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PSLRA SAFE HARBOR: A NEW PERSPECTIVE ON "IMPORTANT FACTORS"

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ABSTRACT

As pointed out by the Second Circuit in Slayton v. American Express Co.*, the materiality standard in the Private Securities Litigation Reform Act's safe harbor for forward-looking statements is unworkable. While prohibiting courts from inquiring into the defendant-issuer's state of mind, the Act requires courts to determine whether "important factors" have been disclosed. How can importance be determined in the absence of context? Or, how can it be determined if "important factors" have been disclosed, without knowing what the issuer considered important? It cannot. Because of this "thorny issue," courts have interpreted the PSLRA materiality standard—"important factors" in the Act—in myriad different ways; some ignoring Congress's prohibition of inquiring into the issuer's state of mind, and others dismissing outright fraud where the alleged misstatement was accompanied by forward-looking statements. A new perspective on what factors are "important factors" is necessary.*

This Comment argues that an objective test based on the categorical factors that investors would consider important is a better test, than the confusing instructions courts currently have. Empirical research shows that investors most fear a large loss on their investment (40%), a below target return (20%), and business risk of the issuer (18%). It stands to reason that information that would affect these areas of risk is what investors would most want to know; or, in other words, categorical information about these areas are investors' "important factors." Because these specific areas of information are objective and can be categorized, a more workable test can be fashioned for materiality under the PSLRA safe harbor. This Comment explains the shortcomings of existing PSLRA materiality and provides an alternative objective approach.

I. INTRODUCTION

To be effective, any attempt to regulate securities or enforce securities law must focus centrally on protecting investors through controlling information.[1] Information is the sole determinant of price. Without information, securities have zero value to the investor. Investors with an informational advantage over the rest of the market will systematically earn higher returns.[2] But the familiar securities regulation question continually arises: what information can investors use to gain an advantage and profit? That is, what information is material?

Material information is information that influences the investor to make the investment decision. Investment decisions, however, are not made upon a single piece of information. Rather, investment decisions are made in the context of all available information about the potential investment opportunity. As a result, the dispositive question is: what information would investors find material given the full universe of existing information about the investment opportunity. Courts have long grappled with this question in the context of Securities Exchange Act Rule 10b-5, which has been resolved by the Supreme Court's holdings in *TSC Industries, Inc. v. Northway,*[3] and *Basic Inc. v. Levinson*.[4] But in one corner of securities law, safe harbor for forward-looking statements under the Private Securities Litigation Reform Act ("PSLRA"), materiality remains an indeterminate idea.[5] This Comment seeks to explain the shortcomings of existing PSLRA materiality—called "important factors" under the Act—and provides an alternative approach that clarifies the PSLRA materiality standard.

In 1995, Congress passed the PSLRA to curb abusive securities

[1] *See* STEPHEN J. CHOI & A. C. PRITCHARD, SECURITIES REGULATION: CASES & ANALYSIS 1–47 (3d ed. 2012).

[2] *Id.* at 2.

[3] TSC Indus. Inc. v. Northway, Inc., 426 U.S. 438 (1976).

[4] Basic Inc. v. Levinson, 485 U.S. 224 (1988).

[5] At the outset, it is important to point out that this Comment addresses securities fraud liability only in the context of forward-looking statements. Therefore, the analysis and proposal herein, which relates only to forward-looking statements in PSLRA cases, which can be distinguished from the pre-PSLRA rules regarding statements of past or present fact set out in *TSC Indus., Inc. v. Northway*, 426 U.S. 438, 448 (1976) (holding that information is material if there is a "substantial likelihood that the disclosure . . . would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.") and *Basic Inc. v. Levinson*, 485 U.S. 224, 240 (1988) (adopting *TSC Industries*, rejecting a more objective standard for materiality, and holding that "materiality depends on the significance the reasonable investor would place on the withheld or misrepresented information.").

litigation practices by so-called strike suit lawyers bringing suit under Exchange Act Rule 10b-5.[6] Part of the protection afforded to securities issuers under the PSLRA is a statutory safe harbor for forward-looking statements.[7] In crafting the safe harbor, Congress explicitly prohibited courts from inquiring into the defendant-issuer's state of mind.[8] Congress also required issuers to include "meaningful cautionary statements identifying *important factors* that could cause actual results to differ materially from those in the forward-looking statement."[9] As the Second Circuit recently pointed out in *Slayton v. American Express Co.*, Congress's instructions are logically contradictory. It is almost impossible to determine which factors are "important" without the context of the issuer's state of mind.[10] Congress's logical breakdown provides little real guidance to courts evaluating securities fraud claims under Rule 10b-5.

A new perspective on what factors are "important factors" is necessary. Up until this point, courts have interpreted the PSLRA standard for important factors in myriad ways. Some courts have ignored Congress's prohibition by inquiring into the issuer's state of mind, while others have dismissed outright fraud claims where the alleged misstatement was accompanied by forward-looking statements. In short, courts have wrestled mightily with what is an "important factor" under the Act.

To alleviate this confusion, courts should focus on the information's importance to the investor, rather than the defendant-issuer's state of mind. Moreover, Congress drafted the PSLRA's safe harbor to protect issuers against overreaching by strike suit lawyers. Accordingly, courts should keep with legislative purposes and employ an "important factors" test that favors securities issuers. The current "important factors" test fails in this regard. As a result, a new test is needed. This Comment argues that an objective test based on the categorical factors that investors would consider important is a better test.[11] Importantly, objectivity can simultaneously protect issuers *and*

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[6] S. REP. NO. 104-98, at 4–5 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 683–84.

[7] Securities Act of 1933 § 27A, 15 U.S.C. § 77z-2 (2006).

[8] H.R. REP. NO. 104-369, at 44 (1995) (Conf. Rep.), *reprinted in* 1995 U.S.C.C.A.N. 730, 743.

[9] Securities Exchange Act of 1934 § 21E, 15 U.S.C. § 78u-5 (2006) (emphasis added).

[10] *See* Slayton v. Am. Express Co., 604 F.3d 758, 771 (2d Cir. 2010).

[11] Throughout this Comment, the term "categorical" is used to denote factors that are absolute in every context—that is, they either fall within the category of "important factors" and they should be included in the objective test or they fall outside the category and should be excluded. In the context of the usage herein,

continued . . .

fulfill investors' information expectations.

Empirical research shows that investors assign risk to an investment based on a number of premises: (i) the investor is only concerned about downside risk, (ii) the investor is most sensitive (40%) to a large loss on the investment, (iii) the issuer is significantly concerned (20%) about the risk of a below target return over the investment period, (iv) the investor strongly considers (18%) the business risk represented by issuer-specific information, and (v) the investor recognizes that available information about the security may be imperfect.[12] Therefore, it stands to reason that investors care most about information regarding these premises, and accordingly, categorical factors that affect these risks are the "important factors" that investors care about.

