Risk Factor Disclosures in Private Securities Offerings

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Risk factors are cautionary statements about risks a company may face that could have a material adverse impact on its business, securities, financial condition, and, among others, the results of operations.[1] These cautionary statements are viewed by many securities practitioners as a form of "insurance" to mitigate civil, regulatory, and potentially even criminal liability in securities offerings. Naturally, successful ventures are viewed as the product of savvy investing and failed ventures as a product of fraud. Armed with hindsight, investors may pursue issuers and their management for fraud-based claims when their investments perform less desirably than expected. Unfortunately, when the investor suits come, or the referrals to regulatory authorities occur, the invested capital has already been expended and rescission may not be an option. Risk factors now become applicable and the offering documents will likely be viewed for determination whether all material information had been disclosed, whether the disclosures were accurate, and whether the risks that materialized were foreseeable. This memorandum is prepared for issuers and their general legal counsel as a guide on the applicable disclosure requirements for private securities offerings. This should not be construed as legal advice and is not exhaustive, but may be viewed as a helpful reference with assistance in initial drafting or simply subsequent verification.[2] We will first provide an overview on the scope and types of required disclosures for risk factors as well as information on the general duty of disclosure in private securities offerings. We then turn to discussion on the applicable law and types of legal claims raised, along with the pleading requirements, for securities lawsuits. This section is followed by pertinent discussion on the "safe harbor" for forward looking statements and compliance requirements in disclosing meaningful cautionary language in opinions and projections. Finally, we conclude the memorandum with a practitioner's perspective on defending civil securities fraud claims and regulatory enforcement actions.

1 Regulation S-K, 17 C.F.R. §229.100, et. seq. governs the required disclosures for the preparation of registration statements, but should be consulted for the disclosure of material information in private securities offerings.

2 The memorandum is provided with citation to precedent of the states of New York and Florida and the corresponding U.S. Courts for the Second and Eleventh federal judicial circuits. The authors are admitted to practice law in New York and Florida and, in conjunction with locally admitted attorneys, the group may provide assistance on a national basis.

RISK FACTORS - SCOPE AND TYPES OF REQUIRED DISCLOSURES

The scope and required disclosure necessary regarding risk factors is set forth, vaguely, under promulgated rule 503(c) of Regulation S-K, 17 C.F.R. §229.503(c); see also *In re WorldCom, Inc. Sec. Litig.*, 346 F. Supp. 2d 628, 690-691 (S.D.N.Y. 2004)(noting that the SEC guidance surrounding the content of Item 503 has been limited, but concurrently noting that the inclusion of a risk factor section, although voluntary, has widely become accepted as a sound and prudent defensive measure); citing 2 Alan R. Bromberg & Lewis D. Lowenfels, *Bromberg & Lowenfels on Securities Fraud and Commodities Fraud* §5:280 (2d ed. 2001). The rule provides that "where appropriate," the most significant risk factors that make an offering speculative or risky must be disclosed under a caption entitled "Risk Factors." The risk factors may include, among others, the issuer's (1) lack of operating history, (2) lack of profitable operations in recent periods, (3) financial position, (4) business or proposed business, and/or (5) the lack of a market for the common securities or securities convertible into common. *In re WorldCom, Inc. Sec. Litig.* at 690. The risk factors must be organized logically, be concise, and not present risks that could apply to any issuer or securities offering. *Id.*; see also U.S. Securities and Exchange Commission, Division of Corporation Finance: *Updated Staff Legal Bulletin No. 7, Plain English Disclosure*, https://www.sec.gov/interps/legal/cfslb7a.htm; 1999 SEC Lexis 2791 (June 7, 1999)(discussing Item 503(c) and the applicability of the "Plain English" requirements to risk factor disclosure). The Commission then expanded on the guidance and provided that risk factor disclosure can be loosely separated into three broad categories: (1) industry risk, (2) company risk, and (3) investment risk. *Id.*

