No. 22-1165

IN THE

Supreme Court of the United States

MACQUARIE INFRASTRUCTURE CORPORATION, *et al.*,

Petitioners,

v.

MOAB PARTNERS, L.P., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SOCIETY FOR CORPORATE GOVERNANCE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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Buckman Co. v. Plaintiffs' Legal Committee,
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Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,
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Diehl v. Omega Protein Corp.,
339 F. Supp. 3d 153 (S.D.N.Y. 2018) 30

Franchi v. SmileDirectClub, Inc.,
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In re Canandaigua Sec. Litig.,
944 F. Supp. 1202 (S.D.N.Y. 1996) 30

Indiana Public Retirement System v. SAIC, Inc.,
818 F.3d 85 (2d Cir. 2016), *cert. granted sub nom. Leidos Inc. v. Indiana Public Retirement System*, 137 S. Ct. 1395 (2017), *cert. dismissed* 138 S. Ct. 2670 (2018) 2

Matrixx Initiatives, Inc. v. Siracusano,
563 U.S. 27 (2011) 3

SEC v. Melchior,
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Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148 (2008) 27

Stratte-McClure v. Morgan Stanley, 776 F.3d 94 (2d Cir. 2015)................................ 2, 5

Sundaram v. Freshworks Inc., 2023 WL 6390622 (N.D. Cal. Sept. 28, 2023).. 13, 30

Statutes and Regulations

Fixing America's Surface Transportation Act, Pub. L. No. 114-94, 129 Stat. 1312 (2015) 32, 33

Section 72002(2) 32

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Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. 306 (2012)..... 31-33

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15 U.S.C. § 78j(b) (§ 10(b))......................2, 3, 5, 14, 19, 21-23, 26, 28, 31, 33

Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 17

15 U.S.C. § 7241... 9

17 C.F.R. § 229 (SEC Reg. S-K).......................... 31, 32

17 C.F.R. § 229.303 (Reg. S-K,
Item 303)............................... 2, 4-7, 13, 16, 18, 20,
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17 C.F.R. § 240.10b-5 (2017) (Rule 10b-5)............ 2, 3

17 C.F.R. § 240.13a-14... 9

Other Authorities

Allianz Glob. Corp. & Specialty, *D&O Insurance Insights* (Nov. 28, 2016),
https://bit.ly/3S9qUHu 28

Allison Grey Anderson, *The Disclosure Process in Federal Securities Regulation: A Brief Review*,
25 Hastings L.J. 311 (1974) 17

Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship*,
108 Colum. L. Rev. 1301 (2008) 18

Amir Amel-Zadeh, *Creating Firm Disclosures*,
4 J. Fin. Reporting 1 (2019) 8

Andrew K. Jennings, *Disclosure Procedure*,
82 Maryland L.R. 920 (2023) 28

Bank of Am. Corp., Exchange Act Release
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Business and Financial Disclosure Required by Regulation S-K, Securities Act No. 10064,
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Caterpillar Inc., Exchange Act Release
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Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6290 (Feb. 8, 2010) 12

Commission Guidance Regarding MD&A of Financial Condition and Results of Operation, 68 Fed. Reg. 75056 (Dec. 29, 2003) 7, 15, 25, 26

Commission Statement About MD&A of Financial Condition and Results of Operations, Securities Act Release No. 8056, 67 Fed. Reg. 3746 (Jan. 25, 2002) 7

Compass Mins. Int'l, Inc., Exchange Act Release No. 4340, 2022 WL 4445488 (Sept. 23, 2022)..... 16

Compl., *Diaz v. The Gap, Inc.*, No. 22-cv-7371-DG-RER (E.D.N.Y. July 20, 2023) Dkt. 27 22

Compl., *General Retirement System of the City of Detroit v. AT&T Inc.*, No. 23-cv-7351-JLR (S.D.N.Y. Aug. 18, 2023), Dkt. 1 22

Compl., *Lozada v. TaskUs, Inc.*, No. 22-cv-1479-JPC (S.D.N.Y. Dec. 16, 2022), Dkt. 26 22

Compl., *N.Y.C. Fire Dep't Pension Fund v. Coupang, Inc.*, No. 22-cv-7309-VSB (S.D.N.Y. Aug. 26, 2022), Dkt. 50 22

Dentsply Sirona Inc., Exchange Act Release No. 90681, 2020 WL 7396438 (Dec. 16, 2020) 16

Dick's Sporting Goods, Inc., SEC Staff Comment Letter (Aug. 9, 2023), http://bit.ly/3FAhsFq 16

Disclosure in Management's Discussion and Analysis About Off-Balance Sheet Arrangements and Aggregate Contractual Obligations, Securities Act No. 8182, 2003 WL 236157 (Feb. 5, 2003) 25

Division of Corporation Finance: Filing Review Process, SEC (Sept. 27, 2019), https://www.sec.gov/divisions/corpfin/cffilingreview 12

Ernst & Young, *2022 SEC Annual Reports – Form 10-K* (2022), http://bit.ly/3Q7Cznr 9, 12

Ernst & Young, *SEC Reporting Update* (2023), https://bit.ly/3szuIay... 15

Globis NV Merger Corp., SEC Staff Comment Letter (May 4, 2022), https://bit.ly/3s73HLo 16

H.R. Conf. Rep. 104-369 (Nov. 28, 1995) 17

H.R. Rep. No. 113-642 (2014) 32

H.R. Rep. No. 114-279 (2015) 32

Jay Clayton, Chair, SEC, *Remarks at the Economic Club of New York* (July 12, 2017), https://www.sec.gov/news/speech/remarks-economic-club-new-york 24

John C. Coffee et al., *Securities Regulation* 205 (13th ed. 2015) 8

Joost Impink et al., *Regulation-induced Disclosures: Evidence of Information Overload?*, 58 ABACUS 432 (Sept. 2022), https://bit.ly/3tSD8Kj 23

Kirchner, Exchange Act Release No. 80947, 2017 WL 2591798 (June 15, 2017) 16

Linda L. Griggs et al., *Living with Leidos*, 49 Sec. Reg. & L. Rep. 1788 (Nov. 13, 2017) 29

Linda L. Griggs et al., *When Rules Collide—Leidos, the Supreme Court, and the Risk to MD&A*, 49 Sec. Reg. & L. Rep. 1511 (Sept. 25, 2017) 12, 29

Management's Discussion & Analysis of Financial Condition & Results of Operations, Securities Act Release No. 6835, 1989 WL 1092885 (May 18, 1989) 4, 15, 18, 20

Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information, 85 Fed. Reg. 12068 (Feb. 28, 2020) 31, 33

Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information, 86 Fed. Reg. 2080 (Jan. 11, 2021) 4, 12, 20, 25, 30, 33

Mary Jo White, Chair, SEC, *The Importance of Independence*, The Fourteenth Annual A.A. Sommer, Jr. Lecture on Corporate, Securities, and Financial Law at Fordham Law School (Oct. 3, 2013), https://www.sec.gov/news/speech/spch100113mjw 26

Mission, SEC (August 29, 2023), https://www.sec.gov/about/mission 17

Model Rules of Prof'l Conduct R.1.3 cmt. 1 (Am. Bar Ass'n 2023)... 17

Raytheon Co., Securities Act Release No. 8715, 2006 WL 1788543 (June 28, 2006)...................... 16

Safe Harbor Rule for Projections, 44 Fed. Reg. 38810 (July 2, 1979)....................... 20

