No. 20-____

IN THE

Supreme Court of the United States

M&T BANK CORPORATION, *et al.*,

Petitioners,

v.

DAVID JAROSLAWICZ, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether Item 105 of Regulation S-K, which obligates public companies to discuss material risk factors in registration statements, periodic SEC filings, and stock-based merger proxies, requires a company with knowledge of a general risk factor to ascertain and disclose facts that may bear on that general risk factor that are not otherwise within the company's actual knowledge.

(2) Whether Item 105 of Regulation S-K requires companies to identify and discuss potentially unlawful business practices or inadequate compliance procedures in circumstances where neither the company nor any regulator has identified an issue or concern and the company believes that such practices or procedures are compliant with applicable law.

PARTIES TO THE PROCEEDING

Petitioners, who are the defendants in this action and who were appellees in the United States Court of Appeals for the Third Circuit, are M&T Bank Corporation; Hudson City Bancorp, Inc.; the Estate of Robert G. Wilmers, by its personal representatives Elisabeth Roche Wilmers, Peter Milliken, and Holly McAllister Swett; René F. Jones; Mark J. Czarnecki; Brent D. Baird; C. Angela Bontempo; Robert T. Brady; T. Jefferson Cunningham, III; Gary N. Geisel; John D. Hawke, Jr.; Patrick W.E. Hodgson; Richard G. King; Jorge G. Pereira; Melinda R. Rich; Robert E. Sadler, Jr.; Herbert L. Washington; Denis J. Salamone; Michael W. Azzara; Victoria H. Bruni; Donald O. Quest; Joseph G. Sponholz; Cornelius E. Golding; William G. Bardel; and Scott A. Belair.

Respondents, who are the plaintiffs in this action and who were appellants in the Third Circuit, are the Belina Family (comprising Richard Belina and Chrisanne Belina) and Jeff Krublit.

David Jaroslawicz filed the initial complaint, and the district court appointed the Belina Family as lead plaintiffs. Lead plaintiffs and additional plaintiff Jeff Krublit filed the Second Amended Class Action Complaint at issue on this petition.

RULE 29.6 DISCLOSURE STATEMENT

M&T Bank Corporation states that it does not have a parent corporation and that no publicly held corporation owns 10 percent or more of its stock.

Hudson City Bancorp, Inc. no longer exists. It was merged into non-party Wilmington Trust Corp., a wholly owned subsidiary of M&T Bank Corporation, in the transaction that underlies this case.

RELATED PROCEEDINGS

United States District Court (D. Del.):

Jaroslawicz v. *M&T Bank Corporation et al.*,
Civ. No. 15-897 (Nov. 21, 2017)

United States Court of Appeals (3d Cir.):

Jaroslawicz v. *M&T Bank Corporation et al.*,
No. 17-3695 (June 18, 2020)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners M&T Bank Corporation, Hudson City Bancorp, Inc., the Estate of Robert G. Wilmers, by its personal representatives Elisabeth Roche Wilmers, Peter Milliken, and Holly McAllister Swett, René F. Jones, Mark J. Czarnecki, Brent D. Baird, C. Angela Bontempo, Robert T. Brady, T. Jefferson Cunningham, III, Gary N. Geisel, John D. Hawke, Jr., Patrick W.E. Hodgson, Richard G. King, Jorge G. Pereira, Melinda R. Rich, Robert E. Sadler, Jr., Herbert L. Washington, Denis J. Salamone, Michael W. Azzara, Victoria H. Bruni, Donald O. Quest, Joseph G. Sponholz, Cornelius E. Golding, William G. Bardel, and Scott A. Belair respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Third Circuit's opinion upon panel rehearing below (App. 1a–33a) is reported at 962 F.3d 701. An earlier opinion by the Third Circuit was vacated by the panel and was previously reported at 912 F.3d 96. The district court's opinion granting defendants' motion to dismiss (App. 34a–52a) is reported at 296 F. Supp. 3d 670. An earlier opinion by the district court granting defendants' prior motion to dismiss is unpublished but reported at 2017 WL 1197716.

JURISDICTION

The Third Circuit issued its decision on June 18, 2020. On March 19, 2020, by general order, the Court extended the time to file this petition to 150 days from the date of the lower court judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

REGULATORY PROVISIONS INVOLVED

Item 105 of Regulation S-K provides:

(a) Where appropriate, provide under the caption "Risk Factors" a discussion of the material factors that make an investment in the registrant or offering speculative or risky. This discussion must be organized logically with relevant headings and each risk factor should be set forth under a subcaption that adequately describes the risk. The presentation of risks that could apply generically to any registrant or any offering is discouraged, but to the extent generic risk factors are presented, disclose them at the end of the risk factor section under the caption "General Risk Factors."

(b) Concisely explain how each risk affects the registrant or the securities being offered. If the discussion is longer than 15 pages, include in the forepart of the prospectus or annual report, as applicable, a series of concise, bulleted or numbered statements that is no more than two pages summarizing the principal factors that make an investment in the registrant or offering speculative or risky. If the risk factor discussion is included in a registration statement, it must immediately follow the summary section required by § 229.503 (Item 503 of Regulation S-K). If you do not include a summary section, the risk factor section must immediately follow the cover page of the prospectus or the pricing information section that immediately follows the cover page. Pricing information means price and price-related information that you may omit from the prospectus in an effective registration statement based on Rule 430A (§ 230.430A of this chapter). The registrant must furnish this information in plain English. See § 230.421(d) of Regulation C of this chapter.

STATEMENT

This petition concerns the scope of Item 105 of Regulation S-K, which governs the disclosure of material factors that make an investment in the registrant or offering speculative or risky. The Third Circuit held that Item 105 requires issuers to (i) disclose facts they did not know at the time of disclosure and that were only later brought to their attention and (ii) acknowledge misconduct they do not believe themselves to have committed and which no regulator has accused them of committing. This holding splits with the First Circuit, which requires an issuer to disclose risk factors under Item 105 only if the issuer had actual knowledge of those risks, and with the Second Circuit, which does not require an issuer to preemptively confess to misconduct that has not resulted in any regulatory or other sanction.

The Third Circuit's decision, if allowed to stand, will significantly reduce the pleading and evidentiary standards plaintiffs must meet in bringing claims under the federal securities laws and will expose thousands of public companies participating in the U.S. securities markets to significant, hindsight-based liability.

This case arises from M&T's acquisition of Hudson City via a cash-and-stock merger. Though Hudson City's shareholders overwhelmingly approved the merger in April 2013, and would ultimately realize a total profit of nearly $2 billion, the Federal Reserve withheld approval of the transaction until September 2015 in light of its concerns regarding M&T's Bank Secrecy Act and anti-money laundering ("BSA/AML") compliance program. In addition, in October 2014, M&T entered into a $2 million settlement with the Consumer Financial Protection Bureau to resolve allegations regarding certain consumer checking practices, without

admitting to any wrongdoing. When the Federal Reserve subsequently approved the M&T/Hudson City merger, it cited this CFPB settlement as relevant to its assessment of M&T's compliance program.

