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Critical Legal Issues: **WORKING PAPER SERIES**

PRIVATE SECURITIES LITIGATION: MAKING THE 1995 REFORM ACT'S "SAFE HARBOR" SAFE AGAIN

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PRIVATE SECURITIES LITIGATION: MAKING THE 1995 REFORM ACT'S "SAFE HARBOR" SAFER

INTRODUCTION: THE SAFE HARBOR IS NOT SO SAFE

Congress passed the Private Securities Litigation Reform Act of 1995 ("Reform Act") to fix several problems with securities class actions, including plaintiffs' reflexive filing of litigation when a company did not meet its projected results. Congress included a safe harbor for forward-looking statements ("Safe Harbor") "to encourage issuers to disseminate relevant information to the market without fear of open-ended liability." H.R. Rep. No. 104-369, at 32 (1995) (Conf. Rep.), *as reprinted in* 1995 U.S.C.C.A.N. 730, 731.

The statutory protection is strong, and its application is straightforward: A material forward-looking statement is not actionable if it either (1) 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* (2) is made without actual knowledge of its falsity. 15 U.S.C. § 77z-2(c)(1); 15 U.S.C. § 78u-5(c)(1).

Yet, in practice, the Safe Harbor is not so safe. Because they think it goes too far, many judges find ways around the Safe Harbor, often committing basic legal errors in their attempts to nullify it. The latest such appellate decision, *In re Quality*

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Sys., Inc. Sec. Litig., 865 F.3d 1130 (9th Cir. 2017) ("*QSI*"), illustrates the problem. But this decision can serve as a catalyst for a movement toward a standard that is faithful to the statute and would help judges apply the statute as written.

I. THE *QSI* DECISION INCREASES THE DANGER

In *QSI*, the plaintiffs challenged statements by Quality Systems, Inc. ("QSI") about its current and future performance. QSI's forecasts of its future performance were accompanied by cautionary language that identified risks and uncertainties. 865 F.3d at 1146-49. The plaintiffs' complaint identified ten statements that they believed to be false or misleading. These included forward-looking statements about future revenue, earnings, and sales; nonforward-looking statements about current operations and results; and "mixed statements" involving both forward-looking and non-forward-looking assertions. *Id.* at 1135, 1142-43, 1147-49.

The district court granted the defendant's motion to dismiss. *Id.* at 1135. The court found that QSI's forward-looking statements fell within the Safe Harbor because they were accompanied by meaningful cautionary language and the plaintiffs had not adequately alleged that the defendants knew they were false. *Id.* at 1135, 1141. In finding QSI's cautionary language meaningful, the district court emphasized that QSI identified specific risk factors unique to QSI's business, unlike the generic, boilerplate language courts often find lacking. The court dismissed the non-forward-looking statements as puffery. *Id.* at 1135, 1141.

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The Ninth Circuit reversed. Rejecting the district court's finding of puffery, the court held the plaintiffs adequately alleged that the non-forward-looking statements that accompanied forward-looking statements were misleading, and that the plaintiffs had sufficiently alleged scienter. *Id.* at 1143-46. In addressing the forward-looking statements accompanied by non-forward looking statements, the Ninth Circuit announced a new rule: whenever a plaintiff adequately alleges that a non-forward-looking statement that accompanies a forward-looking statement is false, the Safe Harbor will not apply unless defendants' cautionary language admits that falsity. *Id.* at 1146-49.

Applying its new rule, the Ninth Circuit held that QSI's cautionary language was not meaningful because it accompanied materially false and misleading non-forward-looking statements that QSI failed to identify as false in its disclosures. *Id.* at 1148-49. The court reversed the dismissal based on "mixed statements," but upheld the dismissal of counts involving the standalone forward-looking statements. *Id.* It nevertheless found the selfsame cautionary language that did not protect the mixed statements sufficient to protect the standalone statements. *Id.*

The court's new rule erodes the Safe Harbor's protection: whenever a plaintiff adequately alleges that a non-forward-looking statement that accompanies a forward-looking statement is false, the Safe Harbor will not apply to the forward-looking statement unless defendants' cautionary language admits the falsity of the non-

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forward-looking statement.