Salant Corp., Exchange Act Release No. 34046, 1994 WL 183411 (May 12, 1994) 16

Sec. & Exch. Comm'n, OMB 3235-0063, *Form 10-K: Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, General Instructions* (2015)... 28

Sec. & Exch. Comm'n, OMB 3235-0063, *Form 10-K: Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, General Instructions* (2023)... 28

Sec. & Exch. Comm'n, OMB 3235-0070,
Form 10-Q: General Instructions (2015) 28

Sec. & Exch. Comm'n, OMB 3235-0070,
Form 10-Q: General Instructions (2023) 28

Society for Corporate Governance et al.,
Disclosure Committee Report: Practices and Trends (2021), https://go.ey.com/3QcaCLc 9, 10

2 Thomas Lee Hazen, *Law Sec. Reg.* § 9:52
(2023) 16, 19

Tidewater Inc., Exchange Act Release No. 56557,
2007 WL 2803999 (Sept. 27, 2007) 16

Travis Dyer et al., *The Evolution of 10-K Textual Disclosure: Evidence from Latent Dirichlet* Allocation,
64 J. of Acct. & Econ. 221 (2017) 24

Under Armour, Inc., Exchange Act Release
No. 4220,
2021 WL 1737508 (May 3, 2021) 16

Zoom Video Communications, Inc.,
SEC Staff Comment Letter (Sept. 28, 2022),
https://bit.ly/409G7dz 16

INTEREST OF *AMICUS CURIAE*[1]

Founded in 1946, the Society for Corporate Governance (the "Society") is an association of over 3,700 governance professionals who serve more than 1,500 public, private, and not-for-profit companies of almost every size and industry. The Society's members support the work of corporate boards and executive management regarding corporate governance and disclosure, compliance with corporate and securities laws and regulations, and exchange-listing requirements. Its mission is to shape corporate governance through education, collaboration, and advocacy, with the ultimate goal of creating long-term shareholder value through more effective and efficient governance.

The Society has a direct and substantial interest in this case. Its members are often responsible for preparing corporate disclosures and other outward-facing statements on behalf of companies, including Forms 10-K and 10-Q, proxy statements, and other disclosures required by the Securities and Exchange Commission ("SEC").

As the leading association of corporate secretaries and other governance professionals in the United States, the Society is well-positioned to explain the practical implications of the Second Circuit's approach, which (if not rejected by the Court) will continue to alter the way that corporate

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus, its members, and its counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

disclosures are drafted. Until recently, the primary consideration driving the content of disclosure in the management's discussion and analysis ("MD&A") section was management's view of the company and its prospects, based on its expertise and understanding of the industry as a whole, as intended by the SEC. The Second Circuit in *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 103 (2d Cir. 2015), *Indiana Public Retirement System v. SAIC, Inc.*, 818 F.3d 85, 94 (2d Cir. 2016), *cert. granted sub nom. Leidos Inc. v. Indiana Public Retirement System*, 137 S. Ct. 1395, 1396 (2017), *cert. dismissed* 138 S. Ct. 2670 (2018), and the decision below, changed that. Companies now face expansive and chilling liability under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) ("Section 10(b)"), and Rule 10b-5, 17 C.F.R. § 240.10b-5 (2017) ("Rule 10b-5"), for allegedly omitting vague "trends" and "uncertainties" under Item 303 of Regulation S-K, 17 C.F.R. § 229.303 ("Item 303"). These decisions undermine Item 303's *raison d'être* by opening the floodgates for private plaintiffs to pursue pure omissions-based federal securities fraud claims under Section 10(b) and Rule 10b-5, simply by second-guessing, with hindsight, management's disclosure decisions under Item 303. In so holding, the Second Circuit has upended decades of settled practice, forcing management to prognosticate and draft defensively what were already the most demanding MD&A disclosures. Instead, management must craft disclosures with a view toward avoiding the costs associated with a future securities fraud litigation in the event of an eventual stock drop, lest a plaintiff one day formulate a theory, potentially plausible in hindsight, that a trend or uncertainty "should have been" disclosed earlier.

Fearing liability under the Second Circuit's approach, management faces pressure to disclose otherwise speculative or isolated events, no matter how trivial. Notably, this incentive applies primarily to anything that is or may be negative, potentially sowing confusion in the information provided to investors. Such disclosures will necessarily be less meaningful and informative to investors, as they fail to provide a true reflection of management's view of the company or to distinguish between those developments that management truly believes represent a trend and those that are more marginal (or do not yet—and may never—represent a trend at all).

SUMMARY OF ARGUMENT

The Society agrees with Petitioners' arguments that the Second Circuit's expansion of private liability under Section 10(b) to cover allegedly omitted "trends" and "uncertainties" was erroneous under the text and structure of the federal securities laws. As this Court has admonished, judicially created private rights of action are construed narrowly, Section 10(b) and Rule 10b-5 "do not create an affirmative duty to disclose any and all material information," and companies can therefore "control what they have to disclose . . . by controlling what they say to the market." *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44-45 (2011) (citing *Basic Inc. v. Levinson*, 485 U.S. 224, 239 n.17 (1988)). The Society submits this brief to describe, based on its members' extensive experience, the robust process for drafting corporate disclosures that developed in the many decades preceding the Second Circuit's novel approach, and the significant changes to that process, with attendant negative consequences for companies

and investors alike, that are accelerating under those rulings.

I. The SEC adopted the MD&A disclosure requirements in Item 303 to "give the investor an opportunity to look at the company through the eyes of management[.]" Management's Discussion & Analysis of Financial Condition & Results of Operations, Securities Act Release No. 6835, 1989 WL 1092885 (May 18, 1989) ("Interpretive Release"). Recent amendments maintained this purpose, aiming "to better allow investors to view the registrant from management's perspective." Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information, 86 Fed. Reg. 2080, 2089 (Jan. 11, 2021) ("2021 Final Rule"). The disclosure regime that predated the Second Circuit's rulings served that purpose. In the decades following the SEC's adoption of MD&A disclosure requirements, companies developed a disciplined process for drafting those disclosures involving a multitude of corporate officers and employees, typically including review by the company's disclosure committee and eventually the board. For MD&A in particular, the reporting process requires management to make difficult judgment calls concerning information that should be disclosed about the company's business and prospects to best permit investors to view the company through management's eyes. Under Congress's mandate, the SEC plays a critical oversight role in the MD&A disclosure process, including by providing uniform guidance on MD&A disclosure rules, issuing comment letters, which function as a dialogue with

individual companies and as an educational resource more generally, and pursuing enforcement actions for potential violations of MD&A disclosure rules. This regime provides companies with clear guidance concerning MD&A disclosure requirements, and it allows management to draft MD&A with the primary objective of sharing management's unvarnished view of the company and its prospects with investors. Where warranted, the SEC also brings enforcement actions against companies violating Item 303.

II. The Second Circuit's approach, which creates significant potential liability under Section 10(b) by allowing plaintiffs to use hindsight to second-guess management's judgments about developing trends, has already led, and will continue to lead, to a counterproductive paradigm shift in the preparation of MD&A. Rather than permitting management to draft MD&A disclosures primarily to inform investors about its view of the business, companies are incentivized to relinquish drafting to litigation counsel and to over-disclose all potential "trends" and "uncertainties," should management's judgment based on then-available information later be questioned. It is thus no surprise that, since *Stratte-McClure*, far more private securities actions asserting Item 303 violations have been filed in the Second Circuit (where such claims are allowed) than in the Ninth Circuit (where they are not). *See* Cert. Reply Br. App. 62a-75a. Similarly, the uniform guidance currently provided by the SEC risks being swamped by a multitude of potentially conflicting interpretations of Item 303 issued in district courts across the country. Adopting the Second Circuit's

position nationwide will further increase Item 303 compliance costs and make it more difficult for the SEC to provide clear, consistent guidance to companies, as it would have to contend with the competing interpretations of Item 303 that have already emerged and will continue to do so. The ripple effects will include an even more costly MD&A disclosure process, while also leading to disclosure that is significantly less useful and informative than exists under the current regime.

