be found.[40] And, as one commentator has noted, "the main reason for truncating disclosure duties" is to further "the interest of encouraging production and innovation."[41] After a brief overview of the United States' mandatory disclosure requirements, this Section will discuss when an implied duty to disclose arises.

1. Mandatory Disclosures

Through the Securities Act, Congress established a system of full disclosure[42] over one of merit regulation[43] based on the conclusion that "[s]unlight is said to be the best of disinfectants."[44] Full disclosure provides investors with an opportunity to evaluate the merits of an investment and fend for themselves, thereby satisfying the purposes of merit-based

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40 *Cf.* Chiarella v. United States, 445 U.S. 222, 235 (1980) ("When an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak.").

41 Donald C. Langevoort, *Disasters and Disclosures: Securities Fraud Liability in the Shadow of a Corporate Catastrophe*, 107 GEO. L.J. 967, 975 (2019).

42 *See* Basic Inc. v. Levinson, 485 U.S. 224, 234 (1988) ("Disclosure, and not paternalistic withholding of accurate information, is the policy chosen and expressed by Congress. We have recognized time and again, a 'fundamental purpose' of the various Securities Acts, 'was to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry." (quoting SEC v. Cap. Gains Rsch. Bureau, Inc., 375 U.S. 180, 186 (1963))).

43 Colombo, *supra* note 33, at 6–7 (defining merit regulation as a government official determining whether the quality of a given security is adequate for sale).

44 Roberta S. Karmel, *Disclosure Reform—the SEC Is Riding Off in Two Directions at Once*, 71 BUS. LAW. 781, 784 (2016) (internal quotation marks omitted) (quoting LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (Frederick A. Stokes Co. 1914)). "In other words, enhanced disclosure would lead to better securities industry practices, by making unsavory practices more difficult to conceal or get away with." Colombo, *supra* note 33, at 3 (citing Susanna Kim Ripken, *The Dangers and Drawbacks of the Disclosure Antidote: Toward a More Substantive Approach to Securities Regulation*, 58 BAYLOR L. REV. 139, 151 (2006)).

regulation.[45] Thus, a specified list of disclosure items was attached to the Securities Act as Schedule A.[46] The statute also created opportunities for both government and regulatory enforcement, as well as for private suits by investors.[47] Broadly, the Securities Act has been regarded as a successful balancing mechanism between the interests of investors and the general public, and the desire to maintain free and efficient markets.[48]

Shortly after this initial legislation, Congress enacted the Exchange Act,[49] which built upon the disclosure requirements established by the Securities Act.[50] The scope of the Securities Act, which focused on distributions of securities, paled in

[45] *See* 1 THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION § 1:17, Westlaw (database updated Dec. 2020) ("It is a basic tenet of federal securities regulation that investors' ability to make their own evaluations of available investments obviates any need that some observers may perceive for the costlier and time-consuming governmental merit analysis of the securities being offered.").

[46] Securities Act of 1933, Pub. L. No. 73-22, sched. A, 48 Stat. 74, 88–91 (codified as amended at 15 U.S.C. § 77aa (2018)). "Schedule A provides only a bare-bones outline of the types of disclosures which are required" in a registration statement. 1 HAZEN, *supra* note 45, § 3:8. Detailed disclosure requirements appear in the SEC's registration forms and in Regulation S–K. *See, e.g.*, Regulation S-K, 17 C.F.R. §§ 229.10–.1305 (2020).

[47] The Securities Act contains a number of private remedies for investors who are injured due to violations of the Act. *See, e.g.*, 15 U.S.C. §§ 77k(a), 77*l*(a)(1)–(2). The Act also contains general antifraud provisions, enforceable by the government, which bar material omissions and misrepresentations in connection with the offer or sale of securities. *Id.* § 77q(a).

[48] *Cf.* Paul G. Mahoney, *The Political Economy of the Securities Act of 1933*, 30 J. LEGAL STUD. 1, 31 (2001) ("The Securities Act accordingly provides a useful cautionary tale about the efficacy of economic regulation. The act is generally regarded as one of the greatest success stories of the New Deal. Unlike many regulatory statutes, it has been largely untouched by claims that it raises entry barriers or enforces cartel agreements among members of the regulated industry. Yet . . . in light of the competitive conditions in the underwriting market in the 1920s, . . . even the Securities Act was a likely source of rents for [regulated] firms.").

[49] Securities Exchange Act of 1934 (Exchange Act), Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a–78qq).

[50] *See* 2 HAZEN, *supra* note 45, § 9:2.

comparison to that of the Exchange Act, which addressed "virtually all aspects of securities transactions and the securities" industry.[51] The Exchange Act set forth a system of periodic disclosure,[52] imposing registration and reporting requirements upon issuers of certain securities,[53] as well securities dealers and other market professionals,[54] national securities exchanges,[55] and self-regulatory organizations, such as the Financial Industry Regulatory Authority.[56] Critically, the Exchange Act created the SEC and provided the statutory basis for the SEC's rulemaking, adjudicatory, and enforcement powers.[57] For example, section 10(b) of the Exchange Act delegates to the SEC responsibility for promulgating rules to determine the scope of anti-fraud liability.[58]

[51] *Id.*

[52] Section 13 of the Exchange Act authorizes the SEC to establish requirements for periodic reporting of information by companies with publicly traded securities. It provides, in pertinent part, that securities issuers "shall file with the Commission . . . such annual reports . . . as the Commission may prescribe." 15 U.S.C. § 78m(a)(2). The SEC has implemented section 13 through regulations providing that issuers "shall file" annual reports on prescribed forms. 17 C.F.R. § 240.13a-1 (2020).

[53] This includes, for example, a company that has more than $10 million in total assets and a class of equity securities, like common stock, that is held of record by either (1) 2,000 or more persons or (2) 500 or more persons who are not accredited investors, or that lists its securities on a U.S. exchange. *See* 15 U.S.C. § 78*l*(b), (g).

[54] *Id.* §§ 78o, 78o-1 (regulating brokers, dealers, and certain issuers).

[55] *Id.* §§ 78f, 78q, 78s.

[56] *Id.* § 78o-3.

[57] For the current provisions, see, for example, *id.* § 78d (SEC organization); *id.* § 78j(b) (SEC rulemaking authority with respect to fraud); *id.* § 78o(b)(1) (SEC adjudication authority with respect to broker-dealer registration); *id.* § 78u (SEC enforcement authority); see also 1 HAZEN, *supra* note 45, § 1:30 ("Much of the [SEC]'s legislative or rule-making power derives from certain sections of the securities laws . . . specifically empower[ing] the SEC to promulgate rules that have the force of statutory provisions.").

[58] 15 U.S.C. § 78j(b). For a discussion of SEC rules-based and principles-based SEC rulemaking, see generally James J. Park, *The Competing Paradigms of Securities Regulation*, 57 DUKE L.J. 625 (2007).

By 1982, the SEC had adopted Regulation S-K,[59] "which served as the basis for coordinating disclosure under both the Securities Act . . . and the Exchange Act . . . by having the requirements for each incorporate by reference questions set out in a single regulation."[60] Today, while some duplication issues remain, integrated disclosure has made great strides in easing the disclosure burden.[61]

The intricacies of Regulation S-K and related rules are numerous, but the concept of materiality continues to be the dividing line between what information must be disclosed and what information may be withheld.[62] Although "[m]ateriality

[59] Adoption of Integrated Disclosure System, Securities Act Release No. 6383, Exchange Act Release No. 18,524, Investment Company Act Release No. 12,264, 47 Fed. Reg. 11,380 (Mar. 16, 1982) (codified as amended in scattered parts of 17 C.F.R.). "While many of the disclosure requirements currently in Regulation S-K originated in Schedule A, the SEC has amended Regulation S-K numerous times since its adoption." Business and Financial Disclosure Required by Regulation S-K, Securities Act Release No. 10,064, Exchange Act Release No. 77,599, 81 Fed. Reg. 23,916, 23,919 (Apr. 22, 2016).

[60] Merritt B. Fox, *Civil Liability and Mandatory Disclosure*, 109 COLUM. L. REV. 237, 243 n.11 (2009) (citing 17 C.F.R. § 229 (2008)). The SEC explained that its goal in adopting the integrated system was "to revise or eliminate overlapping or unnecessary disclosure and dissemination requirements wherever possible, thereby reducing burdens on registrants while at the same time ensuring that security holders, investors and the marketplace have been provided with meaningful, nonduplicative information upon which to base investment decisions." Adoption of Integrated Disclosure System, 47 Fed. Reg. at 11,382.

[61] *See* 1 HAZEN, *supra* note 45, § 3:11. *But see* Karmel, *supra* note 44, at 787 ("Regulations S-K and S-X primarily embody the SEC's disclosure regime, but disclosure policies are also scattered throughout SEC forms, interpretative releases, no-action letters, and comment letters on SEC filings; and the courts have articulated them in a variety of securities cases.").

[62] *See, e.g.*, Press Release, U.S. Sec. & Exch. Comm'n, SEC Adopts Rule Amendments To Modernize Disclosures of Business, Legal Proceedings, and Risk Factors Under Regulation S-K (Aug. 26, 2020), https://www.sec.gov/news/press-release/2020-192 [https://perma.cc/T75L-UNDB] (explaining amendments to Regulation S-K "rooted in materiality" (internal quotation marks omitted)); *see also* 1 HAZEN, *supra* note 45, § 3:10 ("[T]he hallmark of disclosure for both the 1933 Act registration statement and all 1934 Act filings is embodied in the concept of 'materiality[.]'").

is highly factual and thus defies a bright-line definition,"[63] attempts to define it have been codified in SEC rules: "[t]he term 'material,' when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to buy or sell the securities registered."[64] Courts have also played a major role in defining materiality, beginning with the Supreme Court's adoption of an objective standard requiring a showing of "a substantial likelihood that the disclosure of [an] omitted fact would have been viewed by [a] reasonable investor as having significantly altered the 'total mix' of information made available."[65] Moreover, the courts have decided where disclosure of material information is required by an implied duty to disclose outside of the statutory framework.

2. Implied Duty To Disclose

Disclosure is mandatory when it is "'expressly pursuant to an independent statute or regulation'—i.e.[,] an affirmative legal disclosure obligation,"[66] but absent an affirmative disclosure obligation, there is no duty to disclose information simply because it is material.[67] The basis for courts' imposition of a duty to disclose material information beyond affirmative requirements largely has been rooted in the antifraud provisions of the securities laws—specifically section 10(b) of

[63] 1 HAZEN, *supra* note 45, § 3:10.

[64] 17 C.F.R. § 240.12b–2 (2020); *see also id.* § 230.405 (similar).

[65] TSC Indus. v. Northway, Inc., 426 U.S. 438, 449 (1976).

[66] *In re* Sanofi-Aventis Sec. Litig., 774 F. Supp. 2d 549, 561 (S.D.N.Y. 2011) (quoting Thesling v. Bioenvision, Inc., 374 F. App'x 141, 143 (2d Cir. 2010)).

[67] Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 44–45 (2011).

the Exchange Act[68] and the SEC's Rule 10b-5, promulgated thereunder.[69]

As a threshold matter, the Supreme Court has made it abundantly clear that the antifraud provisions themselves do not create an affirmative disclosure obligation.[70] "Disclosure is required under these provisions only when necessary 'to make . . . statements made, in the light of the circumstances

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[68] 15 U.S.C. § 78j(b) (2018) ("It shall be unlawful for any person, . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors."). "Section 10 (b) was designed as a catchall clause to prevent fraudulent practices." Chiarella v. United States, 445 U.S. 222, 226 (1980) (citing Ernst & Ernst v. Hochfelder, 425 U.S. 185, 202, 206 (1976)). For a discussion of how "[l]iability under Section 10(b) differs from that under the . . . Securities Act's Sections 11 and 12," see Matthew C. Turk & Karen E. Woody, *The* Leidos *Mixup and the Misunderstood Duty To Disclose in Securities Law*, 75 WASH. & LEE L. REV. 957, 971–72 (2018).