The defendants in *QSI* appealed the Ninth Circuit's decision, and Washington Legal Foundation ("WLF") filed an *amicus* brief (on which BakerHostetler attorneys worked with WLF on a *pro bono* basis) in support of the defendants' petition for a writ of certiorari. In its brief, WLF advocated for a standard that focuses on the objective content and quality of the cautionary language provided by defendants, and that harmonizes the Safe Harbor with the Court's previous securities decisions. However, as the Supreme Court was approaching a decision on the defendants' petition, the parties settled the litigation.

For public companies and their executives, it is unfortunate that the Supreme Court was not able to review the Ninth Circuit's decision and articulate an objective, context-based approach that is true to the Safe Harbor, its legislative intent, and the Court's securities jurisprudence. This WORKING PAPER is meant to help litigants and courts improve Safe Harbor protection and, in the right case, to encourage the parties to seek Supreme Court review.

II. CONGRESS INTENDED THE SAFE HARBOR TO ENCOURAGE PROJECTIONS

The Reform Act was no small legislative accomplishment. Given the notorious litigation abuses that Congress determined had injured investors—including routine, reflexive lawsuits whenever a company did not achieve its publicly disclosed

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projections—Congress passed the Reform Act to protect companies from frivolous claims and encourage them to disclose forward-looking information.

Congress's overriding concern was that litigation should not deter companies from providing forward-looking information. Citing the testimony of former Securities and Exchange Commission Commissioner Richard Breeden, the Conference Committee noted that information on a company's future prospects is "among the most valuable information shareholders and potential investors have about a firm." H.R. Rep. No. 104-369, at 43.

Congress had determined that many companies opted not to disclose forward-looking information because of liability risks. The Committee cited Mr. Breeden's concerns about the "chilling effect" of litigation on corporate disclosure; a study reflecting reluctance to disclose projections; and anecdotal evidence relating that corporate counsel routinely advised companies to say as little as possible, "so as to provide no grist for the litigation mill." *Id*. at 42-43 (citation omitted). Congress found that "the investing public and the entire U.S. economy have been injured by the unwillingness . . . of issuers to discuss publicly their future prospects, because of fear of baseless and extortionate securities lawsuits." *Id.* at 31-32.

To address those concerns and promote greater disclosure of forward-looking information, Congress created a rule that reduced the risk of liability through the Safe Harbor. Although the Reform Act contains other important features, including

provisions specifying the method for choosing lead counsel and the imposition of heightened pleading standards, contemporary commentators agreed that "by far the most important provision for public companies [was] the new safe harbor for forward-looking information." Boris Feldman, *Informing the Investor, Stifling the Shareholder Suit*, The Recorder (California), Jan. 3, 1996, at 6.

The Safe Harbor protects only forward-looking statements. Although the statute defines forward-looking statements broadly,[1] courts continue to grapple with its scope. The best definition of a forward-looking statement comes from the first reported appellate decision to apply the Safe Harbor, *Harris* v. *Ivax*: "a statement about the state of a company whose truth or falsity is discernible only after it is made necessarily refers only to future performance." 182 F.3d 799, 805 (11th Cir. 1999).

The Safe Harbor protects forward-looking statements that are *either*:

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[1]The term "forward-looking statement" means—(A) a statement containing a projection of revenues, income (including income loss), earnings (including earnings loss) per share, capital expenditures, dividends, capital structure, or other financial items; (B) a statement of the plans and objectives of management for future operations, including plans or objectives relating to the products or services of the issuer; (C) a statement of future economic performance, including any such statement contained in a discussion and analysis of financial condition by the management or in the results of operations included pursuant to the rules and regulations of the Commission; (D) any statement of the assumptions underlying or relating to any statement described in subparagraph (A), (B), or (C); (E) any report issued by an outside reviewer retained by an issuer, to the extent that the report assesses a forward-looking statement made by the issuer; or (F) a statement containing a projection or estimate of such other items as may be specified by rule or regulation of the Commission.

15 U.S.C. § 78u-5(i)(1).

1. accompanied by meaningful cautionary statements disclosing important risk factors that could cause the prediction not to be realized, *or*

2. made without actual knowledge of its falsity.

