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Recommended Citation

39 Sec. Reg. L.J. 257 (2011)

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Mixed Statements: The Safe Harbor's Rocky Shore

By Wendy Gerwick Couture*

I. Introduction

The Private Securities Litigation Reform Act creates a safe harbor that protects companies and individuals, under certain circumstances, from liability under the securities acts for making misleading statements that qualify as “forward-looking.” Courts interpreting this statutory safe harbor are divided about how to treat mixed statements, in which statements about the past or the present are intertwined with statements about the future. This essay identifies three categories of mixed statement that are the subject of frequent litigation, demonstrates the courts’ disagreement about how to treat these categories of statements, and — drawing from the statutory text and policy rationales — recommends whether the safe harbor should apply to each category of statement.

In particular, this essay argues that (1) statements of historical or current fact that underlie predictions should not be protected by the safe harbor; (2) statements about the present that necessarily incorporate predictions should be protected by the safe harbor; and (3) statements that contain both present and future components should be bifurcated, with the safe harbor protecting only those portions that predict.

In addition to providing guidance to future courts, litigators, and companies making disclosures, this essay’s arguments are responsive to the current literature about the safe harbor. Commentators have noted the confusing precedent in the area of mixed statements,¹ and scholars have recognized the importance of developing clear guidelines to analyze substantively mixed statements.² This essay responds to this literature by identifying frequently litigated categories of mixed statements and making recommendations for their consistent treatment.

This essay proceeds in five additional parts. Part II provides an overview of the safe harbor, including the statute’s definition of “forward-looking statement.” Part III analyzes the safe harbor’s ap-

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plicability to statements of historical or current fact that underlie predictions. Part IV analyzes whether the safe harbor should protect statements about the present that necessarily incorporate predictions. Part V analyzes the safe harbor's applicability to statements containing both present and future components. Part VI briefly concludes.

II. Overview of the Safe Harbor for “Forward-Looking Statements”

A. “Forward-Looking Statements” Are Afforded Special Protection.

Congress, citing the importance of making “more information about a company’s future plans available to investors and the public,” enacted a statutory safe harbor for forward-looking statements.³ The safe harbor, applicable in private securities actions premised on allegedly misleading representations,⁴ encourages companies to issue forward-looking statements by providing “certainty that forward-looking statements will not be actionable by private parties under certain circumstances.”⁵ Rather than refraining from voluntarily disclosing predictive information for fear of future liability if the prediction does not come to fruition, companies can now “disseminate relevant information to the market without fear of open-ended liability.”⁶ This atmosphere of greater disclosure should “enhance market efficiency.”⁷

Under the safe harbor, statements qualifying as forward-looking are not actionable if one of two prongs is satisfied.⁸ Under the first prong, a forward-looking statement is not actionable if the following test is satisfied:

[T]he forward-looking statement is — (i) identified as a forward-looking statement, and is accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement.⁹

Mere boilerplate warnings do not qualify as “meaningful cautionary statements.”¹⁰ Rather, the language must “convey substantive information about factors that realistically could cause results to differ materially from those projected in the forward-looking statement.”¹¹ A number of scholars have proposed guidelines for courts to apply when analyzing whether warnings qualify as meaningful cautionary statements.¹²

Under the second prong, a forward-looking statement is not actionable if the plaintiff fails to prove that the statement “was made with actual knowledge . . . that the statement was false or misleading.”¹³

The statutory text and accompanying legislative history confirm that the two prongs of the safe harbor are disjunctive.¹⁴ First, the

statute separates the two prongs of the safe harbor by the conjunction “or” — not the conjunction “and.”¹⁵ Moreover, the Conference Report characterizes the safe harbor as “bifurcated” and states that “[t]he second prong of the safe harbor provides an alternative analysis.”¹⁶ Under this plain reading of the statute, a forward-looking statement is protected, even if the speaker made it with actual knowledge of its falsity, if the statement was identified as forward-looking and accompanied by meaningful cautionary language.

Despite this plain reading of the statute, a number of courts have treated the second prong of the safe harbor as an exception to protection under the first prong.¹⁷ For example, a district court in the Southern District of California recently held:

[E]ven if these statements were subject to the safe harbor or bespeaks caution doctrine and were accompanied by sufficient cautionary statements, as discussed above, the TAC adequately alleges a strong inference that they were made with actual knowledge of their falsity, precluding their protection by the safe harbor provision or bespeaks caution doctrine.¹⁸

These courts' interpretation of the safe harbor, although perhaps supported by valid policy rationales,¹⁹ contravenes the plain language of the statutory text.²⁰

The characterization of statements as forward-looking is often outcome-determinative in securities litigation. This is especially so if courts treat the two prongs of the safe harbor as disjunctive. But even if courts treat “actual knowledge” as an exception to protection under the first prong, this pleading burden is often insurmountable because of the PSLRA's heightened pleading requirements for scienter in securities fraud cases.²¹ Indeed, the number of securities class actions complaints even alleging false forward-looking statements has steadily declined from 71% in 2006 to 45% in 2010,²² suggesting that plaintiffs' counsel are recognizing the fruitlessness of incorporating these allegations in their complaints.

Moreover, Professor Ann Morales Olazabal has recognized the danger of sweeping the “forward-looking statement” brush too broadly.²³ She explains that the safe harbor prefers “Type II errors,” in which fraudulent statements are not actionable, over “Type I errors,” in which non-fraudulent statements are actionable.²⁴ Recognizing the potential negative impacts of Type II errors, she argues that “[c]ourts can and should exercise caution not to be led down a path that results in wholesale safe harbor protection of forward-looking statements that are mixed.”²⁵

Yet, despite the importance of the characterization of a statement as “forward-looking,” relatively little attention has been paid to identifying which statements, in particular, should be classified as

forward-looking.²⁶ This essay seeks to fill that void.

B. The PSLRA defines “forward-looking statement.”

The PSLRA defines “forward-looking statement” as follows:

(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.²⁷

The common element in this definitional list is the requirement that the statement refer to a *future*, as opposed to a *present or past*, state of affairs. In addition to the word “forward” in the phrase “forward-looking statement,” the definition uses various terms to indicate that the statement must refer to the future: “projection,” “future operations,” and “future economic performance.”