[69] 17 C.F.R. § 240.10b-5(a) ("It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) [t]o employ any device, scheme, or artifice to defraud[.]"). The SEC adopted Rule 10b–5 in 1942 pursuant to section 10(b) of the Exchange Act. *See Hochfelder*, 425 U.S. at 195 ("In 1942, acting pursuant to the power conferred by § 10(b), the Commission promulgated Rule 10b-5[.]").

> In a typical § 10(b) private action, a plaintiff must prove (1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.

Stoneridge Inv. Partners v. Scientific-Atlanta, Inc., 552 U.S. 148, 157 (2008) (citing Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 341–42 (2005)). A full discussion of the elements that plaintiffs must prove to state a claim for securities fraud under Rule 10b-5, and of the pleading requirements under the federal securities laws and the Federal Rules of Civil Procedure, is beyond the scope of this Note.

[70] *See Matrixx*, 563 U.S. at 44 ("[Section] 10(b) and Rule 10b-5 do not create an affirmative duty to disclose any and all material information.").

under which they were made, not misleading.[']"[71] Thus, the predicate for a disclosure violation is that a company had a duty to disclose information—existing at the time of the omission or arising subsequently as a result of later events—but fraudulently withheld it.[72] Even if a reasonable investor might consider information to be material, "companies can control what they have to disclose under these provisions by controlling what they say to the market."[73]

Within this framework, particularly since the 1980s, courts have crafted the disclosure duty.[74] "There must . . . be a duty to speak[, but also,] . . . . once [an] issuer speaks, it must tell both the literal truth and the whole truth, including any hidden facts necessary to make what is said not misleading."[75] Thus, a frequent example of a breach of the duty to disclose is when a defendant speaks a "half-truth," withholding information such that the defendant's disclosure is materially misleading.[76] The court will impose "a duty to

[71] *Id.* (quoting 17 CFR § 240.10b–5(b) (2010)).

[72] *See, e.g.*, *Chiarella*, 445 U.S. at 230 (1980) (holding that silence is fraudulent only if there is a duty to disclose); Basic Inc. v. Levinson, 485 U.S. 224, 239 n.17 (1988) ("To be actionable, of course, a statement must . . . be misleading. Silence, absent a duty to disclose, is not misleading under Rule 10b-5."); *In re* Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1431–32 (3d Cir. 1997) (holding that a duty to disclose may arise as a result of events subsequent to a statement).

[73] *Matrixx*, 563 U.S. at 45; *see also* Langevoort, *supra* note 41, at 976 ("There is no liability simply because investors would consider [a] secret important and would like to know it.").

[74] *See* Donald C. Langevoort & G. Mitu Gulati, *The Muddled Duty To Disclose Under Rule 10b-5*, 57 VAND. L. REV. 1639, 1641–42 (2004). Because the law of duty formed haphazardly, there is no overarching theory, leading to a "muddled" body of precedent. *See id.* at 1641–43.

[75] Langevoort, *supra* note 41, at 976.

[76] *See, e.g.*, Ansin v. River Oaks Furniture, Inc., 105 F.3d 745, 752–54 (1st Cir. 1997) (finding that failing to disclose fully, when repurchasing shares from some shareholders, the company's IPO plans was a material omission). For a comprehensive review of the half-truth doctrine, see generally Donald C. Langevoort, *Half-Truths: Protecting Mistaken Inferences by Investors and Others*, 52 STAN L. REV. 87 (1999).

make [the disclosure] complete and accurate"—a duty that remains "whether the disclosure be voluntary or required."[77]

To plead a disclosure violation under section 10(b), a plaintiff often "identif[ies] a specific statement made by the company and then explain[s] either (1) how the statement was materially misleading or (2) how it omitted a fact that made the statement materially misleading."[78] Certain other methods for pleading such violations, however, have been premised upon two related but distinct duties—the duty to correct and the duty to update.[79]

C. Duties To Correct and Update

Even in the absence of an affirmative duty to disclose, "there may be a continuing duty to update [or] correct" information previously disseminated.[80] Though neither section 10(b) nor Rule 10b-5 expressly states that issuers have a duty to correct or to update, the language and legislative history of both are "broad enough to support the imposition" of each.[81] The duty to update arises when an earlier statement was true when made but subsequent events have rendered that statement materially misleading. In contrast, the duty to correct arises when a party makes a false statement, without knowledge that the statement is false, and later learns of the falsity. Both duties assume that a prior statement continues

[77] *In re* Marsh & Mclennan Cos. Sec. Litig., 501 F. Supp. 2d 452, 469 (S.D.N.Y. 2006) (internal quotation marks omitted) (quoting Glazer v. Formica Corp., 964 F.2d 149, 156 (2d Cir. 1992)); Meyer v. JinkoSolar Holdings, 761 F.3d 245, 250 (2d Cir. 2014) ("Even when there is no existing independent duty to disclose information, once a company speaks on an issue or topic, there is a duty to tell the whole truth." (citing Caiola v. Citibank, N.A., 295 F.3d 312, 331 (2d Cir. 2002)).

[78] *In re* Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1430 (3d Cir. 1997) (citing Stransky v. Cummins Engine Co., 51 F.3d 1329, 1331 (7th Cir. 1995)).

[79] *See id.*

[80] JAMES D. COX & THOMAS LEE HAZEN, BUSINESS ORGANIZATIONS LAW § 12.11, at 354 (5th ed. 2020).

[81] *See* Robert H. Rosenblum, *An Issuer's Duty Under Rule 10b-5 To Correct and Update Materially Misleading Statements*, 40 CATH. U. L. REV. 289, 306–08 (1991).

to influence investor behavior.[82] "If a court is persuaded that the earlier [statement] is stale"—perhaps because "subsequent information [has reached] the plaintiff"—"there is no basis to believe" the earlier statement is harming investors and, therefore, "there is no basis for either a duty to update or [to] correct."[83]

Due to their close relation, courts and, as a result, litigants, have conflated these duties.[84] Commentators have long recognized the difficulty in distinguishing the two duties.[85] However, the basic distinction is simple—it turns on whether the material statement at issue was misleading, incomplete, or factually false when made.[86] If the material statement was misleading, incomplete, or factually incorrect

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[82] COX & HAZEN, *supra* note 80, § 12.11, at 354.

[83] *Id.*

[84] *See, e.g.*, *Burlington*, 114 F.3d at 1430 (explaining that "[a]lthough plaintiffs characterize[d] their claim as a 'duty to correct' claim, they appear[ed] to be asserting both a duty to correct and a duty to update"); *Stransky*, 51 F.3d 1329, 1336 (understanding that plaintiff had difficulty differentiating between the duty to update and the duty to correct "because of the confused state of the law in the area").

[85] *See, e.g.*, Kimberly D. Krawiec & Kathryn Zeiler, *Common-Law Disclosure Duties and the Sin of Omission: Testing the Meta-Theories*, 91 VA. L. REV. 1795, 1807 n.29 (2005) ("We coded the duty to update and the duty to correct together, rather than separately, due to the difficulty of distinguishing one from the other, particularly in cases where the court did not distinguish between the two or confused the two issues."); Brill, *supra* note 8, at 615 ("[I]t is important to note that the courts, the SEC, scholars, and litigants have often used the verbs 'correct' and 'update,' and therefore, the legal phrases 'duty to correct' and 'duty to update,' interchangeably. The problem is that the words . . . have similar meanings in common parlance that can overlap." (footnote omitted)).

[86] *See* 3C BLOOMENTHAL & WOLFF, *supra* note 9, § 18:23 n.1; Bruce Mendelsohn & Jesse Brush, *The Duties To Correct and Update: A Web of Conflicting Case Law and Principles*, 43 SEC. REGUL. L.J. 67, 68 (2015) ("[I]t is important to understand the distinction between . . . duties [to correct and to update] 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*." (first citing *Stransky*, 51 F.3d at 1331–33; and then citing Backman v. Polaroid Corp., 910 F.2d 10, 16–18 (1st Cir. 1990) (en banc)).

when made, then a duty to correct may arise. If, instead, the material statement was reasonable when made but later becomes misleading, then a duty to update may arise.[87]

1. Duty To Correct

Unlike the law surrounding the duty to update, the law surrounding the duty to correct is relatively well settled.[88] As discussed, Rule 10b–5 prohibits silence as to a material fact only if knowing the fact was "necessary in order to make the statements made"[89] not materially misleading.[90] If subsequent events reveal that an issuer's statement of material fact was not true when made, a court may impose a duty to correct that statement.[91] Simply put, the duty to correct may only apply to a statement that was incorrect when made.[92] The information that warrants correction is typically "hard" information, or information that is "objectively verifiable and subject to disclosure if material to the relevant transaction."[93] "Soft"

[87] These definitions draw from the several circuit court decisions. As the Third Circuit has explained, "[t]he duty to correct exists 'when a company makes a historical statement that, at the time made, the company believed to be true, but as revealed by subsequently discovered information actually was not.'" Oran v. Stafford, 226 F.3d 275, 286 (3d Cir. 2000) (quoting *Burlington*, 114 F.3d at 1431). By contrast, the duty to update "concerns statements that, although reasonable at the time made, become misleading when viewed in the context of subsequent events." *Id.* (internal quotation marks omitted) (quoting *Burlington*, 114 F.3d at 1431).

[88] *See Backman*, 910 F.2d at 16–17 ("Obviously, if a disclosure is in fact misleading when made, and the speaker thereafter learns of this, there is a duty to correct it.").

[89] 17 C.F.R. § 240.10b-5(b) (2020).

[90] *Supra* Section II.B.2.

[91] *See, e.g.*, *In re* Int'l Bus. Machs. Corp. Sec. Litig., 163 F.3d 102, 109 (2d Cir. 1998); *Burlington*, 114 F.3d at 1430–1431 (first citing *Stransky*, 51 F.3d at 1331–32; and then citing *Backman*, 910 F.2d at 16–17).

[92] Gallagher v. Abbott Lab'ys, 269 F.3d 806, 810 (7th Cir. 2001) ("[A] statement may be 'corrected' only if it was incorrect when made[.]").

[93] *See* Garcia v. Cordova, 930 F.2d 826, 830 (10th Cir. 1991) (citation omitted) (citing Bruce A. Hiler, *The SEC and the Courts' Approach to Disclosure of Earnings Projections, Asset Appraisals, and Other Soft Information: Old Problems, Changing Views*, 46 MD. L. REV. 1114, 1116–17 (1987)) (distinguishing hard and soft information and explaining the scrutiny applied to soft information).

information, on the other hand, "involves some subjectiv[ity] . . . as [in] projections, estimates, opinions, motives, or intentions."[94]

"*Backman v. Polaroid Corporation* was one of the first circuit cases to differentiate . . . the duty to correct [from the] duty to update."[95] The court explained that "if a disclosure is in fact misleading when made, and the speaker thereafter learns of this, there is a duty to correct it."[96] The court then distinguished the duty to update, which arises when "a prior disclosure 'becomes materially misleading in light of subsequent events.'"[97] However, because the defendant's statement at issue "was precisely correct, initially" and "remained precisely correct thereafter," it did not reach the question of whether a duty to update or correct existed.[98] "[T]here was nothing to correct or update."[99]

Various circuits have since adopted similar distinctions between the duties to correct and to update.[100] Straightforward examples of the duty to correct thus arise from cases where an issuer discovers, or a plaintiff uncovers, contradictory information that existed before or at the time of the assertion at issue. For instance, in class action suits resulting from Facebook's $16 billion initial public offering (IPO) in 2012, investors sued the NASDAQ stock exchange owner and certain affiliates over system glitches that

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[94] *Id.* at 830 (internal quotation marks omitted) (quoting Hiler, *supra* note 93, at 1116).