15 U.S.C. § 78u-5(c)(1) (emphasis added).[2]

Under the Safe Harbor's first prong, designated forward-looking statements accompanied by "meaningful cautionary statements" are not actionable. H.R. Rep. No. 104-369, at 43. Congress directed the courts to apply an *objective* standard: "Courts should not examine the state of mind of the person making the statement" but rather should "examine only the cautionary statement accompanying the forward-looking statement." *Id*. at 44.

Congress gave companies guidance in shaping their warnings: "boilerplate warnings will not suffice"; nor will a "cautionary statement that misstates historical facts." *Id.* at 43-44. Rather, "[t]he cautionary statements must convey substantive information about factors that realistically could cause results to differ materially from those projected in the forward-looking statement, such as, for example, information about the issuer's business." *Id.* at 43. Moreover, cautionary statements "must be relevant to the projection and must be of a nature that the factor or factors could actually affect whether the forward-looking statement is realized." *Id.* at 43-44.

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[2] The Safe Harbor has a third prong, immateriality, which was not directly at issue in *QSI.*

At the same time, Congress recognized that companies cannot perfectly predict the future, stressing that "important factors" does *not* mean "all factors." *Id.* at 44. In particular, "[f]ailure to include the particular factor that ultimately causes the forward-looking statement not to come true will not mean that the statement is not protected by the safe harbor." *Id*. The Committee stated that the Safe Harbor was not intended "to provide an opportunity for plaintiff [*sic*] counsel to conduct discovery on what factors were known to the issuer at the time the forward-looking statement was made." *Id.*

The Safe Harbor's second prong—protecting forward-looking statements made without "actual knowledge" that they were false or misleading—was intended as an "alternative analysis." The Senate bill preceding the Conference Committee's final version was a *conjunctive* scienter requirement—to fall within the Safe Harbor, a forward-looking statement had to be *both* (1) accompanied by meaningful cautionary statements *and* (2) made without a purpose and actual intent to mislead. *See* S. 240, 104th Cong. § 105 (1995) (as passed by the Senate June 28, 1995), *reprinted in* 141 Cong. Rec. 17,444, 17,447-48. Congress's ultimate decision to make the two prongs *disjunctive* manifests its clear intent to make the first prong an unambiguous, independent, and objective standard.

III. SOME COURTS HAVE REFUSED TO APPLY THE SAFE HARBOR AS CONGRESS INTENDED

Many courts have struggled against the feeling that the Safe Harbor's disjunctive structure leaves investors to identify and fend off fraud on their own. To those courts, the Safe Harbor allows a company to offer *intentionally* false or misleading forward-looking statements so long as they are accompanied by "meaningful" cautionary language identifying "important" risk factors. That disjunctive structure led the First Circuit to describe the Safe Harbor as a "curious statute, which grants (within limits) a license to defraud." *In re Stone & Webster, Inc. Sec. Litig.*, 414 F.3d 187, 212 (1st Cir. 2005). The plaintiffs' bar has fostered the impression that the Safe Harbor marks an improper return to *caveat emptor*. For example, leading plaintiffs' securities lawyer William Lerach said in an interview that the Safe Harbor gave companies a "[l]icense to lie." Lori Calabro, *I Told You So*, CFO Magazine, Sept. 1, 2002, at 67.

To circumvent the broad protections Congress intended with the Safe Harbor, courts have either committed serious legal errors—as the Ninth Circuit did in *QSI*—or ignored the statute altogether by deciding motions to dismiss on other grounds. Because of this judicial antipathy to the scope of the statute's protections, the Safe Harbor has failed to protect forward-looking statements as Congress intended.

The Ninth Circuit's decision takes this judicial error and avoidance strategy to a new extreme. It invents a new rule—found nowhere in the statute or the Supreme

Court's jurisprudence—that to obtain Safe Harbor protection, a company must admit the falsity of non-forward looking statements accompanying forward-looking statements. Under this standard, plaintiffs could make any forward-looking statement actionable by challenging an accompanying non-forward-looking statement. Given that most projections are based in part on current facts, and that the Ninth Circuit did not specify how courts should determine whether a non-forward-looking statement is false, executives cannot rely on the Safe Harbor when making forward-looking statements that might later be challenged in Ninth Circuit courts.

A. Circumvention Through Judicial Error

Judicial discomfort with this purported "license to defraud" has caused many courts to interpret and apply the Safe Harbor in a manner inconsistent with the statute's plain language and Congress's intent.