Indeed, most courts have little trouble distinguishing between straightforward statements about the present or past and statements about the future.²⁸ A common test that courts apply is whether the statement is “one whose truth cannot be determined until after the statement is made.”²⁹ For example, courts have not had any trouble characterizing as forward-looking statements that “[t]otal losses on these investments for the remainder of 2001 are expected to be substantially lower than in the first quarter”³⁰ and that the company is “expecting a very good year.”³¹ On the other hand, courts have refused to characterize as forward-looking statements that business was “ramping up fast or faster than expected;”³² about “current sales and demand for Ceclor CD;”³³ that a sales force transition was “progressing nicely;”³⁴ that “revenue for the second quarter had risen 4%,”³⁵ that “we are not overinventoried anywhere;”³⁶ that “we still think the stock is undervalued;”³⁷ and that “our China ramp is proceeding on plan.”³⁸

The definition of “forward-looking statement” is unclear, however, with respect to three types of mixed statements: (1) statements of historical or present fact underlying predictions; (2) statements about the present that necessarily incorporate predictions; and (3) statements containing present and future components.³⁹ Courts’ treatment of these types of statements has been inconsistent. This essay will address each in turn.

III. Statements of Historical or Present Fact Underlying Predictions

Take as an example the following statement: “Based on current record levels of demand, we predict demand to continue increasing through the end of the fiscal year.” Does the statement about “current record levels of demand” qualify as a forward-looking statement so that it is protected from liability, even if current levels of demand are not at record level?

The statutory text is unclear about how to treat statements about the present or past that underlie a statement about the future. It would be odd that statements about the present or past could qualify as “forward-looking.” Yet, arguably, to the extent that these statements underlie a statement about the future, they fall within the scope of the statute’s definition of “forward-looking statement.” Subparagraph (D) of the definition includes “any statement of the assumptions underlying or relating to any statement described in subparagraph (A), (B), or (C).”⁴⁰ This “assumption” prong of the definition does not distinguish between assumptions about the future and assumptions about the present or past. Indeed, in a case very similar to the hypothetical example cited above, the court in *In re Metawave Communications Corp. Securities Litigation* classified statements about existing demand as forward-looking because “projections of favorable results for the rest of 2001 [were based] on that demand.”⁴¹

A. Courts Are Split In Their Treatment of Statements of Historical or Present Fact Underlying Predictions.

A number of courts, relying on the aforementioned “assumption” prong of the definition, have applied the safe harbor to statements of past or present fact that underlie predictions.⁴² For example, in *Miller v. Champion Enterprises, Inc.*, the Sixth Circuit recognized that the phrase “given the continuation of outstanding earnings growth and the successful implementation of our retail strategy” implied some present facts, but the court nonetheless characterized the statement as forward-looking because it was “the basis for later ‘forward-looking statements,’ thus qualifying as an ‘assumption underlying’ a forward-looking statement.”⁴³ Applying this same reasoning, courts have applied the safe harbor to statements about the company’s “revenue

results and product demand during the most recent quarter,”⁴⁴ to the statement that “we accomplished our major objectives . . . in 2002;”⁴⁵ to the statement that “the defense [business] is up dramatically;”⁴⁶ and to the statement that “Kenexa’s brand recognition continues to grow.”⁴⁷

Other courts, rejecting this approach, have refused to apply the safe harbor to statements of current or historical fact, even if predictions are premised thereon.⁴⁸ For instance, in *In re Boeing Securities Litigation*, the court refused to characterize statements about “present production problems” as forward-looking, even though they underlay predictions.⁴⁹ Similarly, in *Desai v. General Growth Properties, Inc.*, the court rejected the defendants’ contention that the statements “[w]e had offers from groups of life companies” and “we’re in discussions now on additional loans” were forward-looking because they underlay defendants’ predictions.⁵⁰

B. Recommendation: Do Not Apply the Safe Harbor to Past or Present Statements of Fact, Even if They Underlie Predictions.

This essay, drawing from the text of the statute and policy rationales, argues that courts should not apply the safe harbor to statements of current or historical fact, even if predictions are based thereon.

Let’s apply this recommendation to the example cited above: “Based on current record levels of demand, we predict demand to continue increasing through the end of the fiscal year.”⁵¹ This essay contends that the “current record levels of demand” component of the statement should not qualify as a forward-looking statement, even though it underlies the prediction of increasing demand. Therefore, if current demand were not at record-level, the statement would potentially be actionable.

1. The Text of the Statute Supports this Recommendation

The text of the statute applies explicitly only to “assumptions,”⁵² which arguably excludes verifiable facts. For example, *Webster’s 3rd New International Dictionary* defines an assumption as “something that is taken for granted: supposition.”⁵³ Similarly, as defined in the *New Oxford American Dictionary*, an assumption is defined as “a thing that is accepted as true or as certain to happen, without proof.”⁵⁴ Indeed, picking up on this connotation that an assumption is something that must be supposed, the *Boeing* court distinguished between “assumptions” and “present facts”⁵⁵ and the *Desai* court distinguished between an “assumption” and “a pronouncement of verifiable (or refutable) existing fact.”⁵⁶

Moreover, read in context,⁵⁷ this “assumption” prong of the statute is arguably limited by the broader requirement that the statement be “forward-looking.”⁵⁸ The term “forward-looking statement” is not meaningless in and of itself. Rather, it evokes a statement that looks forward — to the future. Therefore, the “assumption” prong should also be limited to those assumptions that look to the future.

Finally, this interpretation of the “assumption” prong as excluding statements of historical or present fact does not render this prong superfluous.⁵⁹ Some predictive statements are not captured by the other prongs of the definition, which are limited to predictions about certain topics, such as revenues, income, objectives of management for future operations, and statements of future economic performance.⁶⁰ Therefore, predictions about non-enumerated topics fall outside the scope of the definition unless they are captured by the “assumption” prong. Indeed, courts have already applied the “assumption” prong to predictive statements that would otherwise fall outside the scope of the safe harbor. For example, in *Harris v. Ivax Corp.*, the Eleventh Circuit characterized the prediction that “[r]eorders are expected to improve as customer inventories are depleted” as a forward-looking statement — not because the prediction itself fell within one of the enumerated topics — but because it was an assumption underlying a statement of future economic performance.⁶¹ Similarly, in *In re Amylin Pharmaceuticals, Inc. Securities Litigation*, the court characterized the prediction that clinical testing of SYMLIN would be sufficient to support FDA approval as forward-looking — not because it, standing alone, would qualify as a forward-looking statement — but because it was an assumption underlying a forward-looking statement about plans and objectives of management to submit a new drug application to the FDA.⁶²

2. Policy Rationales Support this Recommendation

Applying the safe harbor to statements of present or past fact would not further Congress’s intent in enacting the safe harbor. Congress’s primary concern when enacting the safe harbor for forward-looking statements was encouraging companies to speak about the future without fear that a subsequent turn of events could subject them to liability.⁶³ Statements about the present or past that underlie a statement about the future do not implicate this policy concern because, when making these types of statements, companies need not fear that future events will render them incorrect. Companies can assess the accuracy of statements about the present or past at the time of speaking. Therefore, statements in this category need not be afforded special safe harbor protection.

