Practice Pointers on Earnings Guidance

The decision to provide earnings guidance should involve careful consideration of various factors, including legal, market and reputational risks. Earnings guidance practices will and should vary from company to company and from time to time. The following discussion provides a summary of factors to consider when establishing earnings guidance measures.

Trends and Views on Earnings Guidance

Although there is an active debate as to the usefulness of earnings guidance and whether the practice of providing earnings guidance has been declining recently, a majority of companies provide some form of earnings guidance, and the number of companies that do so has increased in the last two years.[1] Usually those companies that are seasoned issuers with more predictable earnings, have greater analyst coverage or have large market capitalizations provide earnings guidance.[2] The practice in most industries is to provide earnings guidance.[3]

There are different points of view regarding the merits of and the wisdom of providing earnings guidance. The National Investor Relations Institute (NIRI) supports the focus on long-term business value drivers and has indicated that the undue volatility around short-term focus is undesirable.[4] Some have argued that providing earnings guidance forces management to place too much emphasis on short-term goals rather than long-term performance. This results in management focusing on earnings rather than growth, which is contrary to the NIRI's stance on management goals. Proponents argue that providing earnings guidance is beneficial to a company and investors as it reduces uncertainty in the market and encourages transparency. A recent survey on earnings guidance conducted by the NIRI shows that the majority of companies that provide earnings guidance do so in order to provide more information to the market, particularly to ensure sell-side analyst consensus and manage market expectations. Other reasons for providing earnings guidance include facilitation of Regulation FD compliance, adherence to industry practice, fulfilling investor or seller requests for earnings guidance and attempts to control stock volatility. Companies that do not provide earnings guidance cite their management philosophy, focus on long-term performance, industry practice and low visibility on earnings.[5] Therefore, the decision to provide earnings guidance may largely be driven by a company's management philosophy and industry practice. However, a company with a high level of analyst coverage and large investor base may favor providing earnings guidance in order to increase market information and transparency for the benefit of their investors.

Content

Specific Metrics vs. Qualitative Information

All companies must provide general qualitative projections on topics such as industry trends and market risks as required by disclosure rules for offering documents filed with the Securities and Exchange Commission (SEC) and annual and quarterly reports filed with the SEC under the Securities Exchange Act of 1934, as amended (the "Exchange Act").[6] The most common types of non-financial earnings guidance are statements on market and industry conditions, trends and growth, key performance measures, estimated factors that may drive earnings and environmental, social or governmental factors. A company can choose to provide specific financial metrics to quantify future expected performance in addition to the required general qualitative earnings guidance. In industries where period-to-period results are unpredictable, a company may want to avoid providing specific financial metrics. Of those companies that provide earnings guidance, a majority provides both qualitative and quantitative earnings guidance and a minority provides only non-financial earnings guidance.[7]

If a company decides to provide specific financial metrics, it should choose a metric that not only, to the extent possible, accurately provides earnings guidance on future performance but that can also be easily calculated and produced in the future. A majority of companies that provide financial earnings guidance usually provide earnings guidance in ranges and typically provide measures on revenue or sales, capital expenditures, earnings/earnings per share (EPS) and earnings before interest, taxes, depreciation and amortization (EBITDA) or earnings before interest and tax (EBIT).[8] Companies usually do not provide earnings guidance on working

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[1] *See* The National Investor Relations Institute, *Guidance Practices 2014 Survey Report* (Oct. 22, 2014), at 3, *available at*: http://www.niri.org/Main-Menu-Category/resource/publications/Executive-Alert/NIRI-Guidance-Practices-Survey--2014-Report-102214.aspx.
[2] *See id.* at 3 and 19.
[3] *See* Kristian D. Allee, Theordore E. Christensen, Bryan S. Graden, and Kenneth J. Merkley, *When Do Firms Initiate Earnings Guidance? The Timing, Consequences, and Characteristics of Firms' First Earnings Guidance* (Dec. 22, 2014), at 38, *available at*: http://ssrn.com/abstract=2542018 or http://dx.doi.org/10.2139/ssrn.2542018 .
[4] *See* The National Investor Relations Institute, *Standards of Practice for Investor Relations-Disclosure* (Mar. 2014), at 92, *available at*: http://www.niri.org/Main-Menu-Category/resource/publications/Standards-of-Practice-for-Investor-Relations.aspx.
[5] *See supra* note 1 at 3.
[6] *See* Items 303 and 305 of Regulation S-K under the Securities Act of 1933, as amended.
[7] *See supra* note 1 at 5.
[8] *See supra* note 1 at 9.