Many district courts have read a scienter requirement into the first prong, converting the disjunctive "or" into a conjunctive "and." Those courts have held that actual knowledge of the forward-looking statement's falsity robs the cautionary language of its meaning, and thus the statements can never fall within the Safe Harbor.[3] In contrast, despite concerns about a "license to defraud," every Circuit to

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[3] *See, e.g.*, *In re Genworth Fin. Inc. Sec. Litig.*, 103 F. Supp. 3d 759, 790 (E.D. Va. 2016); *City of Ann Arbor Emps.' Ret. Sys. v. Sonoco Prods. Co.*, 827 F. Supp. 2d 559, 576 (D.S.C. 2011); *Freudenberg v. E*Trade Fin. Corp.*, 712 F. Supp. 2d 171, 193–94 (S.D.N.Y. 2010); *In re SeeBeyond Techs. Corp. Sec. Litig*., 266 F. Supp. 2d 1150, 1163-67 (C.D. Cal. 2003).

directly consider whether the first and second prongs are separate bases for protection has correctly interpreted the plain text—that is, "or" means "or."[4]

Other courts have chosen to read words into the statute to specify particular types of information that must be included in a cautionary statement for it to be meaningful. For example, in *Asher v. Baxter Int'l, Inc.*, 377 F.3d 727, 734 (7th Cir. 2004), Judge Frank Easterbrook, hardly an activist judge, thoughtfully examined the legislative history but then proceeded to insert the word "the" before "important" in the phrase "identifying important factors," contrary to Congress's clear intent that "not all factors" must be identified—not even "the particular factor that ultimately causes the forward-looking statement not to come true." *See* H.R. Rep. No. 104-369, at 44.

Compounding this error, the court held that plaintiffs were entitled to discover whether "the items mentioned in Baxter's cautionary language were those that at the time were the (or any of the) 'important' sources of variance." *Asher*, 377 F.3d at 734. Judge Easterbrook noted that Baxter's "cautionary language remained fixed even as the risks changed," so it was unclear without discovery whether "Baxter omitted

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[4] *See OFI Asset Mgmt. v. Cooper Tire & Rubber*, 834 F.3d 481, 502 (3d Cir. 2016); *IBEW Local 98 Pension Fund v. Best Buy Co., Inc.*, 818 F.3d 775, 778 n.2 (8th Cir. 2016); *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1111-12 (9th Cir. 2010); *Slayton v. Am. Express Co.*, 604 F.3d 758, 766 (2d Cir. 2010); *Edward J. Goodman Life Income Trust v. Jabil Circuit, Inc.*, 594 F.3d 783, 794-95 (11th Cir. 2010); *In re Stone & Webster*, 414 F.3d at 195; *Southland Sec. Corp.* v. *INSpire Ins. Sols., Inc.*, 365 F.3d 353, 371 (5th Cir. 2004); *Helwig v. Vencor, Inc.*, 251 F.3d 540, 548 (6th Cir. 2001) (en banc), *overruled on other grounds by Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314 (2007).

important variables from the cautionary language." *Id*. That holding contravenes Congress's intent that the "important" requirement never open the door to discovery. *See* H.R. Rep. No. 104-369, at 44.

The Ninth Circuit's decision in *QSI* committed errors in both of these categories. First, like *Baxter*, the court focused on the absence of cautionary language regarding a *particular* "important factor," which essentially reads "the" into the statute before the words "important factors." But a company need not disclose *all* important factors—even the pivotal one. *See* H.R. Rep. No. 104-369, at 44; *Harris* v. *Ivax*, 182 F.3d 799, 807 (11th Cir. 1999).

Second, the Ninth Circuit's categorical rule provides that cautionary language cannot be "meaningful" absent an admission of falsity that related statements of present or past facts are false or misleading—even if the company did not know they were false or misleading. By not even considering scienter with respect to the falsity of present or past facts, the new rule creates strict liability for companies who inadvertently misstate facts in connection with a forward-looking statement.