Moreover, interpreting the safe harbor as protecting statements of current or historical fact, merely because a prediction is premised

thereon, would gut the securities fraud statute, placing almost every statement out of its reach and compounding the “Type II” errors identified by Professor Olazabal.⁶⁴ The *Boeing* court recognized this potentiality: “To interpret the safe harbor protection of underlying assumptions in the manner suggested by the defendants would allow the exception to swallow the rule. Virtually any factual assertion by a business entity would be subject to safe harbor protection.”⁶⁵ To allow the safe harbor provision to insulate defendants from liability for fraudulent statements of past or present fact would interfere with the securities statutes’ important role of maintaining “public confidence in the marketplace . . . by deterring fraud.”⁶⁶

Finally, the application of the safe harbor to statements of present or historical fact that underlie predictions would create perverse incentives for companies to make forward-looking statements — not for the goal of informing investors and the public, but merely in order to protect themselves from liability with respect to their false statements about the present or past. The *In re Blockbuster Securities Litigation* court noted this potentiality: “Therefore, simply by making financial projections, a company would insulate itself from liability for virtually all fraudulent statements and omissions because, in the securities context, material statements and omissions are invariably related, at least tangentially, to a company’s current and future financial position.”⁶⁷

C. Query: Does the Safe Harbor Apply to Statements of Opinion about the Present?

Even if courts adopt this essay’s recommendation that statements of past or present *fact* not be characterized as forward-looking via the “assumptions” prong, an issue left undecided is whether statements of *opinion* about the present should also be excluded from the definition. This essay argues that, despite authority to the contrary, the safe harbor should not apply to statements of opinion about the present because they cannot be meaningfully distinguished from statements of historical or current fact.

Several courts, while refusing to treat statements of verifiable fact as assumptions underlying predictions, have treated present statements of opinion as forward-looking statements via the “assumptions” prong. For example, the *Desai* court refused to treat statements of verifiable fact as assumptions underlying predictions.⁶⁸ Yet, the court held that the present-tense opinion that two mortgaged properties were “two of our very best assets” was protected by the safe harbor because it was an assumption that “explained the basis for the forward-looking statement as to General Growth’s refinancing prospects on these properties.”⁶⁹

The distinction drawn by these courts fails to recognize that the

truth or falsity of statements of present opinion, just like statements of present or historical fact, does not depend on the occurrence of future events. An opinion is false for purposes of securities fraud if the speaker disbelieves the opinion (“subjective falsity”) and if it is objectively unreasonable at the time spoken (“objective falsity”).⁷⁰ Statements of present opinion do not implicate the policy rationales underlying the safe harbor because future events cannot render them false — they are true or false at the moment spoken.

IV. Statements About the Present That Necessarily Incorporate Predictions

Take as a second example the following statement: “Our litigation reserves are adequate.” Does this statement describe the current state of the company’s finances, thus not qualifying as forward-looking? Or does this statement’s description of the present status of reserves qualify as forward-looking because the adequacy of reserves is, by necessity, premised on a prediction of future claims?

A. Courts Are Split In Their Treatment of Statements About the Present That Necessarily Incorporate Predictions.

Several courts have rejected the notion that a present-tense statement, which necessarily incorporates a prediction, should be treated as a forward-looking statement.⁷¹ For example, in *Miller v. Champion Enterprises, Inc.*, the Sixth Circuit refused to characterize as forward-looking a present charge that the company had decided to take as a result of the bankruptcy of its largest independent retailer, despite the calculation’s incorporation of predictions: “Even if some of the components are somewhat uncertain and dependent on future events, it nevertheless describes Champion’s present calculation.”⁷² Similarly, in *In re Stone & Webster, Inc., Securities Litigation*, the First Circuit refused to treat as forward-looking the statement that the company “has on hand . . . sufficient resources to meet its anticipated [needs].”⁷³ Although the sufficiency of the resources on hand was dependent on the predicted needs, the First Circuit held that “[t]he part of the statement that speaks of the quantity of cash on hand speaks of a present fact.”⁷⁴

A number of other courts have applied a more nuanced approach, treating present-tense statements that necessarily rely on predictions as forward-looking statements within the scope of the safe harbor. For example, the Third Circuit classified a statement about collectability as forward-looking because it was “a prediction of the likelihood of collection on change orders and claims”⁷⁵ and, in a separate case, treated as forward-looking a company’s reference to its pricing as “disciplined” because “[t]he term ‘disciplined’ pricing describes a policy of setting

prices in relation to future medical costs.”⁷⁶ Applying the same reasoning, other courts have categorized as forward-looking statements about the adequacy of the company’s “current reserves and liability coverage”⁷⁷ and “assertions about the adequacy of the Company’s loss reserves.”⁷⁸

B. Recommendation: Apply the Safe Harbor to Present Statements Necessarily Incorporating Predictions.

This essay, drawing from the text of the statute and policy rationales, argues that courts should apply the safe harbor to present statements that necessarily incorporate predictions. Applying this recommendation to the example cited above — “Our litigation reserves are adequate”⁷⁹ — this essay contends that this statement should be treated as forward-looking because the adequacy of reserves necessarily depends on a prediction of future claims.

First, the definition of “forward-looking statement” includes statements “containing a projection of . . . financial items.”⁸⁰ *Webster’s 3rd New International Dictionary* defines “contain” as “to have within; hold;”⁸¹ and the *New Oxford American Dictionary* defines “contain” as “be made up of (a number of things); consist of.”⁸² Arguably, a statement about the present that necessarily incorporates predictions also *contains* predictions, albeit embedded.

Moreover, Congress’s primary concern when enacting the safe harbor for forward-looking statements — encouraging companies to speak about the future without fear that a subsequent turn of events could subject them to liability⁸³ — is implicated by statements about the present that, by necessity, incorporate predictions about the future. When making these types of statement, companies are likely concerned that future events will render them incorrect. Reasonably, companies may refrain from making these types of statement except when compelled to do so, contrary to Congress’s goal of encouraging disclosure. Therefore, statements in this category merit safe harbor protection.

C. Caveat: A Present Statement Does Not Necessarily Incorporate A Prediction If Its Falsity Is Independent of the Prediction.