[95] JONI S. JACOBSEN, JENNIFER C. RYAN & LAURA A. BRAKE, DISCLOSURE DUTIES ARISING UNDER SECTION 10(B): WHEN TO CORRECT OR UPDATE 5 (2011) (footnote omitted), https://katten.com/files/upload/Disclosure_Duties_Arising_Under_Section_10B_When_To_Correct_Or_Update.pdf [https://perma.cc/2ZCD-PU76].

[96] *Backman*, 910 F.2d at 16–17.

[97] *Id.* at 17 (quoting Greenfield v. Heublein, Inc., 742 F.2d 751, 758 (3d Cir. 1984), *abrogated on other grounds by* Basic Inc. v. Levinson, 485 U.S. 224 (1988)).

[98] *Id.* at 17–18.

[99] JACOBSEN ET AL., *supra* note 95, at 5 (citing *Backman*, 910 F.2d at 17–18).

[100] *See, e.g.*, Stransky v. Cummins Engine Co., 51 F.3d 1329, 1331–32 (7th Cir. 1995).

allegedly hampered trading.[101] The investors specifically alleged that NASDAQ's "testing [of] the design of its systems in the . . . weeks leading up to Facebook's IPO . . . revealed unresolved technical issues undermining the reliability of NASDAQ in executing the anticipated trade volume for the [o]ffering," yet those issues "were not corrected before the IPO commenced."[102] Instead, the exchange "made specific statements leading up to the Facebook IPO ensuring 'on-time, on-target and ready-to-launch' technology, that was 'faster' than any [e]xchange in the world and could operate under 'even extremely demanding market conditions.'"[103] In the court's view, "[t]hese were not vague, forward-looking statements of optimism, but 'involved the representation of existing facts' concerning NASDAQ's capability and reliability to carry out enormous volumes of orders at sub-microsecond speeds, which were readily capable of verification."[104] The court found that, because these

> statements were material, [the exchange] had a duty to correct and update them once they were found to be untrue. . . . Just as a misstatement about a company's primary product affects an investor[']s decision to purchase that stock, NASDAQ's failure to correct flawed information about its technology capabilities could have impacted Plaintiffs' decision to participate

[101] *In re* Facebook, Inc., IPO Sec. & Derivative Litig., 986 F. Supp. 2d 428, 439 (S.D.N.Y. 2013).

[102] *Id.* at 467.

[103] *Id.* at 465 (quoting Consol. Amended Class Action Complaint paras. 173, 183, 188, *In re* Facebook, Inc., IPO Sec. & Derivative Litig., 986 F. Supp. 2d 428, 439 (S.D.N.Y. 2013) (MDL No. 12-2389)).

[104] *Id.* (quoting *In re* Quintel Ent. Inc. Sec. Litig., 72 F. Supp. 2d 283, 292 n.4 (S.D.N.Y. 1999)). The court noted that

> NASDAQ's general disclaimers of 'unanticipated disruptions in service' or that 'markets have experienced occasional system failures' in its annual report does not remove its liability when it[s] statements directly touted the reliability and capability of handling trade volume as fast as possible in light of the upcoming IPO, despite knowledge of its inadequacies.

Id. at 466 n.23 (citation omitted) (quoting The NASDAQ OMX Grp., Inc., Annual Report (Form 10-K), at 25–26 (Feb. 24, 2012)).

> in . . . and ability to trade during [the Facebook] [o]ffering.[105]

The court further found that plaintiffs' allegations, which included purported insider knowledge of the problem, adequately demonstrated that NASDAQ knew or should have known of contemporaneous conditions making their failure to correct prior statements touting NASDAQ's software systems materially misleading.[106] Based on these circumstances, the court refused to dismiss claims that NASDAQ had omitted material facts about its capabilities.[107]

Other cases have clarified and expounded upon the duty to correct. For example, the duty can be applied to historical statements and forward-looking statements that lacked a reasonable basis.[108] At the same time, courts have identified several limitations to the duty to correct. As the *Facebook* court suggested, vague or indefinite statements do not trigger the duty, nor does unreliable new information.[109] Moreover, "courts are hesitant to apply the duty to correct in cases

[105] *Id.* at 465–66. Though the court mentioned both the duty to correct and to update, the case should be categorized as a "duty to correct" case, as the statements at issue were misleading when made.

[106] *Id.* at 466.

[107] *Id.* at 471. For another example of a court imposing a duty to correct when defendants learn that their prior statements were untrue when made, see, for example, Zwick Partners, LP v. Quorum Health Corp., No. 16-cv-2475, 2018 WL 2933406, at *7 (M.D. Tenn. Apr. 19, 2018) ("Given the increasing and continued poor performance of CHS, including Quorum hospitals, in 2015 and into 2016, Plaintiffs have sufficiently alleged that Defendants had a duty to correct their April 1, 2016 statements concerning Quorum.").

[108] JACOBSEN ET AL., *supra* note 95, at 6.

[109] *Facebook*, 986 F. Supp. 2d at 465 (emphasizing that the disputed statements "were not vague, forward-looking statements of optimism."); Grossman v. Novell, Inc., 120 F.3d 1112, 1125 (10th Cir. 1997) (rejecting a duty to correct when a prior "statement was too vague and indefinite"); Moss v. HealthCare Compare Corp. (*In re* HealthCare Compare Corp. Sec. Litig.), 75 F.3d 276, 282 (7th Cir. 1996) ("[P]laintiffs can only show that a duty to correct arose by alleging facts sufficient to demonstrate that the internal memorandum [in conflict with the alleged misstatement] was certain and reliable, not merely a tentative estimate."); *see also* Mendelsohn & Brush, *supra* note 86, at 72–73.

involving forward-looking statements unless the . . . statements were based on untrue historical information."[110] And, ordinarily, there is no duty to correct statements made by others unless there is some degree of responsibility for those third-party statements.[111]

2. Duty To Update

The "duty to update," as used herein, describes a duty to provide additional information to update or supplement a previous disclosure that was accurate when made but becomes misleading due to subsequent events.[112] As opposed to the duty to correct, which is widely recognized, the duty to update has been the subject of great debate.[113] Various circuits have recognized a duty to update that operates as an exception to an issuer's general right to remain silent about new material

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[110] Mendelsohn & Brush, *supra* note 86, at 72.

[111] *See* 1 HAZEN, *supra* note 45, § 3:52 n.3. For further discussion of the duty to correct statements made outside the company and third-party liability for the duty to correct, see JACOBSEN ET AL., *supra* note 95, at 8. It remains to be seen how the Supreme Court's extension of Rule 10b-5 liability in *Lorenzo v. SEC* will affect third-party liability under duty to correct and duty to update theories. *See* Lorenzo v. SEC, 139 S. Ct. 1094, 1100–01 (2019) (holding that disseminating "false or misleading statements with intent to defraud can" violate Rules 10b-5(a) and (c) even if the disseminator could not be held liable as the maker of an untrue statement of material fact under Rule 10b-5(b)).

[112] This Note's discussion and analysis of the duty to update and relevant cases do not consider situations in which a separate duty to disclose may apply. However, it is important to recognize that examples exist in which there is both a duty to update and an independent duty to disclose, creating an additional hurdle for courts trying to define disclosure requirements under the former without conflating it with the latter. *See* Mendelsohn & Brush, *supra* note 86, at 77 (discussing *Finnerty v. Stiefel Laboratories, Inc.*, 756 F.3d 1310 (11th Cir. 2014), as a case in which the court "framed the disclosure requirement . . . as a 'duty to update'" even though its ruling might also be "explained by disclosure duties arising out of the company's trades in its own securities").

[113] *See id.* at 74 ("Some courts have questioned whether this type of duty exists at all, ... [but a] number of other courts . . . have accepted the existence of some formulation of a duty to update.").

information.[114] Courts that recognize the duty to update have typically applied it only to future-oriented, or forward-looking, statements.[115] Few courts, however, have actually imposed liability based on this duty.[116]

3. Potential Defenses

Before delving into the case law surrounding the duty to update, it is important to understand the major defenses for forward-looking statements, or statements containing predictions about earnings, revenue, and future economic performance.[117] First, the "bespeaks caution" doctrine developed by courts generally protects forward-looking statements that adequately disclose the risk factors that might cause a different outcome to occur than the one forecast by the issuer.[118] Under the bespeaks caution doctrine, "[a] forward-looking statement accompanied by sufficient cautionary language is not actionable because no reasonable investor could have found the statement materially misleading. In such circumstances, it cannot be supposed by a reasonable investor that the future is settled, or unattended by contingency."[119]

[114] *See, e.g.*, Weiner v. Quaker Oats Co., 129 F.3d 310, 318 (3d Cir. 1997); Zvi Trading Corp. Emps.' Money Purchase Pension Plan & Tr. v. Ross (*In re* Time Warner Inc. Sec. Litig.), 9 F.3d 259, 267–68 (2d Cir. 1993). On the absence of a general duty to disclose, see *supra* text accompanying notes 66–73.

[115] *See, e.g.*, IBEW Local Union No. 58 Pension Tr. Fund & Annuity Fund v. Royal Bank of Scot. Grp., 783 F.3d 383, 390 (2d Cir. 2015).

[116] *See* Mendelsohn & Brush, *supra* note 86, at 74 ("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.").

[117] *See* 15 U.S.C. § 78u-5(i)(1) (2018) (defining "forward-looking statement" for purposes of a statutory safe harbor).

[118] *See* Iowa Pub. Emps.' Ret. Sys. v. MF Glob., Ltd., 620 F.3d 137, 141 & n.8 (2d Cir. 2010).

[119] *Id.* at 141 (footnote omitted) (citation omitted) (citing P. Stolz Fam. P'ship v. Daum, 355 F.3d 92, 96–97 (2d Cir. 2004)).

A second and related defense is a statutory "counterpart" to the bespeaks caution doctrine.[120] The Private Securities Litigation Reform Act of 1995 (PSLRA), which created a safe harbor for forward-looking statements, expressly addresses the absence of a duty to update.[121] The PSLRA added section 27A[122] to the Securities Act and section 21E[123] to the Exchange Act. Section 27A and section 21E define forward-looking statements generally as statements that reference future plans or performance, such as revenue projections and statements tied to future economic performance of a company, but also as "any statement of the assumptions underlying or relating to any [such] statement[s]."[124] The safe harbor protects an issuer when its statement is "(i) identified as a forward-looking statement, and is accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement; or (ii) [is] immaterial,"[125] or if the plaintiff fails to demonstrate that the statement was made with "actual knowledge" that it "was false or misleading."[126] When information falls into one of these categories, the PSLRA "declares that [it] is not fraud for purposes of private securities litigation" as long as it is "made without actual fraudulent intent."[127]

There are limits to the protections conferred upon issuers under both the bespeaks caution doctrine and the PSLRA safe

[120] Rombach v. Chang, 355 F.3d 164, 173 (2d Cir. 2004); *see also* Langevoort, *supra* note 41, at 995 ("The Act codified the judge-made 'bespeaks caution' doctrine, albeit without the nuance some courts had created in applying that principle.").

[121] The statutory safe harbor, which appears in both the Securities Act and the Exchange Act, protects forward-looking statements that are "identified as [such], and . . . accompanied by meaningful cautionary statements." 15 U.S.C. §§ 77z-2(c)(1)(A)(i), 78u-5(c)(1)(A)(i).

[122] Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, § 102, 109 Stat. 737, 749–53 (codified at 15 U.S.C. § 77z-2).

[123] *Id.* § 102, 109 Stat. at 753–56 (codified at 15 U.S.C. § 78u-5).

[124] *See* 15 U.S.C. §§ 77z-2(i)(1), 78u-5(i)(1).

[125] *Id.* §§ 77z-2(c)(1)(A), 78u-5(c)(1)(A).

[126] *Id.* §§ 77z-2(c)(1)(B), 78u-5(c)(1)(B).

