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# #MeToo Litigation: The Changing Landscape, a Year Later

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Last year, we published an overview of the #MeToo litigation landscape describing the rise of related shareholder derivative claims and securities class actions. #MeToo-related litigation shows no signs of abating. In 2019, at least 10 new lawsuits were filed asserting securities law claims based on corporate sexual harassment and misconduct allegations, consistent with the pace of filings in 2017 and 2018.

Harvey Weinstein's recent conviction by a New York jury of third-degree rape and commission of a criminal sexual act is a stark example of the legal consequences of sexual violence and misconduct. When the perpetrator is a high-ranking corporate executive, there are ramifications for the corporation: The Weinstein Company filed for bankruptcy and was acquired for purportedly a fraction of its value before the allegations of misconduct surfaced.

Relatedly, the number of public companies mentioning "sexual harassment" in risk factor disclosures in periodic filings and registration statements has increased exponentially. In the last 20 years, such public filings have referenced "sexual harassment" approximately 114 times, with nearly 60 of those mentions—over 50%—appearing since 2017.

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Regulatory and government enforcement actions and investigations also remain a risk. For example, the New York State Attorney General recently reported it is investigating a celebrity chef, his business partner, his management company and his restaurants based on allegations of sexual harassment and other claims. Sexual misconduct allegations also may result in Securities and Exchange Commission (SEC) investigations or enforcement actions based on purported failures to disclose material information to investors.

Against this backdrop, an understanding of recent court decisions and resolutions in #MeToo litigations is critical to a public company's ability to evaluate and manage its litigation and related risks.

### Lessons From Recent Decisions

Rulings on motions to dismiss in lawsuits alleging violations of the securities laws or derivative actions based on #MeToo-related allegations continue to vary. While motions to dismiss these claims have been granted, others have been denied. In either case, courts scrutinize closely challenged statements pertaining to corporate culture and compliance. The analysis often turns on whether the statements are considered vague and aspirational statements or specific representations. Courts resolving

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such motions are, in effect, determining whether corporate policies and related statements are appropriate targets for securities class action lawsuits in the #MeToo context and if so under what circumstances. How courts decide these issues likely will have an impact on corporate policies and practices and how companies speak publicly about these matters.

The Second Circuit—in a decision that did not address claims of sexual harassment and misconduct—did pass judgment on "vague" and "generic" corporate statements concerning the importance of regulatory compliance and found that the statements could not support a securities fraud claim because they did not invite reasonable reliance and therefore were not materially misleading. The court also addressed statements in the company's code of ethics, described as "general declarations about the importance of acting lawfully and with integrity," finding the guidelines to be "textbook examples of 'puffery.'" *Singh v. Cigna*, 918 F.3d 57, 63 (2d Cir. 2018). But in *In re Signet Jewelers Limited Securities Litigation*, 389 F. Supp. 3d 221, 227 (S.D.N.Y. June 11, 2019), the court confronted claims that were based in part on allegations in a separate litigation that employees working for a wholly-owned subsidiary had been subject to gender discrimination and further that declarations filed in connection with that action rendered false and misleading defendants' public statements about corporate culture and certain defendants' commitment to preventing gender discrimination. The court also evaluated statements contained in defendant's code of conduct and in the company's public filings. The court denied defendants' motion for judgment on the pleadings, finding that notwithstanding *Cigna*, statements contained in a company's code of conduct are not "*per se* inactionable" (id. at 229) and the materiality of an alleged misstatement depends on "context-specific factors, including specificity, emphasis, and whether certain statements are designed to distinguish the company in some fashion that is meaningful to the investing public" (id. at 230). In July 2019, the court granted plaintiffs' motion for class certification, discussing the alleged stock price impact of sexual harassment allegations and resulting press, and rejected defendants' argument that the stock drop resulted from "bad publicity," rather than alleged fraudulent conduct. *In re Signet Jewelers Limited Securities Litigation*, No. 16 Civ. 6728, 2019 WL 3001084 at *17 (S.D.N.Y. July 10, 2019). On March 26, 2020, papers were submitted to the court seeking approval of a $240 million class action settlement.

In July 2019, the Northern District of California granted a motion to dismiss a securities class action alleging that the company concealed "a corporate culture of sexual harassment and misogyny" which purportedly rendered misleading certain risk disclosures in an offering memorandum. *Irving Firemen's Relief & Retirement Fund v. Uber Technologies*, 398 F. Supp. 3d 549, 558 (N.D.C.A. 2019). The court found that the allegations failed to plead the "requisite nexus" between the memorandum's generic statements—including that the company's growth could suffer if it failed to attract qualified personnel—and the "allegedly unlawful practices" to "suggest the representations are false or misleading." Id.