Explaining why it refused to characterize as forward-looking the statement that the company “has on hand . . . sufficient resources to meet its anticipated [needs],” the First Circuit drew the following analogy:

To illustrate the distinction we draw, assume as hypothetical facts that an issuer of securities relating to a business venture carrying an obvious risk of liability (say, the operation of an amusement park) issues a public statement that it has procured liability insurance in amounts suf-

ficient to cover the maximum liability that can be anticipated based on comparable experience. Assume that in the suit, the aspect of the statement alleged to be fraudulent lies not in the estimation of likely liabilities, but in the fact that the issuer was lying in stating that it had obtained insurance. It in fact had no insurance policy. . . . We do not think Congress intended to grant safe harbor protection for such a statement whose falsity consists of a lie about a present fact.⁸⁴

This essay, although disagreeing with the First Circuit's application of this analogy to the alleged misrepresentation in that case,⁸⁵ agrees with the court's hypothetical scenario. As recommended by this essay, a present statement should be shielded only if it necessarily incorporates a prediction. In the First Circuit's hypothetical scenario, the representation that insurance has been purchased does not necessarily incorporate a prediction and thus should not be treated as forward-looking. If, on the other hand, a plaintiff contended that the insurance, albeit purchased, was inadequate to cover anticipated liabilities, the portion of the statement referring to the sufficiency of the liability coverage should be protected because it necessarily relies on a prediction.

Let's apply this caveat to the example cited above — “Our litigation reserves are adequate”⁸⁶ — by hypothesizing that, at the time this statement was made, the company did not have any litigation reserves. Under those facts, the statement would be actionable because the portion of this statement that is false — the presence of litigation reserves — does not necessarily depend on a prediction of future claims.

D. Caveat: The Dodd-Frank Act Excludes Credit Ratings from the Scope of the Securities Exchange Act's Safe Harbor.

Applying this essay's recommendations, credit ratings should be classified as forward-looking statements. Although a credit rating arguably states an opinion about the present, that opinion necessarily relies on predictions about the issuer's “ability and willingness to make timely payments on outstanding obligations.”⁸⁷ Therefore, just like statements about the adequacy of reserves, a credit rating should fall within the scope of the safe harbor.⁸⁸

The Dodd-Frank Wall Street Reform and Consumer Protection Act supersedes this analysis, however, by expressly providing that “statements made by a credit rating agency . . . shall not be deemed forward-looking statements for the purposes of section 21E.”⁸⁹

Congress's inclusion of this provision in the Dodd-Frank Act suggests that Congress believes that credit ratings would otherwise be classified as forward-looking statements.⁹⁰ In other words, it suggests that Congress, consistent with this essay, interprets the definition of

forward-looking statement as including statements about the present that necessarily rely on predictions.

Finally, in an interesting twist, the Dodd-Frank Act excludes credit ratings only from the Securities Exchange Act's safe harbor provision, not from the Securities Act's safe harbor provision.⁹¹ Therefore, credit rating agencies may be able to rely on the safe harbor's protection as a defense to claims under § 11 of the Securities Act.⁹²

V. Statements Containing Present and Future Components

Take as a final example the following statement: "Our production capacity is growing and will continue to do so." Is this statement forward-looking, because it refers to future production capacity, or is it non-forward-looking, because it refers to the state of production capacity at the moment of speaking?

This essay refers to this category of statements as "statements containing present and future components." Statements falling within the scope of the above-discussed categories of "statements of historical or current fact that underlie predictions" and "statements about the present that necessarily incorporate predictions" should not be analyzed here. Rather, this category of statements is limited to those like the above example, where the statement is simultaneously one of "futurity and concurrence."⁹³

A. Courts Are Split In Their Treatment of Statements Containing Present and Future Components.

Several courts treat statements with both present and future components as forward-looking, declining to exclude the present components from the reach of the safe harbor. For example, in *Harris v. Ivax*, the Eleventh Circuit characterized the statement "the challenges unique to this period in our history are now behind us" as entirely forward-looking, despite its connotation that the company was not facing the unique challenges at the time that the statement was made.⁹⁴

Other courts, engaging in a more nuanced analysis, separate these statements into their present and future components, extending safe harbor protection only to the predictive parts of the statements.⁹⁵ For example, in *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, on remand from the Supreme Court, the Seventh Circuit bifurcated the statement that "sales of its 5500 system were 'still going strong'" into two components.⁹⁶ The court recognized that the company was saying "both that current sales were strong and that they would continue to be so."⁹⁷ Therefore, to the extent that current sales were not strong, the safe harbor would not protect the statement.⁹⁸ Similarly, the court in *In re Boeing Securities Litigation* recognized that the statement "[Boeing] is experiencing a near-term decline in productivity" contains

both present and future components: “The ‘near-term’ part of this statement suggests that Boeing will experience a short term decline in productivity, but the ‘is experiencing’ part of the statement indicates that it is already happening.”⁹⁹ The court thus characterized only the part of the statement that is projecting the future as forward-looking.¹⁰⁰

B. Recommendation: Separate Statements Into Present and Future Components.

This essay, drawing from the text of the statute and policy rationales, argues that courts should separate statements containing both present and future components into their component parts, extending safe harbor protection only to the predictive components. Applying this recommendation to the example cited above — “Our production capacity is growing and will continue to do so”¹⁰¹ — the statement should be bifurcated. The statement about current growth in production capacity should not be protected by the safe harbor, while the statement about future growth in capacity should be protected.

By its own terms, the statute applies only to “forward-looking statements.”¹⁰² Therefore, extending safe harbor coverage to present components of a statement would expand the statute beyond its text. Moreover, the primary policy underlying the safe harbor — encouraging predictive speech¹⁰³ — is not implicated by present components of statements (to the extent those present components do not necessarily rely on predictions). Finally, insulating false statements of present fact, merely because they are coupled with predictive statements, would interfere with the securities fraud statute’s goal of maintaining “public confidence in the marketplace . . . by deterring fraud.”¹⁰⁴

C. Caveat: A Mere Assertion that the Present Situation Makes the Prediction Attainable Is Not Separable from the Prediction.

