

Some Thoughts on Preparing Forward-Looking Statements During the COVID-19 Pandemic

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In light of the COVID-19 pandemic, SEC Chair Clayton and Director William Hinman have issued [a joint statement](#) urging public companies to provide as much information as is practicable regarding their current financial and operating status, as well as their future operational and financial planning, in upcoming earnings releases and analyst and investor calls. The joint statement is summarized [here](#).

In the joint statement, companies are encouraged to avail themselves of the safe-harbors for forward-looking statements. Chair Clayton and Director Hinman would not expect good faith attempts to provide appropriately framed forward-looking information to be second guessed by the SEC.

Subject to certain statutory exemptions, the Private Securities Litigation Reform Act of 1995 (PSLRA) enacted [safe harbor provisions](#) for forward-looking statements, whether written or oral:

- That are identified as forward-looking statements, and accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statements; or
- That are immaterial; or
- Where the plaintiff fails to prove that the forward-looking statements (1) if made by a natural person, were made with actual knowledge by that person that the statements were false or misleading; or (2) if made by a business entity, were (a) made by or with the approval of an executive officer of that entity; and (b) made or approved by such officer with actual knowledge by that officer that the statements were false or misleading.

There is extensive case law interpreting the scope and conditions of the safe harbor for forward-looking statements. Companies should continue to take precautions against private securities claims based on forward-looking disclosure:

- In written communications, clearly identify forward-looking statements using expressions of expectation or belief, combined with an explanatory description of the

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company's intention to thereby designate the statements as forward-looking.

- In oral communications, such as conference calls, announce at the beginning of the call that (1) the company can or will provide forward-looking information; (2) actual results could differ materially from the information provided; and (3) the factors that can cause the difference are explained in the risk factors contained in the company's SEC filings.
- Tailor and update the cautionary language that accompanies forward-looking statements, based on the specific risks and uncertainties. Courts have declined to apply the safe harbor where risk disclosures are boilerplate and are not updated or do not identify the appropriate risks (ie, the risks that ultimately caused the prediction to not come to pass).
- In the cautionary language, emphasize that the accuracy of the forward-looking statements depend on future events, and articulate assumptions supporting the forward-looking statements.
- Provide the cautionary language in close proximity to the forward-looking statements, or clearly indicate which sections contain forward-looking statements.
- Some, but not all, courts find that when a statement is "mixed" with forward- and non-forward looking statements, the part of the statement that refers to non-forward looking information is not entitled to the safe harbor protection. Furthermore, a materially false statement of non-forward looking information may preclude application of the safe harbor to the forward-looking portion of the statement.
- The PSLRA and federal securities laws do not impose a duty to update a forward-looking statement. However, companies have a duty to correct prior disclosure that the company determines was untrue at the time it was made, and certain courts have suggested that there is a duty to update a specific and material representation regarding a future event that, without updating, would mislead investors. However, this duty has been very narrowly defined.