In August 2019, the Southern District of Florida granted a motion to dismiss a securities class action that claimed, in part, that the company's code of ethics, which allegedly "'absolutely' prohibited" any type of harassment, was rendered materially misleading after a press report of sexual harassment lawsuits. Plaintiff claimed that the disclosure led to a decline in the company's stock price. *Luczak v. Nat'l Beverage*, 400 F. Supp. 3d 1318, 1324 (S.D. Fla. 2019). The court found that because the article was published 18 months after the sexual harassment lawsuits were filed and because information about the suits was publicly available at the time of filing, there was no corrective disclosure that "establishe[d] a causal link" to plaintiff's claimed stock value loss.

In January 2020, the Eastern District of New York granted a motion to dismiss a putative class action in *In re Liberty Tax Sec. Litig.*, No. 18-cv-00245, 2020 WL 265016, at *7 (E.D.N.Y. Jan. 17, 2020). The lawsuit alleged defendants made false and misleading statements and omissions about the company's compliance efforts, disclosure procedures and internal controls over financial reporting, which plaintiffs claimed concealed the CEO's alleged sexual misconduct. After the CEO's purported termination and public reporting of alleged misconduct, the company's stock price dropped. The court found in part that certain disclosures at issue, which related to the CEO's alleged control of the board, were not material misrepresentations because they were too general for an investor to rely upon and because the CEO's alleged misconduct was unrelated to that

control. The court also held that challenged statements concerning internal controls constituted inactionable "puffery." Id. at *6.

Also in January 2020, in *Constr. Laborers Pension Tr. for S. California v. CBS*, No. 18-CV-7796, 2020 WL 248729, at *8 (S.D.N.Y. Jan. 15, 2020), the Southern District of New York granted in part and denied in part the company and former CEO's motions to dismiss, where plaintiffs had alleged that defendants' code of conduct statements regarding, for example, a zero tolerance policy for sexual harassment, were false in light of allegations regarding executive misconduct. The court held that the code of conduct statements were too "general and aspirational to invite reasonable reliance" and ultimately those "statements were not made to reassure investors" that company executives were not susceptible to being targeted with sexual harassment accusations. Id. In contrast, the former CEO's statements that the company was unaware of sexual misconduct on the part of management survived the motions to dismiss because the allegations gave rise to a strong inference that the former CEO (allegedly involved in prior misconduct) "knew that … his statement and its implications … were not truthful or that, at a minimum, he was 'highly unreasonable in failing to appreciate that possibility.'" Id. at *21.

Not surprisingly given the persistence of securities and derivative litigation based on #MeToo claims, companies are taking preventative measures in disclosures and transaction documents to address potential sexual harassment or misconduct issues.

Moreover, at least one case has been dismissed for failure to plead adequately demand futility in a derivative suit. In *Stein v. Knight*, No. 18-cv-38553, at * 4 (Or. Cir. Ct. April 15, 2019), plaintiffs argued demand would be futile, alleging the board of directors ignored red flags, including inappropriate workplace behavior by certain employees. The court granted defendant-company's motion to dismiss, holding that the conduct identified did not suffice to raise a reasonable doubt that any director knew of legal violations and consciously disregarded them so as to face a "substantial likelihood" of personal liability.

### Overview of Corporate Law Concerns

Not surprisingly given the persistence of securities and derivative litigation based on #MeToo claims, companies are taking preventative measures in disclosures and transaction documents to address potential sexual harassment or misconduct issues. For example, representations in agreements that no sexual harassment or assault allegations have been made against the target company's senior employees and that the company has not entered into any relevant settlement agreements are increasingly common.

Venture capitalists are including similar clauses in investment agreements, allowing investors to fine portfolio companies if #MeToo allegations arise. Some companies are including #MeToo representations in executive employment agreements and are analyzing more closely the definition of "cause" in employment agreements to ensure that violations of harassment and discrimination policies are covered. Additionally, since 2017, 15 states enacted legislation limiting confidentiality in settlement agreements with employees.

These issues ought to be considered as a due diligence topic for certain transactions, which may require reviewing information not traditionally tracked or considered material, including social media, press reports, websites, internal surveys, HR reports, attrition rates, pay equity and internal complaints. Buyers and investors might also wish to consider policies and procedures, leadership composition, pending or prior litigations or settlements.

### Conclusion

We hope that next year our update will report a precipitous drop in the number of class and derivative sexual harassment type claims that are filed against corporate and individual defendants as the result of an adherence to upstanding practices and guidance provided by courts around the country.