The Third Circuit, which generally agrees with this essay’s recommended treatment of statements containing present and future implications, has recognized an exception where the present component of the statement is inseparable from the future component. In *Institutional Investors Group v. Avaya*, the Third Circuit characterized as purely forward-looking the statements “our first quarter results position us to meet our goals for the year” and “we are on track to meet our goals for the year.”¹⁰⁵ The court recognized that the “position us” and “on track” components of the statements referenced the present, but the court further reasoned that these portions “cannot meaningfully be distinguished from the future projection of which they are a part.”¹⁰⁶ These components of the statements “say only

that, whatever that situation is, it makes the future projection attainable.”¹⁰⁷ The court noted that “[s]uch an assertion is necessarily implicit in every future projection.”¹⁰⁸

In contrast, several other courts have separated even these types of present components from the forward-looking components of statements. For example, in *In re Copper Mountain Securities Litigation*, the court held that the statement that the company was “on track” to meet its future goals had present and future components, which could be bifurcated: “[T]o the extent that such statements rested upon a characterization of the present state of the company, such statements are not properly considered forward-looking.”¹⁰⁹

This essay argues that the Third Circuit’s caveat is appropriate. Every prediction carries with it the implicit representation that the current state of affairs is consistent with achievement of the prediction. Merely enunciating this implicit representation should not transform the prediction into an actionable statement, lest the policy underlying the safe harbor — encouraging companies to make predictions — be contravened.

VI. Conclusion

In conclusion, this essay argues that courts should adopt the following recommendations when analyzing whether mixed statements are forward-looking, so as to fall within the scope of the PSLRA’s protection: (1) statements of historical or current fact should not be protected by the safe harbor, even if they underlie predictions; (2) statements about the present that necessarily incorporate predictions should be protected by the safe harbor; and (3) statements that contain both present and future components should be bifurcated, with the safe harbor protecting only those portions that predict the future. These recommendations are consistent with the statutory text and further the policy rationales underlying the safe harbor. Finally, these recommendations, if adopted, would provide meaningful guidance to companies who make mixed statements about the limits of the safe harbor’s protection, lest they inadvertently end up on the rocky shore.

NOTES:

¹Daniel S. Floyd & Sogol K. Pirnazar, *Securities Litigation* § 6:2.2 (Practicing Law Institute 2010) (summarizing cases that discuss the topic of “Handling Mixed Statements of Historical Facts and Future Predictions”).

²*E.g.*, Ann Morales Olazabal, *False Forward-Looking Statements and the PSLRA’s Safe Harbor*, 86 IND. L.J. 595, 633 (2011) (“Courts can and should exercise caution not to be led down a path that results in wholesale safe harbor protection of forward-looking statements that are mixed.”).

³H.R. Conf. Rep. 104-369, 1995 U.S.C.C.A.N. 730, 744 (Nov. 28, 1995).

⁴15 U.S.C. § 77z-2(c) (providing that the safe harbor, subject to exclusions, applies in “any private action arising under this subchapter that is based on an untrue statement of a material fact or omission of a material fact necessary to make the statement not misleading”); 15 U.S.C. § 78u-5(c) (providing that the safe harbor, subject to exclusions, applies “in any private action arising under this chapter that is based on an untrue statement of a material fact or omission of a material fact necessary to make the statement not misleading”). In particular, the safe harbor potentially applies in claims asserted under §§ 11 and 12(a)(2) of the Securities Act and § 10(b) of the Securities Exchange Act. 15 U.S.C. §§ 77k & 77l(a)(2); 15 U.S.C. § 78j(b).

⁵H.R. Conf. Rep. 104-369, 1995 U.S.C.C.A.N. 730, 743 (Nov. 28, 1995).

⁶H.R. Conf. Rep. 104-369, 1995 U.S.C.C.A.N. 730, 731 (Nov. 28, 1995).

⁷H.R. Conf. Rep. 104-369, 1995 U.S.C.C.A.N. 730, 742 (Nov. 28, 1995).

⁸15 U.S.C. §§ 77z-2(c)(1) & 78u-5(c)(1).

⁹15 U.S.C. §§ 77z-2(c)(1)(A)(i) & 78u-5(c)(1)(A)(i).

¹⁰H.R. Conf. Rep. 104-369, 1995 U.S.C.C.A.N. 730, 742 (Nov. 28, 1995).

¹¹H.R. Conf. Rep. 104-369, 1995 U.S.C.C.A.N. 730, 742 (Nov. 28, 1995).

¹²*E.g.*, *Olazabal*, note 3, at 641 (“‘Meaningful cautionary statements’ accompanying predictions and projections are those that temper the forward-looking statement with vigilance or otherwise ground its buoyant character.”); Allan Horwich, *Cleaning the Murky Safe Harbor for Forward-Looking Statements: An Inquiry Into Whether Actual Knowledge of Falsity Precludes the Meaningful Cautionary Statement Defense*, 35 J. CORP. L. 519, 557 (2010) (“‘[M]eaningful’ [should be] interpreted without reference to the speaker’s knowledge (much less belief) in the truth or falsity of the projection.”); Hugh C. Beck, *The Substantive Limits of Liability for Inaccurate Predictions*, 44 AM. BUS. L.J. 161, 200–01 (2007) (“If there are no important incorrect inferences that a reasonable investor would have drawn from the prediction in light of the accompanying disclosures, the disclosures should qualify as meaningful cautionary statements.”); John C. Coffee, Jr., *The Future of the Private Securities Litigation Reform Act: Or, Why the Fat Lady Has Not Yet Sung*, 51 BUS. LAW. 975, 989 (1996) (“That is, statements that did not correct or minimize the lie are arguably not ‘meaningful.’”).

¹³15 U.S.C. §§ 77z-2(c)(1)(B) & 78u-5(c)(1)(B).

¹⁴*In re XM Satellite Radio Holdings Securities Litigation*, 479 F. Supp. 2d 165, 186 n.14, Fed. Sec. L. Rep. (CCH) ¶ 94190 (D.D.C. 2007) (“Plaintiffs mistakenly argue that these predictions are not protected by the PSLRA’s safe harbor because defendants knew them to be false or misleading when made. . . . The [statutory] provision is worded disjunctively: the forward-looking statement must either be accompanied by meaningful cautionary language, or plaintiffs must fail to prove that it was made with actual knowledge of its falsity.”) (emphasis in original).

¹⁵15 U.S.C. §§ 77z-2(c) & 78u-5(c).

¹⁶H.R. Conf. Rep. 104-369, 1995 U.S.C.C.A.N. 730, 742 to 43 (Nov. 28, 1995).

¹⁷*E.g.*, *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 244, Fed. Sec. L. Rep. (CCH) ¶ 95205 (5th Cir. 2009) (“Because the plaintiff adequately alleges that the defendants actually knew that their statements were misleading at the time they were made, the safe harbor provision is inapplicable to all alleged misrepresentations.”); *Payne v. DeLuca*, 433 F. Supp. 2d 547, 561, Fed. Sec. L. Rep. (CCH) ¶ 93879 (W.D. Pa. 2006) (“The safe harbor provision does not apply, however, if the statement was made by a natural person (as compared to a business entity) who had ‘actual knowledge’ at the

time that the statement was false or misleading.”) (citing 15 U.S.C. § 78u-5(c)(1)(B)(i)); *Limantour v. Cray Inc.*, 432 F. Supp. 2d 1129, 1147, Fed. Sec. L. Rep. (CCH) ¶ 93875 (W.D. Wash. 2006).