capital, depreciation and segment data.[9] In addition, a company must keep in mind that, when providing non-GAAP metrics, it will be required under Regulation G to provide comparable GAAP measures and a reconciliation to the comparable GAAP measure. However, this is not required if the non-GAAP measure is a forward-looking measure and comparable GAAP measures are not reasonably available.

Earnings Guidance Period

If a company decides to provide specific financial metrics, it must decide on the period that the earnings guidance covers. A majority of companies provide earnings guidance quarterly as opposed to annually, and they usually provide annual rather than quarterly estimates due to the unpredictability and volatility of current markets. However, the scope of the earnings guidance will depend on the company's ability to forecast quarterly or annual results and its view on investor and market expectations.

Meaningful Cautionary Language

All earnings guidance should be accompanied with a meaningful cautionary statement. Section 27A ("Section 27A") of the Securities Act of 1933, as amended (the "Securities Act"), and Section 21E ("Section 21E") of the Exchange Act were enacted pursuant to the Private Securities Litigation Reform Act of 1995 (the "PSLRA") to provide a safe harbor for forward-looking statements. These safe harbors are available if the information is identified as a forward-looking statement and "accompanied by a meaningful cautionary statement" addressing factors that could cause actual results to differ materially. For example, a company should include factors on which the earnings guidance is based such as expectations on market conditions or trends or future business plans or strategies. A company should also include specific key risks that could cause its actual results and financial condition to differ materially from the earnings guidance.

These safe harbors are only available to a company that files reports under the Securities Act and do not apply in the case of initial public offerings (IPOs) or tender offers. Current case law also provides a similar protection for forward-looking statements under the defense known as the "bespeaks caution doctrine." The defense is only available if the forward-looking statements are not misleading and accompanied by specific and tailored risk disclosure. Thus, a company should always include a cautionary statement that is updated to include applicable risk factors with each release of earnings guidance.

Timing and Liability

Earnings guidance is typically provided quarterly in earnings releases and investor calls. However, when a significant event or change is in process or has occurred, a company must carefully evaluate the decision to and timing in providing or updating existing earnings guidance.

Sections 11 and 12 of the Securities Act

When a company is contemplating a public offering of securities, it must take into account potential liability that may arise under the Securities Act from material misstatements or omissions in the securities offering documents. Purchasers in a registered public offering of a company's securities have a right of action under Section 11 of the Securities Act ("Section 11") for an untrue statement of material fact or an omission to state a material fact in a registration statement. Under Section 12(a)(2) of the Securities Act ("Section 12(a)(2)"), purchasers also have a right of action against a seller for material misstatements or omissions in any prospectus or oral communication in the offer or sale of a company's securities.

Earnings guidance is typically provided in earnings releases, which are usually furnished and not filed on Form 8-K. By furnishing the earnings release, the information is not incorporated by reference into the offering document and subject to Section 11 liability unless the company explicitly does so in the offering document. See "Practical Considerations—Dissemination of Earnings Guidance" below. However, Section 12(a)(2) liability applies to oral communications in addition to a prospectus. If a company representative references the earnings guidance information in oral communications in connection with an offer or sale of securities and the company fails to meet the PSLRA safe harbor conditions, the company must ensure that the earnings guidance does not contain any material misstatements or omissions that will subject the company to Section 12(a)(2) liability. The company may also need to provide updates to such earnings guidance when future events occur that render the information inaccurate or misleading. See "Duty to Update or Confirm Prior Earnings Guidance" below.