III. Finally, these changes oppose Congress's recent efforts to reduce—rather than increase—the burden of disclosure, and to make disclosures more accessible to investors, not less. *See infra* Section III.1. Indeed, the SEC's 2021 amendments to Item 303 made no indication that it believes the scope of its disclosure requirements concerning "trends" and "uncertainties" needs expansion.

ARGUMENT

I. ITEM 303 ANTICIPATES MD&A DISCLOSURES THAT ALLOW INVESTORS TO VIEW A COMPANY THROUGH THE EYES OF MANAGEMENT

The SEC has emphasized that MD&A is a "critical component" of disclosure because it allows investors to "see the company through the eyes of management," and that trend disclosure is "[o]ne of the most important elements necessary to an understanding of a company's performance, and the extent to which reported financial information is indicative of future results." Commission Guidance Regarding MD&A of Financial Condition and Results

of Operation, 68 Fed. Reg. 75056, 75061 (Dec. 29, 2003) ("2003 Guidance"). The SEC therefore has stated that it "has long sought through its rules, enforcement actions and interpretive processes to elicit MD&A that not only meets technical disclosure requirements but generally is informative and transparent." *Id.* at *75056.

More generally, the SEC's goals for corporate disclosure emphasize that such disclosure should be "clear" and "informative" to investors, *id.*, and "must be both useful and understandable." Commission Statement About MD&A of Financial Condition and Results of Operations, Securities Act Release No. 8056, 67 Fed. Reg. 3746, 3747 (Jan. 25, 2002). It has therefore instructed registrants to "provide the most relevant information . . . using language and formats that investors can be expected to understand." *Id.*

Developed over the decades preceding the instant case, the MD&A disclosure regime served these goals by allowing companies, with expert guidance and oversight from the SEC, to make thoughtful disclosure of the trends and uncertainties that management considered important to an understanding of their business at the time of the disclosure, without fear of retrospective liability.

A. Companies Currently Engage in a Disciplined Process That Results in Robust MD&A Disclosure

Compliance with Item 303's requirement to disclose "known trends or uncertainties" is neither costless nor quick. Companies must expend significant resources gathering information, drafting

appropriate language, and forecasting the future. "[T]he process of estimating the impact of those trends, events, and uncertainties . . . is a constant and continuing one." John C. Coffee et al., *Securities Regulation* 205 (13th ed. 2015). This extensive and time-consuming undertaking requires the disciplined efforts of management and employees at all levels of the company, as each SEC filing requires that innumerable details be evaluated, confirmed, and updated. This process is already costly in terms of time, personnel, and resources, even without the additional burden imposed by the Second Circuit's approach.

1. While there is some variation across companies, employees typically begin drafting MD&A several weeks—sometimes several months—in advance of the filing deadline. A recent study found that 34% of companies began drafting MD&A more than seven weeks before filing deadlines, while another 36% began drafting five to six weeks before. Amir Amel-Zadeh et al., *Creating Firm Disclosures*, 4 J. Fin. Reporting 1, 15 (2019). The authors noted that this is likely an underestimate of preparation time, though: "different divisions are involved in preparing these disclosures," making it "more difficult to estimate the collective time spent accurately." *Id.* at 16. Generally, employees with financial reporting specialties will begin drafting and soliciting input from others throughout the company to accurately synthesize the required information. *See id.* at 14. Senior executives like CEOs and CFOs provide critical insight, but companies also engage a broad range of employees in drafting MD&A, including representatives from finance, legal, investor relations, public relations, and marketing.

See id. at 16. Companies are advised to extensively document this process as they "consider all known trends, events and uncertainties as part of the MD&A preparation process and [should] consider documenting the reasons for disclosure or nondisclosure." Ernst & Young, *2022 SEC Annual Reports – Form 10-K*, 84 (2022), http://bit.ly/3Q7Cznr. All the while, MD&A is frequently revised in the weeks between the initial draft and filing as various internal and external participants add to and refine the draft. Amel-Zadeh, *supra*, at 14.

2. "Because the securities regulations are complex, preparing Form 10-K," including MD&A, "requires cooperation among corporate officers, independent auditors, attorneys, and the audit committee of the board of directors." Ernst & Young, *2022 SEC Annual Reports*, *supra*, at 5-6. As a result, companies have built time-consuming, elaborate systems of disclosure controls and procedures that require coordination among multiple internal and external participants to ensure that relevant information is timely identified, captured, and communicated to the drafters. *See* Society for Corporate Governance et al., *Disclosure Committee Report: Practices and Trends*, 8 (2021), https://go.ey.com/3QcaCLc. As a backstop, these efforts are often accompanied by a complex system of certifications and sub-certifications that extends to the furthest reaches of the company. These processes aim to confirm that all relevant disclosure has been made and ultimately includes certifications filed with the SEC by the CEO and CFO. *See* 15 U.S.C. § 7241; 17 C.F.R. § 240.13a-14.

Drafting and finalizing MD&A disclosures is a multi-step process involving a multitude of company personnel and layered systems of review. To begin, the SEC recommends that companies "create a committee with responsibility for considering the materiality of information and determining disclosure obligations on a timely basis." Society for Corporate Governance et al., *supra,* at 2. This committee should include the company's principal accounting officer or controller, the general counsel or other senior legal official, the principal risk management officer, the chief investor relations officer, and other employees and officers whom the company deems appropriate. *See id.* In practice, this committee is often expanded to bring together relevant perspectives from finance, investor relations, internal audit, legal, corporate governance, and other key functions. *Id.* at 2-3. As companies increasingly focus on human capital management, technology, information security, climate, and other environmental risks, some companies have further expanded their committees to include chief information security officers, chief human resources officers, chief technology officers, and chief sustainability officers. *Id.* at 7.

Disclosure committees typically meet quarterly to review Forms 10-K and 10-Q. *Id.* at 9, 12. Additionally, disclosure committees generally have ongoing responsibilities to review earnings releases and presentations, proxy statements, Forms 8-K, earnings call materials, SEC comment letters, registration statements and securities offerings, press releases, shareholder letters, and other external communications. *Id.* at 9. They discuss accounting

and financial reporting, non-GAAP financial metrics, litigation disclosures, M&A-related disclosures, business and regional reporting, executive compensation, cybersecurity risk, data privacy disclosures, and climate and sustainability disclosures. *Id.* at 10. Most of these committees maintain formal meeting minutes documenting these discussions, and commonly these committees report on their activities to the company's audit committee. *Id.* at 15.