¹⁸*In re Dura Pharmaceuticals, Inc. Securities Litigation*, 452 F. Supp. 2d 1005, 1033, Fed. Sec. L. Rep. (CCH) ¶ 93934 (S.D. Cal. 2006) (on remand from the Supreme Court).

¹⁹*Coffee, note 13*, at 989 (“[T]o read the first (or bespeaks caution) prong as immunizing a deliberately false projection simply because some ‘important factors’ that could prevent the projection from being fulfilled were also disclosed requires one to believe Congress saw some policy reason to protect knowing falsehoods.”).

²⁰*Accord Olazabal, note 3*, at 632 (“Some courts, when faced with the distasteful prospect of appearing to ‘let a guilty man go free,’ have chosen instead to convert Prong One’s irrebuttable presumption into a rebuttable one, and impermissibly so. Neither the circuit court majority’s straightforward interpretation, the legislative history, nor any policy objective supports this judicial choice.”); *Horwich, note 13*, at 520 (reviewing the legislative history and the case law and arguing “that the prongs are independent and, in particular, actual knowledge of the weaknesses of a projection, including lack of a good faith belief in the projection, is not relevant to reliance on the meaningful cautionary statement safe harbor”).

²¹15 U.S.C. § 78u-4(b)(2)(A) (“[A complaint must] state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind”); *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 705, Fed. Sec. L. Rep. (CCH) ¶ 94560 (7th Cir. 2008) (on remand from the Supreme Court) (“[T]he ‘strong inference’ that must be drawn to avoid dismissal cannot be an inference merely of recklessness if predictions are challenged as fraudulent.”).

²²Cornerstone Research, Securities Class Action Filings: 2010 Year in Review (2010), available at <http://securities.stanford.edu/>.

²³*Olazabal, note 3*, at 643 (“To give full effect to the statutory safe harbor, courts faced with allegations of fraudulent forward-looking statements must carefully parse mixed statements so as to avoid protecting false statements of existing fact.”).

²⁴*Id.* at 626–30.

²⁵*Id.* at 633.

²⁶*But see id.* (beginning this discussion by citing examples of “substantively mixed statements” and “semantically mixed statements”).

²⁷15 U.S.C. §§ 77z-2(i)(1) & 78u-5(i)(1).

²⁸*E.g., In re Salomon Analyst Winstar Litigation*, 2006 WL 510526, *10 (S.D. N.Y. 2006) (differentiating between “optimistic prospective statements” and “misrepresentation of present or historical facts”) (emphasis in original).

²⁹*Friedman v. Rayovac Corp.*, 295 F. Supp. 2d 957, 989 (W.D. Wis. 2003) (citing *Harris v. Ivax Corp.*, 182 F.3d 799, 805, Fed. Sec. L. Rep. (CCH) ¶ 90528 (11th Cir. 1999)).

³⁰*Slayton v. American Exp. Co.*, 604 F.3d 758, 767, Fed. Sec. L. Rep. (CCH) ¶ 95746 (2d Cir. 2010) (stating that this statement “fits comfortably” within the definition of “forward-looking statement”).

³¹*In re Kindred Healthcare, Inc. Securities Litigation*, 299 F. Supp. 2d 724, 738 (W.D. Ky. 2004) (characterizing this statement as “about future events and therefore forward-looking as defined in the PSLRA”).

³²*In re Staffmark, Inc. Securities Litigation*, 123 F. Supp. 2d 1160, 1171 n.8, Fed. Sec. L. Rep. (CCH) ¶ 91023 (E.D. Ark. 2000) (“This is more correctly viewed as a statement of current performance, not future.”).

³³*In re Dura Pharms., Inc. Sec. Litig.*, 452 F. Supp. 2d at 1034 (“The statements regarding Ceclor CD at issue in this case are not ‘forward looking.’ Plaintiffs allege Defendants misled investors about the current sales and demand for Ceclor CD, and that antibiotic’s market share.”).

³⁴*In re Apple Computer, Inc.*, 127 Fed. Appx. 296, Fed. Sec. L. Rep. (CCH) ¶ 93203 (9th Cir. 2005) (not selected for publication).

³⁵*Friedman*, 295 F. Supp. 2d at 989.

³⁶*Id.*

³⁷*Id.*

³⁸*In re REMEC Inc. Securities Litigation*, 702 F. Supp. 2d 1202, 1234 (S.D. Cal. 2010) (“The Court does not agree with Defendants’ characterization of the statement as forward-looking; instead, the statement describes a current business condition.”).

³⁹The identification of these three categories of mixed statements is not exhaustive. For example, in *Harris v. Ivax Corp.*, 182 F.3d 799, Fed. Sec. L. Rep. (CCH) ¶ 90528 (11th Cir. 1999), the Eleventh Circuit addressed an allegation that the defendants fraudulently omitted a material factor from a mixed list composed of forward-looking and non-forward-looking statements. In that scenario, the court treated the entire list as a forward-looking statement. *Id.* at 806–07.

⁴⁰15 U.S.C. §§ 77z-2(i)(1)(D) & 78u-5(i)(1)(D).

⁴¹*In re Metawave Communications Corp. Securities Litigation*, 298 F. Supp. 2d 1056, 1085 (W.D. Wash. 2003) (“Thus, these statements regarding demand are forward-looking statements because they are ‘assumptions underlying or relating to’ a financial projection or future economic performance.”).

⁴²*E.g., In re Humana, Inc. Securities Litigation*, Fed. Sec. L. Rep. (CCH) ¶ 95260, 2009 WL 1767193, *11 (W.D. Ky. 2009) (“While both statements imply some present facts or circumstances, they are the basis for the later forward-looking statements, and thus qualify as assumptions underlying or relating to a forward-looking statement.”); *In re Compuware Securities Litigation*, 301 F. Supp. 2d 672, 685 (E.D. Mich. 2004) (treating a paragraph containing “both statements of historical facts as well as forward-looking statements” as within the scope of the safe harbor because they discussed “objectives relating to Compuware’s products and services and the assumptions underlying Compuware products’ future performance”); *In re Metawave Comms. Corp. Sec. Litig.*, 298 F. Supp. 2d at 1085.

⁴³*Miller v. Champion Enterprises Inc.*, 346 F.3d 660, 677, 56 Fed. R. Serv. 3d 1177, 2003 FED App. 0359P (6th Cir. 2003).