[9] *See id.*

Anti-Fraud Provisions

A company must also consider the anti-fraud provisions of Section 10(b) and Rule 10b-5 under the Exchange Act (the "antifraud provisions"), which can be the basis of a right of action for any false statement about, or omission of, a material fact, regardless of whether or not such information is part of the offering documents. Therefore, a company should ensure that the earnings guidance it provides is covered by the PSLRA safe harbor and consider whether updating or confirming prior earnings guidance is necessary when prior earnings guidance is no longer accurate and may be misleading. See "Duty to Update or Confirm Prior Earnings Guidance" below.

Section 5 of the Securities Act and Rule 168 Safe Harbor

Section 5 of the Securities Act ("Section 5") prohibits offers of a security before a registration statement is filed. If a company that does not have a registration statement on file with the SEC plans to conduct an offering of securities in close proximity to or concurrently with the release of earnings guidance, such earnings guidance may be considered an offer subject to Section 5. However, Rule 168 ("Rule 168") under the Securities Act provides a safe harbor from Section 5 that generally permits reporting issuers to continue publishing or disseminating regularly released factual business and forward-looking information. It is designed to permit ongoing communications with the market, such as press releases, earnings releases, conference calls, earnings guidance, and other information released in accordance with an issuer's past practices, as long as such communications do not contain information about a potential offering and are not part of the offering process. However, when providing earnings guidance outside of prior practices, a company, whether reporting or non-reporting, should consider whether providing such earnings guidance is necessary at that time.

Duty to Update or Confirm Prior Earnings Guidance

There is no affirmative duty under the federal securities laws to update or confirm prior earnings guidance. Congress specifically did not impose a duty to update forward-looking information when it passed the PSLRA. Section 27A and Section 21E(d) state that a duty to update does not necessarily arise merely by making a forward-looking statement. In addition, it is unclear under case law whether there is such a duty.[10] Current case law indicates that the decision to update or confirm prior earnings guidance should take into account the materiality of a new event or information, whether the new event or information renders prior earnings guidance misleading or inaccurate in a material way[11] and whether the new information is something that would presently factor in the mind of a reasonable investor.[12] A recent survey by the NIRI shows that the overall percentage of companies that provide updates during the quarter or year where a material change has occurred has increased over the past six years, despite the drop in the percentage during 2005 to 2008.[13] Of the responding companies in the survey, 94% stated they would update their financial earnings guidance for both positive and negative material changes.[14]

It may be advisable to update or confirm prior earnings guidance where new events or information render prior earnings guidance misleading or inaccurate in order to avoid potential liability under the antifraud provisions or maintain investor relations by alerting the market of the change. In cases where the new information is easily accessible to the public, the need to update or confirm may not be necessary. However, when there are non-public material events or information, there may be a greater need to provide updates. See "Regulation FD" below. This becomes particularly important when a company is considering a transaction such as a securities offering, share repurchases or mergers and acquisitions as prior earnings guidance will likely be the basis of investor or shareholder voting decisions. Where earnings guidance is provided close to or concurrently with a transaction, a company must be careful to avoid having such earnings guidance become part of the selling efforts and offering documents or ensure that the PSLRA safe harbors are available. If not, a company may be required to update or confirm prior earnings guidance to avoid liability under the federal securities laws and regulations. See "Timing" above.

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[10] Since Backman v. Polaroid Corp., 910 F.2d 10 (1st Cir. 1990), courts have been divided as to whether there is a duty to update disclosure that subsequently becomes misleading. For example, the following courts found a duty to update (at least to some extent): In re IBM Corp. Securities Litig., 163 F.3d 102 (2nd Cir. 1998); In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410 (3rd Cir. 1997); Weiner v. Quaker Oats, Inc., 129 F.3d 310 (3rd Cir. 1997); and Shaw v. Digital Equipment, 82 F.3d 1194 (1st Cir. 1996). Note, however, that in the Shaw case, the First Circuit held that cautiously optimistic comments may not create a duty to update in certain cases. On the other hand, the following courts did not find a duty to update: Gallagher v. Abbott Laboratories, 269 F.3d 806 (7th Cir. 2001); Eisenstadt v. Centel Corp., 113 F.3d 738 (7th Cir. 1997); San Leandro Emergency Med. Plan v. Phillip Morris Cos., 75 F.3d 801 (2d Cir. 1996); Gross v. Summa Four, Inc., 93 F.3d 987 (1st Cir. 1996); Stransky v. Cummins Engine Co., 51 F.3d 1329 (7th Cir. 1995); and Hillson Partners v. Adage Inc., 42 F.3d 20 4 (4th Cir. 1994). The Ninth Circuit's position on the duty to update is ill-defined and unclear.