The Ninth Circuit's rule effectively swallows the entirety of the Safe Harbor's first prong. Companies routinely provide earnings guidance on quarterly analyst calls, during which they also discuss past results and current facts about the business, often in response to direct questions from analysts. Under the Ninth Circuit's rule, such projections might be considered "mixed" statements, and therefore any misstatement

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regarding the present or past state of the business would nullify the first prong of the Safe Harbor for the projections. The practical consequence will likely be the very problem Congress sought to avoid: companies will be hesitant to disclose earnings projections and other information about future business prospects.[5]

B. Circumvention Through Judicial Avoidance

Disagreement with the Safe Harbor has also spawned judicial avoidance. Judges often treat the Safe Harbor as a secondary consideration or avoid it entirely. Over the Reform Act's first ten years, "[d]ozens of Reform Act motions to dismiss premised in part on the safe harbor came and went without courts addressing the issue. Often, courts dismissed the complaints on other grounds or ignored the issue altogether." Douglas Clark, *How Safe is the Safe Harbor?*, Wilson Sonsini Goodrich & Rosati Client Alert, at 1 (June 2005).

Starting in 2005, courts began to apply the Safe Harbor more frequently but then often criticized and worked around it through the types of legal gymnastics discussed above. This phenomenon raises the question of whether the safe harbor is really safe. *See, e.g.*, Lyle Roberts & Noelle Francis, *Is the PSLRA's Safe Harbor*

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[5] Staying silent bears its own risks. For example, Item 303 of Regulation S-K requires an issuer to disclose "any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact." 17 C.F.R. § 229.303(a)(3)(ii). The Supreme Court was set to resolve a circuit split over whether Item 303 can give rise to claims under Section 10(b) before the parties settled. *Leidos, Inc.* v. *Indiana Pub. Ret. Sys.*, *cert granted*, No. 16-581 (Mar. 27, 2017).

Becoming a Safe Puddle?, PLI's Securities Litigation & Enforcement Institute 2008, No. 14673 (June 2008).

Today, jurisprudence on the Safe Harbor is at best unpredictable. Some courts get it right, and some get it wrong—as *QSI* shows—and some still work around it.[6] This unpredictability makes the Safe Harbor an uncertain basis for seeking dismissal, relegating it to a fallback argument.

IV. PROPOSED SOLUTION: AN OBJECTIVE, CONTEXT-BASED APPROACH

As an *amicus* in *QSI*, WLF advocated for a standard that emphasizes an objective, context-based approach to what constitutes "meaningful cautionary statements" that is consistent with the Supreme Court's decisions in *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318 (2015), and *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007).

The proposed standard flows from the D.C. Circuit's decision in *In re Harman Int'l Indus., Inc. Sec. Litig.*, 791 F.3d 90 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 1167 (2016). While *Harman*'s analysis is uneven, WLF agrees with the court's focus on the objective content and quality of the cautionary language.

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[6] *See, e.g.*, *Williams v. Globus Med., Inc.*, 869 F.3d 235, 245-46 (3d Cir. 2017) (using safe harbor as a fallback basis to affirm dismissal of forward-looking statements); *IBEW Local No. 58 Annuity Fund v. EveryWare Glob., Inc.*, 849 F.3d 325, 328, n.2 (6th Cir. 2017) (affirming dismissal of forward-looking statements on scienter grounds); *Ganem v. InVivo Therapeutics Holding Corp.*, 845 F.3d 447, 454 n. 5 (1st Cir. 2017) (affirming dismissal of challenge to forward-looking statements on falsity grounds); *Tongue v. Sanofi*, 816 F.3d 199, 211-14 (2d Cir. 2016) (affirming dismissal of challenge to forward-looking statements under *Omnicare*).

This standard would create more certainty and improve corporate disclosure. The more consistently courts apply the Safe Harbor, the safer companies will feel disclosing their projections, consistent with congressional intent. A context-based standard would also encourage companies to disclose their actual risks in a straightforward, and therefore *meaningful*, way. Companies would thus disclose more forward-looking statements *and* accompanying risks.

In *Harman*, the court turned to a tried and true source—the dictionary—to support an objective standard under the Safe Harbor's first prong. The court observed that "meaningful" means "significant" or of "useful quality or purpose," and that "important" likewise means something "of great significance or value." *Harman*, 791 F.3d at 101 (citations omitted). Building on those definitions, the court ruled that the first prong of the Safe Harbor required cautionary language "that is tailored to a particular company's status at a particular time" as well as to "the [particular] forward-looking statement that it accompanies." *Id.* at 101-02. *Harman*'s focus on the objective *content* and *quality* of the cautionary language—rather than the speaker's state of mind—coheres with congressional intent. *See* H.R. Rep. No. 104-369, at 43-44. *Harman*'s objective standard thus avoids the improperly subjective focus espoused by *Baxter* and mimicked in *QSI*.