⁴⁴*Hockey v. Medhekar*, Fed. Sec. L. Rep. (CCH) ¶ 99465, 1997 WL 203704, *5 (N.D. Cal. 1997) (“Because these non-predictive statements are ‘assumptions underlying or relating to’ statements of future economic performance, they fall under the SRA’s definition of forward-looking statements.”).

⁴⁵*Hess v. American Physicans Capital, Inc.*, 2005 WL 459638, *6 (W.D. Mich. 2005) (explaining that this statement about the past was “the basis for the later forward-looking statements”).

⁴⁶*Western Pennsylvania Electrical Employees Pension Trust v. Plexus Corp.*, 2009 WL 604276, *8 n.6 (E.D. Wis. 2009) (explaining that this statement about the present

was “one of the assumptions underlying Plexus’s projections for the next quarter”).

⁴⁷*Building Trades United Pension Trust Fund v. Kenexa Corp.*, 2010 WL 3749459, *4 n.7 (E.D. Pa. 2010) (noting that this statement relates, at least in part, to the present but holding that it was nonetheless protected by the safe harbor because “it relates to the reasons underlying Kenexa’s prediction of future success in its field”).

⁴⁸*Harris v. Ivax Corp.*, 182 F.3d 799, 805, Fed. Sec. L. Rep. (CCH) ¶ 90528 (11th Cir. 1999) (“Of course, if any of the individual sentences describing known facts (such as the customer’s bankruptcy) were allegedly false, we could easily conclude that that smaller, non-forward-looking statement falls outside the safe harbor.”); *In re Viropharma, Inc. Securities Litigation*, 2003 WL 1824914, *7 (E.D. Pa. 2003) (“Simply because material misrepresentations appear in the same document as a forward-looking statement does not make the statements of fact eligible for the safe harbor.”); *In re Amylin Pharmaceuticals, Inc. Securities Litigation*, Fed. Sec. L. Rep. (CCH) ¶ 92502, 2003 WL 21500525, *7 (S.D. Cal. 2003) (“[T]he statements are not considered forward-looking just because there are other forward-looking statements made in their proximity.”).

⁴⁹*In re Boeing Securities Litigation*, 40 F. Supp. 2d 1160, 1169, Fed. Sec. L. Rep. (CCH) ¶ 90285 (W.D. Wash. 1998).

⁵⁰*Desai v. General Growth Properties, Inc.*, 654 F. Supp. 2d 836, 848, 851, Fed. Sec. L. Rep. (CCH) ¶ 95348 (N.D. Ill. 2009) (“This opinion will of course strive to be more faithful to the statute than Defendants’ attempted rewriting of its terms.”).

⁵¹See the example discussed at the outset of Part III.

⁵²15 U.S.C. §§ 77z-2(i)(1)(D) & 78u-5(i)(1)(D).

⁵³Webster’s 3rd New International 133 (2002).

⁵⁴New Oxford American Dictionary 97 (2001).

⁵⁵*In re Boeing Sec. Litig.*, 40 F. Supp. 2d at 1169 (“Assumptions entitled to safe harbor protection must be just that: assumptions underlying projections and expectations. The statements at issue here . . . are not assumptions, they are present facts.”).

⁵⁶*Desai*, 654 F. Supp. 2d at 848 (“It would frankly be difficult to fashion a statement that is less of an ‘assumption’ and more a pronouncement of a verifiable (or refutable) existing fact.”).

⁵⁷*General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 596, 124 S. Ct. 1236, 157 L. Ed. 2d 1094, 32 Employee Benefits Cas. (BNA) 1001, 93 Fair Empl. Prac. Cas. (BNA) 257, 84 Empl. Prac. Dec. (CCH) ¶ 41592 (2004) (“The cardinal rule [is] that statutory language must be read in context [since] a phrase gathers meaning from the words around it . . .”) (internal quotations omitted).

⁵⁸15 U.S.C.A. §§ 77z-2(i)(1) & 78u-5(i)(1).

⁵⁹*Hibbs v. Winn*, 542 U.S. 88, 89, 124 S. Ct. 2276, 159 L. Ed. 2d 172 (2004) (“[T]he rule against superfluities instructs courts to interpret a statute to effectuate all its provisions, so that no part is rendered superfluous.”).

⁶⁰15 U.S.C. §§ 77z-2(i)(1)(A) to (C) & 78u-5(i)(1)(A) to (C).

⁶¹*Harris*, 182 F.3d at 806.

⁶²*In re Amylin Pharmaceuticals, Inc. Securities Litigation*, Fed. Sec. L. Rep. (CCH) ¶ 92502, 2003 WL 21500525, *7 (S.D. Cal. 2003).

⁶³H.R. Conf. Rep. 104-369, 1995 U.S.C.C.A.N. 730, 731 (Nov. 28, 1995).

⁶⁴*Olazabal*, note 3, at 626–630. See also the test, *supra*, accompanying notes 24–26.

⁶⁵*In re Boeing Sec. Litig.*, 40 F. Supp. 2d at 1169.

⁶⁶*Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 345, 125 S. Ct. 1627, 161 L. Ed. 2d 577, Blue Sky L. Rep. (CCH) ¶ 74529, Fed. Sec. L. Rep. (CCH) ¶ 93218 (2005).

⁶⁷*In re Blockbuster Inc. Securities Litigation*, Fed. Sec. L. Rep. (CCH) ¶ 92806, 2004 WL 884308, *7 (N.D. Tex. 2004). This essay's author was serving as a law clerk for the court when the court issued this opinion.

⁶⁸*Desai*, 654 F. Supp. 2d at 848 (noting the “obvious distinction between an ‘assumption’ of fact and a statement of an existing fact”).

⁶⁹*Id.* at 851.

⁷⁰*E.g., Greenberg v. Crossroads Systems, Inc.*, 364 F.3d 657, 670, Fed. Sec. L. Rep. (CCH) ¶ 92738 (5th Cir. 2004) (“A statement of belief is only open to objection where the evidence shows that the speaker did not in fact hold that belief *and* the statement made asserted something false or misleading about the subject matter.”) (emphasis added); *Nolte v. Capital One Financial Corp.*, 390 F.3d 311, 315, Fed. Sec. L. Rep. (CCH) ¶ 93043 (4th Cir. 2004) (“[A] statement of opinion may be a false factual statement if the statement is false, disbelieved by its maker, and related to matters of fact which can be verified by objective evidence”).