Although all these events occurred *after* the parties had filed their joint proxy soliciting shareholder approval for the merger, plaintiffs brought a putative class action alleging that petitioners had violated § 14(a) of the Securities Exchange Act of 1934 and SEC Rule 14a-9 by soliciting such approval by means of a materially deficient proxy statement. As pertinent here, plaintiffs alleged that petitioners had fallen short of their disclosure obligations under Item 105 by failing to disclose M&T's allegedly noncompliant business practices and regulatory procedures in the joint proxy. In the decision below, the Third Circuit found that plaintiffs' Item 105 theory was viable, because "whether M&T had actual knowledge of the shortcomings in its BSA/AML compliance or its consumer checking practices [was] of no moment."

In so holding, the Third Circuit split sharply with both the First Circuit and Second Circuit. In the First Circuit, Item 105 requires disclosure of facts actually known to the filer at the time of disclosure. *See Silverstrand Invs.* v. *AMAG Pharms., Inc.*, 707 F.3d 95, 103 (1st Cir. 2013). And in the Second Circuit, issuers need not disclose "uncharged, unadjudicated wrongdoing" under Item 105, even if an investigation is underway, because "[d]isclosure is not a rite of confession." *City of Pontiac Policemen's and Firemen's Ret. Sys.* v. *UBS AG*, 752 F.3d 173, 184 (2d Cir. 2014) (internal quotation marks omitted). The decision below cannot be reconciled with these precedents, and petitioners would have prevailed under the law of either the First or the Second Circuit.

The Third Circuit expressed "caveats, cautions, and qualms" about its conclusion, and with good reason. Because the decision below threatens to expand exponentially the number of cognizable federal securities law claims, including based on the judicially created private right of action under § 14(a) of the Exchange Act, the questions presented are exceptionally important for each and every public company in the United States and warrant this Court's immediate review. And because of the federal securities laws' broad venue provisions and Delaware's status as the domicile of choice for U.S. public companies, the Third Circuit's expansive interpretation of Item 105 threatens to become the de facto national standard, frustrating further percolation. The Court should intervene now to resolve the conflict of authority and forestall the proliferation of hindsight-based securities claims alleging failures to detect and disclose unknown material risks.

The petition should be granted.

A. Background

Part 229 of Title 17 of the Code of Federal Regulations, more commonly known as Regulation S-K, delineates the SEC's disclosure requirements with respect to the nonfinancial statement portions of the various forms required to be filed under the Securities Act of 1933 and the Securities Exchange Act of 1934. Adopted in 1977, Regulation S-K reflects the SEC's "efforts to harmonize disclosure required under both the Securities Act and the Exchange Act by creating a single repository for disclosure regulation that applies to filings by registrants under both statutes." Exchange Act Release No. 77599 at 10 (Apr. 13, 2016). Regulation S-K thus permeates the disclosure regime governing the U.S. securities markets, extending to registration statements under the Securities Act, which

accompany any public stock offering, and proxy statements and periodic reports under the Exchange Act.

This case concerns a prominent disclosure requirement in Regulation S-K: Item 105. Where it applies (and it often does), Item 105 imposes an affirmative obligation on companies to discuss the "material factors that make an investment in the registrant or offering speculative or risky." 17 C.F.R. § 229.105(a). Companies filing periodic reports under the Exchange Act must comply with Item 105 in their annual reports (*i.e.*, 10-Ks) and, to the extent there have been material changes, in their quarterly reports (*i.e.*, 10-Qs). Companies making public securities offerings must comply with Item 105 in their registration statements. And, as in the case here, companies soliciting approval from shareholders for stock-based mergers via Form S-4 must comply with Item 105 in their proxy statements seeking such approval.

B. Facts and Procedural History

1. In 2012, M&T agreed to acquire Hudson City. App. 36a. The deal required the approval of both companies' shareholders, and so Hudson City and M&T filed a joint proxy statement with the SEC (the "Joint Proxy"). App. 5a. Pursuant to Item 503 of Regulation S-K, since amended and recodified as Item 105, the Joint Proxy discussed the most significant risk factors confronting the merger and M&T.[1] App. 6a.

[1] The amendments to former Item 503 are not relevant to the analysis of either of the questions presented by this petition. Accordingly, the caselaw analyzing former Item 503 continues to govern the interpretation of Item 105. For the sake of consistency with the opinion below and to reflect the regulation's current placement within Regulation S-K, petitioners refer to Item 105 throughout this petition.

Included in this "Risk Factors" discussion was a section on the "Regulatory Approvals Required for the Merger," which emphasized the risk that regulators could withhold or substantially delay approval of the transaction. Defs.' C.A. Br. 8 (3d Cir. Apr. 2, 2018). The merger parties explained that securing such approval would depend in part upon the Federal Reserve's evaluation of "the effectiveness of the companies in combatting money laundering," as well as, more generally, its assessment of any "unsound banking practices." *Id.* M&T also explained that it believed its BSA/AML policies and procedures were compliant with applicable law. App. 8a.

About a week before the Hudson City shareholder vote, M&T and Hudson City disclosed that regulatory approval for the merger would be delayed because of concerns that the Federal Reserve had recently expressed about M&T's BSA/AML compliance program. Hudson City's shareholders were undeterred by this development and subsequently voted overwhelmingly to approve the merger. App. 8a–10a.

Over the next two years, M&T worked to address the Federal Reserve's concerns. While it was doing so, the CFPB announced an enforcement action against M&T concerning allegations that the bank had unlawfully offered some customers free checking accounts before switching them to fee-based accounts. M&T resolved these allegations with the CFPB by agreeing to refund about $2 million to customers. App. 10a. The resulting settlement agreement contained no admission or judicial finding of any wrongdoing or noncompliance on the part of M&T. *See* Defs.' C.A. Br. 12 (3d Cir. Apr. 2, 2018).

Ultimately, the Federal Reserve issued an order approving the merger on September 30, 2015, and the merger closed on November 1, 2015. *See id.* at 13–14.

2. A few weeks before the merger closed, David Jaroslawicz filed a complaint on behalf of a putative class of Hudson City shareholders, asserting claims under § 14(a) and § 20(a) of the Exchange Act and under SEC Rule 14a-9, along with a claim for breach of fiduciary duty under Delaware law. App. 10a. After the appointment of the Belina Family as lead plaintiffs, plaintiffs filed an amended complaint reasserting the same claims, and defendants moved to dismiss for failure to state a claim. The district court granted the motion, but with leave to amend. App. 11a.

In their second amended complaint, plaintiffs pleaded only a § 14(a) claim, proffering two theories of liability. First, plaintiffs contended that because the Joint Proxy did not discuss M&T's allegedly "non-compliant BSA/AML practices and deficient consumer checking program," M&T had failed to comply with Item 105. *Id.* Plaintiffs did not contend that M&T had knowledge of the allegedly noncompliant BSA/AML practices. Quite the opposite, plaintiffs' theory sounded in negligence: the parties "would have *discovered*" the deficiencies, plaintiffs asserted, had only they "performed adequate due diligence." Second Am. Compl. ¶ 14 (D. Del. Apr. 20, 2017), ECF No. 72 (emphasis added). Second, plaintiffs contended that "M&T's failure to discuss these allegedly non-compliant practices" rendered M&T's opinion statements regarding its belief in its own compliance, among other statements, materially misleading. App. 11a.