[11] *See* Ross v. A.H. Robins Co., 607 F.2d 545 (1979) (holding that the company should promptly correct material information that is no longer accurate).

[12] *See* Matrixx Initiatives Inc. v. Siracusano, 131 S. Ct. 1309 (2011) (finding that a misrepresentation or omission is material if there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information"). *See also* Basic Inc. v. Levinson, 485 U.S. 224 (1988); and SEC v. Texas Gulf Sulphur Co., 258 F.Supp. 262 (1966) (holding that information is material where a reasonable person would consider such information as relevant to the stock price).

[13] *See supra* note 1 at 25.

[14] *See id.*

Regulation FD

Regulation FD under the Exchange Act ("Regulation FD") prohibits a company from selectively disclosing material non-public information to analysts, institutional investors, and others without concurrently making widespread public disclosure. This prohibition reflects the view that all investors should have equal access to a company's material disclosures at the same time. The timing of the required public disclosure depends on whether the selective disclosure was intentional or unintentional. Accordingly, the company must make this public disclosure (i) simultaneously, in the case of intentional disclosures, or (ii) promptly afterwards, in the case of unintentional disclosures.[15] The public disclosure may be made through an Exchange Act filing (such as a Current Report on Form 8-K) or through any method reasonably designed to effect broad, non-exclusionary distribution of the information.

The SEC has drawn particular attention to the practice of providing earnings guidance to analysts. In the SEC's view, an issuer takes on a high degree of risk under Regulation FD when it engages in private discussion with an analyst seeking earnings guidance. Even seemingly benign comments that earnings match analysts' forecasts could trigger a violation of Regulation FD. For this reason, issuers may elect to avoid providing earnings guidance to analysts outside of methods that meet the definition of "public disclosure" under Regulation FD. In light of the recent earnings guidance from the SEC staff, which we discuss below, a company should consider whether it is prudent to implement a "no comment" policy regarding confirmation of prior earnings guidance, particularly in those situations where there is a heightened risk for selective disclosure regarding prior earnings guidance.

The SEC staff has issued earnings guidance regarding Regulation FD.[16] Question 101.01 of the Compliance and Disclosure Interpretations ("C&DIs") addresses the extent to which a company may permissibly confirm prior public earnings guidance to analysts or investors on a selective basis. The C&DIs indicate a few key principles for a company to consider when confirming earnings guidance and drafting or updating its Regulation FD policies:

- Whether a Regulation FD disclosure obligation is triggered depends on the materiality of the company's confirmation of the earnings guidance.
- In assessing the materiality, a company must consider the extent to which the confirmation (including the related circumstances and context around the confirmation) conveys additional material in formation.
- In examining these circumstances, the amount of time that has elapsed since the original earnings guidance was given, and the extent to which there have been intervening events since that time may be relevant factors.
    - For example, the confirmation of quarterly earnings guidance at the end of a quarter may be material, while confirmation in the middle of the quarter may not be deemed as material, given differing inferences that could be drawn, based on the relative timing of the confirmations.
    - An intervening loss of a customer since the publication of the original earnings guidance may make a subsequent confirmation of the original earnings guidance material.

While it should be acceptable to confirm earnings guidance privately within a short time after earnings guidance is announced publicly, there may be significant risks associated with engaging in private discussions with analysts or investors regarding earnings guidance. The narrow window for permissibly confirming earnings guidance would not exist in circumstances where there has been a subsequent intervening event that would call into question the earnings guidance, or where the timing of the confirmation itself conveys additional material information.