The disclosures set forth under Item 503 are broad in scope and liability for failure to disclose material facts will depend upon whether other required disclosures were made. See *Panther Partners, Inc. v. Ikanos Communs., Inc.*, 538 F. Supp. 2d 662, 668-669, 2008 U.S. Dist. LEXIS 18536 (S.D.N.Y. 2008)(noting that Item 303(a)(3)(ii) of Regulation S-K requires disclosure of any known trends or uncertainties that would materially affect the amount of income from a company's continuing operations);[3] see also *Seow Lin v. Interactive Brokers Group, Inc.*, 574 F. Supp. 2d 408, 416-417 (S.D.N.Y. 2008). However, no amount of general cautionary language can protect a company from a failure to disclose a specific, known risk or a risk that has already occurred. *Id.* at 417; citing *In re Prudential Sec. Inc. P'ship Litig.*, 930 F. Supp. 68, 72 (S.D.N.Y. 1996). Hence, characterizing payments as "dividends" to investors when a company is not profitable is actionable as fraud. *SEC v. Tecumseh Holdings Corp.*, 765 F. Supp. 2d 340, 355-356 (S.D.N.Y. 2011). Similarly, the disclosure of risk factors or analogous cautionary language must be specific to the alleged misrepresentation to insulate a defendant from liability. *Deng v. 278 Gramercy Park Group, LLC*, 23 F. Supp. 3d 281, 287-288 (S.D.N.Y. 2014)(holding that private placement memorandum that indicated that the manager had "complete discretion" on how to apply the net proceeds of the offering did not insulate the principal (Kaish) from liability under 10b-5 for misappropriating funds as developer fees); citing *P. Stolz Family P'ship L.P. v. Daum*, 355 F.3d 92, 97 (2d Cir. 2004); *Hunt v. Alliance N. Am. Gov't Income Trust, Inc.*, 159 F.3d 723, 729 (2d Cir. 1998); *In re ProShares Trust Secs. Litig.*, 728 F.3d 96, 102 (2d Cir. 2013); *Panther Partners Inc. v. Ikanos Comm's, Inc.*, 681 F.3d 114, 122 (2d Cir. 2012); *Wilson v. Merrill Lynch & Co., Inc.*, 671 F.3d 120, 130-31 (2d Cir. 2011); and *Slayton v. Am. Exp. Co*, 604 F.3d 758, 772 (2d Cir. 2010); however, see *San Diego County Emples. Ret. Ass'n v. Maounis*, 749 F. Supp. 2d 104, 121-123 (D.N.Y. 2010)(holding that disclosure of lack of diversification and manager discretion in portfolio allocation was sufficient to support motion to dismiss where the lack of diversification precipitated the loss).

The dividing line between the type of information which must be disclosed is materiality. Hazen, Thomas Lee, *Treatise on the Laws of Securities Regulation*, §3.4[2] (Thomson West 5th). Materiality consists of those facts which a reasonable investor would consider significant in making an investment decision. *Id.*; citing *Basic v. Levinson*, 485 U.S. 224, 108 S. Ct. 978, 99 L. Ed. 2d 194 (1988). In light of the anti-fraud prohibitions contained