An objective test based on categorical factors is the most effective method for determining whether "important factors" have been sufficiently disclosed. All three constituencies in a Rule 10b-5 action benefit from an objective test of categorical "important factors." First, securities issuers—the intended beneficiaries of PSLRA safe harbor protection—subjected to an objective test are relieved of the need to expend precious resources rooting out possible sources of 10b-5 liability. Second, courts can apply and administer an objective test more easily than a subjective standard because the former does not require the application of the latter's boundless inquiry into the context of the disclosure. Finally, investors—potential 10b-5 plaintiffs—can rely on disclosures by securities issuers knowing that information that will affect the risks of their investment has been sufficiently disclosed to evaluate the primary non-systemic risks. If disclosure does not take place, investors can also take comfort in knowing there is a simple test for whether "important factors" were disclosed rather than a court's unpredictable determination.

In Part II, this Comment explains SEC Rule 10b-5, its uses and the circumstances that can give rise to liability under the Rule. Part III details the development of safe-harbors for forward-looking statements and gives background on the PSLRA and its interaction with Rule 10b-5. Part IV focuses on the conflict at the crux of this issue: Congress's inconsistent instructions to courts on whether to inquire into the state of mind of 10b-5 defendants. Part V explains an alternative proposal on how courts should apply the PSLRA safe

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categorical factors are the opposite of factors that a court must weigh and consider in each instance.

[12] Robert A. Olsen, *Investment Risk: The Experts' Perspective*, 53 FIN. ANALYSTS J. 2, Mar.-Apr. 1997, at 62, 63, *available at* http://www.jstor.org/stable/4479986.

harbor. Lastly, in Part VI, the Comment concludes that an objective test based on categorical factors is normatively a better test than Congress's conflicting instructions on the PSLRA safe harbor.

II. BACKGROUND ON RULE 10B-5

A. Securities Regulation and the Role of Rule 10b-5

SEC Rule 10b-5 is the "bedrock" antifraud rule that allows investors to allege securities fraud against an issuer.[13] SEC Rule 10b-5, as interpreted by the courts, offers investors a private right of action against securities issuers who:

> employ any device, scheme, or artifice to defraud; make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.[14]

Because of this broad regulatory language, investors may plausibly allege 10b-5 liability in countless circumstances.

The need for Rule 10b-5 arose in 1942. SEC solicitors in Boston discovered that a company president was simultaneously making public announcements of his company's poor performance while repurchasing stock from shareholders at lower prices, when in fact the company's earnings were going to quadruple.[15] At that time, the Securities Exchange Act of 1933 only prohibited fraud in the *sale* of securities.[16] The Act said nothing of fraud in the *purchase* of securities.[17] To close the gap, SEC Assistant Solicitor Milton V. Freeman drafted the Securities Exchange Act Rule 10b-5 with language lifted from §17(a) of the 1933 Act adding the words "in

[13] *See* ALAN R. PALMITER, EXAMPLES & EXPLANATIONS: SECURITIES REGULATION 369 (5th ed. 2011).

[14] 17 C.F.R. § 240.10b-5 (2011). Courts often avoid citing the regulation since it is broader in scope than the actual statute.

[15] Milton V. Freeman, *The Insider Trading Sanctions Bill—A Neglected Opportunity*, 4 PACE L. REV. 221, 222 (1984), *available at* http://digitalcommons.pace.edu/plr/vol4/iss2/2.

[16] Thomas L. Hazen, *The Jurisprudence of SEC Rule 10b-5*, SS050 ALI-ABA 513 (2011).

[17] *Id.*

connection with the purchase or sale of any security."[18] The SEC approved the Rule without debate[19] pursuant to the catch-all rulemaking authority in §10(b) of the Securities Exchange Act of 1934.[20]

Four years later in 1946, a Pennsylvania federal district court recognized an inferred private cause of action under Rule 10b-5 for the first time.[21] Since then, Rule 10b-5 has been involved in innumerable private actions and SEC proceedings. The Rule has served as the basis for a broad array of claims, including traditional claims alleging misstatements or omissions in SEC filings, claims alleging negligent securities practices, and even allegations of corporate mismanagement.[22] More recently, Rule 10b-5 has been limited to cases involving intentional deception.[23]

B. The Elements of Rule 10b-5

Rule 10b-5 makes it illegal for securities issuers to dispense false or misleading information about its securities. The Rule states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.[24]

As it relates to the PSLRA, Rule 10b-5 requires plaintiffs to allege five main elements on which the plaintiff bears the burden of proof: (i) material misinformation, (ii) scienter, (iii) plaintiff's reliance, (iv) causation, and (v) damages.[25] Therefore, in order to state a claim under Rule 10b-5, a plaintiff must allege that the defendant securities issuer made material misstatements or omissions of material fact, with scienter,[26] and that the defendant's actions caused injury to the

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[18] *Id.*
[19] *Id.*
[20] PALMITER, *supra* note 13, at 370.
[21] Kardon v. Nat'l Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946).
[22] PALMITER, *supra* note 13, at 370.
[23] *Id.*
[24] 17 C.F.R. § 240.10b-5 (2011).
[25] PALMITER, *supra* note 13, at 384.
[26] Scienter is a significant element—and often a troublesome element for plaintiffs—in Rule 10b-5 claims. A 10b-5 plaintiff must prove the defendant acted

continued . . .

plaintiff based on plaintiff's reliance on the statement.[27] If a securities fraud plaintiff fails to show any of the five required elements in its allegation of fraud or misstatements, the claim will fail.

III. **PSLRA BACKGROUND**

In the early 1990s, securities plaintiffs used Rule 10b-5 to bring innumerable claims of varying merit against securities issuers[28]. In response to these "abusive and meritless suits,"[29] Congress enacted the PSLRA.[30] The House Conference Report shows that securities issuers—possible 10b-5 defendants—presented Congress with extensive evidence of specious litigation.[31] Based on the fear that so-called "strike suits" under Rule 10b-5 could "increase the cost of raising capital and chill corporate disclosure," Congress recognized the need to provide a safe harbor for securities issuers.[32] Specifically, the Act had three purposes "(1) to encourage the voluntary disclosure of information by corporate issuers; (2) to empower investors so that they—not their lawyers—exercise primary control over private securities litigation; and (3) to encourage plaintiffs' lawyers to pursue valid claims and defendants to fight abusive claims."[33] In other words, Congress intended the PSLRA to be a direct limitation on securities plaintiffs' ability to utilize Rule 10b-5 as grounds for meritless litigation.[34]

A. Pre-existing Safe Harbors For Forward-Looking Statements

The PSLRA, however, did not introduce the concept of safe harbor protection for securities issuers. In 1979, sixteen years before the PSLRA, the SEC promulgated Rule 175, which provided a safe harbor for certain forward-looking statements made with a "reasonable basis" and in "good faith."[35] But, as noted in the PSLRA Senate Report,

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with "a mental state embracing intent to deceive, manipulate, or defraud." Ernst v. Hochfelder, 425 U.S. 185, 194 n.12 (1976). Insufficient pleading of scienter is a frequent basis for dismissal.