Defendants again moved to dismiss, and the district court again granted their motion. The district court held that, to the extent the Item 105 theory was premised on the alleged failure to discuss deficiencies in the BSA/AML program, M&T had sufficiently discussed the regulatory risks relating to the merger.

App. 44a–46a. And as for the consumer checking issues that were addressed in the later CFPB settlement, the district court found that plaintiffs had not plausibly alleged that those issues posed a significant risk to the merger's approval "at the time the Proxy issued." App. 46a. The district court further held that plaintiffs had failed to plead any actionable opinion statements. App. 46a–50a.

The district court granted plaintiffs leave to amend, but plaintiffs elected to stand on their second amended complaint and appealed its dismissal. App. 11a.

3. After the completion of briefing in the Third Circuit but before oral argument, the Third Circuit invited the SEC to file an amicus brief addressing, among other things, whether Item 105 is satisfied where a proxy filer "neglects to disclose that one of the parties to the proposed merger has serious regulatory violations that could derail or significantly delay a merger." App. 54a.

The SEC subsequently submitted a letter explaining that it was unable to file an amicus brief by the Third Circuit's deadline. The signatory to the letter, the Chief Counsel of the SEC's Division of Corporation Finance, thus "express[ed] no views on the particular legal questions raised in the matter before the Court" and instead "offered background information" on Item 105 on his own behalf. App. 56a.

4. On December 26, 2018, the Third Circuit issued an opinion vacating the district court's dismissal of plaintiffs' § 14(a) claim to the extent it was premised on plaintiffs' Item 105 theory and affirming the dismissal of the claim to the extent it was based on allegedly misleading opinion statements. Defendants petitioned for panel rehearing or rehearing en banc.

i. On February 28, 2019, the en banc court ordered that the petition for rehearing en banc be held in abeyance pending a decision by this Court in *Emulex Corp.* v. *Varjabedian*, No. 18-459. After this Court dismissed *Emulex* as improvidently granted, the panel granted defendants' petition for panel rehearing, vacated its December 26, 2018 opinion, reconstituted itself in light of the retirement of the Honorable Thomas I. Vanaskie, and called for supplemental briefing.

ii. On June 18, 2020, the Third Circuit issued an opinion that, like the opinion it had earlier withdrawn, vacated the district court's dismissal of the § 14(a) claim to the extent it was premised on a violation of Item 105 and affirmed the dismissal of the claim to the extent it was premised on misleading opinion statements.

With respect to Item 105, the Third Circuit held that the "Second Amended Complaint plausibly allege[d] that the BSA/AML deficiencies and consumer checking practices posed significant risks to the merger before M&T issued the Joint Proxy" and that "the weaknesses present in M&T's BSA/AML and consumer compliance programs" would have been material. App. 29a. Because the Joint Proxy omitted discussion of these "deficiencies" and "weaknesses," plaintiffs had "met their pleading burden." *Id.*

The court acknowledged that the First Circuit's decision in *Silverstrand* stood for the sound proposition that pleading a viable Item 105 claim "requires an allegation that a known risk factor existed at the time of the offering." App. 22a. The knowledge requirement was met here, said the panel, because "M&T knew that the state of its compliance program would be subject to extensive review from federal regulators," App. 23a, and "knew the failure to obtain regulatory approval would be significant, possibly fatal, to the merger,"

App. 28a. In light of M&T's knowledge of this looming regulatory inspection and its potential consequences, M&T had to disclose "the failure of [its] internal compliance program," App. 28a n.15, and its "BSA/AML deficiencies," App. 29a. It did not matter that plaintiffs had not alleged—indeed, had disclaimed—that defendants knew of these deficiencies when they issued the Joint Proxy: "whether M&T had actual knowledge of the shortcomings in its BSA/AML compliance or its consumer checking practices [was] of no moment." App. 29a. Nor did it matter that plaintiffs made "no allegation that M&T offered an insincere opinion" when it told investors that it believed its BSA/AML policies and procedures complied with applicable law. App. 31a. Rather, "it [was] the risk to the merger posed by the regulatory inspection itself that triggered the need for disclosur[e]" of the omitted information under Item 105. App. 29a.

The court likewise held that plaintiffs had plausibly alleged that M&T was required to disclose the alleged consumer checking problems identified by the CFPB in its enforcement action announced more than a year and a half later. Again, "whether M&T had actual knowledge of . . . its consumer checking practices [was] of no moment." *Id.* According to the panel, Item 105 imposed an obligation on M&T to disclose the alleged deficiencies regardless, because "regulatory review of a bank's consumer checking practices as part of a merger would not be unexpected" and posed a "risk to the merger." *Id.*

REASONS FOR GRANTING THE PETITION

This petition satisfies all the conventional requirements for certiorari. The Third Circuit's treatment of Item 105 squarely conflicts with that of the First Circuit and Second Circuit. The decision below was wrong. And the petition presents two questions of exceptional importance to the thousands of public companies that must regularly comply with Item 105—questions that are unlikely to benefit from further percolation given the federal securities laws' broad venue provisions in conjunction with the Third Circuit's status as the home (via Delaware) to a large majority of American public companies. The questions presented thus warrant this Court's prompt review, and the petition should be granted.

I. The decision below conflicts with the decisions of two other circuits.

The Third Circuit's decision in this case establishes a clear split of authority in the federal circuit courts regarding the scope of Item 105 in two significant respects.

A. In holding that Item 105 requires disclosure of facts regardless of whether they are actually known to the reporting company at the time of disclosure, the Third Circuit created a conflict with the First Circuit's contrary decision in *Silverstrand*.

In *Silverstrand*, the plaintiff shareholders alleged that the defendant pharmaceutical company, AMAG Pharmaceuticals, Inc., had failed to disclose in connection with a secondary stock offering that use of its new drug had resulted in 23 so-called "Serious Adverse Events" ("SAEs"), even though it knew about these reactions and had reported them to the FDA. 707 F.3d

at 98–104.[2] When information about these SAEs came to light post-offering, AMAG's stock tanked, and shareholders brought a putative class action under § 11 of the Securities Act, premised in part on Item 105. *See id.* at 99–101. The plaintiffs had stated an Item 105 claim, the First Circuit held, because the defendant "failed to disclose the 23 SAEs, *even though it knew about them*." *Id.* at 106 (emphasis added).

In the decision below, the Third Circuit purported to adopt a knowledge requirement, but it split from the First Circuit on the critical and outcome-determinative question of whether defendants must have actual knowledge of the facts that they are alleged to have omitted. In this case, unlike in *Silverstrand*, plaintiffs did not allege that defendants had knowledge of the BSA/AML deficiencies at issue. To the contrary, plaintiffs' theory is that M&T "*failed to detect*" its own alleged noncompliance, Second Am. Compl. ¶ 76 (emphasis added), and "would have discovered" these deficiencies had it "performed adequate due diligence," *id.* ¶ 14.