A company should be alert to specific language that may be deemed to be confirming prior earnings guidance. Question 101.01 of the C&DIs addresses the types of language that may be deemed to be confirming prior earnings guidance. A statement by the company that it has "not changed" or that it is "still comfortable with" prior earnings guidance is the same as providing a direct confirmation of the prior earnings guidance. Further, merely referencing the prior earnings guidance may imply confirmation of that earnings guidance. In the event that a company does not wish to confirm the prior earnings guidance, the C&DIs note that the company could say "no comment." A company could also make clear when referring to prior earnings guidance that the earnings guidance was provided as an estimate as of the date it was given, and that it is not being updated at the time of the subsequent statement.[17]

Regulation FD is a disclosure rule and not an antifraud rule. Therefore, a company that violates Regulation FD can be subject to an SEC enforcement action, as can the individual personnel at the company who were responsible for the violation. The enforcement action might be comprised of an injunction or fines, along with the attendant obligations to disclose the violation. The number of SEC enforcement actions under Regulation FD in connection with the earnings guidance has been increasing. For example, the SEC has

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[15] *See* SEC v. Senetek PLC, SEC Release No. 34-50400 (Sept. 16, 2004), *available at*: http://www.sec.gov/litigation/admin/34-50400.htm (in which the SEC brought administrative action against a company where the CEO and CFO corrected reports containing financial projections based on material non-public information that were not simultaneously disclosed publicly). *See also* SEC v. Office Depot, Inc., SEC Release No. 34-63152 (Oct. 21, 2010), *available at*: http://www.sec.gov/litigation/admin/2010/34-63152.pdf (in which the SEC brought administrative action against a company where an employee indirectly disclosed material earnings guidance by referencing comparable companies with declining results to certain analysts, and such information was publicly disclosed several days later).
[16] *See* Compliance and Disclosure Interpretations, Regulation FD (updated June 4, 2010), *available at*: http://sec.gov/divisions/corpfin/earnings guidance/regfd-interp.htm.
[17] *See* our Frequently Asked Questions About Regulation FD, *available at*: http://media.mofo.com/files/Uploads/Images/FAQs-Regulation-FD.pdf.

brought enforcement actions in cases where company executives (1) confirmed previous earnings guidance or corrected analyst projections with certain analysts[18] or (2) disclosed information at investor conferences that differed from previously disclosed earnings guidance.[19]

Practical Considerations

Establishing an Internal Earnings Guidance Policy

As the decision to provide earnings guidance and earnings guidance practices require careful thought, a company should adopt an internal earnings guidance policy. The policy should contain steps through which the content of the earnings guidance is vetted and reviewed to ensure that the company meets the conditions of available safe harbors. It should establish designated persons who are authorized to provide earnings guidance and specify the channels through which such information should be provided, including an internal corporate approval process covering web content, in order to manage exposure to liability. The policy should also address how the designated persons should address questions from analysts or investors regarding current and prior earnings guidance to avoid Regulation FD issues. A company may consider establishing a "no comment" rule for such questions. In addition, the policy should also address the role of the audit committee in reviewing and approving earnings guidance. The listing rules of stock exchanges, such as NASDAQ and the New York Stock Exchange, require audit committee oversight of a company's accounting and financial reporting processes, and 90% of companies have audit committees that review their quarterly earnings releases.[20] Given that earnings guidance is usually provided in earnings releases, a company should create a role for the audit committee in the review process for earnings guidance in addition to the earnings release.

A company should continually re-evaluate and update its internal earnings guidance policy to address changing circumstances as the policy may not address certain situations or the company may deem prudent to depart from practices established in the policy. Further, in connection with such re-evaluation and updating, a company should make sure to consult with their counsel for earnings guidance.

Discontinuing Earnings Guidance

A company that chooses to provide or is currently providing earnings guidance may discontinue the practice but must do so with careful consideration. Companies that have ceased providing earnings guidance have done so where there is a change in management, a change in management philosophy, a change in industry practice, or anticipated difficulty in forecasting earnings.[21] Usually companies simply cease providing earnings guidance without any explanation while only a small number of companies have publicly announced their intention and rationale behind the change.[22]

The quantity and quality of analyst coverage on a company may change as a result of discontinuing earnings guidance. Earning earnings guidance surveys also indicate that the amount of analyst coverage remained the same for companies that have announced the change while analyst coverage decreased for those that did not announce.[23] In addition, for companies that discontinue providing earnings guidance, there is an increase in analyst error and a decrease in analyst consensus, as there is less information available.[24] Where industry practice is to provide earnings guidance, a company should consider announcing its intention to discontinue providing earnings guidance. Further, a company may want to avoid changing earnings guidance practices close to an offering of securities, as it may affect analyst coverage and reports on the company impacting the investor base for the offering.