To comply with their disclosure obligations, many companies institute subcommittees within their disclosure committees. *Id.* at 5. Companies frequently use a three-level system, comprised of a subcommittee that reviews first drafts of disclosure documents, the full disclosure committee that reviews the documents passed on by the subcommittee, and an executive-level subcommittee focused on CEO and CFO certifications. *Id.* Finally, depending on the company's specific procedures, the company's audit committee, the full board and officers will review and approve the disclosure prior to filing. *Id.*

3. Amid these layers of input and review, there is extensive discussion about the type and degree of disclosure. Close calls, including with respect to materiality and whether a series of events constitutes a "trend," can monopolize the attention of management for weeks and may require the assistance of outside counsel. As the SEC itself has recognized, "confusion related to disclosure requirements" may cause companies to "either over-disclose and incur additional compliance costs, or under-disclose and face increased litigation risk." 2021 Final Rule, 86 Fed. Reg. at 2114. The risk of

exposing the company to litigation and significant liability encourages companies to "approach MD&A as requiring a check-the-box approach and defensive disclosures given the potential risk of an expensive class action related to an omission of material information," rather than "being approached as an opportunity for management to tell its story and to seek to enable investors to see the company through the eyes of management[.]" Linda L. Griggs et al., *When Rules Collide—Leidos, the Supreme Court, and the Risk to MD&A*, 49 Sec. Reg. & L. Rep. 1511, 13 (Sept. 25, 2017).

The most difficult decisions often center on whether a potential trend or uncertainty is ripe for disclosure: whether there is truly a trend or uncertainty, and whether enough is known about it to make disclosure useful to investors. *See* Ernst & Young, *2022 SEC Annual Reports*, *supra*, at 83 ("One of the most difficult judgments management makes in MD&A relates to known 'trends, events and uncertainties' that might affect future earnings or other measures of performance."). As the SEC has noted, "[a]nalyzing the materiality of known trends, events or uncertainties may be particularly challenging for registrants preparing MD&A disclosure." Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6290, 6295 (Feb. 8, 2010) ("Climate Guidance"). Managing these complexities requires exceptionally fine-tuned judgment and industry savvy, and must "consider a substantial amount of financial and non-financial information available to them, including information that itself may not be required to be disclosed." *Id.* In the most difficult cases, the

company lacks all the information it needs to make a conclusive and comprehensive disclosure to the market, but it has enough information to know that at some point, disclosure may need to be made depending on how events unfold.

For example, a company may face uncertainty about the need to make climate-related disclosures in its MD&A. Under guidance issued in 2010, the SEC stated that it "has not quantified, in Item 303 or otherwise, a specific future time period that must be considered in assessing the impact of a known trend, event or uncertainty that is reasonably likely to occur." Climate Guidance, 75 Fed. Reg. at 6294; *see also Sundaram v. Freshworks Inc.*, 2023 WL 6390622 at *7 (N.D. Cal. Sept. 28, 2023) ("[t]he case law is far from settled regarding the length of time necessary to constitute a 'trend' for the purpose of Item 303") (quoting *Franchi v. SmileDirectClub, Inc.*, 633 F. Supp. 3d 1046, 1066 (M.D. Tenn. 2022)). Under this guidance, companies must determine when climate-related risks become material. They must tread with extreme caution to avoid acting prematurely and inadvertently giving investors misinformation or disclosing as a trend something that is not (and may never be) a trend, while simultaneously not delaying so long that they can be accused of concealing a problem. This is particularly difficult in the realm of climate disclosures, where companies must make predictions about the speed at which climate-related risks may materialize. Prior to the Second Circuit's approach, illustrated in *Macquarie*, companies made these decisions based on their considered business

judgment, without being influenced by the specter of significant private liability under Section 10(b).

Furthermore, SEC filings are but one part of the ongoing information conveyed to investors. Earnings releases provide additional insight to investors, and company officers spend meaningful time discussing their business with sophisticated investors and industry analysts, both in group settings such as calls and conferences, as well as on an individual basis. The result is that investors are able to seek a broad range of information and probe into many aspects of the business.

B. Under Congress's Direction, the SEC Plays a Central Oversight and Enforcement Role with Respect to MD&A Disclosure

The SEC plays a key role throughout the disclosure process: preparing guidance and interpretive releases that companies could rely upon in drafting MD&A, reviewing and commenting on disclosures, and enforcing any perceived violations. The SEC's central role in the disclosure regime provides companies with uniform guidance in drafting MD&A disclosures and a mechanism for enforcement of the disclosure rules, both of which contribute to clear and meaningful disclosure for investors.

1. In drafting MD&A disclosures, companies rely upon the expert guidance provided by the SEC's Division of Corporation Finance ("DCF"), including through Staff Legal and Accounting Bulletins, Staff Disclosure Guidance Topics, updates to the Division's

Financial Reporting Manual, no-action and interpretive letters, and Compliance and Disclosure Interpretations. The DCF has issued extensive guidance on MD&A disclosures in particular. *See, e.g.*, 2003 Guidance, 68 Fed. Reg. at 75056; Interpretive Release, 1989 WL 1092885 at *1.

The DCF's staff, which possesses "specialized industry, accounting, and disclosure review expertise," reviews disclosure filings and discusses these disclosures with the filing companies. *Division of Corporation Finance: Filing Review Process*, SEC (Sept. 27, 2019), https://www.sec.gov/divisions/corpfin/cffilingreview. The staff reviews each reporting company to at least some extent every three years and "may provide a company with comments where the staff believes a company can significantly enhance its compliance with the applicable requirements." *Id.* The company and the staff then engage in a dialogue consisting of the exchange of letters or more informal discussions, which allows the company to either explain its disclosures to the staff's satisfaction or amend them to address the staff's comments. *Id.* (noting that "[a]t any time during the filing review process, a company or its representatives may request that the staff reconsider either a previously-issued comment or its view of the company's response to a comment" and "[t]he company or its representatives should feel free to involve the Disclosure Program Director, the Division's Deputy Director or Director at any stage in the filing review process"). The SEC routinely—and in recent years, increasingly—comments on companies' MD&A disclosures. *See* Ernst & Young,

SEC Reporting Update, 2 (2023), https://bit.ly/3szuIay; *see, e.g.*, Dick's Sporting Goods, Inc., SEC Staff Comment Letter (Aug. 9, 2023), http://bit.ly/3FAhsFq; Zoom Video Communications, Inc., SEC Staff Comment Letter (Sept. 28, 2022), https://bit.ly/409G7dz; Globis NV Merger Corp., SEC Staff Comment Letter (May 4, 2022), https://bit.ly/3s73HLo. In appropriate cases, "[t]he SEC vigorously enforces the MD&A disclosure requirements." 2 Thomas Lee Hazen, Law Sec. Reg. § 9:52 (2023). *See, e.g.*, *Compass Mins. Int'l, Inc.*, Exchange Act Release No. 4340, 2022 WL 4445488 (Sept. 23, 2022), *Under Armour, Inc.*, Exchange Act Release No. 4220, 2021 WL 1737508 (May 3, 2021); *Dentsply Sirona Inc.*, Exchange Act Release No. 90681, 2020 WL 7396438 (Dec. 16, 2020); *Kirchner*, Exchange Act Release No. 80947, 2017 WL 2591798 (June 15, 2017); *Bank of Am. Corp.*, Exchange Act Release No. 72888, 2014 WL 4101590 (Aug. 21, 2014); *Tidewater Inc.*, Exchange Act Release No. 56557, 2007 WL 2803999 (Sept. 27, 2007); *Raytheon Co.*, Securities Act Release No. 8715, 2006 WL 1788543 (June 28, 2006); *Salant Corp.*, Exchange Act Release No. 34046, 1994 WL 183411 (May 12, 1994); *SEC v. Melchior*, No. 90–C–1024J, 1993 WL 89141 (D. Utah Jan. 14, 1993); *Caterpillar Inc.*, Exchange Act Release No. 30532, 1992 WL 71907 (Mar. 31, 1992).