[27] *See* Slayton v. Am. Express Co., 604 F.3d 758 (2d Cir. 2010).

[28] H.R. REP. NO. 104-369, at 31 (1995) (Conf. Rep.), *reprinted in* 1995 U.S.C.C.A.N. 730.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] S. REP. NO. 104-98, at 4 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 683.

[33] *Id.*

[34] *See* H.R. REP. NO. 104-369, at 31; S. REP. NO. 104-98, at 4. It is important to recognize that Congress in providing protection for securities issuers is furthering the societal goal of capital formation.

[35] S. REP. NO. 104-98, at 16; *see also* 17 C.F.R. § 230.175 (2011).

Rule 175 did not provide meaningful protection. [36]

Along with the initial statutory safe harbor in Rule 175, courts created the judicial "bespeaks caution" doctrine[37] that provides safe harbor for forward-looking statements accompanied by cautionary language. [38] Under the bespeaks caution doctrine, the alleged misstatements of the defendant issuer are deemed immaterial as a matter of law if a "document's forecasts, opinions or projections are accompanied by meaningful cautionary statements" and "the forward-looking statements will not form the basis for a securities fraud claim if those statements did not affect the 'total mix' of information the document provided investor."[39] As such, courts can dismiss securities fraud actions for failure to state a claim or on a motion to dismiss as a matter of law provided that the challenged statements looked forward, and cautionary language accompanied the statement.[40] Essentially, the PSLRA codified the bespeaks caution doctrine and adopted language from judicial opinions and SEC Rule 175.[41]

B. Safe Harbor For Forward-Looking Statements Under the PSLRA

Statutory language is the appropriate starting point for analyzing the safe harbor protection under the PSLRA. Three "inlets" are available to securities issuers making forward-looking statements[42]:

(c) Safe Harbor—

[36] S. REP. NO. 104-98, at 16.

[37] *See In re* Donald J. Trump Casino Sec. Litig.-Taj Mahal Litig., 7 F.3d 357 (3d Cir. 1993) ("When an offering document's forecasts, opinions, or projections are accompanied by meaningful cautionary statements, the forward-looking statements will not form the basis for a securities fraud claim if those statements did not affect the "total mix" of information the document provides investors. In other words, cautionary language, if sufficient, renders the alleged omissions or misrepresentations immaterial as a matter of law").

[38] *Id.*; *See, e.g.*, *In re* Worlds of Wonder Sec. Litig., 35 F.3d 1407 (9th Cir. 1994); Rubinstein v. Collins, 20 F.3d 160 (5th Cir. 1994); Kline v. First W. Gov't Sec., Inc., 24 F.3d 480 (3d Cir. 1994); Sinay v. Lamson & Sessions Co., 948 F.2d 1037 (6th Cir. 1991); I. Meyer Pincus & Assoc. v. Oppenheimer & Co., 936 F.2d 759 (2d Cir. 1991); Romani v. Shearson Lehman Hutton, 929 F.2d 875 (1st Cir. 1991); Luce v. Edelstein, 802 F.2d 49 (2d Cir. 1986).

[39] *Trump Casino*, 7 F.3d at 371.

[40] Donald C. Langevoort, *Disclosures that "Bespeak Caution,"* 49 BUS. LAW. 481, 482–83 (1994).

[41] S. REP. NO. 104-98, at 43; *see also* Ann Morales Olazabal, *False Forward-Looking Statements and the PSLRA's Safe Harbor*, 86 IND. L.J. 595, 618 n.87 (2011).

[42] Edward J. Goodman Life Income Trust v. Jabil Circuit, Inc., 594 F.3d 783, 795 (11th Cir. 2010).

> (1) In general—[In any private action under Rule 10b-5, a securities issuer] shall not be liable with respect to any forward-looking statement, whether written or oral, if and to the extent that—
>
> (A) the 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; or
>
> (ii) immaterial; *or*
>
> (B) the plaintiff fails to prove that the forward-looking statement—
>
> (i) . . . was made with actual knowledge by that person that the statement was false or misleading . . . ."[43]

Significantly, Congress drafted the three inlets of the safe harbor to be disjunctive.[44] That is, a securities issuer need only find one inlet to the safe harbor, rather than having to enter all three.[45]

1. *First Inlet: Forward-Looking Statements Accompanied by Meaningful Cautionary Language*

The first inlet is an affirmative protective method for securities issuers. If an issuer makes it clear that his forward-looking statement is about future events, and if the statement is accompanied by meaningful cautionary language that identifies "important factors", then the statement is protected from 10b-5 claims.

"Forward-looking statements" are those statements identified by linguistic cues like "we expect" or "we believe" that are combined with an explanatory description of the company's intent to designate the statement as a forward-looking statement.[46] Forward-looking

[43] Securities Act of 1933 § 27A, 15 U.S.C. § 77z-2 (2006) (emphasis added).

[44] Slayton v. Am. Express Co., 604 F.3d 758, 766 (2d Cir. 2010) ("The safe harbor is written in the disjunctive; that is, a defendant is not liable if the forward-looking statement is identified and accompanied by meaningful cautionary language or is immaterial or the plaintiff fails to prove that it was made with actual knowledge that it was false or misleading."). *Contra* Freeland v. Iridium World Commc'ns, 545 F. Supp. 2d 59, 71 (D.D.C. 2008) ("No degree of cautionary language will innoculate statements that defendants knew were simply not true when made . . . .").

[45] *See generally* Olazabal, *supra* note 41, at 602.

[46] *Slayton*, 604 F.3d at 769; *see also* Amicus Curiae Brief for Securities and Exchange Commission at 2, Slayton v. Am. Express Co., 604 F.3d 758 (2d Cir. 2010) (No. 08-5442-cv), 2010 U.S. 2nd Cir. Briefs LEXIS 38 at *3 (explaining that including a note at the end of a securities filing which includes "[t]he words

continued . . .

statements include, but are not limited to, statements "containing a projection of revenues, income (including income loss), earnings (including earnings loss) per share, capital expenditures, dividends, capital structure, or other financial items."[47] Generally, a statement of future economic performance, or management's plans or objectives are forward-looking statements.[48] Courts have said that "meaningful cautionary statements" are those warning statements that are sufficient to allow an investor to make an intelligent investment decision based on his or her preference for risk.[49] The PSLRA Conference Report states that "[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 information about the issuer's business."[50]

Under the PSLRA, issuers do not have to identify all the factors that could cause actual results to differ materially from projections.[51] Issuers are also not required to identify the actual factor that causes results to differ.[52] Courts, however, have enforced the Conference Committee's instruction that "boilerplate" warnings that do not change as the risks to the company change are not meaningful cautionary statements.[53] "[C]autions must be tailored to the risks that accompany the particular projections."[54]

Controversially, where issuers' forward-looking statements are accompanied by meaningful cautionary language, courts have generally held that the issuers' actual knowledge and state of mind is irrelevant.[55] The court in *Harris v. Ivax Corp.*[56] reached this

'believe', 'expect', 'anticipate', 'optimistic', 'intend', 'aim', 'will', 'should' and similar expressions are intended to identify such forward-looking statements" generally should be sufficient to identify as forward-looking a statement that uses these words.").