Dissemination of Earnings Guidance

The most common channels of disseminating earnings guidance are press releases via a paid distribution service, quarterly conference calls or webcasts, investor presentations and Exchange Act filings under Forms 8-K, 10-Q or 10-K.[25] When including earnings guidance in Exchange Act filings under Forms 8-K, 10-Q or 10-K, a company must be careful about potential liability under Section 11. If a company has a registration statement that incorporates content in a Form 10-Q, 10-K or 8-K, such information would be subject to

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[18] *See, e.g.*, SEC v. Raytheon Company, SEC Release No. 34-46897 (Nov. 25, 2002), *available at*: http://www.sec.gov/litigation/admin/34-46897.htm. *See also* SEC v. Schering-Plough Corporation and Richard J, Kogan, SEC Release No. 34-48461 (Sept. 9, 2003), *available at*: http://www.sec.gov/litigation/admin/34-48461.htm; SEC v. Flowserve Corporation, C. Scott Greer, and Michael Conley, SEC Release No. 34-51427 (Mar. 24, 2005), *available at*: http://www.sec.gov/litigation/admin/34-51427.pdf; SEC v. Christopher A. Black, SEC Release No. 60715 (Sept. 24, 2009), *available at*: http://www.sec.gov/litigation/admin/2009/34-60715.pdf; SEC v. Presstek, Inc. and Edward J. Marino, SEC Release No. 21443 (Mar. 9, 2010), *available at*: http://www.sec.gov/litigation/litreleases/2010/lr21443.htm; and Motorola, Inc., SEC Release No. 46898 (Nov. 25, 2002), *available at*: http://www.sec.gov/litigation/investreport/34-46898.htm.
[19] *See* SEC v. Siebel Systems, Inc., SEC Release No. 34-46896 (Nov. 25, 2002), *available at*: http://www.sec.gov/litigation/admin/34-46896.htm.
[20] *See* Steven E. Bochner and Richard Cameron Blake, *The Earnings Release: Legal Requirements and Best Practices*, 22 INSIGHTS: THE CORPORATE & SECURITIES LAW ADVISOR 3 (2008), at 9-10.
[21] *See supra* note 4 at 3.
[22] *See supra* note 4 at 13.
[23] *See supra* note 4 at 29.
[24] *See supra* note 4 at 30-31.
[25] *See supra* note 1 at 11-12.

Section 11 liability unless the PSLRA safe harbors for forward-looking statements apply. See "Timing and Liability—Sections 11 and 12 of the Securities Act" and "Content—Meaningful Cautionary Language." Therefore, a company should make sure to identify the earnings guidance in such filings as a forward-looking statement and include a meaningful cautionary statement addressing factors that could cause actual results to differ materially from such earnings guidance.

A company also can "furnish" rather than file earnings guidance under Form 8-K. Earnings guidance is usually included in earnings releases that are Form 8-K exhibits but provided as furnished information. By furnishing the earnings release, the information is not incorporated by reference into offering documents (for example, a shelf registration statement on Form S-3) and is not subject to Section 11 liability. The majority of companies that provide earnings guidance "furnish" rather than file their earnings releases under Form 8-K.