Such a standard is also workable for company management seeking to provide guidance to investors—the Safe Harbor's animating purpose. The *Harman* standard

would require a company to disclose what are essentially "the real risks." *See How Safe is the Safe Harbor?*, *supra*, at 3. While the "real risks" cannot be identified in the abstract, they have objective characteristics consistent with the *Harman* standard: (1) "they change all the time, so if the safe harbor risks don't change over time, they are not real risks;" (2) they are specific to the particular forward-looking statement to which they apply, *i.e.*, "the same risks that apply to a statement concerning financial projections don't apply to a statement concerning the release of a new product;" and (3) they "are rarely, if ever, vague." *Id.* And, most importantly, "[a]ll companies face real risks," and the company itself is in the best position to identify and disclose them. *Id.* Tailored, detailed discussion of challenges demonstrates an effort on the part of the company to identify the "real risks." But that is *not* to say that courts should inquire into company management's state of mind—no company is perfectly prescient, and a company's failure to identify a risk that ultimately materializes does not mean that its other detailed disclosures of risks were neither "meaningful" nor "important."

The Supreme Court has regularly used the overall objective context of a statement to make complex assessments of its import—even on motions to dismiss. For example, in *Omnicare*, the Supreme Court considered when a statement of opinion can be actionable as a false or misleading statement. The Supreme Court explained that whether a statement of opinion is "false" turns on whether the speaker

actually holds the opinion—a subjective inquiry. *Omnicare*, 135 S. Ct. at 1326. Yet in most cases—including *Omnicare*—investors also allege that statements were "misleading" because they omitted facts that undermine them. *See id.* at 1327. That, the Supreme Court held, is an "objective" inquiry that "depends on the perspective of a reasonable investor." *Id.* And importantly, "whether an omission makes an expression of opinion misleading always depends on context." *Id.* at 1330. The Supreme Court observed that investors review a company's statement, "whether of fact or of opinion, in light of all its surrounding text, including hedges, disclaimers, and apparently conflicting information," and "tak[ing] into account the customs and practices of the relevant industry." *Id.* A plaintiff must show that a statement is objectively misleading in light of this "full context." *Id.*

Even in an area as plainly subjective as scienter, courts rely on objective cues to make judgments at the pleading stage in the absence of direct evidence of a defendant's state of mind. In *Tellabs*, the Supreme Court held that to determine whether a securities-fraud plaintiff has alleged facts giving rise to a "strong inference" of scienter as required by the Reform Act, "courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." 551 U.S. at 322. "The inquiry … is whether *all* of the facts alleged, taken collectively, give

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rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard." *Id.* at 322–23 (emphasis in original).

Likewise, in applying the Safe Harbor, courts can look solely to the objective context of cautionary statements to determine whether they are "meaningful" and disclose "important" risk factors. How closely tailored are the risk factors to the forward-looking statements they support? Are they particular to this company, or could they apply to anyone? Have the risk factors applied to forward-looking statements evolved over time as the overall risk factors facing the business—as disclosed in the company's annual and quarterly reports, press releases, and other public information incorporated into the complaint or subject to judicial notice—have changed? Do the risk factors address additional historical facts that have recently been disclosed in public filings? In short, does it appear that the company has made a genuine effort to identify the "real risks," as opposed to simply issuing boilerplate cautions? Those questions can be answered *without* inquiring into company management's state of mind. Context provides the appropriate objective basis to evaluate cautionary language on a motion to dismiss.

CONCLUSION

In passing the Reform Act, Congress wanted to encourage companies to disclose their projections. The counterbalance is "meaningful" disclosure of risks. With an objective standard that examines meaningfulness in a broader frame, courts would be better equipped to evaluate a company's disclosures. Such a standard

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would be faithful to the statutory text, further Congress's intent that companies disclose their projections and risks, and harmonize the Safe Harbor with the Supreme Court's decisions in *Omnicare* and *Tellabs*.

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