[47] Securities Exchange Act of 1934 § 21E, 15 U.S.C. § 78u-5 (2006).

[48] *Id.*

[49] *See* Harris v. Ivax Corp., 182 F.3d 799, 807 (11th Cir. 1999).

[50] H.R. REP. NO. 104-369, at 43 (1995) (Conf. Rep.), *reprinted in* 1995 U.S.C.C.A.N. 730, 742.

[51] *Id.* at 44.

[52] *Id.* (explaining that the conference report, moreover, that accompanied the PSLRA specified that "[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."); *see also Harris*, 182 F.3d at 807.

[53] Asher v. Baxter Int'l Inc., 377 F.3d 727, 732 (7th Cir. 2004); H.R. REP. NO. 104-369, at 44 (1995) (Conf. Rep.), *reprinted in* 1995 U.S.C.C.A.N. 730, 743 (explaining "[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.").

[54] *Asher*, 377 F.3d at 732.

[55] *Harris*, 182 F.3d at 803.

conclusion by looking to the disjunctive language of the PSLRA.[57] Most significant to the analysis here, the conference report explicitly said that courts *should no*t inquire into the state of mind of the issuer at the time of the statement.[58] The cautionary statement requirement is meant to give investors more information "and not to provide an opportunity for plaintiff counsel to conduct discovery on what factors were known to the issuer at the time the forward-looking statement was made."[59] Although the terms "meaningful" and "important" are not defined in the statute, Congress intended these terms to create a standard on which a court could decide a 10b-5 case upon a motion to dismiss.[60]

2. *Second Inlet: Immateriality*

The second inlet bars challenges to immaterial statements.[61] Immaterial statements are those statements on which an investor could not reasonably rely, such as puffery.[62] "[S]tatements of subjective analysis or extrapolations, such as opinions, motives and intentions, or general statements of optimism . . . constitute no more than 'puffery' and are understood by reasonable investors as such."[63]

3. *Third Inlet: Heightened Scienter Pleading Under the PSLRA*

Plaintiffs alleging securities fraud under Rule 10b-5 must satisfy the PSLRA's heightened pleading requirements "by stating with particularity the circumstances constituting fraud."[64] Proof of scienter is a required element of a securities fraud claim under Rule 10b-5, therefore "a complaint 'must state with particularity facts giving rise to a strong inference that the defendant acted with the required state of

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[56] *Id.*

[57] *Id.* Courts cite the fact that Congress linked the clauses of the safe harbor with the word "or" rather than the word "and." *See* Slayton v. Am. Express Co., 604 F.3d 758, 766 (2d Cir. 2010); *see also* Southland Sec. Corp. v. INSpire Ins. Solutions, Inc., 365 F.3d 353, 371–72 (5th Cir. 2004).

[58] H.R. REP. NO. 104-369, at 44 (1995) (Conf. Rep.), *reprinted in* 1995 U.S.C.C.A.N. 730, 743 (emphasis added).

[59] *Id.*

[60] *Id.*

[61] The "immateriality prong" is not relevant to the analysis in this Comment and will not be addressed.

[62] *See In re* Aetna, Inc. Sec. Litig., 617 F.3d 272, 283 (3d Cir. 2010).

[63] *Id.* (citing *In re* Advanta Corp. Sec. Litig., 180 F.3d 525 (3d Cir. 1999) (citation omitted)).

[64] Slayton v. Am. Express Co., 604 F.3d 758, 766 (2d Cir. 2010).

mind.'"[65] This heightened standard is a significant obstacle for 10b-5 claims. A complaint will only survive if a reasonable person could make a strong inference as to the issuer's intent to commit fraud.[66] "The 'strong inference' [of scienter] . . . is met when the inference of fraud is at least as likely as any non-culpable explanations offered."[67] Significantly, many 10b-5 claims will be dismissed at the pleading stage because the PSLRA scienter pleading standard is higher than notice pleading under Federal Rule of Civil Procedure 8.[68]

IV. **PSLRA PROBLEM: WHAT IS AN "IMPORTANT FACTOR"?**

Congress's contradictory instructions in the PSLRA's statutory language and legislative intent have created a confusing situation for courts when issuers make forward-looking statements about "important factors" that the issuer actually knows will materially affect results. That is, where the company warns of future occurrences that may already be certain. This Comment analyzes such situations, but first it is necessary to clarify and explain the issue.

The Second Circuit Court of Appeals first identified the issue in *Slayton v. American Express Co.*[69] In *Slayton*, American Express disclosed that "[t]otal losses on [American Express's high-yield] investments for the remainder of 2001 are expected to be substantially lower than in the first quarter."[70] Along with this forward-looking statement, the company included the warning "[f]actors that could cause actual results to differ materially from these forward-looking statements include . . . potential deterioration in the high-yield sector, which could result in further losses in AEFA's investment portfolio."[71] The court concluded that the facts as alleged by the plaintiffs indicated that at the same time American Express warned of *potential* deterioration in the high-yield investments, it knew of *actual* deterioration.[72] In other words, at the time of the statement American Express actually knew the statement was false.

The Second Circuit had a difficult time reconciling Congress's

[65] *Id.* (quoting the statutory language from Securities Exchange Act of 1934 § 21D, 15 U.S.C. § 78u-4(b)(2) (2006).

[66] *See id.*; Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 324 (2007).

[67] *Slayton*, 604 F.3d at 766 (citing *Tellabs, Inc.*, 551 U.S. at 324).

[68] FED. R. CIV. P. 8.

[69] *Slayton*, 604 F.3d at 770–71.

[70] *Id.* at 768 (citation omitted).

[71] *Id.* at 769 (citation omitted).

