

TITLE 15 - COMMERCE AND TRADE
CHAPTER 2B - SECURITIES EXCHANGES**§ 78u-5. Application of safe harbor for forward-looking statements****(a) Applicability**

This section shall apply only to a forward-looking statement made by—

- (1) an issuer that, at the time that the statement is made, is subject to the reporting requirements of section 78m (a) of this title or section 78o (d) of this title;
- (2) a person acting on behalf of such issuer;
- (3) an outside reviewer retained by such issuer making a statement on behalf of such issuer; or
- (4) an underwriter, with respect to information provided by such issuer or information derived from information provided by such issuer.

(b) Exclusions

Except to the extent otherwise specifically provided by rule, regulation, or order of the Commission, this section shall not apply to a forward-looking statement—

- (1) that is made with respect to the business or operations of the issuer, if the issuer—
 - (A) during the 3-year period preceding the date on which the statement was first made—
 - (i) was convicted of any felony or misdemeanor described in clauses (i) through (iv) of section 78o (b)(4)(B) of this title; or
 - (ii) has been made the subject of a judicial or administrative decree or order arising out of a governmental action that—
 - (I) prohibits future violations of the antifraud provisions of the securities laws;
 - (II) requires that the issuer cease and desist from violating the antifraud provisions of the securities laws; or
 - (III) determines that the issuer violated the antifraud provisions of the securities laws;
 - (B) makes the forward-looking statement in connection with an offering of securities by a blank check company;
 - (C) issues penny stock;
 - (D) makes the forward-looking statement in connection with a rollup transaction; or
 - (E) makes the forward-looking statement in connection with a going private transaction; or
- (2) that is—
 - (A) included in a financial statement prepared in accordance with generally accepted accounting principles;
 - (B) contained in a registration statement of, or otherwise issued by, an investment company;
 - (C) made in connection with a tender offer;
 - (D) made in connection with an initial public offering;
 - (E) made in connection with an offering by, or relating to the operations of, a partnership, limited liability company, or a direct participation investment program; or
 - (F) made in a disclosure of beneficial ownership in a report required to be filed with the Commission pursuant to section 78m (d) of this title.

(c) Safe harbor**(1) In general**

Except as provided in subsection (b) of this section, 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, a person referred to in subsection (a) of this section 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) if made by a natural person, was made with actual knowledge by that person that the statement was false or misleading; or
 - (ii) if made by a business entity;¹ was—
 - (I) made by or with the approval of an executive officer of that entity; and
 - (II) made or approved by such officer with actual knowledge by that officer that the statement was false or misleading.

(2) Oral forward-looking statements

In the case of an oral forward-looking statement made by an issuer that is subject to the reporting requirements of section 78m (a) of this title or section 78o (d) of this title, or by a person acting on behalf of such issuer, the requirement set forth in paragraph (1)(A) shall be deemed to be satisfied—

- (A) if the oral forward-looking statement is accompanied by a cautionary statement—
 - (i) that the particular oral statement is a forward-looking statement; and
 - (ii) that the actual results might differ materially from those projected in the forward-looking statement; and
- (B) if—
 - (i) the oral forward-looking statement is accompanied by an oral statement that additional information concerning factors that could cause actual results to materially differ from those in the forward-looking statement is contained in a readily available written document, or portion thereof;
 - (ii) the accompanying oral statement referred to in clause (i) identifies the document, or portion thereof, that contains the additional information about those factors relating to the forward-looking statement; and
 - (iii) the information contained in that written document is a cautionary statement that satisfies the standard established in paragraph (1)(A).

(3) Availability

Any document filed with the Commission or generally disseminated shall be deemed to be readily available for purposes of paragraph (2).

(4) Effect on other safe harbors

The exemption provided for in paragraph (1) shall be in addition to any exemption that the Commission may establish by rule or regulation under subsection (g) of this section.

(d) Duty to update

Nothing in this section shall impose upon any person a duty to update a forward-looking statement.

(e) Dispositive motion

On any motion to dismiss based upon subsection (c)(1) of this section, the court shall consider any statement cited in the complaint and any cautionary statement accompanying the forward-looking statement, which are not subject to material dispute, cited by the defendant.

(f) Stay pending decision on motion

In any private action arising under this chapter, the court shall stay discovery (other than discovery that is specifically directed to the applicability of the exemption provided for in this section) during the pendency of any motion by a defendant for summary judgment that is based on the grounds that—

- (1) the statement or omission upon which the complaint is based is a forward-looking statement within the meaning of this section; and
- (2) the exemption provided for in this section precludes a claim for relief.

(g) Exemption authority

In addition to the exemptions provided for in this section, the Commission may, by rule or regulation, provide exemptions from or under any provision of this chapter, including with respect to liability that is based on a statement or that is based on projections or other forward-looking information, if and to the extent that any such exemption is consistent with the public interest and the protection of investors, as determined by the Commission.

(h) Effect on other authority of Commission

Nothing in this section limits, either expressly or by implication, the authority of the Commission to exercise similar authority or to adopt similar rules and regulations with respect to forward-looking statements under any other statute under which the Commission exercises rulemaking authority.

(i) Definitions

For purposes of this section, the following definitions shall apply:

(1) Forward-looking statement

The term “forward-looking statement” means—

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

(2) Investment company

The term “investment company” has the same meaning as in section 80a-3 (a) of this title.

(3) Going private transaction

The term “going private transaction” has the meaning given that term under the rules or regulations of the Commission issued pursuant to section 78m (e) of this title.

(4) Person acting on behalf of an issuer

The term “person acting on behalf of an issuer” means any officer, director, or employee of such issuer.

(5) Other terms

NB: This unofficial compilation of the U.S. Code is current as of Jan. 5, 2009 (see <http://www.law.cornell.edu/uscode/uscpri.html>).

The terms “blank check company”, “rollup transaction”, “partnership”, “limited liability company”, “executive officer of an entity” and “direct participation investment program”, have the meanings given those terms by rule or regulation of the Commission.

Footnotes

¹ So in original. The semicolon probably should be a comma.

(June 6, 1934, ch. 404, title I, § 21E, as added Pub. L. 104–67, title I, § 102(b), Dec. 22, 1995, 109 Stat. 753.)

References in Text

This chapter, referred to in subsecs. (c)(1), (f), and (g), was in the original “this title”. See References in Text note set out under section 78a of this title.

Effective Date

This section not to affect or apply to any private action arising under this chapter or title I of the Securities Act of 1933 (15 U.S.C. 77a et seq.), commenced before and pending on Dec. 22, 1995, see section 108 of Pub. L. 104–67, set out as an Effective Date of 1995 Amendment note under section 771 of this title.

Construction

Nothing in section to be deemed to create or ratify any implied right of action, or to prevent Commission, by rule or regulation, from restricting or otherwise regulating private actions under this chapter, see section 203 of Pub. L. 104–67, set out as a note under section 78j–1 of this title.