The Third Circuit, in turn, drew no pleading-stage inference regarding defendants' knowledge of either the alleged BSA/AML deficiencies or consumer checking deficiencies in concluding that plaintiffs had adequately pleaded that M&T was required to disclose them. Quite the opposite, the Third Circuit held that "whether M&T had actual knowledge of the shortcomings in its BSA/AML compliance or its consumer checking practices *[was] of no moment*." App. 29a (emphasis added). That

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[2] As the First Circuit explained, an SAE is a regulatory term of art that refers to, among other things, death, inpatient hospitalization, or a congenital abnormality or birth defect. *See Silverstrand*, 707 F.3d at 98 n.3.

was because it was the "risk to the merger posed by the regulatory inspection itself that triggered the need for [these] disclosures under Item 105." *Id.* In other words, because M&T knew that the merger would face regulatory scrutiny, M&T needed to disclose any "deficiencies" that potentially could jeopardize regulatory approval, even if it didn't know about them.

In so holding, the Third Circuit fundamentally diverged from the First Circuit's decision in *Silverstrand*. In the First Circuit, a reporting company must have knowledge of the actual facts it is alleged to have omitted to trigger a disclosure obligation under Item 105. *See Silverstrand*, 707 F.3d at 106 ("Because the Complaint alleged that [defendant] failed to disclose the 23 SAEs, even though it knew about them, we cannot conclude that it failed to state plausible § 11 claims for omissions of . . . Item [105] risks."). In the Third Circuit, no such requirement exists. It is enough that the reporting company have knowledge of some general risk, within which some specific facts bearing on that risk might lurk, undiscovered and unknown.

Though the Third Circuit attempted to reconcile its decision with *Silverstrand*, it could do so only by misreading the First Circuit's holding as motivated by something other than the defendant's knowledge of the 23 SAEs that it omitted from its risk disclosure. "The registrant in *Silverstrand* allegedly knew that the FDA would scrutinize the reported effects of its product," the Third Circuit noted. App. 22a. "So allegations of failing to disclose that factor was enough to state a claim." App. 22a–23a. But the First Circuit did not hold that knowledge of imminent regulatory scrutiny was enough to state a claim regardless of whether the defendant knew about the SAEs. To the contrary, the First Circuit held that the plaintiffs had

stated a claim precisely because the defendant "failed to disclose the 23 SAEs, even though it knew about them." *Silverstrand*, 707 F.3d at 106.

Thus, this is not a case involving a shared or similar legal standard that a court misapplied in a fact-bound manner. Rather, the First and Third Circuits have intractably split on the question of whether actual knowledge is required under Item 105 to trigger a disclosure obligation. That the Third Circuit declined to acknowledge the conflict it was creating does not render the conflict any less real or its consequences any less significant. Only this Court's intervention can resolve the split of authority.

B. The Third Circuit's decision also squarely conflicts with the Second Circuit's decision in *City of Pontiac*. In *City of Pontiac*, plaintiffs brought a putative class action under §§ 11 and 12(a)(2) of the Securities Act, alleging that UBS AG and certain of its officers and directors had violated Item 105 by failing to disclose that the bank was engaged in tax evasion. *City of Pontiac*, 752 F.3d at 182. The bank's offering materials had "disclosed that the DOJ was investigating whether . . . UBS client advisors entered the United States to help U.S. clients evade their tax obligations, in violation of U.S. law." *Id.* at 184. But plaintiffs' theory was that Item 105 required more—that, "in addition to disclosing the existence of an investigation, defendants were required to disclose that UBS was, in fact, engaged in an ongoing tax evasion scheme." *Id.*

The Second Circuit rejected that argument, even though UBS had since entered into a deferred prosecution agreement with the DOJ and IRS in which it "revealed that [it] had violated United States tax laws," "admitted participation in a conspiracy to defraud the

IRS," and "disclosed that [it] had paid a $780 million fine." *Id.* at 178. "[D]isclosure is not a rite of confession," the Second Circuit emphasized, and Item 105 does not create a "duty to disclose uncharged, unadjudicated wrongdoing." *Id.* at 184 (internal quotation marks omitted). By disclosing the investigation and its potential consequences as a risk factor, UBS had met its disclosure obligation under Item 105, even though it had not disclosed its actual legal and regulatory deficiencies. *Id.* at 183–84.

If the Third Circuit had applied the Second Circuit's standard to this case, it would have dismissed plaintiffs' claim, which posits that Item 105 obligated defendants to "reveal that M&T had failed" to comply with applicable law and to disclose "the serious extent of such non-compliance." Second Am. Compl. ¶ 3. Instead, the court held that the Joint Proxy's failure to disclose M&T's "BSA/AML deficiencies and consumer checking practices" was actionable. App. 29a; *see also* App. 28a n.15 (indicating M&T should have disclosed "the failure of [its] internal compliance program").

The Third Circuit sought to distinguish *City of Pontiac* as a case in which the relevant disclosure was more specific than the one at issue here: "unlike the defendants in *City of Pontiac*," the Third Circuit reasoned, "M&T offered little more than generic statements about the process of regulatory review." App. 28a. But *City of Pontiac* did not rest on the specificity with which UBS disclosed the investigation; it was animated by the principle that the securities laws do not call for the "confession" of wrongdoing. And in any case, the distinction is an empty one because the information the Third Circuit held should have been disclosed is exactly the type of "uncharged, unadjudicated wrongdoing" that the Second Circuit

held to be outside the ambit of Item 105. *City of Pontiac*, 752 F.3d at 184 (internal quotation marks omitted).

II. The decision below is incorrect.

The Third Circuit did not only create a split of authority in holding that actual knowledge is not required under Item 105 and that SEC reporting companies must disclose unadjudicated wrongdoing when that regulation applies; it got it wrong.

A. With respect to the knowledge element of Item 105, the SEC has never suggested that Item 105 requires disclosure of facts unknown to the company. To the contrary, the SEC has made clear that Item 105 is animated by a "principles-based approach" that is intended to "facilitate an understanding of a registrant's business, financial condition and prospects through the lens through which management and the board of directors manage and assess the performance of the registrant." Modernization of Regulation S-K Items 101, 103, and 105, 85 Fed. Reg. 63726, 63727, 63744 (Oct. 8, 2020). Application of a materiality-based standard, as required by Item 105, the SEC has explained, "involves a certain degree of judgment." *Id.* at 63752. And consistent with this emphasis on the "lens" and "judgment" of management, the SEC's Division of Corporation Finance has issued guidance that makes clear that Item 105's scope is delimited by facts of which registrants "are aware." *See* Div. of Corp. Fin., *CF Disclosure Guidance: Topic No. 2, Cybersecurity*, SEC (Oct. 13, 2011), https://bit.ly/2Rij39Q (discussing Item 105's application to cybersecurity risks and advising that "[i]n evaluating whether risk factor disclosure should be provided, registrants should [] consider . . . threatened attacks *of which they are aware*" (emphasis added)). Indeed, it is precisely because of this sensible limitation that companies are "well positioned to deter-

mine the particular nature of a risk" that may warrant discussion under Item 105 and "to explain how a risk affects them." 85 Fed. Reg. at 63746.