[72] *Id.* at 769 (emphasis in original).

explicit prohibition of inquiry into American Express's state of mind[73] with the likelihood that it had actual knowledge of high-yield portfolio deterioration. The court recognized the inherent contradiction that the safe harbor seemingly protects lies, so long as the lies are accompanied by warnings that the statements might not be true.[74] Rather than focusing on American Express's actual knowledge, the court instead focused on the meaning of "important" in the first inlet of the safe harbor.[75] Setting out the issue, the court said:

> We find Congress's directions difficult to apply in this case. On the one hand, the Conference Report makes quite plain that it does not want courts to inquire into a defendant's state of mind, i.e., a defendant's knowledge of the risks at the time he made the statements. At the same time, however, the Conference Report requires cautionary statements to convey substantive information about factors that realistically could cause results to differ materially from projections.[76]

Significant to the analysis here, the Second Circuit identified the logical inconsistency that in assessing whether an issuer has identified the "important factors" under the inlet, some reference by which to determine the realistic factors at the time the statement is necessary.[77] Calling it a "thorny issue," the *Slayton* court avoided deciding the case based on the contradictory legislative intent, and invited Congress to give further clarity to guide courts in deciding whether an issuer has identified "important factors."[78]

Only one other court has discussed the PSLRA safe harbor contradiction, and it too failed to put forth a useful standard. In *In re SeeBeyond*, the plaintiffs brought a 10b-5 claim against a security issuer, a technology company, which included an allegation that forward-looking statements made in a press release were not accompanied by meaningful cautionary language.[79] Unlike the *Slayton* court, however, the Central District of California in *SeeBeyond* delved into the "thorny issue" of whether or not an inquiry

[73] *Id.* at 771 (citing H.R. REP. NO. 104-369, at 44 (1995) (Conf. Rep.), *reprinted in* 1995 U.S.C.C.A.N. 730, 743).
[74] *Id.* at 772.
[75] *Id.* at 770–71.
[76] *Id.* at 771.
[77] *Id.*
[78] *Id.* at 772.
[79] *See In re* SeeBeyond Techs. Corp. Secs. Litig., 266 F. Supp. 2d 1150 (C.D. Cal. 2003).

is allowed in to the speaker's state of mind.[80] In dicta, the court said "something like a 'state of mind' element in [the first inlet] is already clearly present in the statute. Whether cautionary language is meaningful in that it identifies important factors, can only be understood with reference to the defendant's knowledge of relevant factors."[81] In other words, the *SeeBeyond* court made the same point that the *Slayton* court made: it is impossible to determine what is important without looking in to the state of mind of the speaker. The *SeeBeyond* court backed up that assertion by arguing that the proper standard is *not* an objective inquiry that excludes looking into the speaker's state of mind:

> whether a specific factor is "important" . . . should not be evaluated by an objective standard (i.e. what the defendant should have known). If an objective standard is adopted for determining whether a factor is "important," then it seems this would *heighten* the bar of the first prong of the safe harbor provision, making it more difficult for defendants to take advantage of its grant of immunity.[82]

Instead, the court said a subjective inquiry "with reference to those factors of which the speaker is aware—things that the speaker believes may cause actual results to vary" is the correct standard.[83] The *SeeBeyond* approach, which contradicts Congress's instruction and allows inquiry into the speaker's state of mind, is in the minority.[84]

A. PSLRA Interpretation

The *Slayton* court's argument is crucial to the analysis in this Comment, and to understand its importance the argument must be considered in the broader context of PSLRA debate. From the start, the PSLRA and its safe harbor have been controversial.[85] Lending to

[80] *Id.* at 1165–66 n.8.

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] The Second, Fifth, Sixth, and Eleventh Circuits have all held that so long as the language accompanying the forward-looking statements is meaningful, the speaker's state of mind is irrelevant. *See* Slayton v. Am. Express Co., 604 F.3d 758, 771 (2d Cir. 2010); Edward J. Goodman Life Income Trust v. Jabil Circuit, Inc., 594 F.3d 783 (11th Cir. 2010); Miller v. Champion Enters. Inc., 346 F.3d 660, 678 (6th Cir. 2003); Harris v. Ivax Corp., 182 F.3d 799, 807 (11th Cir. 1999).

[85] A WestLaw search for citing references to 15 U.S.C. § 78u-5 (Application of safe harbor for forward-looking statements) produces an astounding 6938 hits; one early case recognizing potential problems with the PSLRA and the bespeaks caution doctrine held that a warning was not meaningful if it made "a representation of

continued . . .

this controversy is the fact PSLRA protection may be challenged on many different grounds including: whether a statement meets the heightened scienter pleading, [86] whether statements are forward-looking, [87] whether statements are "accompanied by" cautionary statements,[88] whether statements are meaningful,[89] and even whether the inlets of the safe harbor are disjunctive.[90] Therefore, it is helpful to see that the issue being analyzed here—the meaning of "important factors" in the PSLRA statutory text—is just one question in the broader field of PSLRA interpretation. The significance of the *Slayton* court's argument is that in all of the commentary, academic literature, litigation, and interpretation of the PSLRA, no one has suggested or even identified a solution to the contradictory instructions in the PSLRA safe harbor. The *Slayton* court came the closest, but it merely identified the issue, not a solution.

B. What Does the Term "Important Factors" Mean?

The central issue to the analysis in this Comment is: what does the term "important factors" mean in the context of the PSLRA safe harbor? First, the statutory text should guide the interpretation of the term "important factors."[91] But in this case, the statutory language is not helpful because of the contextual reasons raised in *Slayton*. The language of the statute explains that important factors are those "that could cause actual results to differ materially from those in the forward-looking statement."[92] From the statutory language, it can be deduced that important factors are those with more than a de minimis probability of affecting results. However, there is no objective standard to guide the inquiry. Many 10b-5 cases are close cases that turn on a measure of a factor's importance. An undefined standard is not helpful in those cases.

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present fact," such close cases are typical of those falling under the PSLRA safe harbor. Shaw v. Digital Equip. Corp., 82 F.3d 1194, 1213 (1st Cir. 1996).

[86] Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308 (2007).

[87] *In re* Smith & Wesson Holding Corp. Sec. Litig., 604 F. Supp. 2d 332 (D. Mass. 2009).

[88] Asher v. Baxter Int'l Inc., 377 F.3d 727 (7th Cir. 2004).

[89] Rombach v. Chang, 355 F.3d 164, 173 (2d Cir. 2004).

[90] *See* Lormand v. U.S. Unwired, Inc., 565 F.3d 228, 244–45 (5th Cir. 2009) (holding that defendants who have actual knowledge may not obtain the benefit of the safe harbor). *Contra* Edward J. Goodman Life Income Trust v. Jabil Circuit, Inc., 594 F.3d 783 (11th Cir. 2010); Miller v. Champion Enters. Inc., 346 F.3d 660, 672 (6th Cir. 2003); Harris v. Ivax Corp., 182 F.3d 799 (11th Cir. 1999) (holding that if a statement is accompanied by meaningful cautionary language, the defendant's state of mind is irrelevant).

[91] Slayton v. Am. Express Co., 604 F.3d 758, 770–71 (2d Cir. 2010).