3 Holding affirmed by 347 Fed. Appx. 617, 2009 U.S. App. LEXIS 20652 (2d Cir. N.Y. 2009), overturned on other grounds.

in the securities acts and precedent developed through the courts, including that of fraud based on omissions and failures to disclose material information, most securities practitioners will recommend disclosure to all investors equivalent to that information which would otherwise be contained in a registration statement. This coincides with the purpose underlying registration requirements; providing investors full disclosure of information thought necessary to make informed investment decisions, including that of risks inherent in the investment. *Panther Partners, Inc. v. Ikanos Communs., Inc.* at 664; citing *SEC v. Ralston Purina Co.*, 346 U.S. 119, 124, 73 S. Ct. 981, 97 L. Ed. 1494 (1953). Although the type of information required to be disclosed depends upon several factors, including the amount of securities to be sold, nature of the issuer, and circumstances surrounding the offering, information which must be contained is comprised of the following: (i) name of the issuer, (ii) state of incorporation or organization, (iii) the location of the principal place of business, (iv) the names and addresses of directors as well as all executive, financial, and accounting officers, or their equivalent, (v) the names and addresses of all underwriters, (vi) names and addresses of all beneficial owners of ten percent (10%) or more of any class of the issuer's stock or more than ten percent (10%) of the aggregate amount of the stock, (vii) the amount of securities held by the persons identified in the foregoing, as well as whether these persons have indicated an intention to subscribe in the particular offering, (viii) the general character of the issuer's business, (ix) a statement of the issuer's capitalization, including a description of all classes of stock and relative rights or preferences, (x) if applicable, information with respect to any options pertaining to the offering, including persons allotted more than ten percent (10%) of such options, (xi) the amount of capital stock to be included in the shares to be offered, (xii) the amount of outstanding debt, inclusive of the securities to be offered, with information pertaining to maturity dates, interest rates, and character of amortization provisions, (xiii) the specific purpose of the use of funds as well as any other sources in which amounts are to be raised, (xiv) compensation paid to, directly or indirectly, directors, officers, and other persons performing similar functions, (xv) the estimated net proceeds to be derived from the offering, (xvi) the price at which the securities will be offered or other method by which the price will be computed, including any discounts offered (xvii) all underwriters' compensation, (xviii) itemized account of expenses incurred in connection with the sale of securities, (xix) net proceeds derived from securities sales in the preceding two years, including the offering price and principal underwriters, (xx) promotional fees paid during the prior two years, (xxi) names and addresses of any sellers of property which is to be acquired with the proceeds of the offering, other than in the ordinary course of business, (xxii) the interest of any directors, principal officers, or ten percent (10%) or greater shareholders in any property acquired, other than in the ordinary course of business, within the prior two years, (xxiii) names and address of counsel who have passed on the legality of the offering, (xxiv) dates of, parties to, and general terms of any material contracts, (xxv) a recent balance sheet of the issuer, (xxvi) detailed profit and loss statements for the preceding two fiscal years, and (xxvii) if the proceeds are to be used to acquire any business, profit and loss statements for the business to be acquired. *Treatise on the Laws of Securities Regulation*, §3.3.

APPLICABLE LAW AND PLEADING REQUIREMENTS

§10(b) of the Exchange Act makes it unlawful to "use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe." *Slayton v. Am. Express Co.* at 765; 15 U.S.C. §78j(b). Rule 10b-5 promulgated thereunder states that it "shall be unlawful for any person . . . [t]o 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." *Slayton v. Am. Express Co.* at 765; 17 C.F.R. §240.10b-5(b). To prove a claim, a plaintiff must show that the defendant's statements were misleading as to a material fact and/or that the defendant omitted to state a material fact when he had a duty to disclose.[4] *Phila. Fin. Mgmt. of San Francisco,*

4 Essentially the same elements are required under §17(a)(1)-

LLC v. DJSP Enters., 572 Fed. Appx. 713, 716 (11th Cir. 2014); citing *Basic Inc. v. Levinson* at 238 and *Rudolph v. Arthur Andersen & Co.*, 800 F.2d 1040, 1043 (11th Cir. 1986). To state a claim for securities fraud under §10(b) of the Exchange Act and Rule 10b-5 in the Eleventh Circuit, a plaintiff must allege six elements: (1) a material misrepresentation or omission, (2) made with scienter, (3) a connection with the purchase or sale of a security, (4) reliance on a misstatement or omission, (5) economic loss, and (6) a causal connection between the material misrepresentation or omission and the loss, commonly called "loss causation." *Phila. Fin. Mgmt. of San Francisco, LLC v. DJSP Enters.* at 715; citing *Instituto De Prevision Militar v. Merrill Lynch*, 546 F.3d 1340, 1352 (11th Cir. 2008). In the Second Circuit, to state a claim under Rule 10b-5, a plaintiff must allege that, in connection with the purchase or sale of securities, the defendant made material misstatements or omissions of material fact, with scienter, and that the plaintiff's reliance on the defendant's actions caused injury to the plaintiff. *Slayton v. Am. Express Co.* at 765; citing *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 161 (2d Cir. 2000). Thereafter, §20(a) imposes derivative liability on persons that control primary violators of the Act. *Phila. Fin. Mgmt. of San Francisco, LLC v. DJSP Enters.* at 713, 715; citing *Laperriere v. Vesta Ins. Group, Inc.*, 526 F.3d 715, 721 (11th Cir. 2008). The Second Circuit follows this precedent and holds that §20(a) of the Act establishes joint and several liability, subject to a good faith exception, for every person who, directly or indirectly, controls any person liable under any provision of the Exchange Act. *Slayton v. Am. Express Co.* at 765; 15 U.S.C. §78t(a).