The perils of the Third Circuit's interpretation are particularly acute in Securities Act cases brought under § 11, as cases involving Item 105 often are (including *Silverstrand* and *City of Pontiac*). Although § 10(b) of the Exchange Act requires that defendants act with scienter for liability to attach, and § 14(a) requires that defendants act with at least negligence, § 11 imposes strict liability on issuers that "omi[t] to state a material fact required to be stated [in a registration statement]." 15 U.S.C. § 77k(a). Registration statements associated with stock offerings require disclosure of risk factors under Item 105, and the scope of Item 105's disclosure obligation cannot vary based on the claim at issue. Thus, under the Third Circuit's expansive interpretation, issuers filing registration statements are defenseless against claims that they violated Item 105 by failing to disclose facts of which they were not—or even could not have been—aware.

That cannot be the law, as it would convert the securities laws into a "scheme of investor's insurance," contrary to Congress's intent. *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 345 (2005). Under the appropriate "actual knowledge" standard that applies in the First Circuit, issuers are strictly liable only for omitting material risks of which they were aware, a standard far more consistent with Congress's desire to protect not just investors through the federal securities laws, but also "securities *issuers*." *Chadbourne & Parke LLP* v. *Troice*, 571 U.S. 377, 390 (2014).

B. The Third Circuit's holding that M&T was required to disclose its alleged noncompliance with law is also wrong.

As the Second Circuit held in *City of Pontiac*, Item 105 does not establish a "duty to disclose uncharged, unadjudicated wrongdoing"—and that is for good reason. 752 F.3d at 184 (internal quotation marks omitted). The federal securities laws are intended to promote "full and fair disclosure," *Cal. Public Employees' Retirement System* v. *ANZ Securities, Inc.*, 137 S. Ct. 2042, 2047 (2017) (internal quotation marks omitted), not to place the disclosing company in the shoes of its regulators so that it can pass judgment on the lawfulness of its own conduct. Assessing whether a corporate policy or practice complies with applicable law is an "inherently subjective and uncertain" exercise, *Omnicare, Inc.* v. *Laborers District Council Construction Industry Pension Fund*, 575 U.S. 175, 186 (2015), and, except in egregious cases, it is only with the clarity of hindsight that a company can know that a court or regulator will deem a given program or practice noncompliant. Rare are cases of corporate misconduct "where there was absolutely no doubt about illegality; ordinarily, there would be contestable fact questions and legal defenses available to the company." Donald C. Langevoort, *Disasters and Disclosures: Securities Fraud Liability in the Shadow of a Corporate Catastrophe*, 107 Geo. L.J. 967, 1001 (2019).

By requiring issuers and filers to preemptively disclose "noncompliance" before any regulator or third party has even raised a concern—much less made an adverse determination—the Third Circuit thrusts corporations into an untenable position. Either they must confess sins they do not believe themselves to have committed (and which no regulator has accused them of committing) or expose themselves to substantial liability. And because Item 105 imposes a "mandat[ory]" and affirmative disclosure obligation, a company cannot protect itself by choosing not to speak. App. 17a n.10.

This case presents a fine example. M&T believed that its BSA/AML procedures complied with applicable law, and told shareholders so. *See* App. 8a, 30a n.17. And, as the Third Circuit recognized in its discussion of plaintiffs' *Omnicare* theory, plaintiffs made "no allegation that M&T offered an insincere opinion" when it addressed the matter of its regulatory compliance. App. 31a. Yet, under the Third Circuit's interpretation of Item 105, M&T's belief in its own compliance—an "inherently subjective and uncertain" question—is of no consequence. *Omnicare, Inc.*, 575 U.S. at 186. In light of the decision below, the bank faces liability for failing to disclose deficiencies it did not perceive and for failing to predict regulatory action it did not foresee.

The Third Circuit's holding that Item 105 requires disclosure of regulatory noncompliance is wrong for an additional reason. A neighboring provision in Regulation S-K, Item 103, specifies when a registrant must disclose legal proceedings, and its reach is limited to proceedings that are either "pending" or "known to be contemplated by governmental authorities." 17 C.F.R. § 229.103(a). Well-settled principles of construction dictate that Item 105, as the more general regulation, may not be construed to displace the more specific Item 103 by requiring the disclosure of a "risk factor" that is material *only* because it could result in proceedings that would be governed by Item 103. *See Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 170 (2007). The effect of the Third Circuit's decision is to impose a new, heightened disclosure requirement under Item 105 that renders Item 103 essentially superfluous.

III. The questions presented are exceptionally important.

The questions presented are of national importance and warrant this Court's immediate review.

A. The decision below creates a nightmare scenario for SEC reporting companies, in which they are required to disclose facts of which they do not know and that have not been brought to their attention by a regulator or otherwise. So long as they can be alleged to have known of some high-level risk—like the risk of regulatory scrutiny for a financial institution (as here), the risk of a design defect for a consumer-product company, the risk of an unsuccessful medical trial for a pharmaceutical company, or the risk of a competitor's patent infringement suit for a cutting-edge technology firm—disclosure of unknown facts that later cause the risk to materialize is required. Worse, in holding that Item 105 requires disclosure of noncompliant practices and procedures, the Third Circuit has imposed an affirmative obligation on public companies to self-report potential "wrongdoing," even before the relevant authority has commenced an investigation into the specific underlying conduct. And not only must these companies preemptively identify all potential regulatory deficiencies, they must accurately forecast whether the authorities will someday deem a particular practice or procedure noncompliant with applicable law.

The result is an impossible disclosure standard that can be met only with the wisdom of hindsight. Absent this Court's intervention, the Third Circuit's standard will confound future filers, trigger an onslaught of hindsight-based claims in a context that is uniquely vulnerable to "abusive litigation," and prompt a wave of speculative disclosure that will serve only to confuse

rather than inform. *Tellabs, Inc*. v. *Makor Issues & Rts., Ltd.*, 551 U.S. 308, 313 (2007).

The litigation roadmap charted by the Third Circuit is simple for plaintiffs to navigate and readily portable to all sorts of public companies: (1) identify a corporate event that has allegedly and unexpectedly harmed shareholders (*e.g.*, a regulatory penalty); (2) allege that the company knew of the general category of risk that the event fell within (*e.g.*, regulatory scrutiny); and (3) identify the facts that brought the risk to fruition and, in retrospect, the company allegedly could have uncovered and disclosed (*e.g.*, the specific regulatory deficiencies). That is all that is needed to state a claim premised on Item 105 in the Third Circuit. And because the Third Circuit has rendered the duty-to-disclose element of such a claim so readily satisfied as to be a nullity, many "plaintiffs with weak claims" will sail past the pleadings stage and be well positioned "to extort settlements from innocent companies." *Stoneridge Inv. Partners* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008).