[127] Langevoort, *supra* note 41, at 994–95.

harbor. Where forward-looking language does "not expressly warn of or d[oes] not directly relate to the risk that brought about plaintiffs' loss," a plaintiff may overcome such cautionary language.[128] Further, mere boilerplate words of caution—for example, a statement at the beginning of a conference call that merely warns that forward-looking statements are "subject to certain risks and uncertainties"—are insufficient notices of risk and do not protect forward-looking statements.[129]

Still, these defenses have "become an integral component of" promoting full disclosure, allowing issuers to feature "warnings" in their "periodic reports and other communications in which they disseminate such [forward-looking] soft information as earnings estimates . . ., growth in demand for their products, cash flow, and the like."[130] Critically, the PSLRA specifically states that "[n]othing in this section shall impose upon any person a duty to update a forward-looking statement."[131] As one commentator has explained, "the statutory safe harbor is a trade-off: effective immunization of forward-looking information from liability so as to encourage honest voluntary disclosures that would otherwise not be made because of fear of liability."[132]

This fear of liability has only been exacerbated by the onset of COVID-19. While the lasting effects of the pandemic are yet to be determined, companies are aware of how "securities litigation is triggered by the announcement or

[128] Halperin v. eBanker USA.COM, Inc., 295 F.3d 352, 359 (2d Cir. 2002) (citing Hunt v. All. N. Am. Gov't Income Tr., Inc., 159 F.3d 723, 729 (2d Cir. 1998)).

[129] Ill. State Bd. of Inv. v. Authentidate Holding Corp., 369 F. App'x 260, 264 n.3 (2d Cir. 2010) (summary order) (internal quotation marks omitted) (citing *Halperin*, 295 F.3d at 359).

[130] Ann Morales Olazábal, *False Forward-Looking Statements and the PSLRA's Safe Harbor*, 86 IND. L.J. 595, 597–98 (2011) (citing Karen K. Nelson & A.C. Pritchard, *Litigation Risk and Voluntary Disclosure: The Use of Meaningful Cautionary Language*, ANN. CONF. ON EMPIRICAL LEGAL STUD., Aug. 2007, at 1, 3). For a thorough discussion of the PSLRA's legislative history and purpose, see *id.* at 613–18.

[131] 15 U.S.C. §§ 77z-2(d), 78u-5(d).

[132] Langevoort, *supra* note 41, at 995.

occurrence of a significant adverse event."[133] As a result, a renewed emphasis has been placed upon these safe harbors and the ways companies can avail themselves of their protections; careful attention to the drafting of disclosures can help avoid potential liability,[134] particularly within the context of the duty to update.

III. APPROACHES TO THE DUTY TO UPDATE

A. Recognition of the Duty To Update

Scholars have generally cited *Ross v. A.H. Robins Co.*[135] as the first case to have raised the question of whether a duty to update might exist.[136] The *Ross* plaintiffs alleged that a company's failure to "correct" favorable statements regarding the safety, effectiveness, and future of its product violated section 10(b) of the Exchange Act and Rule 10(b)(5).[137] The plaintiffs argued that the company had a duty to provide additional disclosures as evidence became available surrounding the safety and effectiveness of its product and as

[133] *See* Jay Kasner, Scott Musoff & Susan Saltzstein, Skadden, Arps, Slate, Meagher & Flom LLP, *Potential Securities Litigation Issues*, *in* CORONAVIRUS/COVID-19 UPDATE 8, 8 (2020), https://www.skadden.com/insights/publications/2020/03/coronavirus-covid-19-update [https://perma.cc/4YB4-9HUN] (click "PDF").

[134] *Id.* ("Corporate disclosures relating to performance, projections and the potential impact of the virus often will be viewed in hindsight . . . . In particular, companies should pay close attention to updating risk factors and cautionary language, especially those surrounding forward-looking statements in order to maximize the protections of the PSLRA's safe harbor.").

[135] 465 F. Supp. 904 (S.D.N.Y.), *rev'd*, 607 F.2d 545 (2d Cir. 1979) (reversing on a remedial issue unrelated to the duty to update).

[136] *See, e.g.*, Porter, *supra* note 39, at 2213; Rosenblum, *supra* note 81, at 290 ("The concept that an issuer has a duty to correct its own statements gained widespread judicial and academic acceptance following the decision . . . in *Ross v. A.H. Robins Co.*"); Steven E. Bochner & Samir Bukhari, *The Duty To Update and Disclosure Reform: The Impact of Regulation FD and Current Disclosure Initiatives*, 7 STAN. J.L. BUS. & FIN. 225, 232 (2002).

[137] *Ross*, 465 F. Supp. at 906.

numerous class action product liability suits were being filed against the company.[138] The court agreed, explaining that "[i]t is now clear that there is a duty to correct or revise a prior statement which was accurate when made but which has become misleading due to subsequent events."[139] Given the undeveloped status of the duties to correct and update at the time, the court used the term "duty to correct" when discussing the company's disclosure obligations when, by today's understanding, the issue concerned the duty to update.[140] Unfortunately, this contributed to subsequent courts' misuse of the term "duty to correct" when referring to the duty that may arise when a statement becomes materially misleading in light of subsequent events—i.e., the duty to update.[141]

The same mistaken use of the "duty to correct" to describe the duty to update was present in the First Circuit's opinion in *Backman v. Polaroid Corp*.[142] The case concerned Polaroid's issuance of a third quarter report that announced record earnings and sales for the quarter and the first nine months of 1978, while briefly acknowledging substantial expenses related to its instant motion picture system, Polavision.[143] After a negative market reaction to news of Polavision's

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[138] *Id.* at 906–07.

[139] *Id.* at 908. "The district court ultimately granted the defendant's motion for summary judgement based upon the plaintiffs' failure to adequately plead fraud with particularity as required by Rule 9(b) of the Federal Rules of Civil Procedure," but, "for reasons unknown," continued on to "the merits of the case." Porter, *supra* note 39, at 2213 (citing *Ross*, 465 F. Supp. at 913).

[140] Porter, *supra* note 39, at 2214–15.

[141] *See, e.g.*, Kamerman v. Steinberg, 123 F.R.D. 66, 72 (S.D.N.Y. 1988) ("The law in this and other Circuits establish a general duty to correct under Section 10(b) and Rule 10b–5: 'it is now clear that there is a duty to correct or revise a prior statement which was accurate when made but which has become misleading due to subsequent events.'" (quoting *Ross*, 465 F.Supp. at 908)).

[142] 910 F.2d 10 (1st Cir. 1990) (en banc).

[143] *Id.* at 15–16; *see also id.* at 16–17 (increasing confusion by also referring to the duty to correct in appropriate terms: "[o]bviously, if a disclosure is in fact misleading when made, and the speaker thereafter learns of this, there is a duty to correct it").

continuing losses in a subsequent press release announcing yearly earnings, plaintiffs brought suit against the company for breaching a duty to disclose adverse material facts concerning sales difficulties with Polavision.[144] Initially, a panel found that even if the optimistic third quarter report was not misleading at the time of its issuance, there was "sufficient evidence to support a jury's determination that the report's relatively brief mention of Polavision difficulties *became* misleading in light of the subsequent information acquired by Polaroid indicating the seriousness of Polavision's problems."[145] The panel decision "intensified concern that a duty to update might be broadly applied to all types of statements," as it held that Polaroid "was required to update statements made in the third quarter report once it became apparent that Polavision would not be the success Polaroid had previously anticipated."[146]

In a rehearing by the First Circuit, the full court withdrew the panel decision and declined to reach the issue of the duty to update.[147] The court explained that since Polaroid's statements were pure statements of historical fact correct at the time when made and "precisely correct thereafter," there was no duty to update the earlier statements regardless of subsequent changing circumstances.[148] Still, the court went further, stating that "in special circumstances, a statement, correct at the time, may have a forward intent and connotation upon which parties may be expected to rely. If this is a clear meaning, and there is a change, correction, more exactly, further disclosure, may be called for."[149] The court concluded by acknowledging "amici apprehension because of

[144] *Id.* at 19 (Bownes, J., dissenting).

[145] *Id.* at 17 (majority opinion) (quoting Backman v. Polaroid Corp., Nos. 89-1171, 89-1172, 1990 U.S. App. LEXIS 787, at *28 (1st Cir.), *rev'd en banc*, 910 F.2d 10).

[146] Porter, *supra* note 39, at 2214.

[147] *Backman*, 910 F.2d at 10, 17–18.

[148] *Id.* at 17–18.

[149] *Id.* at 17.

the panel opinion's not only requiring update, but requiring it in terms of a new duty that had never been undertaken."[150]

In 1993, the Second Circuit decided *In re Time Warner Inc. Securities Litigation*,[151] which further fleshed out the duty to update doctrine. Time Warner sought to alleviate its significant debt troubles by embarking on a highly publicized campaign to find international "strategic partners" for investments.[152] When the campaign failed, Time Warner instead announced a stock offering, which resulted in the dilution of its shareholders' rights.[153] Shareholders sued Time Warner, alleging that a series of statements from Time Warner officials were materially misleading, as they misrepresented the status of the ongoing strategic partnership discussions and failed to disclose consideration of the stock offering alternative.[154] The statements consisted of generally positive messages

> concerning the progress of the search for strategic partners, and impl[ied] to varying degrees that significant partnerships w[ould] be consummated and announced in the near future. None of the statements acknowledged that negotiations with prospective partners were going less well than expected or that an alternative method of raising capital was under consideration.[155]

The court first addressed the plaintiffs' theory that the defendants' statements touting strategic partnerships gave rise to a duty to disclose as the "alliance negotiations" developed.[156] The court "agree[d] that a duty to update opinions and projections may arise if the original opinions or projections have become misleading as the result of

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[150] *Id.* at 18.

[151] Zvi Trading Corp. Emps.' Money Purchase Pension Plan & Tr. v. Ross (*In re* Time Warner Inc. Sec. Litig.), 9 F.3d 259 (2d Cir. 1993).

[152] *Id.* at 262.

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *Id.* at 267.

intervening events."[157] However, the public statements were insufficiently specific to give rise to a duty to update, which required forward-looking statements with "definite positive projections."[158] Rather, "the statements suggest[ed] only the hope of any company, embarking on talks with multiple partners, that the talks would go well."[159] Interestingly, the court provided an example of what circumstances would create a duty to update these statements:

> Although the statements are generally open-ended, there is one sense in which they have a solid core. The statements represent as fact that serious talks with multiple parties were ongoing. If this factual assertion ceased to be true, defendants would have had an obligation to update their earlier statements. But the complaint does not allege that the talks ever stopped or ceased to be "serious," just that they eventually went poorly.[160]

As to the allegation of a failure to disclose the simultaneous consideration of alternative methods of raising capital, the court stated 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."[161] "Whether consideration of . . . alternate approach[es] constitute[d]" a material fact and whether

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[157] *Id.* (first citing W. Alton Jones Found. v. Chevron U.S.A. Inc. (*In re* Gulf Oil/Cities Serv. Tender Offer Litig., 725 F. Supp. 712, 745–49 (S.D.N.Y.1989); and then citing *In re* Warner Commc'ns Sec. Litig., 618 F.Supp. 735, 752 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986)).

[158] *Id.*

[159] *Id.*

[160] *Id.* at 267 n.4. *Time Warner* presents a prime example of the confusion surrounding when a duty to update arises: the line between an allegation that negotiations ceased to be "serious" and an allegation that negotiations "eventually went poorly" is very fine, as the two seem comparable, if not synonymous.