The PSLRA imposes additional, heightened pleading requirements for §10(b) and Rule 10b-5 claims predicated on allegedly false or misleading statements or omissions in that it mandates that "the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." *Phila. Fin. Mgmt. of San Francisco, LLC v. DJSP Enters.* at 715-716; 15 U.S.C. §78u-4(b)(1). The complaint must "plead with particularity facts giving rise to a strong inference that the defendants either intended to defraud investors or were severely reckless when they made the alleged materially false or incomplete statements." *Phila. Fin. Mgmt. of San Francisco, LLC v. DJSP Enters.* at 715-716; quoting *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1238 (11th Cir. 2008). To do so, the plaintiffs must "state with particularity both the facts constituting the alleged violation, and the facts evidencing scienter, i.e., the defendant's intention 'to deceive, manipulate, or defraud.'" *Slayton v. Am. Express Co.* at 773; citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 325, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007); quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194, 96 S. Ct. 1375, 47 L. Ed. 2d 668 & n.12 (1976). Under this heightened pleading standard, a plaintiff must plead facts to support a strong inference of scienter; that is, the "inference of scienter must be more than merely plausible or reasonable--it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent." *Slayton v. Am. Express Co.* at 773; citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.* at 314.

SAFE HARBOR FOR FORWARD-LOOKING STATEMENTS

The Securities Exchange Act of 1934 was amended in 1995 and the adoption of the PSLRA established a statutory safe harbor for forward-looking statements. *Slayton v. Am. Express Co.* at 765-766; Pub. L. No. 104-67, 109 Stat. 737 (Dec. 22, 1995). The safe harbor protects forward-looking statements that are "accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement." *Slayton v. Am. Express Co.* at 770-771; citing 15 U.S.C. §78u-5(c)(1)(A)(i). A defendant will not be liable for a forward-looking statement if it is 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

(3) of the Securities Act, 15 U.S.C. §77q(a)(1-3), in connection with the offer or sale of a security, though no showing of scienter is required for the SEC to obtain an injunction under subsections (a)(2) or (a)(3). *SEC v. Tecumseh Holdings Corp.* at 349 (S.D.N.Y. 2011); citing *SEC v. Monarch Funding Corp.*, 192 F.3d 295, 308 (2d Cir. 1999).

forward-looking statement. *Slayton v. Am. Express Co.* at 762 (holding that defendant would not be protected by the safe harbor because the cautionary language was vague, but dismissal was affirmed as plaintiff failed to plead facts that the statement was made with actual knowledge that it was false or misleading); see also *Deng v. 278 Gramercy Park Group, LLC* at 288-289 (holding that although statements that are opinions or projections are not per se actionable under the securities laws, a statement indicating that a construction and mezzanine loan could be rapidly approved was unreasonable under the circumstances and therefore, actionable under §10b and Rule 10b-5). Alternatively, a defendant will not be held liable where the plaintiff fails to prove that the forward-looking statement was made or approved by an executive officer with actual knowledge by that officer that the statement was false or misleading. *Slayton v. Am. Express Co.* at 765; 15 U.S.C. §78u-5(c). Because the safe harbor specifies an "actual knowledge" standard for forward-looking statements, the scienter requirement for forward-looking statements is stricter than for statements of current fact. *Slayton v. Am. Express Co.* at 773; *Investors Group v. Avaya, Inc.*, 564 F.3d 242, 274 (3d Cir. 2009).

