

Cooley

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On October 6, 2011, The Honorable Marsha J. Pechman issued an opinion in *In re Coinstar Securities Litigation*, Case No. C11-133 MJP (W.D. Washington Oct. 6, 2011) that serves as a stark warning to public companies not to forget to verbalize safe harbor warnings at the beginning of *any* oral presentation containing forward-looking statements.

In *Coinstar*, plaintiffs alleged that defendants had violated Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5, by making false and misleading statements concerning Coinstar's fourth quarter and fiscal year 2010 revenue projections. The Court granted-in-part and denied-in-part defendants' motion to dismiss. The Court dismissed allegations pertaining to projections made during a conference call where Coinstar had verbally provided safe harbor warnings, but denied the motion to dismiss as to a later oral statement reiterating the projections where Coinstar failed to provide a verbal safe harbor warning.

The PSLRA "safe harbor"

The Private Securities Litigation Reform Act of 1995 (the "PSLRA") created a statutory "safe harbor" for forward-looking statements. The safe harbor contains three separate tests. If any one of the tests is met, the statement cannot give rise to liability. Under the first test, a forward-looking statement is protected if it is identified as such and "accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement." Under the second test, the statement is protected if it is immaterial. Under the third test, it is protected if the plaintiff is unable to prove that the statement was made with actual knowledge that it was false.

If the forward-looking statement is accompanied by meaningful cautionary statements, then a defendant's state of mind is irrelevant. That is, a defendant could knowingly make a false projection, but so long as the statement was identified as a forward-looking statement and accompanied by meaningful cautionary language, no liability would attach.

The *Coinstar* decision

In *Coinstar*, the Court dismissed plaintiffs' allegations that defendants made false and misleading statements regarding Coinstar's fourth quarter and fiscal year 2010 revenue projections during the company's third-quarter earnings call. The Court reviewed the transcript of the conference call and held that these statements were protected by the PSLRA's safe harbor because Coinstar verbally warned investors during the call that actual results might differ materially from Coinstar's projections and referred investors to Coinstar's most recent 10-K and 10-Q for a full list of risk factors. The Court noted that under the PSLRA's safe harbor, oral forward-looking statements do not need to be accompanied by meaningful cautionary language if they are accompanied by a warning that actual results may differ materially from the forward-looking statements, and the warning is accompanied by an oral statement referring people to a readily available written document, such as a 10-K or 10-Q, that contains adequate cautionary language. *Because Coinstar complied with these requirements, the Court did not make any inquiry into whether Coinstar knew the statements were false at the time they were made.* Instead, the Court dismissed the allegations regarding forward-looking statements made during the third-quarter earnings call.

The Court then reviewed virtually identical statements made by Coinstar a few weeks later at a subsequent conference. The Court reviewed the transcript of the conference and determined that these statements were *not* protected by the PSLRA's safe harbor because they were *not* accompanied by a verbal warning and there was no oral statement referring investors to a 10-Q or 10-K that

contained cautionary language. Defendants requested that the Court take judicial notice of a PowerPoint slide that was displayed at the conference which provided a warning and referred investors to the company's SEC filings for more detailed cautionary language. The Court refused to take judicial notice of the slide because plaintiffs contested its authenticity. As a result, the Court relied on the conference transcript alone and held that the forward-looking statements were not protected by the safe harbor because the transcript was devoid of an oral safe harbor warning.

Lessons learned

It remains to be seen whether other courts will adopt the *Coinstar* court's analysis, or whether that analysis is correct, but public companies would be well served by strictly adhering to best practices when making both written and oral statements to the market. Although it might seem tedious to walk through safe harbor warnings at the beginning of every conference call, it is important that companies orally state that actual results may differ materially from any forward-looking statements and refer listeners to readily available written documents, such as SEC filings, which contain adequate cautionary language. Merely displaying a slide without any verbal statement puts a company at risk of not obtaining safe harbor protection.

Financial analysts, institutional investors and other market participants are used to, and expect, robust cautionary language that addresses company specific risks. Generic or boilerplate cautionary language is insufficient to obtain protection of the PSLRA's safe harbor. It is essential for companies to make sure that SEC filings, such as 10-K's and 10-Q's, contain such language. Shareholder letters, press releases and other written company communications should also contain meaningful cautionary language, as well as refer to and incorporate SEC filings with broader risk factor disclosure. In addition, companies must be alert to the need to change disclosure language when the nature of the risks changes.

Finally, when making forward-looking statements, it is best to avoid "puffing" optimism, vague statements or hyperbole. Rather, companies should focus on hard data and pay strict adherence to the requirements of the safe harbor for maximum protection.

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