[161] *Id.* at 268.

nondisclosure of that material fact made the original disclosure misleading were questions left to the jury.[162]

Following these decisions, courts continue to confront duty to update issues raised by both private litigants and the SEC. Absent clear legislative direction, the circuit courts have either split or remained silent on the issue.[163] Courts that do entertain the existence of a duty to update have constructed a general framework as to which statements the duty may apply: (1) statements that remain "alive" in the minds of investors, and (2) statements that relate to a "fundamental change" to the issuer.[164] There is also a general consensus that the duty to update does not apply to certain statements: (1) financial projections, (2) statements to which specific cautionary language appropriately attaches, (3) vague statements and puffery, and (4) statements of historical fact.[165] The net result is that the duty to update has only been applied in specific, limited circumstances, and potential liability under the duty is highly dependent on the circuit in which the case is brought.[166]

1. Statements Remaining "Alive"

Ross v. A.H. Robins was not only among the first reported cases to outline the contours of the duty to update, but also became the source for the idea that the duty to update prior statements "exists so long as the prior statements remain

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[162] *Id.*

[163] *Compare* Gallagher v. Abbott Lab'ys, 269 F.3d 806, 808 (7th Cir. 2001) ("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."), *with* City of Edinburgh Council v. Pfizer, Inc., 754 F.3d 159, 176 (3d Cir. 2014) ("[W]e have held that a duty to update applies[.]" (citing United States v. Schiff, 602 F.3d 152, 170 (3d Cir. 2010)).

[164] *See* Mendelsohn & Brush, *supra* note 86, at 74–75, 78–79; JACOBSEN, ET AL., *supra* note 95, at 9, 11–12 (suggesting that statements must be both alive and related to a fundamental change).

[165] *See* Mendelsohn & Brush, *supra* note 86, at 75–78; JACOBSEN, ET AL., *supra* note 95, at 9–11.

[166] *See* Mendelsohn & Brush, *supra* note 86, at 74–80 (discussing the duty to update in various circuits).

'alive.'"[167] "[M]any courts have [since] embraced the broad conclusion that the duty to update is triggered when the statement in question is clear, factual and forward-looking, such that some continuing representation remains 'alive' in the mind of investors when circumstances change."[168]

Although this is an elastic 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 . . . considered the issue of whether a company had a duty to update specific earnings projections."[169] The court aptly noted that, although it had "generally recognized that a duty to update might exist under certain circumstances, [it had] not clarified when such circumstances might exist," nor the particular "question of whether a duty to update might exist for ordinary, run-of-the-mill forecasts, such as the earnings projection in th[at] case."[170]

The Third Circuit explained that for a plaintiff to establish "that a duty to update a forward-looking statement arose on account of an earlier-made projection," the plaintiff had to allege "that the projection contained an implicit factual representation that remained 'alive' in the minds of investors as a continuing representation. Determining whether such a representation is implicit in an ordinary forecast is a function

[167] Ross v. A.H. Robins, 465 F.Supp. 904, 908 (S.D.N.Y.), *rev'd on other grounds*, 607 F.2d 545 (2d Cir. 1979).

[168] ERIC R. SMITH, THOMAS D. WASHBURNE, JR. & UYEN H. PHAM, DUTY TO UPDATE PREVIOUSLY DISCLOSED INFORMATION 3 (2011), https://www.venable.com/files/Publication/d90ad0bd-0947-4956-aa70-1026f1ac03be/Presentation/PublicationAttachment/cf3d0d7f-ca04-4b19-96e1-1510529d9821/Duty_to_Update_Previously_Disclosed_Information.pdf [https://perma.cc/W9FT-Y2TP].

[169] *Id.* (citing *In re* Burlington Coat Factory Sec. Litig., 114 F.3d 1410 (3d Cir. 1997)). In essence, the claim in that case alleged that "the disclosure of a single specific forecast produced a continuous duty to update the public with either forecasts or hard information that would in any way change a reasonable investor's perception of the originally forecasted range." *Burlington*, 114 F.3d at 1432.

[170] *Id.* at 1431–32.

of what a reasonable investor expects as a result of the background regulatory structure."[171] Based on this conception of the duty to update, the court rejected the argument "that an ordinary earnings projection contains an implicit representation on the part of the company that it will update the investing public with all material information that relates to that forecast."[172] The court suggested that an accurate disclosure of past success does not contain a representation that a trend will continue, and that a "judicially created rule that triggers a duty of continuous disclosure of all material information every time a single specific earnings forecast is disclosed would likely result in a drastic reduction in the number of such projections made by companies"—to the detriment of investors.[173]

Among the circuits that have accepted the "remains alive" principle, several limitations have been imposed, which has resulted in far more examples of what does not "remain alive" than what actually does. First, as *Burlington* demonstrates, there is typically no duty to update ordinary financial projections or predictions.[174] This limitation was made even clearer with the enactment of the PSLRA,[175] as earnings projections fall squarely within the statute's definition of forward-looking statements and thus cannot be subject to the duty if accompanied by sufficient cautionary language.[176]

[171] *Id.* at 1432 (citations omitted).

[172] *Id.* at 1433.

[173] *Id.*

[174] *Id.* at 1432–33; *see also In re* Advanta Corp. Sec. Litig., 180 F.3d 525, 536–37 (3d Cir. 1999) (rejecting under the PSLRA safe harbor a duty to update claim centered on "a projection of revenues"), *abrogated on other grounds by* Institutional Invs. Grp. v. Avaya, Inc., 564 F.3d 242 (3d Cir. 2009); Hillson Partners Ltd. v. Adage, Inc., 42 F.3d 204, 219 (4th Cir. 1994) ("Assuming there can ever be a 'duty to update,' there was no such duty here. The statements at issue here were predictions, neither material under the federal securities laws nor pled with sufficient particularity. . . . There is no duty to update such statements on the basis of subsequent events." (citing Zvi Trading Corp. Emps.' Money Purchase Pension Plan & Tr. v. Ross (*In re* Time Warner Inc. Sec. Litig.), 9 F.3d 259, 267 (2d Cir. 1993)))

[175] On the PSLRA, see *supra* text accompanying notes 120–132.

[176] JACOBSEN ET AL., *supra* note 95, at 9 (citing 15 U.S.C. § 78u-5(c)–(d) (2006)).

Second, specific cautionary language which warns investors that statements should not be interpreted as containing any implicit representation regarding subsequent events or future disclosures by the company will tend to negate a duty to update under the PSLRA or the "bespeaks caution" doctrine.[177] However, according to the Second Circuit, general boilerplate cautionary language is insufficient to shield liability under a duty to update theory.[178] Third, as the *Time Warner* court explained, the duty does not apply to vague statements of optimism or hope.[179] While some courts have recognized that forward-looking statements carrying a positive implication arguably could create a duty to update, one does not attach where the statements are only optimistic statements that are too vague and loose to be actionable.[180] Finally, the duty generally has not been applied to statements of pure historical fact that were accurate when made,[181]

[177] *See supra* Section II.C.3; Grossman v. Novell, Inc., 120 F.3d 1112, 1119–21 (10th Cir. 1997) (finding certain statements too vague and others not actionable because of clear cautionary language that prevented them from being materially misleading); JACOBSEN ET AL., *supra* note 95, at 9–11.

[178] Ill. State Bd. of Inv. v. Authentidate Holding Corp., 369 F. App'x. 260, 263, 264 & n.3 (2d Cir. 2010) (summary order). *But see* Mendelsohn & Brush, *supra* note 86, at 78 n.77 ("[T]he 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." (citing Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, § 102, 109 Stat. 737, 753–56 (codified at 15 U.S.C. § 78u-5(c)(2) (2018))).

[179] *See Time Warner*, 9 F.3d at 267 (discussing "statements suggest[ing] only the hope of any company, embarking on talks with multiple partners"); San Leandro Emergency Med. Grp. Profit Sharing Plan v. Philip Morris Cos., 75 F.3d 801, 811 (2d Cir. 1996).

[180] *See, e.g.*, Gross v. Summa Four, Inc., 93 F.3d 987, 995 (1st Cir. 1996) (citing Glassman v. Computervision Corp., 90 F.3d 617, 635 (1st Cir. 1996); Shaw v. Digit. Equip. Corp., 82 F.3d 1194, 1217–19 (1st Cir. 1996)), *superseded by statute on other grounds*, PSLRA § 101(b)).

[181] *See In re* Yahoo! Inc. Sec. Litig., No. C 11-02732, 2012 WL 3282819, at *21 (N.D. Cal. 2012) (rejecting a duty to update claim because the statements at issue were "historical opinions of the value of the

though other circuits have "raised the possibility . . . that the duty to update may be applicable to a historical statement that had a 'forward intent and connotation' that parties relied upon."[182]

2. Statements Representing a Fundamental Change

Although many courts have focused their analysis on whether the statement in question contains continuing representations that remain "alive" in some sense, other courts have framed the duty to update as requiring that the statement relate to a fundamental change to the issuer. The Third Circuit has been particularly instructive in this area, having noted in *Burlington* 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."[183] Even prior to *Burlington*, the Third Circuit had explored a duty to update on the basis that statements about fundamental changes may carry an implicit promise that they will be updated. In both *Greenfield*[184] and *In re Phillips*,[185] the initial disclosures that were argued to have triggered the duty to update involved information about events that could have fundamentally changed the natures of the companies involved. Specifically, both cases involved

investment at the time the statement was made" and because they were vague expressions of optimism).

[182] *See* Mendelsohn & Brush, *supra* note 86, at 77 (quoting Backman v. Polaroid Corp., 910 F.2d 10, 17 (1st Cir. 1990) (en banc)).

[183] *Id.* at 79 (internal quotation marks omitted) (quoting *In re* Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1434 n.20 (3d Cir. 1997)).

[184] Greenfield v. Heublein, Inc., 742 F.2d 751 (3d Cir. 1984), *abrogated by* Basic Inc. v. Levinson, 485 U.S. 224 (1988) (criticizing a bright-line materiality test advocated in *Greenfield*).

[185] *In re* Phillips Petroleum Sec. Litig., 881 F.2d 1236 (3d Cir. 1989).

takeover attempts, and the plaintiffs claimed that they should have been updated with information as to those attempts.[186]

> 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.[187]

Though the duty was not found in either situation,[188] the cases demonstrate "attempts to balance a system of non-continuous disclosure with the interests of investors when significant developments . . . related to previously released plans for major transactions" occur.[189]

B. Rejection of the Duty To Update

The Seventh Circuit stands as the lone appellate court that has rejected outright any duty to update beyond the periodic disclosure obligations of a public company.[190] In

[186] *See Greenfield*, 742 F.2d at 757–58; *Phillips*, 881 F.2d at 1239, 1245.

[187] *Burlington*, 114 F.3d at 1433–34.

[188] *Greenfield*, 742 F.2d at 758–59 (recognizing that a duty to update may apply to a statement about takeover attempts, but ruling that disclosure was not required because the company had not made any prior statements on the subject that could have generated a duty to update); *In re* Phillips Petroleum Sec. Litig., 881 F.2d at 1246 (declining to require update to a statement about a takeover attempt in part because plaintiffs did not produce evidence of a relevant subsequent change of intent). For a more recent example, see *United States v. Schiff*, where 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. 602 F.3d 152, 170 (3d Cir. 2010).

[189] Mendelsohn & Brush, *supra* note 86, at 78–79.

[190] *See, e.g.*, Higginbotham v. Baxter Int'l Inc., 495 F.3d 753, 760 (7th Cir. 2007) (rejecting a duty to update before the next quarterly report); Gallagher v. Abbott Lab'ys, 269 F.3d 806, 808–09 (7th Cir. 2001) ("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. . . . [J]udges have no authority to scoop the political branches and adopt continuous disclosure under the banner of Rule

Stransky v. Cummings Engine Co., the Seventh Circuit concluded that Rule 10b-5 does not contemplate a duty to update since such a duty would come after the original statement in question, and the rule itself considers the "circumstances under which [statements] were made."[191] As the court stated, "[t]he rule implicitly precludes basing liability on circumstances that arise after the speaker makes the statement."[192] Furthermore, "[t]he securities laws approach matters from an *ex ante* perspective: just as a statement true when made does not become fraudulent because things unexpectedly go wrong, so a statement materially false when made does not become acceptable because it happens to come true."[193]

In *Gallagher v. Abbott Laboratories*, the Seventh Circuit again refused to acknowledge a duty to update.[194] *Gallagher* distinguished between a duty to update disclosures by adding the latest information and a duty to correct disclosures false when made, holding that while the Exchange Act may require the latter, it does not require not the former.[195] The court rationalized that U.S. securities regulation is premised upon

10b-5."); Stransky v. Cummins Engine Co., 51 F.3d 1329, 1332 (7th Cir. 1995) (finding that a company has no duty to update a historical statement that was accurate when made).