To avail themselves of safe harbor protection under the meaningful cautionary language prong, defendants must demonstrate that their cautionary language was not boilerplate and conveyed substantive information. *Slayton v. Am. Express Co.* at 772; Conference Report at 43, 1995 U.S.C.C.A.N. at 742. The Third Circuit has interpreted this direction to mean that cautionary language must be extensive and specific and that a vague or blanket (boilerplate) disclaimer which merely warns the reader that the investment has risks will ordinarily be inadequate to prevent misinformation. *Slayton v. Am. Express Co.* at 772; see also *SEC v. Tecumseh Holdings Corp.* at 351-352 (providing that fraud was established where disclaimers in offering memoranda, qualifying profit projections, were insufficient as the companies had continuing and mounting losses). To suffice, the cautionary statements must be substantive and tailored to the specific future projections, estimates, or opinions in the prospectus which the plaintiffs challenge. *Slayton v. Am. Express Co.* at 772; citing *Inst. Investors Group v. Avaya, Inc.* at 256. The Fifth Circuit has held that "[t]he requirement for meaningful cautions calls for substantive company-specific warnings based on a realistic description of the risks applicable to the particular circumstances, not merely a boilerplate litany of generally applicable risk factors." *Slayton v. Am. Express Co.* at 772; citing *Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 372 (5th Cir. 2004) and *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 246-47 (5th Cir. 2009). The question faced is what Congress meant by "important" as the statute itself does not define the term. *Slayton v. Am. Express Co.* at 770-771. The Eleventh and Sixth Circuits have held, however, that courts may not inquire into a defendant's state of mind and conduct discovery on importance. *Slayton v. Am. Express Co.* at 771; citing *Edward J. Goodman Life Income Trust v. Jabil Circuit, Inc.*, 594 F.3d 783, 795 (11th Cir. 2010) and *Miller v. Champion Enters., Inc.*, 346 F.3d 660, 678 (6th Cir. 2003).

The Federal Court of Appeals for the Eleventh Circuit recently addressed forward-looking statements protected by the safe harbor. *Phila. Fin. Mgmt. of San Francisco, LLC v. DJSP Enters.*, 572 Fed. Appx. 713. In this case, the plaintiffs filed suit alleging that statements regarding technology implemented for streamlined foreclosure processing were actionable as fraud. The Eleventh Circuit, however, expressly rejected the claims on grounds that plaintiffs failed to allege that the company did not use the described technology or that those systems did not improve the efficiency and accuracy in processing foreclosures. *Id.* at 716. The court proceeded to hold that statements of "rigor," "efficiency," "accuracy," and "effectiveness" were not material as although those traits are important to the success of the foreclosure-processing business, the terms did not assert specific, verifiable facts that reasonable investors would rely upon to make their investment decisions. *Id.*; citing *SEC v. Merch. Capital, LLC*, 483 F.3d 747, 766 (11th Cir. 2007). These statements were not affirmative representations, but rather held to be opinions regarding the overall quality of the company's foreclosure practices. *Phila. Fin. Mgmt. of San Francisco, LLC* at 717; citing *Next Century Commc'ns Corp. v. Ellis*, 318 F.3d 1023, 1027-28 (11th Cir. 2003)(noting that opinions were non-actionable "puffery" which would not induce an investor to rely). Similarly, forward-looking statements regarding

business prospects and expected financial results were protected under the PSLRA's safe harbor provisions as such (i) were identified as forward looking statements and (ii) were accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially. *Phila. Fin. Mgmt. of San Francisco, LLC* at 717; 15 U.S.C. §78u-5(c)(1)(A)(i); see also *Ehlert v. Singer*, 245 F.3d 1313, 1320 (11th Cir. 2001) (holding that cautionary language satisfied the safe harbor statute because the warnings actually given were not only of a similar significance to the risks actually realized, but were also closely related to the specific warning which plaintiffs asserted should have been given). The court then proceeded to reject plaintiff's theory that the corporate officer had a motive to conceal the lower than expected performance to maintain an artificially high stock price as there was a lack of evidence demonstrating that he knew of the slowdown at the time the statements were made. *Phila. Fin. Mgmt. of San Francisco, LLC* at 718; citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.* at 325 (although personal financial gain may weigh in favor of a scienter inference, such is construed on the entirety of the allegations in the complaint).