Use of Social Media

A company should take extra care in providing or posting earnings guidance on social media such as company websites, Facebook or Twitter accounts. Use of social media to provide earnings guidance requires the same precautions to avoid liability under Section 11 and Section 12 and violation of Section 5 and the anti-fraud provisions as a company may, in certain cases, be liable for material misstatements in, or omissions from, its web content if investors rely upon such information in making an investment decision regarding the company's securities.[26] The plaintiffs' bar recognizes that corporate websites can be sources for actionable statements in connection with securities class actions. The plaintiffs' bar thus looks for overly optimistic statements or forward-looking information on web pages that a company may overlook when reviewing and revising their websites, such as the "About Us" or "President's Message" sections. Therefore, a company must ensure that earnings guidance posted on social media accounts does not inadvertently become part of a registration statement or prospectus subject to Section 11 and Section 12 liability when the offering documents reference such accounts or website.

For example, if a company's website address is included in a registration statement or prospectus and is an active hyperlink, all information, including earnings guidance, posted on the company's website will be considered part of the registration statement or prospectus subject to Section 11 and Section 12 liability. Unless the PSLRA safe harbor applies to the earnings guidance posted on the website, a company will need to update and confirm such earnings guidance if inaccurate or misleading under current circumstances. In addition, as the definition of the term "offer" in Section 2(a) of the Securities Act is interpreted broadly, many web pages, including web pages intended to serve market or promotional functions, might be considered to contain an offer under the Securities Act.[27]

Therefore, when a company is preparing for an offering, they must evaluate Section 5 issues and ensure that any earnings guidance published on social media accounts or websites close to or concurrently with an offering meets the Rule 168 safe harbor conditions or the PSLRA safe harbors. A company establishing a website or social media account close to a contemplated offering may not wish to use such channels to provide earnings guidance as they do not have an established history of using such communications with the marketplace and may be considered conditioning the market for the offering.[28]

Another concern with posting earnings guidance on social media accounts and websites is that such information once posted will always be available, and as website content is continuously available, the content is considered continuously "published" and "alive." Consequently, the line between information that was misleading when "made" and information that becomes misleading after subsequent events have come to pass is blurred and further complicates the decision to update or confirm prior earnings guidance. According to the SEC, the maintenance of previously posted materials or statements on a company's website is not deemed to be the reissuance or reposting of such materials or information solely because they remain accessible to the public, nor is there a duty to update such information.[29] A company should make it apparent to the users of its website that posted earnings guidance speaks to a certain date or to an earlier period.

The SEC has stated that if such distinctions are not apparent to the reasonable person, the posted materials should be separately identified as historical or previously posted materials or statements and should be located in a separate section of the company's website containing previously posted materials or statements. Of course, the foregoing analysis does not apply if a company affirmatively restates or reissues earnings guidance. Generally, reissued or restated earnings guidance should be accurate when reissued or restated. It seems likely that in the case of Facebook or Twitter postings, which by their nature are updates as of a particular time, the SEC would be more likely to find that a reasonable person would understand that the posting speaks only as of a certain time.

A company also must be careful of potential Regulation FD violations if its social media platforms or website contains earnings guidance that is available to analysts and other similar market participants and the website or social media accounts are not deemed "public" for Regulation FD purposes. Though the SEC has deemed websites and social media platforms as means to disseminate material

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[26] *See* SEC Release No. 33-7856 (Apr. 28, 2000).
[27] *See* In re Apple Computer Sec. Litig., 886 F.2d 1109 (9th Cir. 1989). *See also* In re Carter-Wallace Sec. Litig. 150 F.3d 153 (2d Cir. 1988).
[28] *See supra* note 7.
[29] *See* SEC Release No. 34-58288 (Aug. 1, 2008).

information, without running afoul of Regulation FD,[30] a company should analyze whether a social media channel is in fact a "recognized channel of distribution."[31] The SEC has provided non-exclusive factors that a company should consider when determining whether a social media account is a recognized channel of distribution. At this point in time, it is likely best for a company to utilize media as a supplement to, and not a replacement for, the more traditional means of disseminating earnings guidance such as earnings releases or earnings calls and concurrent Form 8-K filings furnishing the earnings guidance.[32]

Although social media is being more broadly used, it may still be too early to conclude that it is a recognized channel of distribution. While this is an evolving area, most people interested in finding investment-related information would likely not first turn to a company's Facebook or Twitter account. Instead investors are more likely visit a company's website or the SEC's EDGAR website. Companies also have not routinely listed their social media addresses in periodic reports or press releases; rather, these alternative addresses are more likely to be found in promotional materials for a company's products or services. Following the release of the 21(a) Report, a number of companies identified various social media sites through which they intended to disseminate information; however, practices are still evolving.