[92] Securities Exchange Act of 1934 § 21E, 15 U.S.C. § 78u-5 (2006).

Second, as courts have pointed out, where the statutory language is not dispositive the analysis should turn to the legislative history.[93] The Committee Report says that important factors are those "that realistically could cause results to differ materially from those projected in the forward-looking statement, such as information about the issuer's business."[94] Congress then provided that "'[i]mportant factors means the stated factors identified in the cautionary statement 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."[95] As pointed out in *Slayton*, even though Congress provided this guidance, it fails to define the term "important factors."[96] Courts have latched on to Congress's one concrete example of what is *not* a "meaningful cautionary statement about important factors." The Committee Report makes clear that "boilerplate warnings" are not meaningful cautionary statements about important factors.[97] The objective nature of this one congressional instruction has made it an attractive ground to base decisions on what constitutes a meaningful cautionary statement about an important factor.[98] Although Congress provided the boilerplate carve-out, neither the statutory text nor the legislative history defines "important factors."

With no guidance from Congress on the meaning of "important factors" and a lack of resolution from the two courts that have analyzed the meaning of importance, we are left only to outside sources to try to determine the meaning of "important." Merriam-Webster's Dictionary defines important as "marked by or indicative of significant worth or consequence."[99] This leads to the question: in the context of the PSLRA, what circumstances make a factor have significant worth? According to the arguments in *Slayton* and

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[93] *Slayton*, 604 F.3d at 771 (holding that "[t]he conference report 'is generally the most reliable evidence in legislative history of congressional intent because it represents the final statement of the terms agreed to by both houses.'" (quoting Auburn Hous. Auth. v. Martinez, 277 F.3d 138, 147 (2d Cir. 2002)).

[94] H.R. REP. NO. 104-369, at 43 (1995) (Conf. Rep.), *reprinted in* 1995 U.S.C.C.A.N. 730, 742.

[95] *Id.*at 43–44.

[96] *See Slayton*, 604 F.3d at 770.

[97] H.R. REP. NO. 104-369, at 43.

[98] *See* Asher v. Baxter Intern. Inc., 377 F.3d 727, 732–33 (7th Cir. 2004); W. Pa. Elec Emps. Pension Trust v. Plexus Corp., No. 07C0582, 2009 WL 604276, *8–9 (E.D. Wis. March 6, 2009); *see also* Lormand v. U.S. Unwired, Inc., 565 F.3d 228, 244–45 (5th Cir. 2009); Desai v. Gen. Growth Props., Inc., 654 F. Supp. 2d 836, 844–46, 56 (N.D. Ill. 2009).

[99] Important Definition, MERRIAM-WEBSTER'S ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/important (last visited Oct. 8, 2011).

SeeBeyond, that question must be answered by looking at the speaker's state of mind.[100] As already discussed, however, Congress has prohibited this kind of inquiry. Clearly then, determining exactly what factors Congress intended securities issuers to disclose along with forward looking statements is not an easy analysis, and the courts have struggled with it.

V. PROPOSAL: AN ALTERNATE PERSPECTIVE

Difficulty in dealing with the definition of "important factors" may stem from the fact that, almost uniformly, courts seem to have forgotten to consider the perspective that matters most: the investor's. In the many cases that turned on whether a statement was "meaningful," whether a factor was "important," or whether results might be "materially" different, the investor's perspective was often overlooked. That is, courts have failed to take a practical approach by asking "what would matter to an investor?" Instead, courts have focused on congressional intent and other legal analyses, which have failed to provide any clear guidance. Failure to think practically is a phenomenon most likely related to the fact that judges are legal practitioners with little expertise in making investment decisions. Suffice it to say, the viewpoint of a federal judge and that of an investment professional are likely miles apart. As a result, disclosures have been judged on importance from a legal perspective and *not* the importance of the disclosed information in the investment decision.

This is an interesting result in light of the fact that Congress made it clear in the stated purposes of the PSLRA that the act was intended to increase disclosure to allow investors to make better investment decisions.[101] The Senate Report explicitly stated that the purpose of the PSLRA was to "reduce this chill on voluntary disclosures by issuers."[102] Recognizing that abusive 10b-5 lawsuits de-incentivize disclosures by securities issuers and that investors often receive less information as a result, Congress concluded that Rule 10b-5 made investing more risky in the absence of a safe harbor.[103] The goal of the PSLRA is to help investors make more informed risk assessments in their investment decisions. To meet this goal, courts should look at what factors would be important to an average investor to determine the sufficiency of disclosures under the PSLRA, rather than abstract

[100] *Slayton*, 604 F.3d at 771; *In re* SeeBeyond Techs. Corp. Secs. Litig., 266 F. Supp. 2d 1150 (C.D. Cal. 2003).
[101] S. REP. NO. 104-98, at 5 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 684.
[102] *Id.*
[103] *Id.*

legal analysis.

A. What Matters to the Reasonable Investor?

If courts should analyze the importance of factors to the reasonable investor, a foundational understanding of investing is necessary. First, the analysis should be prospective from the investor's viewpoint before the investment decision is made. Analyzing the disclosure should be made without the benefit of hindsight. Courts should only consider the factors that the investor considered before making the investment.

Second, the test should be categorical and objective[104] based on the

[104] The argument is made for an objective test despite broad agreement among courts, academics, and regulators that objective tests should be rejected in favor of fact-specific findings in 10b-5 cases. For example, SEC Staff Accounting Bulletin No. 99 rejects an objective standard in the form of a per se rule that misstatements or omissions that account for less than 5% of earnings are immaterial:

> The FASB rejected a formulaic approach to discharging "the onerous duty of making materiality decisions" in favor of an approach that takes into account all the relevant considerations. In so doing, it made clear that —
>
> [M]agnitude by itself, without regard to the nature of the item and the circumstances in which the judgment has to be made, will not generally be a sufficient basis for a materiality judgment.
>
> Evaluation of materiality requires a registrant and its auditor to consider all the relevant circumstances, and the staff believes that there are numerous circumstances in which misstatements below 5% could well be material. Qualitative factors may cause misstatements of quantitatively small amounts to be material; as stated in the auditing literature:
>
> As a result of the interaction of quantitative and qualitative considerations in materiality judgments, misstatements of relatively small amounts that come to the auditor's attention could have a material effect on the financial statements.

SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45150, 45152 (Aug. 19, 1999) (citations omitted).

The Second Circuit in *Litwin v. Blackstone Group, L.P.*, 634 F.3d 706, 716–17 (2d Cir. 2011) adopted the SEC's reasoning and guidance in SAB-99, holding that determining information's importance to an investor "is an inherently fact-specific finding, that is satisfied when a plaintiff alleges a statement or omission that a reasonable investor would have considered significant in making [an] investment decision[]."