[191] *Stransky*, 51 F.3d at 1332 (emphasis omitted) (quoting 17 C.F.R. § 240.10b-5(b)).

[192] *Id.*

[193] *Id.* (internal quotation marks omitted) (quoting Pommer v. Medtest Corp., 961 F.2d 620, 623 (7th Cir. 1992), *superseded by statute on other grounds*, Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 476, 105 Stat. 2236, 2387 (codified at 15 U.S.C. § 78aa-1 (2018)).

[194] *Gallagher*, 269 F.3d at 808–09.

[195] *Id.* at 810; *see also Higginbotham*, 495 F.3d at 760–61 (explaining and reaffirming *Gallagher*'s holding). The Seventh Circuit has recognized that the duty to correct may arise in certain circumstances. *See* Moss v. HealthCare Compare Corp. (*In re* HealthCare Compare Corp. Sec. Litig.), 75 F.3d 276, 282 (7th Cir. 1996) ("[W]e decline to . . . adopt[] a bright-line rule that no duty to correct exists in any case. Rather, . . . plaintiffs can only show that a duty to correct arose by alleging facts sufficient to demonstrate that the internal memorandum [in conflict with the alleged misstatement] was certain and reliable, not merely a tentative estimate.").

a periodic disclosure system which, unlike a continuous disclosure system, does not require a duty to update.[196] Thus, the Seventh Circuit's rejection of the duty to update has largely been based on the pre-existing obligations imposed in the SEC's disclosure regime and the court's refusal to require anything beyond them.[197] As the Seventh Circuit succinctly stated in the years following *Gallagher*, "what rule of law requires 10–Q reports to be updated on any cycle other than quarterly? That's what the 'Q' means. . . . The securities laws create a system of periodic rather than continual disclosures."[198]

C. The Ninth Circuit Tackles the Duties To Correct and Update

While many circuits have taken some position on the duty to update, others have remained undecided on the matter.[199] The Ninth Circuit, for example, had refused to rule on this "novel question of law."[200] Recently, however, the court may have implicitly taken a stance on the duty in *Khoja v. Orexigen Therapeutics, Inc.* (*Khoja II*), where it affirmed in part and reversed in part the district court's dismissal of a securities

[196] *Gallagher*, 269 F.3d at 808–10.

[197] *See id.* at 809–10 (explaining the disclosure requirements of the Securities Act, Exchange Act, and SEC regulations, emphasizing the periodic, rather than continuous, nature of those requirements).

[198] *Higginbotham*, 495 F.3d at 760 (citing *Gallagher*, 269 F.3d at 810).

[199] *See, e.g.*, Helwig v. Vencor, Inc., 251 F.3d 540, 561 (6th Cir. 2001) (en banc) ("Though the [PSLRA] does not impose a 'duty to update,' and we do not decide today whether such an obligation exists, we at least require an actor to 'provide complete and non-misleading information with respect to the subjects on which he undertakes to speak.'" (footnote omitted) (citation omitted) (citing 15 U.S.C. § 78u-5(d)) (quoting Rubin v. Schottstein, Zox & Dunn, 143 F.3d 263, 268 (6th Cir. 1998))), *abrogated on other grounds by* Tellabs, Inc. v. Makor Issues & Rts., Ltd., 551 U.S. 308 (2007).

[200] Roberts v. Foxhollow Techs., Inc. (*In re* FoxHollow Techs., Inc. Sec. Litig.), 359 F. App'x 802, 804–05 (9th Cir. 2009) (refusing to decide whether a duty to update exists because the statements at issue were not "clear, factual, and forward-looking, such that some continuing representation remain[ed] alive in the minds of investors when circumstances change").

fraud class action complaint.[201] Lead plaintiff Karim Khoja sued Orexigen Therapeutics, Inc. and several of its executives, alleging violations of section 10(b) of the Exchange Act and Rule 10b-5 for making false or misleading statements and omitting material information about clinical trials (the "Light Study") involving Orexigen's drug in development to treat obesity.[202] Orexigen had filed a Form 8-K in March 2015 that described the Light Study and the "unexpectedly positive" drug results that had been gathered up to that point in time (the "25 percent interim results").[203] "Securities [a]nalysts responded immediately and positively to the revelations about" the drug, and "Orexigen's stock[] surged."[204] "Weeks later, on March 26, 2015," Orexigen discovered "that, as the Light Study reached 50 percent completion ('50 percent interim results'), the Light Study no longer indicated a heart benefit from [the drug], contrary to what the earlier 25 percent interim results suggested."[205] Among other things, Khoja claimed that Orexigen "omitted the 50 percent interim results [from its Form 8-K], which 'demonstrated that [Orexigen's] prior representations about [the drug's] purported [heart] benefit were false.'"[206]

The district court found that Orexigen had no duty to disclose those results.[207] "The court reasoned that Orexigen's earlier statements about the 25 percent interim results remained accurate because th[e] results 'still showed "a positive effect[.]"'"[208] The Ninth Circuit reversed the district

[201] Khoja v. Orexigen Therapeutics (*Khoja II*), Inc., 899 F.3d 988, 1018 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2615 (2019) (mem.).

[202] *Id.* at 994, 997.

[203] *Id.* at 994-95. The shorthand is the court's. *Id.* at 994 (internal quotation marks omitted).

[204] *Id.* at 995.

[205] *Id.* at 996.

[206] *Id.* at 1013 (second and fourth alterations in original) (quoting Consol. Complaint for Violation of the Fed. Sec. L. at 43, Khoja v. Orexigen Therapeutics, Inc. (*Khoja I*), 189 F. Supp. 3d 998 (S.D. Cal. 2016) (No. 15-CV-540), *aff'd in part, rev'd in part, and remanded*, 899 F.3d 988, *cert. denied*, 139 S. Ct. 2615 (2019) (mem.)).

[207] *Id.* at 1015.

[208] *Id.* (quoting *Khoja I*, 189 F. Supp. 3d at 1019).

court's dismissal of this claim, finding that the plaintiffs sufficiently pled that it was misleading for the defendants to fail to disclose that they were in possession of new results indicating that the 25 percent interim results, which the defendants had previously touted, "were not so promising after all."[209] "Although the 25 percent interim results were still technically accurate, the issue [was] whether, having learned new information that diminished the weight of those results, Orexigen was obligated to share that information."[210] The court concluded that the defendants "had a duty to disclose" that the new results "diminished the weight" of the earlier interim results.[211]

The defendants filed a petition for certiorari, challenging the Ninth Circuit's decision and requesting that the Supreme Court restrict a publicly traded company's duty to update earlier statements that were "accurate when made but later became misleading because of subsequent events."[212] The petition argued that the Ninth Circuit had created a duty to "update an accurate statement of historical fact when the 'value' or 'weight' of that statement has been 'diminished' by subsequent events."[213] This ruling, argued the petitioners, "directly conflict[ed] with every other circuit that ha[d]

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[209] *Id.*

[210] *Id.* There is some debate over whether the court instead implicated the duty to correct, rather than the duty to update. Matthew Dallett, *Is There a "Duty To Update" Public Disclosures? Supreme Court Declines To Review Decision That Did Not Clearly Present the Issue*, JD SUPRA (June 14, 2019), https://www.jdsupra.com/legalnews/is-there-a-duty-to-update-public-36586/ [https://perma.cc/65L5-ZTJK] (discussing plaintiffs' characterization, in their response to defendants' petition for certiorari, of the Ninth Circuit's decision as imposing a duty to correct).

[211] *Khoja II*, 899 F.3d at 1015. ("The Complaint sufficiently pled that, even if investors understood that more results were necessary to confirm [the drug's] potential heart benefit, the 25 percent interim results clearly suggested a promising venture. Naturally, if subsequent data indicated those earlier interim results were not so promising after all, their value diminished. Because the 50 percent interim results did precisely that, Orexigen had a duty to disclose them.").

[212] Petition for Writ of Certiorari at i, 4–5, Hagan v. Khoja, 139 S. Ct. 2615 (2019) (mem.) (No. 18-1010), *denying cert. to* 899 F.3d 988.

[213] *Id.* at i.

previously recognized a duty to update."[214] The respondents took a far different view, arguing that "it would be impossible to resolve any such [circuit] conflict because" the case did not involve the duty to update, but, rather, the duty to correct.[215] Respondents framed the court's decision as a straightforward application of the "settled legal principle that a company has a duty to disclose material facts correcting a previous statement of historical fact when subsequently revealed facts make clear that the previous statement was false or misleading."[216]

Essentially, the issue turned on whether the 25 percent interim results were "accurate" when made. If they were, as the petitioners argued, then the Ninth Circuit's holding implicated a duty to update. If not, as the respondents argued, then it implicated a duty to correct. The court never explicitly stated whether the 25 percent interim results were accurate when made. Reasonable arguments could be made on both sides. On one hand, the Ninth Circuit described the 50 percent interim results as having "diminished the weight" of the 25 percent interim results, creating a duty to share these new results.[217] Though the Ninth Circuit never characterized its analysis as one implicating the duty to update, its discussion of Orexigen's obligation tracks the definition of the duty to update adopted in this Note and in the case law previously reviewed.[218] On the other hand, the Ninth Circuit found that the plaintiff "pled a plausible claim that Orexigen had a duty to disclose that the 25 percent interim results in the March 2015 Form-8K [sic] were unreliable."[219] While unreliability implies inaccuracy, they are not necessarily interchangeable—as the court itself stated, the 25 percent interim results were still "technically accurate" at the time

[214] *Id.* at 12. The duty to update generally has not been applied to statements of historical fact. *See supra* text accompanying notes 181–182.

[215] Brief in Opposition at 12, Hagan v. Khoja, 139 S. Ct. 2615 (2019) (mem.) (No. 18-1010), *denying cert. to* 899 F.3d 988.

[216] *Id.* at 12–13 (collecting cases).

[217] *Khoja II*, 899 F.3d at 1015.

[218] *See supra* Sections II.C.2, III.A.

[219] *Khoja II*, 899 F.3d at 1010.

they were made, even after the 50 percent interim results were revealed.[220]

Ultimately, and unfortunately, on May 20, 2019, the Supreme Court left the Ninth Circuit's decision in *Khoja II* in place when it denied Orexigen's petition for certiorari,[221] leaving the question of whether the duty to update applies to historical statements with forward-looking components unresolved.[222] The method for evaluating when subsequent events sufficiently diminish the value or weight of a historical statement remains unclear.

IV. REVIVING THE DUTY TO UPDATE

The diametrically opposed analyses of the statements at issue in *Khoja II* demonstrate just one example of the confusion surrounding the triggering events for the duty to update and the difficulty of distinguishing it from the duty to correct. For the past thirty years, commentators have called for further clarity from Congress or the Supreme Court to rectify the conflicting case law,[223] yet, other than the

[220] *Id.* at 1015.

[221] Hagan v. Khoja, 139 S. Ct. 2615 (2019) (mem.), *denying cert. to* 899 F.3d 988.

[222] *See* Jason Halper, Kyle DeYoung & Adam Magid, *2019 Year in Review: Securities Litigation and Enforcement*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 20, 2020), https://corpgov.law.harvard.edu/2020/02/20/2019-year-in-review-securities-litigation-and-enforcement/ [https://perma.cc/Y82S-AKD8] (suggesting that the Ninth Circuit's decision is in tension with at least five other circuits, as it imposes a relatively unconstrained duty that, arguably, would apply any time "new information 'diminishe[s]' the 'weight' and 'value' of" prior information).