2. There are good reasons why Congress entrusted the SEC, rather than private plaintiffs, with primary responsibility for the interpretation and enforcement of Item 303. Doing so ensures that the securities laws are interpreted and enforced consistently across the country. *See Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*,

511 U.S. 164, 188 (1994) (explaining the need for predictability in the securities markets). It also ensures that the securities laws are enforced according to the SEC guidance discussed above. Additionally, the SEC can provide prospective alterations to the disclosure regime, whereas civil litigation is inherently retrospective.

More fundamentally, plaintiffs' lawyers have an ethical obligation to maximize recovery for their clients, regardless of the general public policy effect of the legal position they are taking. *See* Model Rules of Prof'l Conduct R.1.3 cmt. 1 (Am. Bar Ass'n 2023). Congress passed the Private Securities Litigation Reform Act of 1995 in recognition of the harm of frivolous private securities litigation to the detriment of the public interest. *See* H.R. Conf. Rep. 104-369, at 32 (Nov. 28, 1995). By contrast, the SEC has long "had a mandate to use its statutory authority to the greatest extent possible to protect unwary investors from fraud and exploitation" and is best positioned to consider the impact of its interpretive and enforcement decisions on investors generally, and not individual litigants. Allison Grey Anderson, *The Disclosure Process in Federal Securities Regulation: A Brief Review*, 25 Hastings L.J. 311, 331 (1974). The SEC acts in pursuit of its "mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation" in the market as a whole. *Mission*, SEC (August 29, 2023), https://www.sec.gov/about/mission. It is therefore uniquely able to weigh and determine how to promote a proper balance between over- and under-disclosure, and between premature and tardy disclosure. And, unlike private litigants, the SEC balances the need

for appropriate enforcement against the negative consequences that can result from over-enforcement. *See* Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship*, 108 Colum. L. Rev. 1301, 1329 (2008) ("If overdeterrence appears to be a problem . . . the public enforcer can adjust by ratcheting down the enforcement level; conversely, if underdeterrence appears to be a problem, the public enforcer can ratchet it up."). This difference in incentives may explain why the SEC has brought only fourteen enforcement actions involving Item 303 since 2014, compared to the 159 complaints that plaintiffs have filed alleging such violations in the same time period. *Compare* Ann.A *with* Pet. 62a-75a.

Moreover, the need to consider the societal impacts of enforcement is particularly important for generally worded regulations like Item 303 that, if always enforced to the greatest extent, could result in undesirable consequences. Rose, *supra*, at 1329 ("Discretionary nonenforcement allows society to avoid the costs of crafting more precisely tailored rules, and the loopholes such rules inevitably create."); *see also* Interpretive Release, 1989 WL 1092885, at *1 (MD&A requirements "are intentionally general, reflecting [the SEC's] view that a flexible approach elicits more meaningful disclosure and avoids boilerplate discussions."). Private plaintiffs and their lawyers do not have the same goal and are not equally well-positioned to promote the SEC's mission. *Cf. Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 349-51 (2001) (noting that government agencies can take a "measured response"

to avoid over-disclosure, whereas private litigants lack the incentive to do so).

II. THE SECOND CIRCUIT'S APPROACH DRAMATICALLY ALTERS THE PROCESS FOR DRAFTING DISCLOSURES, DEGRADES THE QUALITY OF DISCLOSURE, AND HARMS INVESTORS

If adopted by the Court, the Second Circuit's expansion of Section 10(b) liability to the alleged omissions of "trends" and "uncertainties" in MD&A would accelerate a paradigm shift in the preparation and enforcement of such disclosures. The potential consequences of this accelerated shift would be pronounced: disclosures would be less useful to investors, but more expensive for companies to prepare. In addition, the shift would frustrate the recently considered judgments of Congress and the SEC in this area.

A. The Second Circuit's Approach Is Leading to Disclosures That Are Less Useful to Investors

The specter of expansive liability and costly litigation under Section 10(b) created by *Macquarie* and its predecessors incentivizes companies to dramatically change their MD&A disclosure processes and practices and accelerates the trend of producing significantly less useful disclosures, to the detriment of the investing public and registrants alike.

1. "The line between those MD&A disclosures which are required and those which may be avoided is far from a clear one" and necessarily involves

making difficult judgments in the face of considerable ambiguity and uncertainty. Hazen, *supra*, § 9:52. It requires management to forecast the future based upon imperfect or incomplete information. Trends are notoriously difficult to identify, both *ex ante* and in hindsight. The SEC itself has acknowledged how difficult trends and their future impacts are to judge, stating that "even the most carefully prepared and thoroughly documented projections may prove inaccurate." Safe Harbor Rule for Projections, 44 Fed. Reg. 38810 (July 2, 1979).

Under the Second Circuit's approach, companies seeking to avoid costly litigation are incentivized to resolve all unclear disclosure decisions in favor of more disclosure, leading to disclosure of marginal, insignificant, and unhelpful information. This is all the more likely in light of the double negative inquiry required by Item 303, unchanged in the 2021 amendments: if management *cannot* conclude that a trend is unlikely to materialize, then it must disclose *unless* management determines that the trend would be immaterial. Interpretive Release, 1989 WL 1092885 at *3-4; *see also* 2021 Final Rule, 86 Fed. Reg. at 2094 (affirming two-step test).

For example, assume that a company has received an internal complaint from an anonymous whistleblower. When a whistleblower complaint is received, a company must first evaluate the complaint from several angles before deciding whether it merits disclosure to investors—considering the plausibility of the allegations, as well as the potential impact on the business should those allegations turn out to be true. Following an initial

evaluation, management might engage an external firm to conduct an independent investigation into the allegations or conduct its own investigation. At some point, management may satisfy itself that the investigation reveals a trend or uncertainty requiring disclosure and decide to disclose the issue to the market. (Management might also decide that the allegations are not justified or are isolated and do not represent a disclosable trend.) This takes time. But the point at which management decides to disclose the issue will always be subject to second-guessing. If management must fear that its decision will be questioned in hindsight by private litigants, management will be pushed to err on the side of disclosing too much information too soon, before it is confident in the results of the investigation.

Premature disclosure carries its own risks. The disclosure of the fact of the investigation could cause investors to believe that the company is at greater risk than it truly is, causing an artificial and unfounded drop in a company's share price to the detriment of all investors. Premature disclosure is also more likely to be incomplete or imprecise, putting companies in a Catch-22: either they wait to disclose until they are more certain and risk being sued on the theory that they waited too long, or they disclose prematurely and risk having to later correct the incomplete, early disclosure, opening the door to a lawsuit alleging that their first disclosure was misleading. Placing companies in such a double bind serves no useful purpose for their investors.