B. Circuit conflicts over the scope of the federal securities laws are of heightened importance not only because of the tax that frivolous securities litigation levies on the public markets, but because the federal securities laws' broad venue provisions lend themselves to forum shopping. Both the Securities Act and the Exchange Act authorize nationwide service of process and confer venue in any district "wherein the defendant is found or is an inhabitant or transacts business." 15 U.S.C. § 78aa(a) (Exchange Act); 15 U.S.C. § 77v(a) (Securities Act). As a result, the outlier position of a single circuit can become the de facto national standard, both amplifying the importance of an erroneous decision and impeding percolation of a federal securities

law question in the lower courts. And that is especially so with respect to the decisions of the Third Circuit, given Delaware's status as the domicile of choice for U.S. public companies.[3]

C. With new securities class actions being filed at a record clip in 2019 (nearly double the 1997–2018 average), the dangers associated with an incorrect, liability-expanding decision are all the more stark. *See* Cornerstone Research, *Securities Class Action Filings—2019 Year in Review* 1 (2020), https://bit.ly/35x8h7W. "Each of the last three years—2017 through 2019—has been more active than any previous year" with respect to securities filing activity, *id.* at 3, resulting in almost one in ten U.S. exchange-listed companies facing a securities class action in 2019, *id.* at 11. The Third Circuit was already a hotbed of this activity, accounting for almost 80 percent of merger-based securities class actions in 2019, *id.* at 14, and serving as the third-most popular circuit for other types of securities class actions, *id.* at 38. And now that the Third Circuit has held that Item 105's disclosure obligation requires the disclosure of unknown facts and potential misconduct, plaintiffs will have every incentive to steer their claims there.

D. This confluence of factors warrants the Court's intervention. And this case is an ideal vehicle in which to take up the scope of Item 105. The decision below was exclusively confined to the same pure questions of

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[3] In 2019, 89 percent of U.S.-based companies that underwent an initial public offering chose to incorporate in Delaware. *See* Del. Div. of Corps., *Annual Report Statistics*, https://corp.delaware.gov/stats/. Even where a company is not incorporated in Delaware (or another state within the Third Circuit), most will at least transact business there, such that venue lies.

law presented here and offered an extensive treatment of the scope of Item 105. Each of the questions is outcome-determinative. And there are no factual or procedural obstacles that will frustrate the Court's ability to reach the questions presented and resolve them cleanly.

* * *

Given the extraordinarily high stakes, this Court has repeatedly granted certiorari over the past decade to establish and maintain uniform standards in private securities litigation. *See, e.g.*, *Emulex Corp.*, 139 S. Ct. 782 (2019) (Mem.); *Cyan, Inc.* v. *Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061 (2018); *Leidos, Inc.* v. *Ind. Pub. Ret. Sys.*, 137 S. Ct. 1395 (2017) (Mem.); *Omnicare, Inc.*, 575 U.S. 175 (2015); *Chadbourne & Parke LLP*, 571 U.S. 377 (2014); *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258 (2014); *Amgen Inc.* v. *Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455 (2013); *Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U.S. 27 (2011).[4] It should do so again here.

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[4] In many of these cases, the Court granted review where, as here, a court of appeals had reversed or vacated the dismissal of plaintiffs' claims and remanded for further proceedings. *See, e.g.*, *Varjabedian* v. *Emulex Corp.*, 888 F.3d 399, 401 (9th Cir. 2018); *Indiana Pub. Ret. Sys.* v. *SAIC, Inc.*, 818 F.3d 85, 88 (2d Cir. 2016); *Siracusano* v. *Matrixx Initiatives, Inc.*, 585 F.3d 1167, 1169–70 (9th Cir. 2009); *see also Broudo* v. *Dura Pharms., Inc.*, 339 F.3d 933, 935 (9th Cir. 2003).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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November 15, 2020

APPENDIX

APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-3695

DAVID JAROSLAWICZ

v.

M&T BANK CORPORATION; HUDSON CITY BANCORP INC.; *THE ESTATE OF ROBERT G. WILMERS, BY ITS PERSONAL REPRESENTATIVES ELISABETH ROCHE WILMERS, PETER MILLIKEN, AND HOLLY MCALLISTER SWETT; RENE F. JONES; MARK J. CZARNECKI; BRENT D. BAIRD; ANGELA C. BONTEMPO; ROBERT T. BRADY; T. JEFFERSON CUNNINGHAM, III; GARY N. GEISEL; JOHN D. HAWKE, JR.; PATRICK W.E. HODGSON; RICHARD G. KING; JORGE G. PEREIRA; MELINDA R. RICH; ROBERT E. SADLER, JR.; HERBERT L. WASHINGTON; DENIS J. SALAMONE; MICHAEL W. AZZARA; VICTORIA H. BRUNI; DONALD O. QUEST; JOSEPH G. SPONHOLZ; CORNELIUS E. GOLDING; WILLIAM G. BARDEL; SCOTT A. BELAIR

BELINA FAMILY; JEFF KRUBLIT,

Appellants

(*Amended pursuant to Clerk's Order dated 3/1/18)

On Appeal from the United States District Court
for the District of Delaware
(D.C. No. 1-15-cv-00897)
District Judge: Honorable Richard G. Andrews

Argued: July 17, 2018

Before: McKEE, MATEY, and SILER, JR.,†
Circuit Judges.

(Filed: June 18, 2020)

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OPINION

MATEY, *Circuit Judge*.

It is a familiar story in the life of a publicly held business. A corporation identifies an opportunity and decides to ask its shareholders for their approval to pursue. But the business runs in a highly regulated space like finance. So the company proceeds through a thick web of laws and regulations that detail how to explain both the risks and the rewards of the opportunity to the shareholders. With a bit of good fortune, all the hard work pays off when the shareholders give their blessing. And then, after the deal is done, only the class action hurdle remains. That is because for more than five decades, these transactions have been subject to a three-tier system of enforcement: oversight by Congress, supervision by regulators like the Securities and Exchange Commission, and "private attorneys general"[1] pursuing "a private right of action." *Gen. Elec. Co. v. Cathcart*, 980 F.2d 927, 932 (3d Cir. 1992) (citing *J.I. Case Co. v. Borak*, 377 U.S. 426, 430–31 (1964)).

We consider that final frontier of enforcement in this appeal. Hudson City Bank ("Hudson") and M&T Bank Corporation ("M&T") successfully merged in 2015. But their union triggered a protest by a few Hudson shareholders, who filed a putative class action (together, the "Shareholders"). The complaint alleged the banks didn't disclose material information about M&T's practice of adding fees to no-fee "free" checking accounts or its failure to comply with federal anti-money laundering regulations. And despite a healthy

[1] Most ascribe the colorful phrase to Judge Jerome Frank. *Associated Indus. N.Y. State, Inc. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943), *vacated*, 320 U.S. 707 (1943).

return on their investment, the Shareholders argue these omissions or misstatements caused all Hudson shareholders financial harm. In a comprehensive opinion, the District Court dismissed these claims. We now vacate and remand for further proceedings based on prior decisions allowing suits alleging inadequate transparency or deception. We reiterate the long-standing limitations on securities fraud actions that insulate issuers from second-guesses, hindsight clarity, and a regime of total disclosure.

I. BACKGROUND

A. The Proposal

Chartered in 1868, Hudson grew to become one of the largest savings banks in New Jersey. Avoiding modern products and trends in favor of steady deposits and safe mortgages, Hudson enjoyed a strong reputation of stability. But, following the 2008 recession, Hudson struggled to hold its footing. It launched reforms, shedding debt, eying diversification, and considering opportunities to merge. Eventually, Hudson found a partner in M&T and the two banks struck a deal. Investors appeared to welcome the announcement with M&T's stock price rising on the news.