The Court of Appeals for the Second Federal Circuit also had a recent opportunity to opine on the application of the safe harbor afforded under the Private Securities Litigation Reform Act and requirements for meaningful cautionary statements. *Slayton v. Am. Express Co.*, 604 F.3d 758. The Second Circuit noted that separate sections of an offering document or periodic report should be separately construed, such as that of the financial statement portion and the management's discussion and analysis, as the purpose of MD&A is to present the company's business through the eyes of management. *Id.* at 767; citing *Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations*, 68 Fed. Reg. 75,056, 75,056 (Dec. 29, 2003). The SEC, filing an amicus cureau brief, supported the defendants' position and opined that terms such as "we expect" or "we believe" combined with a designation of a forward-looking statement properly place the reader on notice. *Slayton* at 769. In applying the judicially-created bespeaks caution doctrine, on which the cautionary language prong of the PSLRA is based in part, the court drew a distinction in that future risks can be disclosed under the protection of the safe harbor, but such protection would not extend where the risk has already materialized. *Id.* at 770; citing Conference Report at 43-44, 1995 U.S.C.C.A.N. at 742-743 and *Rombach v. Chang*, 355 F.3d 164, 173 (2d Cir. 2004).

A PRACTITIONER'S PERSPECTIVE

As is typical with many areas of the practice of law, the cost in subsequently attempting to remedy a failure to disclose or defend civil, regulatory, or criminal actions far exceeds the resources necessary in achieving substantial compliance. Due to what we characterize as the community's general perception of a low risk of these subsequent actions, as well as the typical entrepreneur's view of the high likelihood of the success at the onset of the venture, resources are not appropriately devoted to either preparing offering materials internally or hiring experienced professionals to assist. However, it is important to recognize that many of the risks that materialize will be viewed in hindsight and then further given a thorough analysis if a regulatory investigation or lawsuit arises. While identifying the most material risks and drafting comprehensive disclosures is itself a difficult endeavor, the lack of proper allocation of resources will almost guaranty that the promoters of the company face a serious prospect for liability.

The existence alone of professionally drafted offering documents and comprehensive risk disclosures will likely serve as a deterrent to any litigation. The ideal scenario for litigation counsel will be to have offering documents with the particular risks identified which the plaintiff or regulator claims is the proximate cause of the investor's loss. In this case, there is a strong probability of being able to prevail on a motion to dismiss and prior to the taking of any civil discovery, a time-consuming and expensive task. More likely, the existence of the detailed risk disclosures will dissuade both private litigants and regulatory authorities from even pursuing the case. The majority of non-institutional investor suits will be brought on a contingency basis and, aside from the threat of fee-

shifting sanctions for frivolous suits, the low likelihood of recovery will not provide incentive to accept the cases in the first instance. Regulators will also be discouraged as although they are not necessarily solely driven by monetary recovery, their resources are limited and focused on more egregious violations or those that have a likelihood of success.

A final note of importance pertains to resource control and secondary effects of alleged securities violations. In the case of a regulatory enforcement matter, the initiation of a lawsuit alone can create a self-perpetuating collapse of smaller issuers. In many instances, a regulatory enforcement suit may be initiated with a judicially-approved freeze of company assets; and the lack of any available cash flow will bring an abrupt halt to all operations. The ensuing steps may be the appointment of a court receiver to administer the company's operations and then the liquidation of those remaining assets to cover the substantial cost of a court-supervised administration. Similarly, as public notice of the enforcement action is made, the general public and the issuer's investor base will likely assume that the allegations hold merit; thereby only further creating hurdles to additional fundraising and pressure from pre-existing investors for the repurchase of their securities. In the context of a civil securities lawsuit, the issuer may be positioned to properly defend the suit, but management should set objectives for resolution and cost estimates from the onset. These lawsuits may take years to defend on the merits and this will inevitably lead to substantial legal fees. Hence, choosing an experienced law firm is important, but equally important is the selection of legal counsel within the allocated budget to endure the term of the litigation.

ABOUT THE GROUP

This memorandum is presented by the Securities Practice Division of the Convergent Capital Group. Convergent Private Equity Partners was created with a focus on growth-stage companies and for the provision of technical guidance in the business development for limited industry sectors, including retail, hospitality, and multi-family or commercial / industrial real estate. The affiliated law firms focus on structuring securities and other complex commercial transactions and then also civil litigation, including civil securities suits and regulatory enforcement matters.

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