This incentive to over-disclose or prematurely disclose events that may not be and may never

become trends will be powerful, given the *in terrorem* effect of Section 10(b) litigation. Companies that manufacture or sell consumer goods need to consider whether every product return or warranty claim could be plausibly viewed in hindsight as an emerging trend that requires disclosure. Pharmaceutical companies need to weigh whether every adverse drug reaction or device failure reported by an individual subsequently could be viewed in hindsight by a private litigant as an early trend that should have been disclosed. Food services companies need to consider whether initial negative feedback in response to the rollout of a new menu, which management did not think did or would constitute a trend, nonetheless would be characterized by entrepreneurial plaintiffs' lawyers as the onset of a disclosable material trend should the worst unexpectedly happen.[2]

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[2] Recent complaints filed in federal district courts provide a flavor of the sorts of hindsight-bias claims companies are facing, emboldened by the Second Circuit's mistaken precedents. *See, e.g.*, Compl., *General Retirement System of the City of Detroit v. AT&T Inc.*, No. 23-cv-7351-JLR (S.D.N.Y. Aug. 18, 2023), Dkt. 1 (Section 10(b) claim based, in part, on the company's alleged failure to disclose under Item 303 that AT&T failed to provide employees with proper safety training or warn them of the presence of toxic lead); Compl., *Lozada v. TaskUs, Inc.*, No. 22-cv-1479-JPC (S.D.N.Y. Dec. 16, 2022), Dkt. 26 (Section 10(b) claim based, in part, on alleged failure to disclose under Item 303 omitting high employee attrition rate); Compl., *N.Y.C. Fire Dep't Pension Fund v. Coupang, Inc.*, No. 22-cv-7309-VSB (S.D.N.Y. Aug. 26, 2022), Dkt. 50 (Section 10(b) claim based, in

The result of the incentives created by *Macquarie* and its predecessors is not only more disclosure, but also lower quality disclosure—the "avalanche of trivial information" that the Court warned of in *Basic*, 485 U.S. at 231. This dynamic would harm investors and undermine recent efforts to make corporate disclosures more useful to investors, as well as contribute to the "information overload" that a recent study found negatively impacts securities analysts (let alone average investors). Joost Impink et al., *Regulation-induced Disclosures: Evidence of Information Overload?*, 58 ABACUS 432, 459 (Sept. 2022), https://bit.ly/3tSD8Kj. That study concluded "that the increases in disclosure regulations over the past decades have not necessarily been useful and that a focus on more effective disclosures is warranted" to mitigate the negative impacts of overwhelming disclosures. *Id. Macquarie* further exacerbates this problem.

a. The increased disclosure incentivized under *Macquarie* is of dubious significance to investors, both because those disclosures themselves are unilluminating at best and because their inclusion will overburden investors when identifying and

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part, on alleged failure to disclose under Item 303 that the company maintained unsafe working conditions and exploited its suppliers and merchants); Compl. *Diaz v. The Gap, Inc.*, No. 22-cv-7371-DG-RER (E.D.N.Y. July 20, 2023) Dkt. 27 (Section 10(b) claim based, in part, on alleged failure to disclose under Item 303 an unsuccessful launch of a body positive clothing line).

distinguishing the most critical information from an already voluminous filing to avoid the risk of potential future liability. As then-SEC Chairman Jay Clayton noted, "the median word-count for SEC filings has more than doubled, yet readability of those documents is at an all-time low."[3] Indeed, by the mid-2010s, the median Form 10-K had reached "nearly 50,000 words"—more than double the median length of a Form 10-K in 1996 (23,000 words), and more than triple the length permitted for a merits brief in this Court (15,000 words). *See* Travis Dyer et al., *The Evolution of 10-K Textual Disclosure: Evidence from Latent Dirichlet Allocation*, 64 J. of Acct. & Econ. 221, 222 (2017). Under the Second Circuit's approach, disclosures are likely to continue to get longer. The SEC has recognized the "possibility that high levels of immaterial disclosure can obscure important information or reduce incentives for certain market participants to trade or create markets for securities." Business and Financial Disclosure Required by Regulation S-K, Securities Act Release No. 10064, 2016 WL 1595258, at *23919 (Apr. 22, 2016) ("2016 Guidance"). Investors faced with an ever-larger flood of "trend" disclosures will struggle to separate the trends that management actually considers important from more marginal sets of similar events that were included simply to reduce the risk of litigation.

b. These additional and premature disclosures will be unhelpful to investors, as

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[3] Jay Clayton, Chair, SEC, *Remarks at the Economic Club of New York* (July 12, 2017), https://www.sec.gov/news/speech/remarks-economic-club-new-york.

companies are incentivized to include overcautious disclosures of potentially negative information in order to avoid omission liability. In line with the Court's admonition about over-disclosure in *Basic*, the SEC has long stated that "the effectiveness of MD&A decreases with the accumulation of unnecessary detail," and emphasized that "companies should avoid the unnecessary information overload for investors that can result from disclosure of information that is not required, is immaterial, and does not promote understanding." 2003 Guidance, 68 Fed. Reg. at 75057, 75061. The SEC reemphasized this in its recent Item 303 amendments, underscoring "the historical and continued importance of materiality in MD&A" and its "continue[d] . . . belie[f] that MD&A's materiality-focused and principles-based approach facilitates disclosure of complex and often rapidly evolving areas. . . ." 2021 Final Rule, 86 Fed. Reg. at 2089. The SEC therefore has stated "it is increasingly important for companies to focus their MD&A on material information" and has encouraged companies to "evaluate issues presented in previous periods and consider reducing or omitting discussion of those that may no longer be material or helpful." 2003 Guidance, 68 Fed. Reg. at 75061.

The SEC also noted in a release adopting amendments to Item 303 that a higher threshold for trend disclosure would reduce the possibility that investors will be "overwhelmed by voluminous disclosure of insignificant and possibly unnecessarily speculative information" under a lower disclosure threshold. Disclosure in Management's Discussion and Analysis About Off-Balance Sheet Arrangements and Aggregate Contractual Obligations, Securities

Act Release No. 8182, 2003 WL 236157, at *5985 (Feb. 5, 2003). In 2013, then-SEC Chair Mary Jo White spoke about the problem of "information overload" in which "ever-increasing amounts of disclosure make it difficult for investors to focus on the information that is material and most relevant to their decision-making . . . ."[4]

Because of the *in terrorem* impact of the Second Circuit's expansion of Section 10(b) liability to Item 303, however, companies will be incentivized to lower their disclosure threshold for potential trends, which will undermine the above-articulated SEC goals.

2. The incentives created by *Macquarie* and its predecessors are also changing the way that MD&A disclosures are drafted, to the detriment of investors. As the SEC has stated, "MD&A should be a discussion and analysis of a company's business as seen through the eyes of those who manage that business" because "[m]anagement has a unique perspective on its business that only it can present." 2003 Guidance, 68 Fed. Reg. at 75056. Affirmation of

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[4] Mary Jo White, Chair, SEC, *The Importance of Independence*, The Fourteenth Annual A.A. Sommer, Jr. Lecture on Corporate, Securities, and Financial Law at Fordham Law School (Oct. 3, 2013), https://www.sec.gov/news/speech/spch100113mjw ("[T]he SEC needs to maintain the ability to exercise its own independent judgment and expertise when deciding whether and how best to impose new disclosure requirements. For, it is the SEC that is best able to shape disclosure rules consistent with the federal securities laws and its core mission.").

Macquarie threatens to deprive investors of this unique perspective.

Rather than permitting management to draft MD&A disclosures in a manner that allows investors to see the company through the eyes of management, the Second Circuit's approach incentivizes companies to cede drafting responsibility to litigation counsel with the objective of addressing how a company could be viewed with hindsight if the worst should happen. But determining what constitutes a "trend" requires a sophisticated understanding of a company's business to determine what implications a particular set of facts might have—an understanding that experienced management is well-positioned to possess, but litigators are not.

As a result, companies risk over-disclosing marginal trends that management do not consider significant but that were included to reduce the risk of future liability. These defensive disclosures may prompt the market to form unnecessarily negative views about a company's prospects, crowd out useful investor information, and artificially depress its stock or otherwise cause investors to mistakenly undervalue the company, all because they deprive investors of the ability to truly see the company through the eyes of management.

B. The Second Circuit's Expansion of Liability Under Item 303 Is Increasing the Cost of Being a Public Company

In addition to degrading the quality of MD&A disclosure, *Macquarie* is increasing the burden of preparing that disclosure. *See Stoneridge Inv.*

Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 164 (2008) (considering the impact that expanding liability under Section 10(b) would have on the cost of being a public company).