[223] *See, e.g.*, Brill, *supra* note 8, at 677 ("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[.]"); 3C BLOOMENTHAL & WOLFF, *supra* note 9, § 18:23 ("Ultimately, the question whether there is a duty to update may well be resolved by the U.S. Supreme Court, and given the state of the current law, it should be."); Rosenblum, *supra* note 81, at 289 (examining the "still murky" areas of the duty to update).

protections put in place for forward-looking statements,[224] no such clarity has been provided. While this issue has always carried significant implications for the United States' disclosure regime, with the unpredictable nature of the ongoing COVID-19 pandemic, it has become more critical than ever to determine whether a duty to update should have a role in the grand scheme of securities regulation, and if so, how it can best fulfill that role.

Since the pandemic threw the country into disarray at the beginning of 2020, "public companies [have] fac[ed] unprecedented levels of economic slowdown, restrictions on business operations, and restrictions on personal mobility."[225] The SEC has responded by repeatedly emphasizing the importance of forward-looking disclosures. On March 25, 2020, the CF Division issued guidance on disclosure with respect to COVID-19, reminding companies that the risks and effects that they have experienced to date, or expect to experience in the future, and the ways in which their management is responding to the evolving circumstances, may be material to investors and market participants.[226] The guidance specifically advised companies "to evaluate the current and expected impact of COVID-19 through the eyes of management, and . . . proactively [to] revise and update disclosures as facts and circumstances change."[227] On April 8, 2020, the SEC further recommended that companies try to make "[r]obust, [f]orward-[l]ooking [d]isclosures [that] [w]ill [b]enefit [i]nvestors" and, more broadly, promote the wider exchange of companies' plans to respond to the pandemic.[228]

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[224] *See supra* Section II.C.3.

[225] Teri O'Brien, James Shea & Melissa Garcia, *SEC Provides Additional Disclosure Guidance for COVID-19: What Public Companies Have Been Disclosing and What To Expect as Q1 Draws To a Close*, PAUL HASTINGS (Mar. 27, 2020), https://www.paulhastings.com/publications-items/details/?id=7fbb066f-2334-6428-811c-ff00004cbded [https://perma.cc/KNX9-UVZR].

[226] Div. of Corp. Fin., SEC, *supra* note 2.

[227] *Id.*

[228] Press Release, Jay Clayton, Chairman, U.S. Sec. & Exch. Comm'n & William Hinman, Dir., Div. of Corp. Fin., U.S. Sec. & Exch. Comm'n, The Importance of Disclosure – for Investors, Markets and Our

To mitigate the legal risks of such disclosures, the SEC encouraged companies to avail themselves of safe harbor laws, and also noted that it would not expect to second guess good faith attempts to provide appropriately framed forward-looking information.[229] Once again, on June 23, 2020, the CF Division issued supplemental guidance "encourage[ing] companies to provide disclosures that allow investors to evaluate the current and expected impact of COVID-19 through the eyes of management and to proactively revise and update disclosures as facts and circumstances change."[230]

Early scholarship largely advocated for the limitation of the duty to update as a natural outgrowth of the valid concern that such a duty is inconsistent with the U.S. periodic disclosure regime.[231] Today, the duty has been so limited.[232] Ironically, the question now is whether the duty to update has been whittled down to the point where it is nearly non-existent—a result wholly favorable to issuers and detrimental to potential plaintiffs. While a drastic event such as a global crisis is not the only instance in which the duty to update should arise, it highlights precisely why the duty is still valuable and should not be extinguished. Under the efficient

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Fight Against COVID-19 (Apr. 8, 2020) (emphasis omitted), https://www.sec.gov/news/public-statement/statement-clayton-hinman [https://perma.cc/T5X8-VFU9].

[229] *Id.*

[230] Div. of Corp. Fin., SEC, *Disclosure Considerations Regarding Operations, Liquidity, and Capital Resources: CF Disclosure Guidance: Topic No. 9A*, U.S. SEC. & EXCH. COMM'N (June 23, 2020), https://www.sec.gov/corpfin/covid-19-disclosure-considerations [https://perma.cc/5ZAZ-FVWX].

[231] *See, e.g.*, Brill, *supra* note 8, at 634 ("In fact, 'a duty to update all historical information could

be interpreted as a continuing duty to provide daily updates of financial statement balances.' Such a duty would necessitate sweeping changes to the periodic reporting rules and regulations that the Exchange Act

prescribes." (footnote omitted) (quoting John E. Hayes, III, Note, 39 U. KAN. L. REV. 951, 963 (1991))); Rosenblum, *supra* note 81, at 323–25; Bochner & Bukhari, *supra* note 136, at 235.

[232] *See* Mendelsohn & Brush, *supra* note 86, at 80 ("[A] review of court decisions suggests that the[] duties [to correct and to update] apply in limited circumstances (especially the duty to update)[.]").

capital market hypothesis, which market players and courts generally assume, the price of a stock reflects all material public information, and therefore, any material misrepresentations.[233] Courts have accepted the "fraud on the market theory," which allows investors to satisfy the reliance requirement when bringing a securities fraud class action by assuming they relied "on the integrity of the market price."[234] In that particular context, "it is reasonable to presume that *most* investors—knowing that they have little hope of outperforming the market in the long run based solely on their analysis of publicly available information—will rely on the security's market price as an unbiased assessment of the security's value in light of all public information."[235] Such reliance can be tainted by fraud or misrepresentation.[236]

Accordingly, when new information affects a previously reasonable disclosure that had moved a company's stock price, it is not just the company's investors that have the right to be updated, but also the stock market itself, in order to generate a more accurate price. If the previous disclosure is left untouched, then the investing public will be harmed by the

[233] Bell v. Ascendant Sols., Inc., 422 F.3d 307, 310 n.2 (5th Cir. 2005) ("The central premise of the [fraud on the market] theory [of liability] is that, in an efficient capital market, the market price of a stock reflects all public information; hence an investor who purchases a stock in such a market is harmed if the price reflects false information as a consequence of a material misrepresentation." (first citing Daniel R. Fischel, *Efficient Capital Markets, the Crash, and the Fraud on the Market Theory*, 74 CORNELL L. REV. 907, 911 (1989); and then citing Basic Inc. v. Levinson, 485 U.S. 224, 246 (1988)). While academic, economic, and legal debates have continued to question the hypothesis, "[e]ven the foremost critics of the efficient capital markets hypothesis acknowledge that public information generally affects stock prices." Halliburton Co. v. Erica P. John Fund, 573 U.S. 258, 272 (2014). These large-scale debates, many of which—such as the concern that markets may less readily assimilate public information that is more difficult to obtain and understand— have merit, are beyond the scope of this Note.

[234] Fischel, *supra* note 233, at 908; s*ee also Basic*, 485 U.S. at 247;

[235] *Halliburton*, 573 U.S. at 273 (internal quotation marks omitted) (quoting Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 462 (2013)).

[236] *Id.* at 274.

risk of making uninformed decisions based on a stock price that reflects information now rendered materially misleading.[237] As a result, the duty to update serves both the direct and indirect protection of investors, particularly in uncertain times, by informing their personal investment decisions and the market in which they operate.

To carry out these purposes while limiting frivolous litigation, three distinct updates to the current duty to update framework should be undertaken to harmonize the duty with the country's periodic disclosure regime. First, the "fundamental change"[238] analysis should be fully subsumed into the "remains alive"[239] analysis. Pleading a duty to update claim should continue to be possible only when a disclosure, accurate when made, later allegedly becomes materially misleading in light of subsequent events. But determining what type of original disclosure is subject to the duty has become unnecessarily convoluted due to the development of these separate threshold questions. As a practical matter, it remains unclear how much statements relating to fundamental changes truly differ from statements remaining "alive" in the minds of investors, as the latter seem to encompass the former. Keeping in line with the leading circuits that have developed the duty to update, a duty to update theory should only prevail "if the previous statement contain[s] an 'implicit factual representation that remained "alive" in the minds of investors as a continuing representation.'"[240] Statements remaining "alive," as discussed, will likely involve forward-looking disclosures, and thus can be shielded from liability with the appropriate safe harbor defenses.[241] Issuers and company representatives alike should be responsible for taking the steps necessary to ensure the appropriate language is used to trigger these defenses.

[237] *Bell*, 422 F.3d at 310 n.2 (first citing Fischel, *supra* note 233, at 911; and then citing *Basic*, 485 U.S. at 246).

[238] *See supra* Section III.A.2.

[239] *See supra* Section III.A.1.

[240] Oran v. Stafford, 226 F.3d 275, 286 (3d Cir. 2000) (quoting *In re* Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1432 (3d Cir. 1997)).

[241] *See supra* Section II.C.3 (discussing the safe harbors).

Given that, under current case law, the difference between a valid invocation of a defense and an invalid one is largely a matter of wording,[242] the benefits of taking such precautions largely outweigh any additional burdens.

Second, if companies do not take the appropriate steps to shield their forward-looking statements, or if a *Khoja II*-related issue regarding a "diminished" historical statement arises, then courts will inevitably proceed to assess materiality.[243] Accordingly, a consistent materiality test must be developed. Because the "duty [to disclose] arises from the combination of a prior statement and a subsequent event, which, if not disclosed, renders the prior statement false or misleading, the inquiries as to duty and materiality coalesce."[244] Thus, although materiality is traditionally a question of fact, and duty is a question of law,[245] courts still need to engage with the materiality question to some extent at a motion to dismiss stage. Specifically, there should be two materiality prongs to any test of the duty to update: (1) the original statement must be material, and (2) the subsequent information must be material. Only then should a court find that the latter rendered the former "materially" misleading. A focus on just the original statement or the additional information is incomplete.

The major question then becomes, which statements are material? Generally, the answer is statements upon which investors may reasonably rely in making their investment

[242] *See, e.g.*, 15 U.S.C. §§ 77z-2(c)(1)(A)(i); 78u-5(c)(1)(A)(i) (2018) (giving the "meaningful cautionary statement" path to PSLRA protection).

[243] *See, e.g.*, Khoja v. Orexigen Therapeutics (*Khoja II*), Inc., 899 F.3d 988, 1012–13 (9th Cir. 2018) (discussing materiality), *cert. denied*, 139 S. Ct. 2615 (2019) (mem.).

[244] Zvi Trading Corp. Emps.' Money Purchase Pension Plan & Tr. v. Ross (*In re* Time Warner Inc. Sec. Litig.), 9 F.3d 259, 267 (2d Cir. 1993). Simply put, the duty to update cannot arise without a finding of materiality. Thus, this does not disturb the "foundational" principles that "[f]irst, not all material information has to be disclosed. . . . [and] [s]econd, immaterial information is often required to be disclosed." Langevoort & Gulati, *supra* note 74, at 1644–45.

[245] Langevoort & Gulati, *supra* note 74, at 1644.

decisions.[246] But, particularly in large class action suits where plaintiffs adequately plead that the market for the common stock at issue was an efficient market,[247] an evaluation of materiality should look to whether and how the stock price of the company facing a duty to update claim changed. Instead of disregarding the efficient capital market hypothesis in judgments of materiality, which has led to "ad hoc decisionmaking,"[248] the efficient capital market hypothesis should be utilized to help assess materiality.[249] The first prong entails examining the stock price when the original statement is released. The second prong entails examining the stock price when the subsequently discovered information or changing circumstances, which a plaintiff now claims rendered the original statement misleading, finally surface (as they inevitably would in order for such litigation to arise at all). The burden would be on the plaintiff to show an appreciable effect on the price under both prongs. If there is

[246] *See supra* notes 62–65 and accompanying text.

[247] A plaintiff would be required to show that the shares were traded in an efficient market in order to succeed in this materiality assessment, similar to the fraud on the market theory of reliance in section 10(b) securities fraud actions. *See* Basic Inc. v. Levinson, 485 U.S. 224, 248 n.27 (1988).

[248] Roger J. Dennis, *Materiality and the Efficient Capital Market Model: A Recipe for the Total Mix*, 25 WM. & MARY L. REV. 373, 419 (1984) (emphasis omitted).