Confusingly, however, other courts have endorsed objective tests for materiality and importance of information based on stock price reaction under the efficient markets hypothesis. In 2005, the Third Circuit decided *In re Merck & Co., Inc. Securities Litigation*, 432 F.3d 261, 269 (3d. Cir. 2005), where it explicitly held that materiality can be determined by looking at price movements in the market. "Our . . . standard for measuring the materiality of statements in an efficient market . . . holds that the 'materiality of disclosed information may be measured post hoc by looking

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investment decision-making process of the reasonable investor.[105] Necessary to this inquiry are two questions: (i) what is the reasonable investor's decision-making process, and (ii) what categorical factors should be analyzed?

Investment decision-making can take a top-down[106] or a bottom-up approach.[107] Either way, security selection is an important step and the one analyzed here. Investors invest in the expectation of future returns, yet investors also prefer to minimize risk.[108] That is, they want the highest amount of return for the least amount of risk. But, sometimes investors are willing to trade off decreased return for lesser risk or a little risk for greater return; this is known as the risk-return trade-off.[109]

While the trade-off is often made in the context of the rest of the investor's portfolio,[110] security specific risk and return will ultimately determine whether the potential investor chooses to invest. Relevant

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to the movement, in the period immediately following disclosure, of the price of the firm's stock.'") (citations omitted).

My position is supported by distinguishing between existing materiality standards outside of the PSLRA safe harbor context that reject objective tests, and the standard proposed herein which is in the context of PSLRA safe-harbor protection. For purposes of this Comment's endorsement of an objective test within the safe-harbor, SAB-99, *Litwin*, and *In re Merck* are inapposite. First, each of these rules address misstatements of past occurrences rather than forward-looking statements. Therefore, each is irrelevant to the argument here. Second, even if one wanted to apply these rules to forward-looking statements, under the PSLRA safe-harbor Congress has prohibited the sorts of fact-specific discovery that would be required to apply such rules. That is, congressional intent precludes the *Litwin* and *In re Merck* standards in the context of the PSLRA safe harbor for forward-looking statements. As a result, even though courts have rejected objective tests of materiality for *past* misstatements, objective tests of materiality and "importance" for *forward-looking* statements have not been addressed.

[105] The perspective of the reasonable investor should be used as opposed to the average investor, the term often used in determining the efficient investment frontier under the Capital Asset Pricing Model. Even though the financial literature supports using the average investor, this quagmire may be avoided by choosing to use the reasonable investor, with whom courts are already familiar. *See* Levinson v. Basic, Inc., 786 F.2d. 741 (6th Cir. 1986).

[106] Top-down investing begins with allocation between asset classes such as stocks, bonds, risk-free securities, etc., and then moves on to security selection. *See Top Down/Bottom Up*, PRAC. LAW INST. POCKET MBA, Nov. 14, 2007.

[107] Bottom-up investment strategies focus on specific securities, which appear to be attractively priced relative to their risk. *See id.*

[108] ZVI BODIE, ALEX KANE & ALAN MARCUS, INVESTMENTS 10 (7th ed. 2008).

[109] *Id.* at 11.

[110] Robert C. Illig, *The Promise of Hedge Fund Governance: How Incentive Compensation Can Enhance Institutional Investor Monitoring*, 60 ALA. L. REV. 41, 98 (2008) (explaining the modern portfolio theory which posits that the real danger to investors is the lack of sufficient diversification in the portfolio).

to the analysis here is how the investor identifies and assigns a risk measurement to the security. A reasonable investor's contemplation of investment risk is a function of four elements: possibility of a large loss, possibility of a return below target, business risk, and an investor's knowledge about an investment.[111] Risk of a large loss makes up 40% of the risk assigned to a security and includes events like loss of principal investment, a large drop in stock price, or a large negative return.[112] Possibility of a return below the target return—20% of an investor's attributable risk—is made of events like downward price fluctuations, reduction in dividend, and non-payment of interest on fixed income securities.[113] The issuer's business risks comprise 18% of an individual investor's risk attribution to a specific security.[114] Included in business risks are factors like the issuer's debt level, cost controls, competitive position in the marketplace, and industry type.[115] Finally, an investor's comfort with his knowledge about the security makes up 10% of the risk he assigns to the security.[116] Amount, quality, and timeliness of information all factor into an investor's assessment of risk associated with knowledge.[117] Conclusions to be drawn from the individual investor's risk assessment of a security include that: (i) the investor is only concerned about downside risk; (ii) the investor is most sensitive (40%) to a large loss on the investment; (iii) the investor places significant weight (18%) on issuer-specific information in the form of business risk; and (iv) the investor recognizes that his information about the security may be imperfect.[118] In focusing on what factors investors think are important, courts should implement this risk assessment information.

In light of the investor's risk assessment, the crucial question is what categorical factors should be analyzed in determining if an issuer has disclosed the required "important factors?" As addressed below, a new standard is needed to assess these "important factors."

B. A Better Standard: Categorical "Important Factors" That Matter to Investors

Based on how an investor analyzes risk, certain categorical factors

[111] Robert A. Olsen, *Investment Risk: The Experts' Perspective*, 53 FIN. ANALYSTS J. 62, 62–66, Mar.-Apr., 1997, *available at* http://www.jstor.org/stable/4479986.

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.*

are always going to be important. Therefore, an objective, "important factors" standard based on categorical factors is more workable than the contradictory instructions given by Congress. Categorical factors, as that term is used in this Comment, are absolute factors. In an objective test where the determination is binary—yes or no—categorical factors are either included or excluded based on whether they are one of the included factors. Determination of whether categorical factors have been disclosed is the opposite of a determination in which the court must weigh and consider the facts of each instance. No analysis of categorical factors is needed.

1. Factors That Could Cause Large Loss

In the context of what matters to the average investor, the most important factors are those that could cause a large loss on an investment.[119] Logically, an equity investor would be most concerned about bankruptcy, a merger or acquisition on unfavorable terms, or some other company failure.[120] In bankruptcy, common stockholders are paid last and often recoup little of their investment.[121] Moreover, in a fire sale merger, as were common during the 2007 financial crisis, shareholders may lose over 50% of their investment.[122] In other words, investors are most concerned about factors that could bring upon a failure of the company. A list of all the factors would be more than is required; it is acceptable to state that categorical factors that could bring on bankruptcy or insolvency are "important factors." Such factors are those that involve liquidity, solvency, exposure to trading risk, portfolio asset values, and other factors. Examples are the issuer's ability to refinance or redeem its debt, the ratio of the issuer's liquid assets to its outstanding debt, the ratio of the issuer's current assets to its interest due on debt, or the value-at-risk measurement.[123]

Clearly, a single set of important factors based on risk of

[119] *Id.* at 64.

[120] *Id.*

[121] *What Every Investor Should Know—Corporate Bankruptcy*, SECURITIES AND EXCHANGE COMMISSION, http://www.sec.gov/investor/pubs/bankrupt.htm (last visited Feb. 20, 2012).