1. As discussed above, the process of drafting MD&A is labor-intensive and challenging. That process is becoming more time-consuming and expensive under the Second Circuit's view, as companies need to act defensively with litigation on the horizon. Public companies in the United States already "spend over fifteen million people-hours producing securities disclosures" annually. Andrew K. Jennings, *Disclosure Procedure*, 82 Maryland L.R. 920, 921 (2023). According to the Office of Management and Budget, domestic issuers spent 2,790 hours annually preparing their required annual and semi-annual reports, up from an estimated 2,561 hours in 2015—a 9% increase in less than ten years. *Compare* Sec. & Exch. Comm'n, OMB 3235-0063, *Form 10-K: Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, General Instructions* (2023) *and* Sec. & Exch. Comm'n, OMB 3235-0070, Form 10-Q: General Instructions (2023) *with* Sec. & Exch. Comm'n, OMB 3235-0063, *Form 10-K: Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, General Instructions* (2015) *and* Sec. & Exch. Comm'n, OMB 3235-0070, Form 10-Q: General Instructions (2015). The cost of defending and resolving private securities litigation has grown alongside increased liability risk and insurance costs. "[T]here is . . . a general tendency towards [securities class] actions being dismissed or settled more slowly, with the consequences trending to being lengthier litigation, increased defense costs and higher

settlement expectations among plaintiffs who are investing more time and expense to build legal cases." Allianz Glob. Corp. & Specialty, *D&O Insurance Insights*, 13 (Nov. 28, 2016), https://bit.ly/3S9qUHu.

a. If the Court cements the Second Circuit's approach, the time, personnel, and effort that companies must expend on their disclosures will grow. Companies may be forced to change their structure of internal controls to ensure that everything that could conceivably be considered a trend in retrospect is reported up to management for evaluation. Companies thus may be required to involve even more employees located in further reaches of the company in the disclosure process. Litigation counsel may be introduced "in[to] the drafting process at earlier stages, which may lengthen the time for preparation of a periodic report." Linda L. Griggs et al., *Living with Leidos*, 49 Sec. Reg. & L. Rep. 1788, 2 (Nov. 13, 2017). Management—including senior management—would be required to sift through vast amounts of data to identify all sets of potentially related events that a future plaintiff might try to string together into a trend after a stock price drop. *See* Griggs, *When Rules Collide*, *supra*, at 14. Shareholders would be faced with "[l]onger and more complex disclosures [that] would be even less readable and provide limited additional meaningful information to investors." *Id.* MD&A would look less like the company through the eyes of management than through the eyes of litigation counsel.

b. The Second Circuit's approach amplifies the uncertainty that companies face in complying with Item 303. As public companies well know,

uncertainty is costly. Companies are less able to rely on the primacy of SEC interpretation and guidance on MD&A disclosure rules. Courts across the country will continue to add to the multiplicity of interpretations of what constitutes a trend under Item 303—a subject that remains unsettled. *See, e.g.*, *Sundaram*, 2023 WL 6390622, at *7 (noting that "[t]he case law is far from settled regarding the length of time necessary to constitute a 'trend' for the purpose of Item 303.") (quoting *Franchi*, 633 F. Supp. 3d at 1066). Item 303 is already "'broad and ambiguous,' a result of the SEC's 'decision to leave the standard of disclosure 'intentionally general, reflecting [the SEC's] view that a flexible approach elicits more meaningful disclosure and avoids boilerplate discussions, which a more specific approach could foster.'" *Diehl v. Omega Protein Corp.*, 339 F. Supp. 3d 153, 167 (S.D.N.Y. 2018) (quoting *In re Canandaigua Sec. Litig.*, 944 F. Supp. 1202, 1210 (S.D.N.Y. 1996)). Companies must keep abreast of the quickly shifting legal landscape—with all the cost that entails—and incorporate into their disclosure decision-making an updated overview of all legal theories and pronouncements in this area, or else face the risk of private litigation.

2. In addition, the increased disclosure burdens associated with the Second Circuit's ruling undermines the SEC's efforts, as expressed in the 2021 amendments to Item 303, "to eliminate duplicative disclosures and enhance MD&A disclosures for the benefit of investors, while simplifying compliance efforts for registrants." 2021 Final Rule, 86 Fed. Reg. at 2109. The SEC recognized that "the amendments could reduce registrants' disclosure burden and associated compliance costs." *Id.* at 2110. For investors, the SEC

recognized that the amendments "could potentially reduce information asymmetry between registrants and investors, which could enhance the investment decision process[.]" *Id.* If upheld, *Macquarie* will stymie the purpose underlying the 2021 amendments to Item 303 to simplify disclosures for both public companies and the average investor.

III. THE SECOND CIRCUIT'S APPROACH DISREGARDS CONGRESS'S AND THE SEC'S CONSIDERED JUDGMENTS ABOUT MD&A DISCLOSURES

The Second Circuit's extension of Section 10(b) liability to trend and uncertainty disclosures under Item 303 also threatens to upset Congress's and the SEC's careful judgments with respect to the scope of MD&A disclosure.

1. Increasing the burden of disclosure runs counter to congressional efforts to reduce it.

Twice since 2012, Congress has directed the SEC to modernize and simplify Regulation S-K, including Item 303. In 2012, Congress passed the Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. 306 (2012) (the "JOBS Act"), directing the SEC to undertake "a comprehensive evaluation of [the SEC's] disclosure requirements, which included an assessment of the information [the SEC's] rules require registrants to disclose, how and where this information is presented, and how [the SEC] can better leverage technology as part of these efforts." Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information, 85 Fed. Reg. 12068, 12069 (Feb. 28, 2020) (proposed rule). The JOBS Act

mandated that the SEC issue a report, eventually known as the S-K Study, which led to the Disclosure Effectiveness Initiative, a four-year regulatory review that ultimately sought "to improve [the SEC's] disclosure regime for the benefit of both investors and registrants." *Id.*

Three years after the JOBS Act, Congress enacted the Fixing America's Surface Transportation Act, Pub. L. No. 114-94, 129 Stat. 1312 (2015) (the "FAST Act"). Although primarily a transportation and infrastructure law, the FAST Act included sections aimed at modernizing and simplifying Regulation S-K's disclosure requirements. In particular, Section 72002(2) of the FAST Act instructed the SEC to "eliminate provisions of Regulation S-K, required for all issuers, that are duplicative, overlapping, outdated, or unnecessary." Section 72003 further required the SEC to perform a study to, among other things, "determine how best to modernize and simplify [the requirements of Regulation S-K] in a manner that reduces the costs and burdens on issuers while still providing all material information."

In enacting the FAST Act, Congress underlined the importance of reducing the burden of disclosing unnecessary and unhelpful information so that companies can instead focus their efforts and resources on innovating and creating jobs. *See* H.R. Rep. No. 114-279, at 2 (2015) ("Simplifying and streamlining disclosure requirements will enable companies to divert fewer resources to compliance, freeing up additional capital for other purposes."). Congress also stated that it believes company management should be given the discretion to determine what information is important for

investors to know. *See* H.R. Rep. No. 113-642, at 5 (2014) (explaining that one of the goals of the FAST Act was to "restore[] management discretion in identifying the material matters that should be disclosed to shareholders in periodic SEC filings").