[249] Some circuit courts already require a showing that the fraud alleged caused a decline in the stock price at issue, particularly a decline in price after the disclosure of the alleged fraud. Jay W. Eisenhofer, Geoffrey C. Jarvis & James R. Banko, *Securities Fraud, Stock Price Valuation, and Loss Causation: Toward a Corporate Finance-Based Theory of Loss Causation*, 59 BUS. LAW. 1419, 1431–34 (2004) (discussing examples within the context of the loss causation element of a securities fraud claim). Beyond loss causation, considerations of the stock price have also been used to assess materiality. *See, e.g.*, Oran v. Stafford, 226 F.3d 275, 282 (3d Cir. 2000) ("Because in an efficient market 'the concept of materiality translates into information that alters the price of the firm's stock,' if a company's disclosure of information has no effect on stock prices, 'it follows that the information disclosed . . . was immaterial as a matter of law.'" (quoting *In re* Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1425 (3d Cir. 1997)).

an appreciable effect[250] with respect to each prong,[251] then a court could hold that the new information rendered the original misstatement materially misleading, warranting the application of the duty to update. If there is no effect at either or both stages, then the duty to update should not arise.[252]

For a practical application, consider the following hypothetical, utilizing the basic facts of *Khoja II*[253] and assuming that the plaintiffs have adequately pled that the 25 percent interim results remained "alive." When Orexigen had filed the March 2015 Form 8-K that described the "unexpectedly positive" 25 percent interim results, "[s]ecurities [a]nalysts responded immediately and positively to the revelations about" the drug and "Orexigen's stock[] surged."[254] According to the efficient capital markets hypothesis, the stock price reflected the new "total mix" of information available.[255] Investors who were aware of the new

[250] Of course, materiality assessments are not quite so simple as a matter of a change in share price, and critics point out the difficulties in relying on share price in determining materiality. "[P]rices fluctuate continuously in response to a variety of issuer and market developments as well as 'noise' trading." Jill E. Fisch, Jonah B. Gelbach & Jonathan Klick, *The Logic and Limits of Event Studies in Securities Fraud Litigation*, 96 TEX. L. REV. 553, 555 (2018). For a comprehensive review on the use of event studies to determine whether a highly unusual price movement has occurred, see generally *id.* For additional scholarship on stock price valuation in securities fraud actions, see generally Eisenhofer et al., *supra* note 249.

[251] This would most likely look like a positive effect with respect to the original statement, and then a negative effect when the subsequently discovered information finally hit the market.

[252] Of course, like any other affirmative disclosure duty, other elements must also be present in addition to an issuer's breach of a duty to update in order for the issuer to be held in violation of Rule 10b-5. *See* Rosenblum, *supra* note 81, at 298.

[253] For those facts and the shorthand terms used to describe them, see *supra* Section III.C.

[254] Khoja v. Orexigen Therapeutics, Inc. (*Khoja II*), 899 F.3d 988, 995 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2615 (2019) (mem.).

[255] Recall that the Supreme Court has defined "materiality" as requiring "a substantial likelihood that the disclosure of [an] omitted fact would have been viewed by [a] reasonable investor as having significantly

stock price and chose to purchase shares in the company were relying on that "total mix" of information by way of their knowledge of the stock price. If the plaintiffs are able to adequately plead a connection between the disclosure and the change in the stock price, under the first prong of the duty to update test, the 25 percent interim results were material.

Just weeks later, when Orexigen discovered that the 50 percent interim results were less favorable, the 25 percent interim results were "still technically accurate."[256] Once the 50 percent interim results were finally made public, the stock price allegedly dropped significantly.[257] If the plaintiffs are able to adequately plead a connection between the release of this information and the stock price, then, under the second prong of the duty to update test, the 50 percent interim results can be deemed material. In this hypothetical, the plaintiffs are able to adequately plead such a connection. By failing to update the public with the new results, the stock price continued to reflect the prior, more positive, disclosure, and therefore did not accurately reflect the "total mix" of information available. Investors continued to rely on the then-tainted integrity of the stock price, potentially incurring harm as a result. As such, the 50 percent interim result rendered the 25 percent interim results, though accurate when first announced, materially misleading.

The final suggested change to the duty to update addresses what is perhaps the greatest concern surrounding the duty: the fear of creating a continuous disclosure regime. Scholars and economists have made arguments for and against such a regime.[258] While courts will always be instructive with respect to the interpretation of the law, they are, at their core, reactive neutral arbiters, designed to be

altered the '*total mix*' of information made available." TSC Indus. v. Northway, Inc., 426 U.S. 438, 449 (1976) (emphasis added).

[256] *Khoja II*, 899 F.3d at 1015.

[257] *Id.* at 1005.

[258] *See* Dale Arthur Oesterle, *The Inexorable March Toward a Continuous Disclosure Requirement for Publicly Traded Companies: "Are we There Yet?"*, 20 CARDOZO L. REV. 135, 188–94 (1998) (collecting and discussing such arguments).

passive and only exercise their lawmaking powers after a case has been brought before them.[259] By contrast, regulators—here, the SEC—are designed to enforce law proactively, including by monitoring activities and initiating enforcement proceedings.[260] The SEC in particular has the power to "'make, amend, or rescind' . . . rules . . . [as] necessary to carry out the provisions of the law."[261] Given that much of the revived attention on the duty to update stems from the SEC's calls for more continuous disclosures due to COVID-19, it follows that the SEC should step forth to clarify what, if anything, it means by these calls.

One step the SEC could take is to codify what types of statements qualify as "alive" in the minds of investors and, thus, are potentially subject to the duty to update. While public companies are already required to file additional reports in the intervening period between periodic reports to disclose events that are presumptively material,[262] specific regulation of typically-material subsequent events or information would resolve the uncertainty surrounding when the duty is in play at all. Another critical step would be for the SEC to set guidelines for when such updates need to be made. To this end, the SEC could look to other jurisdictions with ongoing reporting regimes that "require listed entities to disclose information under a general obligation of materiality comprising price sensitive information."[263] For example, certain jurisdictions require the disclosure of certain material developments either "immediately" or on a specified periodic

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[259] *See* Katharina Pistor & Chenggang Xu, *Incomplete Law*, 35 N.Y.U. J. INT'L L. & POL. 931, 948 (2003).

[260] *See id.* at 948–49.

[261] *Id.* at 1001 (quoting 15 U.S.C. § 77s(a) (1997)); *see also supra* Section II.B.1.

[262] *See Form 8-K*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/fast-answers/answersform8khtm.html [https://perma.cc/8L3H-HS5K] (last modified Aug. 10, 2012); INT'L ORG. OF SEC. COMM'NS, PRINCIPLES FOR ONGOING DISCLOSURE AND MATERIAL DEVELOPMENT REPORTING BY LISTED ENTITIES 7 app. at 7 (2002), https://www.sec.gov/about/offices/oia/oia_corpfin/princdisclos.pdf [https://perma.cc/U3QT-X5WN].

[263] INT'L ORG. OF SEC. COMM'RS, *supra* note 262, at 7 app. at 7.

basis, while also permitting delays depending on varying circumstances, subject to approval by the appropriate regulators.[264] Prescribing a clear list of triggering events for the duty to update and clear time frames for the disclosure of those triggering events would allow for a far easier assessment of the merits of these duty to update claims while also informing issuers of their obligations under the duty at the outset and enabling them to avoid potential litigation as a result.

V. CONCLUSION

When a company subject to the federal securities laws has made a disclosure, it has chosen to speak and, pursuant to the duty to disclose, it must tell the whole truth in that disclosure.[265] However, even when an original statement is fully accurate, subsequent events and information may arise that render an initial disclosure misleading. For various reasons, companies may be hesitant to supplement a prior disclosure before their next required periodic report.[266] If an unanticipated development, ranging from a large-scale crisis to company-specific trial results, undermines a previous disclosure, corporate "representatives may fear that the new disclosure would call undue attention to" any errors made.[267] Instances where safe harbors cannot protect issuers, or reporting requirements do not already impose an obligation to disclose,[268] create a further disincentive to tell the public the new truth. Courts "developed the concept[] of . . . a 'duty to update' [in order] to address" this precise scenario where "a

[264] *See id.* at 7 app. at 7–8.

[265] *See supra* Section II.B.2.

[266] Mendelsohn & Brush, *supra* note 86, at 67.

[267] *Id.*

[268] On some of these requirements, see *id.* at 70–71 ("[I]ssuers 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. 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." (footnote omitted)).

company is required to revise a prior disclosure that may no longer be accurate in advance of the next periodic report."[269] But, as demonstrated, the duty has been misconstrued for the past three decades. As a result, the duty to update has been restricted to the point where plaintiffs who suffered legitimate harms from a failure to update may not be entitled to recover any realistic remedies under a doctrine that was established to protect them. At the same time, the duty raises valid concerns over the burdens that issuers could face, as it risks transforming the already-numerous reporting requirements into an unsustainable, limitless obligation to disclose any material change in circumstance.

Despite the increasing difficulty in succeeding on duty to update claims, plaintiffs have continued to bring causes of action that implicate the duty in light of COVID-19.[270] Furthermore, the SEC's informal encouragement of updating disclosures, and amendments it has made implicating the duty since the pandemic began,[271] have brought the debate

[269] *Id.* at 67.

[270] *See, e.g.*, Class Action Complaint for Violation of the Fed. Sec. L. at 15–16, Di Scala v. ProShares Ultra Bloomberg Crude Oil, No. 20-cv-05865 (S.D.N.Y. dismissed Feb. 22, 2021) (mem.) ("In its March 25, 2020 amended Registration Statement, UCO acknowledged the existence of the COVID-19 pandemic, but only in general terms. . . . However, the March 25, 2020 amended Registration Statement failed to disclose that UCO's investment strategy and objective had already become outdated and that UCO would have to change course from its traditional, passive investment strategy. . . . The language [in the amended Registration Statement] is a verbatim cut and paste from the March 6, 2020 Registration Statement, without any meaningful update or disclosure."); Class Action Complaint at 4, Arbitrage Fund v. Forescout Techs., Inc., No. 20-cv-03819 (N.D. Cal. June 10, 2020) ("Forescout's future SEC filings during the Class Period continued to mislead investors by failing to update significantly out-of-date and inflated projections, as well as by failing to warn investors that Advent had concerns regarding the Company's recent financial performance.").

[271] On August 26, 2020, the SEC adopted amendments to replace certain prescriptive disclosure requirements with principles-based rules, which aim to give companies greater flexibility to provide disclosures that are appropriately tailored to their business. *See generally* Modernization of Regulation S-K Items 101, 103, and 105, Securities Act Release No. 10,825, Exchange Act Release No. 89,670, 85 Fed. Reg. 63,726 (Oct. 8, 2020) (to be codified at 17 C.F.R. pts. 229, 239, 240); Peter Castellon et al., *SEC Adopts*

surrounding the duty to update back into the spotlight. For these reasons, the suggestions set forth in this Note seek to clarify the duty to update while preventing it from overshadowing the periodic regime underlying U.S. securities regulation. In particular, both courts and the SEC have important roles to play if the duty, as argued, continues to exist. By setting parameters for when the duty may arise, the legal standards under which the duty should be assessed, and how issuers may comply with their obligations to update, the approach adopted here will minimize frivolous litigation, remedy the conflation of the duty to correct and the duty to update, and impose liability only in cases where disclosure's purposes can truly be advanced.

a More Principles-Based Approach to Public Company Disclosure Requirements, NAT'L. L. REV. (Sept. 1, 2020), https://www.natlawreview.com/article/sec-adopts-more-principles-based-approach-to-public-company-disclosure-requirements [https://perma.cc/98KA-ABN4]. One amendment in particular, the requirement that material changes to a registrant's previously disclosed business strategy be disclosed, may implicate notions of the duty to update, but the SEC did not provide any definition of "business strategy" nor any set timeframes for disclosure of these material changes. *See* Modernization of Regulation S-K Items 101, 103, and 105, 85 Fed. Reg. at 63,732.