B. The Joint Proxy

The merger agreement promised Hudson shareholders a mixture of cash and M&T stock, and required approval by the shareholders of both banks. To provide the required notice, Hudson and M&T opted to issue a Joint Prospectus ("Joint Proxy") and filed a single Form S-4 in accordance with SEC rules.[2] That form

[2] Firms may use Form S-4 to register securities issued in a merger. (Docket Entry Dated July 13, 2018: Letter from David R. Fredrickson, Chief Counsel/Associated Director, Division of

requires issuers to provide, among other things, "the information required by Item 503 of Regulation S-K." Item 503, since recodified as Item 105,[3] asks for "the most significant factors that make an investment in the registrant or offering speculative or risky." 17 C.F.R. § 229.105. Each "risk factor" requires an individual topic heading supported by information that is both "concise and organized logically." *Id.* Specificity is key, as the regulation cautions filers to omit "risks that could apply generically to any registrant or any offering." *Id.* And Item 105 is where the Shareholders direct their attack, alleging this portion of the Joint Proxy was misleading and incomplete. We turn to those disclosures.

1. The "Risks Related to M&T"

As required, the Joint Proxy included a section titled "Risks Related to M&T" (App. at 0237), with subsections on "Risks Relating to Economic and Market Conditions," "Risks Relating to M&T's Business," and "Risks Relating to the Regulatory Environment." (App. at A0237–48.) Discussing the regulatory environment, the Joint Proxy noted that "M&T is subject to extensive government regulation and supervision" because of "the Dodd-Frank Act and related regulations." (App. at A1010 (emphasis omitted).) It cautioned that "M&T expects to face increased regulation of its industry as a result of current and possible

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Corporate Finance, United States Securities and Exchange Commission (July 12, 2018).) The form also allows for the filing of a joint prospectus/proxy statement, as M&T and Hudson elected to do here.

[3] *See* FAST Act Modernization and Simplification of Regulation S-K, 84 FR 12674, 12716–17 (April 2, 2019). We will refer to the current regulation.

future initiatives." (App. at A1010.) That will lead to "more intense scrutiny in the examination process and more aggressive enforcement of regulations on both the federal and state levels," which would "likely increase M&T's costs[,] reduce its revenue[,] and may limit its ability to pursue certain desirable business opportunities." (App. at A1010.) The Joint Proxy also stated that "from time to time, M&T is, or may become, the subject of governmental and self-regulatory agency information-gathering requests, reviews, investigations and proceedings and other forms of regulatory inquiry, including by the SEC and law enforcement authorities." (App. at A0248.) That ongoing oversight, in turn, might lead to "significant monetary damages or penalties, adverse judgments, settlements, fines, injunctions, restrictions on the way in which M&T conducts its business, or reputational harm." (App. at A0248.) And the Joint Proxy noted operational risks "encompass[ing] reputational risk and compliance and legal risk, which is the risk of loss from violations of, or noncompliance with, laws, rules, regulations, prescribed practices or ethical standards, as well as the risk of noncompliance with contractual and other obligations." (App. at A0245.) That dense fog of possible problems, as we will see, looms large.

2. Other Warnings

A few additional statements related to risk appeared elsewhere in the Joint Proxy. A section titled, "Regulatory Approvals Required for the Merger" advised that "[c]ompletion of the merger . . . [is] subject to the receipt of all approvals required to complete the transactions contemplated by the merger agreement . . . from the Federal Reserve Board." (App. at A1017.) And the Federal Reserve Board, "[a]s part of its evaluation . . . , reviews: . . . the effectiveness of

the companies in combatting money laundering." (App. at A1018.) While M&T "believe[d]" timely regulatory approval was realistic, it was unsure. (App. at A1017; *see also* App. at A1009.) Rather, M&T offered that:

> Although we currently believe we should be able to obtain all required regulatory approvals in a timely manner, we cannot be certain when or if we will obtain them or, if obtained, whether they will contain terms, conditions or restrictions not currently contemplated that will be detrimental to M&T after the completion of the merger or will contain a burdensome condition.

(App. at A1017.)

3. The Annual Report

At M&T's election, the Joint Proxy incorporated M&T's 2011 Annual Report on Form 10-K as permitted by Form S-4. There, M&T warned that the Patriot Act requires that "U.S. financial institutions . . . implement and maintain appropriate policies, procedures and controls which are reasonably designed to prevent, detect and report instances of money laundering." (App. at A1028.) But investors could take comfort, the Joint Proxy explained, because M&T's "approved policies and procedures [are] believed to comply with the USA Patriot Act." (App. at A1028.)

C. New Disclosures, Governmental Intervention, and Regulatory Delay

M&T filed the Joint Proxy with the SEC, which was declared effective on February 22, 2013, mailed it to all shareholders five days later, and scheduled a vote on the proposal for April. Then, a few days before the ballots, M&T and Hudson announced that "additional

time will be required to obtain a regulatory determination on the applications necessary to complete their proposed merger." (App. at A1041.) In a supplemental proxy, M&T revealed that the Federal Reserve Board identified "certain regulatory concerns" about "procedures, systems and processes relating to M&T's Bank Secrecy Act and anti-money-laundering compliance program."[4] (App. at A1041.) M&T explained that to address these concerns, "the timeframe for closing the transaction will be extended substantially beyond the date previously expected." (App. at A1041.) As a result, M&T and Hudson amended their merger agreement and moved the closure back several months.[5] The

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[4] As the Joint Proxy notes, the merger required approval by the Federal Reserve Board, among other regulators. As part of its review, the Federal Reserve Board assesses the banks' effectiveness in combatting money laundering, requiring a risk-management program incorporating the Bank Secrecy Act and anti-money-laundering ("BSA/AML") compliance. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ("USA PATRIOT") Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified at various sections of the U.S. Code). Title III of the Act, captioned "International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001," amended the Bank Secrecy Act, 31 U.S.C. § 5311 *et seq.*, and "imposed more stringent requirements aimed at money laundering." *Mendez Internet Mgmt. Servs., Inc. v. Banco Santander de P.R.*, 621 F.3d 10, 13 (1st Cir. 2010). To ensure compliance, banks must collect, process, and update information necessary to make money-laundering risk determinations for every customer and account. Banks are also required to have in place acceptable processes and policies to detect and report related suspicious activity.

[5] M&T provided more context a few days later during an earnings conference call, explaining that the compliance issues were significant enough to "impact [the] ability to close the merger . . . in the near term." (App. at A1048.) And M&T noted it needed "to implement [a] plan for improvement . . . to the

shareholder vote, however, remained as scheduled. And these revelations did not deter the shareholders, who overwhelmingly approved the merger. But it took nearly two and a half more years before regulators allowed the deal to close.

While the banks awaited the conclusion of the Federal Reserve review, M&T received more bad news. The Consumer Financial Protection Bureau ("CFPB") announced an enforcement action against M&T for offering customers free checking before switching them to fee-based accounts without notice. A practice, the CFPB noted, that was in place when the merger was first proposed, and that had impacted nearly 60,000 customers. M&T agreed to pay $2.045 million to settle the allegations, the approximate amount of the customer injuries.

D. The Shareholder Suit

A few weeks before the merger closed, David Jaroslawicz, a Hudson shareholder, filed a putative class action against M&T, Hudson, and their directors and officers (together, "M&T"). He claimed that the Joint Proxy omitted material risks associated with the merger in violation of the Securities Exchange Act, 15 U.S.C. § 78n(a)(1) and 17 C.F.R. § 240.14a-9(a). He also brought a claim for breach of fiduciary duty under Delaware law.[6]

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satisfaction of . . . the regulators prior to obtaining regulatory approvals for the merger." (App. at A1048.)