The SEC ultimately promulgated a series of amendments to Regulation S-K "that were intended to modernize, simplify, and enhance the MD&A disclosures for investors while reducing compliance burdens for registrants." 2021 Final Rule, 86 Fed. Reg. at 2087. The SEC also recognized that the amendments, "to the extent the amendments result in more tailored and informative disclosure, . . . could potentially reduce information asymmetry between registrants and investors, which could enhance the investment decision process, improve firms' liquidity, and decrease the cost of capital." *Id.* at 2110. The amendments expressed no concerns about Item 303 compliance, but rather "[the] amendments reflect a standard that is consistent with longstanding Commission guidance, and [the SEC] agree[d] with those commenters that stated [the amendments] reflect[] current practice." *Id.* at 2093.

2. A construction of Section 10(b) that increases the disclosure burdens under Item 303 would directly conflict with Congress's objectives to streamline these disclosure requirements. As the SEC explained in its proposed MD&A rules, "[t]he JOBS Act and the FAST Act, and the work on the Disclosure Effectiveness Initiative and the S-K Study, [were] focused on modernizing and improving disclosure to reduce costs and burdens while continuing to provide investors with all material information." 85 Fed. Reg. at 12069. The Second

Circuit's expansion of Section 10(b) to include liability under Item 303 directly undermines Congress's intent.

CONCLUSION

For the foregoing reasons, the Society urges the Court to reverse the decision of the Circuit Court.

Respectfully submitted,

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APPENDIX

APPENDIX TABLE OF CONTENTS

Appendix A: List of SEC Item 303
Enforcement Actions (1985 – Present) 1a

Appendix A

List of SEC Item 303 Enforcement Actions (1985 – Present):

Date Issued	Case
1/10/1985	*Charter Co.*, Exchange Act Release No. 21647, 1985 WL 661155
3/31/1992	*Caterpillar Inc.*, Exchange Act Release No. 30532, 1992 WL 71907
3/1/1993	*Pres. Life Corp.*, Exchange Act Release No. 31934, 1993 WL 65652
9/17/1993	*Kahler Corp.,* Exchange Act Release No. 32916, 1993 WL 375869
2/17/1994	*Shared Med. Sys. Corp*., Exchange Act Release No. 33632, 1994 WL 49960
5/12/1994	*Salant Corp*., Exchange Act Release No. 34046, 1994 WL 183411
5/12/1994	*Am. W. Airlines, Inc.*, Exchange Act Release No. 34047, 1994 WL 183412
7/25/1994	*Huntway Partners, L.P.*, Exchange Act Release No. 34436, 1994 WL 386584
9/26/1994	*Meris Lab'ys, Inc*, Exchange Act Release No. 34722, 1994 WL 523841

10/20/1994	*Philip A. Fitzpatrick*, Exchange Act Release No. 34865, 1994 WL 575965
6/6/1995	*Kemper Corp.*, Exchange Act Release No. 35814, 1995 WL 358038
6/26/1995	*Am. Mobile Sys. Inc.*, Exchange Act Release No. 35888, 1995 WL 390275
9/21/1995	*P. Andrew Baker*, Exchange Act Release No. 36260, 1995 WL 560220
9/26/1995	*Richard D. Russell*, Exchange Act Release No. 36280, 1995 WL 568739
10/11/1995	*Gibson Greetings, Inc.*, Exchange Act Release No. 36357, 1995 WL 597476
12/22/1995	*Bank of Boston Corp.*, Exchange Act Release No. 81, 1995 WL 757874
5/2/1996	*Sulcus Comput. Corp.*, Exchange Act Release No. 37160, 1996 WL 222495
9/19/1996	*Cypress Bioscience Inc.*, Exchange Act Release No. 37701, 1996 WL 531656
9/26/1996	*Advanced Micro Devices, Inc.*, Exchange Act Release No. 37730, 1996 WL 549106
10/2/1996	*Aura Sys. Inc.*, Exchange Act Release No. 37776, 1996 WL 559838
2/18/1997	*Alan D. Rosskamm*, Exchange Act Release No. 38298, 1997 WL 65771

6/25/1997	*Nat'l. P'ship Inv. Corp.*, Exchange Act Release No. 38773, 1997 WL 349021
12/22/1997	*Presstek, Inc.*, Exchange Act Release No. 39472, 1997 WL 784548
4/20/1999	*Terex Corp.*, Exchange Act Release No. 41312, 1999 WL 228423; *Larry L. Skaff*, Exchange Act Release No. 41313, 1999 WL 228426
5/6/2003	*Timothy E. Nolan*, Exchange Act Release No. 47802, 2003 WL 21005537
5/6/2003	*Andrx Corp.*, Exchange Act Release No. 47803, 2003 WL 21005531
11/13/2003	*Gateway, Inc.*, Exchange Act Release No. 48778, 2003 WL 22683974
4/11/2005	*Glob. Crossing Ltd.*, Exchange Act Release No. 51517, 2005 WL 831350
4/18/2005	*Coca-Cola Co.*, Exchange Act Release No. 51565, 2005 WL 883699
7/15/2005	*Comerica, Inc.,* Exchange Act Release No. 52041, 2005 WL 1963611
6/28/2006	*Raytheon Co.*, Securities Act Release No. 8715, 2006 WL 1788543)
3/15/2007	*Franklyn A. Caine*, Exchange Act Release No. 55476, 2007 WL 776494

9/25/2007	*Elec. Data Sys. Corp.*, Exchange Act Release No. 56519, 2007 WL 2778644
9/27/2007	*Tidewater Inc.*, Exchange Act Release No. 56557, 2007 WL 2803999
8/5/2010	*Navistar Int'l Corp.*, Exchange Act Release No. 62653, 2010 WL 3071892
8/21/2014	*Bank of Am. Corp.*, Exchange Act Release No. 72888, 2014 WL 4101590
2/12/2014	*Apple Reit Six, Inc.*, Exchange Act Release No. 71546, 2014 WL 547605
6/15/2017	*Kirchner*, Exchange Act Release No. 80947, 2017 WL 2591798
4/24/2018	*Altaba Inc., f/d/b/a Yahoo! Inc.*, Exchange Act Release No. 83096, 2018 WL 1919547
9/16/2019	*Marvell Tech. Grp., Ltd.*, Exchange Act Release No. 86971, 2019 WL 4447393
7/31/2020	*Valeant Pharms. Int'l, Inc., n/k/a Bausch Health Co. Inc.*, Exchange Act Release No. 89442, 2020 WL 4391617; *Howard B. Schiller*, Exchange Act Release No. 89444, 2020 WL 4391619; *J. Michael Pearson*, Exchange Act Release No. 89443, 2020 WL 4391618; *Tanya R. Carro, CPA*, Exchange Act Release No. 89445, 2020 WL 4391620

9/30/2020	*HP Inc.*, Exchange Act Release No. 90060, 2020 WL 5820418
12/9/2020	*Gen. Elec. Co.*, Exchange Act Release No. 90620, 2020 WL 7265278
12/16/2020	*Dentsply Sirona Inc.*, Exchange Act Release No. 90681, 2020 WL 7396438
5/3/2021	*Under Armour, Inc.*, Exchange Act Release No. 91741, 2021 WL 1737508
8/3/2022	*Surgalign Holdings, Inc.*, Exchange Act Release No. 95415, 2022 WL 3138564
9/23/2022	*Compass Mins. Int'l, Inc.*, Exchange Act Release No. 95889, 2022 WL 4445488
9/25/2023	*GTT Commc'ns, Inc.* Exchange Act Release No. 98491, 2023 WL 6247540
9/29/2023	*Newell Brands Inc.*, Exchange Act Release No. 98629, 2023 WL 6373141