⁷¹*E.g., Freudenberg v. E*Trade Financial Corp.*, 712 F. Supp. 2d 171, 194, Fed. Sec. L. Rep. (CCH) ¶ 95743 (S.D. N.Y. 2010) (rejecting “Defendants’ argument that ‘loan loss allowances and securities impairments were projections about future performance’”).

⁷²*Miller*, 346 F.3d at 686.

⁷³*In re Stone & Webster, Inc., Securities Litigation*, 414 F.3d 187, 212, Fed. Sec. L. Rep. (CCH) ¶ 93,300 (1st Cir. 2005).

⁷⁴*Id.* at 213.

⁷⁵*GSC Partners CDO Fund v. Washington*, 368 F.3d 228, 242, Fed. Sec. L. Rep. (CCH) ¶ 92823 (3d Cir. 2004).

⁷⁶*In re Aetna, Inc. Securities Litigation*, 617 F.3d 272, 281 (3d Cir. 2010) (“Thus, to the extent that ‘disciplined’ pricing said anything about the current price of premiums, it did so in the form of a projection.”).

⁷⁷*In re Kindred Healthcare, Inc. Securities Litigation*, 299 F. Supp. 2d 724, 738 (W.D. Ky. 2004) (explaining that “[t]he amount Kindred keeps in reserves to cover liability claims is necessarily a prediction about its future claims experience based on past claims history as well as current filings”).

⁷⁸*Hess*, 2005 WL 459638, at *7.

⁷⁹See the example discussed at the outset of Part IV.

⁸⁰15 U.S.C. §§ 77z-2(i)(1)(A) & 78u-5(i)(1)(A) (emphasis added).

⁸¹Webster’s 3rd New International 133 (2002).

⁸²New Oxford American Dictionary 97 (2001).

⁸³H.R. Conf. Rep. 104-369, 1995 U.S.C.C.A.N. 730, 731 (Nov. 28, 1995).

⁸⁴*In re Stone & Webster, Inc., Securities Litigation*, 414 F.3d 187, 212, Fed. Sec. L. Rep. (CCH) ¶ 93,300 (1st Cir. 2005).

⁸⁵In *In re Stone & Webster, Inc., Securities Litigation*, the plaintiffs did not contend that the company did not have any resources on hand. Rather, the plaintiffs contended that the resources on hand were woefully insufficient. *Id.* at 213 (“The Company was, according to the allegations of the Complaint, in an extreme liquidity crunch.”). The sufficiency of the resources necessarily depended on a prediction of anticipated needs. Therefore, this essay argues that the company’s statement should have been treated as forward-looking.

⁸⁶See the example discussed at the outset of Part V.

⁸⁷MORTGAGE-BACKED SECURITIES § 10:1 (Securities Law Handbook Series 2011).

⁸⁸See text, *supra*, accompanying notes 76–82.

⁸⁹Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 933(a), 124 Stat. 1276 (2010).

⁹⁰NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 22:30 (7th ed. 2009) (“Courts have declared that the mere fact that a legislature enacts an amendment indicates that it intended to change the original act by creating a new right or withdrawing an existing one. Therefore, any material change in the language of the original act is presumed to indicate a change in legal rights.”); *but see id.* § 22:30 (“Although, generally, a statutory amendment is presumed to have been intended to change the law, legislative history may indicate that the amendment was intended instead as a clarification.”). The Joint Explanatory Statement of the Committee of Conference does not discuss the forward-looking statement amendment. H.R. Conf. Rep. No. 111-517 (2010).

⁹¹Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 933(a), 124 Stat. 1276 (2010) (not referencing § 27 of the Securities Act).

⁹²It is uncertain whether credit rating agencies will face suit under section 11. Prior to the enactment of the Dodd-Frank Act, most credit rating agencies were protected from liability under § 11 of the Securities Act because S.E.C. Rule 436(g) exempted credit ratings provided by nationally recognized statistical rating organizations (“NRSROs”) from being considered part the expertised portion of the registration statement. 17 C.F.R. § 230.436(g). In an effort to subject credit rating agencies to potential section 11 liability, Congress nullified Rule 436(g) with the Dodd-Frank Act. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 939G, 124 Stat. 1276 (2010). NRSROs have responded thus far by refusing to consent to the inclusion of their ratings in registration statements, essentially forcing the S.E.C. to grant issuers of asset-backed securities an open-ended reprieve from the requirement of including an NRSRO rating in their registration statements. *See SEC No-Action Letter to Ford Motor Credit Co LLC*, 2010 WL 2882538 (Nov. 23, 2010).

⁹³*In re Boeing Sec. Litig.*, 40 F. Supp. 2d at 1169.

⁹⁴*Harris*, 182 F.3d at 805; *see also In re Ucapital Corp. Securities Litigation*, 149 F. Supp. 2d 1353, 1374, Fed. Sec. L. Rep. (CCH) ¶ 91512 (S.D. Fla. 2001) (“When viewed in their entirety, the press releases quoted in the amended class action complaint are mixed statements; thus, they must be considered forward-looking statements eligible for the safe-harbor provision.”).

⁹⁵*Desai*, 654 F. Supp. 2d at 848 (“So a defendant is not entitled to safe harbor protection for an entire statement just because portions of it are forward-looking. Instead the Court must parse each statement to determine which portions merit potential protection as forward-looking statements and which do not.”).

⁹⁶*Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 705, Fed. Sec. L. Rep. (CCH) ¶ 94560 (7th Cir. 2008).

⁹⁷*Id.*

⁹⁸*Id.* (“The element of prediction in saying that sales are ‘still going strong’ does not entitle Tellabs to a safe harbor with regard to the statement’s representation concerning current sales.”).

⁹⁹*In re Boeing Sec. Litig.*, 40 F. Supp. 2d at 1168.

¹⁰⁰*Id.*

¹⁰¹See the example discussed at the outset of Part V.

¹⁰²15 U.S.C. §§ 77z-2(i)(1) & 78u-5(i)(1).

¹⁰³H.R. Conf. Rep. 104-369, 1995 U.S.C.C.A.N. 730, 731 (Nov. 28, 1995).

¹⁰⁴*Dura Pharms., Inc.*, 544 U.S. at 345.

¹⁰⁵*Institutional Investors Group v. Avaya, Inc.*, 564 F.3d 242, 254, Fed. Sec. L. Rep. (CCH) ¶ 95217 (3d Cir. 2009).

¹⁰⁶*Id.* at 255.

¹⁰⁷*Id.*

¹⁰⁸*Id.*

¹⁰⁹*In re Copper Mountain Securities Litigation*, 311 F. Supp. 2d 857, 880 (N.D. Cal. 2004).