[122] For instance, shares of Wachovia Bank reached $56.95 on January 1, 2007 and last traded at $5.54 per share on December 31, 2008, representing a 90.27% loss for Wachovia shareholders over a span of two years. *See* EQUITYHP (Bloomberg Finance L.P.).

[123] VAR is a statistical representation of "the most that the portfolio is likely to lose over a given time horizon except in a small percentage of circumstances." It is a standard measure of financial market risk. Matthew Pritsker, *The Hidden Dangers of Historical Simulation*, FED. RES. BOARD, June 19, 2001, *available at* http://www.federalreserve.gov/pubs/feds/2001/200127/200127pap.pdf.

insolvency or bankruptcy will not do for all publicly traded companies, but within industries, certain specific data or information can be determined objectively. For instance, in the financial services industry loan-loss ratios, capital ratios, current or liquidity ratios and revenue by operating segment will pertain to each company's risk of failure, and the question should be what information would investors looking at companies in that industry consider in their investment decision. In other words, intra-industry companies can be assessed by the same categorical factors.

For risk of large loss, a categorical factor standard is better than a subjective factor for two reasons. First, an objective test based on categorical factors gives more clarity to investors and sets expectations for the types of available investment information. Arguably, this could lead to more efficient markets because all investors are dealing with the same information contemporaneously. Second, companies would not needlessly expend resources searching for data that may expose them to 10b-5 liability. Rather, companies could be more forthcoming with information without the worry of liability, an objective of the PSLRA. [124]

2. Factors That Could Cause Below-Target Returns.

When an investor makes an investment decision, part of the risk-return trade-off is calculating the return that is required. Return is simply how much an investor will be compensated for the deployment of his funds to a certain investment. For example, an investor believes Company A's stock is undervalued at $10 per share. He believes the stock is worth at least $12 per share and that the stock will reach that price over the investment period. Further, Company A issues a $0.25 dividend every quarter. At the end of one year, the investor expects to sell his shares purchased at $10 for $12, thereby earning $2 per share. But the investor will also receive a $1 dividend. Therefore, his total return is $3 on a $10 investment, or 30%.

Calculating target return is a critical part of each investor's investment decision, and investors are sensitive to changes in target return. As a result, investors will find factors that might affect expected return to be "important factors." Below target return to the investor may result from a number of factors including a downward price fluctuation or a reduction in dividend.

Price fluctuation is a function of market supply and demand that is subject to "animal spirits"—that is, a security's price is often based on

[124] S. REP. NO. 104-98, at 5 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 684.

the market's primeval instincts rather than reason.[125] Thus, the price of a company's stock on the market is often out of the hands of the company itself. Beyond controlling capital structure, operational and business risks, the company has very little control over the price at which its stock will trade. Considering these influences, a categorical factors standard on all factors that could push prices down would be difficult implement and administer. Moreover, it is difficult to imagine how securities issuers could give a meaningful cautionary statement about market risk, other than a broad disclaimer that would say "our stock trades in the public market, its price may go down." Therefore, no standard for "important factors" should be applied to factors that could cause a downward price fluctuation other than those factors related business risk and large loss discussed herein.

On the other hand, dividend policy is also a component of target return. Dividend policy is an important consideration in the investment decision, and it is a factor within the control of individual companies. Therefore, whether or not the company envisions changes to its dividend policy can be a categorical "important factor" to investors. A binary disclosure on future changes in dividend policy can be easily disclosed by securities issuers and easily tested by courts. Therefore, a clear standard would be more efficient and workable for courts than abstract speculation into random factors that might necessitate a change of dividend policy.

3. Factors Affecting Business Risk

The third type of investment risk that investors are most concerned about is business risk.[126] Business risk is a function of revenues, expenses, taxes, interest, depreciation, and accounting measures that flow through to the income statement. The Securities and Exchange Commission already requires issuers to include a "Risk Factors" section that discusses the most significant business risk factors that make the investment speculative or risky.[127] SEC Regulation S-K is an ex ante determination of the information that investors will always find important.[128] In other words, the SEC always requires securities issuers to disclose certain information; the discretionary determination of materiality is removed from the issuer.[129] Because a disclosure requirement already exists under SEC rules, an "important factors" test

[125] JOHN M. KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY 161–62 (1936).
[126] Olsen, *supra* note 111, at 63.
[127] 17 C.F.R. § 229.503 (2011).
[128] CHOI & PRITCHARD, *supra* note 1, at 49; *see* 17 C.F.R. §229.503.
[129] *See* 17 C.F.R. § 229.503; CHOI & PRITCHARD, *supra* note 1, at 49.

looking at business risks is made easier to administer.

The same intra-industry categorical factors standard that applies to the risk of large losses, discussed above, also applies to business risk disclosures. That is, factors that could affect the earnings of one company in an industry are likely to affect the earnings of other companies in that industry. As an example, in the energy sector the price of oil is a major determinant of revenue, while crude oil purchases and production and manufacturing are major expenses.[130] Within that sector, companies could be required to disclose information on factors that might affect energy specific expenses like the amount of remaining oil in their deposits, any expenses related to bringing a new pumping platform online, or any factor affecting the company's ability to extract oil. Each of those factors could cause a below target return. Clearly then, investors would find those factors to be "important factors."

Categorical factors standards as to business risk can provide the same efficiencies discussed above: efficiency for issuers and reduced uncertainty for investors. Categorical tests do not require securities issuers to expend resources rooting out possible sources of 10b-5 liability. Meanwhile, investors can take comfort in knowing that the known business risks have been disclosed, and if not, there is a simple mechanism—the proposed categorical factor standard under Rule 10b-5—for redressing the non-disclosure. Moreover, the courts could easily administer a categorical test. Because a requirement to discuss risk factors already exists,[131] a categorical requirement for disclosing "important factors" could be administered without requiring courts to abstractly inquire into the security issuer's business.

VI. CONCLUSION

As pointed out in *Slayton*, the PSLRA contains a major flaw in the analysis of "important factors": how can a court determine what factors are important if it cannot look to the context of the statement?[132] Although the PSLRA may have been somewhat successful in fulfilling Congress's intent to curb abusive strike suits, the important factor analysis of the PSLRA safe harbor requires further development. An easier, more reliable, and more efficient method than Congress's conflicting instructions can be found in an objective test of categorical factors that investors find important. The

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[130] *See* EXXON MOBIL CORPORATION, FORM 10-K ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934 30, 64 (2011).

[131] 17 C.F.R. § 229.503.

[132] Slayton v. Am. Express Co., 604 F.3d 758, 770–71 (2d Cir. 2010).

framework for this type of test already exists, but it is up to the securities law bench to adopt the perspective they should have had all along: the investor's.