As a tool to disseminate information, social media has both significant advantages and disadvantages over a traditional website. Social media is far more advanced in utilizing push technology to communicate. Unlike a traditional website, a Twitter message or Facebook posting can be pushed instantaneously to all followers or friends. A company utilizing social media does not have to wait for an investor to affirmatively check its website, but can notify its followers immediately when new information is posted. This instantaneous mode of communication comes with a significant downside, however, as the amount of information that can be transmitted is limited. Unlike a website that can deliver multiple pages of information with embedded files and tables, most social media outlets can only communicate a fraction of that amount of information. In addition, social media requires that, in most cases, individuals must sign up and be accepted in order to participate in the communication, so it is not a mechanism for communication that is generally open to the public.

The evaluation of whether there has been a reasonable waiting period for investors to react to information provided through social media will ultimately depend on the popularity of each company's social media presence. For example, with companies such as Google and Coca Cola that each have millions of followers, a message sent over their Twitter or Facebook accounts would likely be considered adequately publicly disseminated within a short period of time after being transmitted. By contrast, for a company with far fewer followers, there may need to be a longer time lag after the information is communicated before the information could be considered adequately publicly disseminated.

Special Considerations for Certain Types of Transactions

Share Repurchase Programs

Share repurchases require careful attention to earnings guidance practices because there is potential for liability under Rule 10b-5, similar to pending offerings or strategic transactions. The key to avoiding liability is careful consideration of the timing of the earnings guidance and the share repurchases. For example, a company should consider limiting share repurchases to time periods that closely follow earnings guidance announcements. The more closely in time the share repurchases follow the earnings guidance, the less likely that intervening events will have impacted the earnings guidance. A company with particularly active share repurchase programs may want to consider adopting and closely monitoring blackout trading windows and utilizing Rule 10b5-1 plans executed during open trading windows.

Insider Sales

A decision not to update earnings guidance may restrict the ability of a company's executives and other insiders to sell shares of the company's stock. If the company learns of facts that cause management to conclude that prior earnings guidance may no longer be accurate, both the underlying facts and management's conclusion could later be found to be material non-public information. If insiders sell shares before the stale earnings guidance is updated, regulators and plaintiffs could take the position that those transactions constituted improper insider trading. Therefore, if events negatively affect the accuracy of earlier earnings guidance, a company should consider suspending executive purchases and sales of stock in order to avoid allegations of insider trading.

Mergers and Acquisitions

Companies often provide earnings guidance about the effects of significant corporate transactions, such as whether the transaction will be accretive to earnings. Such statements are subject to all of the concerns discussed herein generally, including the risk of liability under Rule 10b-5 and, if there is a registration statement to be filed in connection with the transaction, Section 11 and Section 12. Such

[30] *See* Netflix, Inc., and Reed Hastings, SEC Release No. 34-69729 (Apr. 2, 2013) (hereinafter, the "21(a) Report").
[31] *See supra* note 7.
[32] *See* our Frequently Asked Questions About Liability of Public Companies and Companies in Registration for Website and Social Media Content, *available at*: http://media.mofo.com/files/Uploads/Images/FAQCompanyWebsiteContent.pdf. *See also supra* note 6.

statements also need to be considered in the context of the incremental statutory liability imposed by the proxy and tender offer rules in connection with business combination transactions. Regulation M-A under the Securities Act may require documents containing these statements to be filed with the SEC. In business combination transactions, a company must also closely monitor public statements of their financial advisors, information agents and proxy solicitors that might be attributed to the company for purposes of compliance with Regulation FD. Statements made in the context of a company's merger and acquisition transaction (including statements regarding the combined results of the target and acquirer and resulting synergies) may also influence voting decisions, tender decisions and purchase and sale decisions by both the company's and the target's shareholders, which increases the number of potential claimants. As a result, providing earnings guidance in the context of mergers and acquisitions is particularly complex and requires careful thought.

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