

February 3, 2021

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Support for Petition for Rulemaking on COVID-19 Related Litigation – File 4-766

Dear Ms. Countryman:

The undersigned associations write in support of the recent rulemaking petition filed by the U.S. Chamber of Commerce urging that the Securities and Exchange Commission (SEC) adopt rules designed to limit speculative COVID-related securities litigation.

We would first like to express our gratitude for the efforts of the SEC to oversee the capital markets during this unprecedented global health pandemic. The SEC has acted quickly and decisively to provide targeted regulatory relief and guidance to market participants. In line with the goal of continuing to provide relief and guidance as necessary during this challenging period, we would like to draw your attention to the imminent matter of COVID-19 related securities litigation. Troubling trends in the securities litigation space combined with a look at the COVID-related securities lawsuits that have been filed lead us to believe this is an area ripe for SEC action.

The number of securities suits filed in recent years has been record breaking.¹ And even more importantly, the rate of lawsuits relative to the number of listed companies reached 8.66% in 2019, the highest it has ever been.² A factor contributing to this rise in securities litigation is the proliferation of “event-driven” lawsuits, where a disaster or other negative event results in a stock drop followed by a securities suit alleging a failure by the issuer to warn about the risk of this negative event.³ COVID-19 broadly affects the entirety of the U.S. capital markets and could potentially be used as the “negative event” that leads to an increased flood of event-driven lawsuits.

In fact, this is exactly what is starting to occur. According to recent estimates the number of filed COVID-19 securities class action suits is at least 22,⁴ and this number is predicted to be only the beginning of COVID-related securities lawsuits.⁵ These suits have not been limited to industries heavily impacted by the pandemic, such as the pharmaceutical and travel industries.

¹ Cornerstone Research, Securities Class Action Filings – 2019 Year in Review (2020), <https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2019-Year-in-Review> (“Plaintiffs filed 428 new securities class actions across federal and state courts, the highest number on record and nearly double the 1997-2018 average.”)

² Kevin LaCroix, Federal Court Securities Suit Filings Remain at Elevated Levels, D&O Diary (Jan. 1, 2020), <https://www.dandodiary.com/2020/01/articles/securities-litigation/federal-court-securities-suit-filings-remain-at-elevated-levels/>.

³ John C. Coffee, Jr., The Changing Character of Securities Litigation in 2019: Why It’s Time to Draw Some Distinctions (Jan. 22, 2019), <http://clsbluesky.law.columbia.edu/2019/01/22/the-changing-character-of-securities-litigation-in-2019-why-its-time-to-draw-some-distinctions/>

⁴ Kevin LaCroix, Online Learning Firm Hit with COVID-19-Related Securities Suit, D&O Diary (November 22, 2020), <https://www.dandodiary.com/2020/11/articles/coronavirus/online-learning-firm-hit-with-covid-19-related-securities-suit/>.

⁵ Kevin LaCroix, Two Companies Hit with COVID-19-Related D&O Lawsuits, D&O Diary (July 19, 2020), <https://www.dandodiary.com/2020/07/articles/coronavirus/covid-19-and-do-insurance-julyupdate/>.

They have begun to affect organizations that receive or use federal aid and to extend to disclosures about how COVID-19 has impacted economic projections and financial results.⁶ Given that these suits have the potential to affect almost every industry and are predicted to increase, it is important that targeted relief be granted to protect investors and the public interest.

Other countries are already making that shift. For example, Australia recently recognized the threat that “opportunistic class actions” presented and temporarily amended their continuous disclosure requirements so that companies and directors could only be liable if there was “‘knowledge, recklessness or negligence’ with respect to updates on price sensitive information to the market.”⁷ This relief is even more important considering the uncertainty and difficulties that have faced companies. These companies need to be able to focus on and put resources towards recovering from COVID-19, not speculative litigation.

As the Chamber’s rulemaking petition points out, the Private Securities Litigation Reform Act (PLSRA) contains a safe harbor for certain forward-looking statements and provides the SEC with the authority to expand the exemptions to liability included under this safe harbor. We encourage you to act and expand the liability exemptions under the PLSRA to include statements about the impact of COVID-19 and pre-pandemic statements that are alleged to be misleading due to the impact of COVID-19. Alternatively, the SEC could act to require a heightened scienter standard of actual knowledge of a statement’s falsity.

The SEC has been working diligently and admirably to address each challenge that is presented during this pandemic. Addressing the concerns related to COVID-related securities litigation will provide necessary and targeted relief for market participants and allow them to aid in recovery from the pandemic’s financial and social impacts. Thank you for your attention to this important matter.

Sincerely,

U.S. Chamber Center for Capital Markets
Competitiveness
U.S. Chamber Institute for Legal Reform
American Car Rental Association
American Property Casualty Insurance
Association
Florida Justice Reform Institute
Forum for Community Leaders
Greater Pittsburgh Chamber of Commerce
National Air Carrier Association

National Association of Chain Drug Stores
National Multifamily Housing Council
New Jersey Civil Justice Institute
Pennsylvania Chamber of Business and
Industry
Retail Industry Leaders Association
Wholesale & Specialty Insurance
Association (WSIA)

⁶ Kevin LaCroix, Tallying and Analyzing COVID-19-Related Securities Suits, D&O Diary (November 1, 2020), <https://www.dandodiary.com/2020/11/articles/coronavirus/tallying-and-analyzing-covid-19-related-securities-suits/>.

⁷ Treasurer of the Commonwealth of Australia, Temporary changes to continuous disclosure provisions for companies and officers (May 25, 2020), <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/temporary-changes-continuous-disclosure-provisions>; Corporations (Coronavirus Economic Response) Determination (No. 2) 2020, <https://www.legislation.gov.au/Details/F2020L00611>.