
Circuit Split on PSLRA Safe Harbor Eligibility for Risk Disclosure Statements Deepens

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Federal securities laws generally provide a safe harbor for companies making forward-looking statements accompanied by meaningful cautionary language. As a result, risk disclosures have become a common tool for companies to communicate prospective business risks to investors while limiting potential legal liability. However, risk disclosures can themselves become actionable under federal securities laws if they portray risks as hypothetical when those risks have already materialized. So, when are risk disclosures actionable?

The federal circuit courts are deeply divided on this issue. Nine federal circuit courts have weighed in on the topic, resulting in three meaningfully different interpretations of the law. While some circuits require both the materialization of a risk and near-certain harm to the company, others take broader or more restrictive approaches to liability. The Supreme Court declined to resolve the split in 2024, and recent decisions from the Second and Ninth Circuits have reaffirmed their respective approaches, further underscoring the divide.

Cahill's alert examines the safe harbor for forward-looking statements under the Private Securities Litigation Reform Act (PSLRA) and its application to risk disclosure statements under federal securities laws. The alert also analyzes the existing circuit split, including the Second Circuit's decision in *Smith v. Gap, Inc.* and the Ninth Circuit's decision in *Construction Laborers Pension Trust of Greater St. Louis v. Funko Inc.*, and explores the implications for companies navigating potential securities litigation liability.

Read the full alert below.

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