**ANNOTATIONS AND COMMENTS**

Section 17 of the Securities Act provides, in pertinent part:

It shall be unlawful for any person in the offer or sale of any securities… directly or indirectly

 to employ any device, scheme, or artifice to defraud, or

 to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

 to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. § 77q.

*See SEC v. Jamie L. Solow*, 06-cv-81041 (S.D. FL), docket entry 118 at p.14; *In Re Bankatlantic Securities Litigation*, 07-cv-61542 (S.D. FL), docket entry 643 at p.21; *SEC v. Yun*, 99-cv-117 (M.D. FL), docket entry 360 at p.19; *see also SEC v. Grinsburg*, 362 F.3d 1292, 1298 (11th Cir. 2004) (preponderance of evidence standard and use of circumstantial evidence); *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988) (materiality); *Aaron v. SEC*, 446 U.S. 680, 697 (1980) (negligence standard); *SEC v. Merchant Capital, LLC*, 483 F.3d 747, 766-67, 768, & 772 (11th Cir. 2007) (materiality); *see generally* Sand’s, Comments to Instruction 82-3, 82-4 & 82-8.

A duty to correct “applies 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. The company then must correct the prior statement within a reasonable time.” *Stransky v. Cummins Engine Co., Inc.*, 51 F.3d 1329, 1331 (7th Cir 1995), citing *Backman v. Polaroid Corp.*, 910 F.2d 10, 16-17 (1st Cir. 1990). *See also, In re Burlington Coat Factory Secs. Litig.*, 114 F.3d 1410, 1430-32 (3rd Cir. 1997) (noting that a duty to correct may also arise with forward-looking statements if they are based on assumptions that the speaker later learns were incorrect when made). The duty to update is a distinct doctrine; it may apply “when a company makes a forward-looking statement - a projection - that because of subsequent events becomes untrue.” *Stransky*, 51 F.3d at 1332. *See also, In re Int’l. Bus. Mach. Corp. Sec. Litig.*, 163 F.3d 102, 110 (2nd Cir. 1998).

There is a split among the courts whether there is a duty to update information disclosed to the public to insure the accuracy of statements and representations previously made in light of new information or developments. The Eleventh Circuit has not addressed whether there is a duty to update. In a case where the evidence suggests a change in information or other developments and a party determines there was a duty to update, the court will need to determine if, considering the current legal authority, a duty to update information instruction is required to be given and, if so, the form of instruction to be given. *See* Eric R. Smith, Thomas D. Washburne, Jr. & Uyen H. Pham, *Duty to Update Previously Disclosed Information*, Practical Law Company (2011), http://www.venable.com/files/Publication/d90ad0bd-0947-4956-aa70-1026f1ac03be/ Presentation/PublicationAttachment/cf3d0d7f-ca04-4b19-96e1-1510529d9821/Duty\_to\_ Update\_Previously\_Disclosed\_Information.pdf. *Compare In Re Burlington Coat Factory Secs. Litig.*, 114 F.3d 1410 (3rd Cir. 1997) (duty triggered where representation remained alive) and *Ill. State Bd. of Inv. v. Authentidate Holding Corp., et al.*, 369 F. App’x 260 (2nd Cir. 2010) (duty depends on significance of information and whether there were cautionary statements) with *Gallagher v. Abbott Laboratories*, 269 F.3d 806 (7th Cir. 2001) (no duty to update).