[6] The District Court later appointed the Belina family to serve as lead plaintiffs for the class action.

After the Shareholders filed an amended complaint, M&T moved to dismiss for failure to plead an actionable claim. The District Court granted that motion, but allowed the Shareholders to amend. After the Shareholders amended, M&T again moved to dismiss. The District Court granted M&T's motion. *See Jaroslawicz v. M&T Bank Corp.*, 296 F. Supp. 3d 670 (D. Del. 2017).

In their Second Amended Complaint, the Shareholders presented two theories of M&T's liability for the Joint Proxy's deficiencies. First, because the Joint Proxy did not discuss M&T's non-compliant BSA/AML practices and deficient consumer checking program, the Shareholders contend that M&T failed to disclose material risk factors facing the merger, as required by Item 105. Second, they assert that M&T's failure to discuss these allegedly non-compliant practices rendered M&T's opinion statements about its adherence to regulatory requirements and the prospects for prompt approval of the merger, misleading.

The District Court held that the Joint Proxy sufficiently disclosed the regulatory risks associated with the merger. The Court also held that M&T did not have to disclose the consumer checking violations exposed after the merger announcement. And, applying *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 575 U.S. 175 (2015), the Court found no misleading opinions. The Court again allowed the Shareholders to amend the pleadings, but the Shareholders asked for a final order of dismissal with prejudice to file this appeal.[7]

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[7] Following a panel decision of this Court, M&T petitioned for en banc review or a panel rehearing, and we granted the latter request. *See Jaroslawicz v. M&T Bank Corp.*, 925 F.3d 605

II. JURISDICTION AND THE STANDARD OF REVIEW

The District Court had jurisdiction under 15 U.S.C. § 78aa, and 28 U.S.C. §§ 1331 and 1337. We have jurisdiction under 28 U.S.C. § 1291. As the Shareholders bring their appeal from the District Court's final order granting a motion to dismiss with prejudice, we exercise plenary review. *See In re NAHC, Inc. Sec. Litig.*, 306 F.3d 1314, 1322–23 (3d Cir. 2002). But we are to accept the facts in the light most favorable to the non-moving party. *Jones v. ABN Amro Mortg. Grp., Inc.*, 606 F.3d 119, 123 (3d Cir. 2010). Dismissal is proper only where the complaint fails to state a claim "that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). A claim is plausible "when the plaintiff pleads factual content that allows the courts to draw the reasonable inference that the defendant is liable for the misconduct alleged."[8] *Id*.

(3d Cir. 2019). In its petition for rehearing, M&T waived the argument that the Shareholders' Second Amended Complaint failed to plausibly allege loss causation. (Appellees' Reh'g Pet. at 6.)

[8] The District Court reviewed the allegations under the general pleading standard of Federal Rule of Civil Procedure 8, but M&T argues that all § 14(a) claims are subject to the heightened pleading requirements of the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(b)(1). Still, the parties agree on the statements alleged to have been misleading, do not dispute their specificity, and thus do not argue that the pleading standard is determinative.

III. THE SHAREHOLDERS' TWIN THEORIES OF LIABILITY: ACTIONABLE OMISSIONS AND MISLEADING OPINIONS

A. The Shareholders Plausibly Allege an Actionable Omission or Misrepresentation

1. Actionable Omissions and Misrepresentations Defined

We start by setting some boundaries. The Shareholders have pleaded claims under Section 14(a) of the Securities Exchange Act of 1934, as codified at 15 U.S.C. § 78n(a), and the regulations promulgated by the Commission. But that statute does not provide for a private right of action. And since "Congress creates federal causes of action," where "the text of a statute does not provide a cause of action, there ordinarily is no cause of action." *Johnson v. Interstate Mgmt. Co.*, 849 F.3d 1093, 1097 (D.C. Cir. 2017); *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 313 (2012) ("A statute's mere prohibition of a certain act does not imply creation of a private right of action for its violation."). But during an "*ancien regime*," courts followed a different path, often finding "as a routine matter . . . impl[ied] causes of action not explicit in the statutory text itself." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017). And while courts have since "adopted a far more cautious course before finding implied causes of action," *id.*, in securities fraud actions under § 14(a) what was then is still now. *Cathcart*, 980 F.2d at 932 (citing *Borak*, 377 U.S. at 430–31); *see also Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 284 (2014) (Thomas, J., concurring) ("[T]he implied 10b-5 private cause of action is 'a relic of the heady days in which this Court assumed common-law powers to create causes of action[.]'") (quoting *Corr. Servs. Corp. v. Malesko,* 534

U.S. 61, 75 (2001) (Scalia, J., concurring)). So while courts have since "sworn off the habit of venturing beyond Congress's intent," the Shareholders' suit, for now, still finds room in the half-empty "last drink" poured in *Borak*. *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001); *see also Wisniewski v. Rodale, Inc.*, 510 F.3d 294, 298 (3d Cir. 2007) (noting *Borak* arrived during an "older and less restrictive approach to implied private rights of action"). Reconsideration of that interpretation is beyond our role, *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016), even if perhaps not beyond the horizon. *See Emulex Corp. v. Varjabedian*, 139 S. Ct. 1407 (2019).

2. The Elements of an Omissions Claim

Section 14(a) makes it unlawful to solicit a proxy "in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78n(a)(1). It "seeks to prevent management or others from obtaining authorization for corporate actions by means of deceptive or inadequate disclosures in proxy solicitations." *Seinfeld v. Becherer*, 461 F.3d 365, 369 (3d Cir. 2006) (internal quotations marks omitted). In turn, Rule 14a-9, promulgated by the SEC under the authority of Section 14(a), bars "false or misleading" material statements and omissions in a proxy.[9] The Shareholders allege that M&T

[9] "No solicitation subject to this regulation shall be made by means of any proxy statement . . . containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading[.]" 17 C.F.R. § 240.14a-9(a).

violated Rule 14a-9, and thus Section 14(a), by issuing a Joint Proxy lacking material information.

We have outlined a three-step test for liability under Section 14(a), requiring a showing that: "(1) a proxy statement contained a material misrepresentation or omission which (2) caused the plaintiff injury and (3) that the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction." *Tracinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212, 228 (3d Cir. 2007) (internal quotation marks omitted). And omissions in a proxy statement can violate Section 14(a) and Rule 14a-9 in one of two ways: where "[(a)] the SEC regulations specifically require disclosure of the omitted information in a proxy statement, or [(b)] the omission makes other statements in the proxy statement materially false or misleading." *Seinfeld*, 461 F.3d at 369 (internal quotation marks omitted).

But not every omission or misrepresentation will support a claim for damages. *Tracinda Corp.*, 502 F.3d at 228. Rather, stated or omitted information must be "material," and we have set forth a two-part definition. *Id.* First, we determine whether "there is a substantial likelihood that a reasonable shareholder would consider [the omission or misrepresentation] important in deciding how to vote." *Id.* (quoting *Shaev v. Saper*, 320 F.3d 373, 379 (3d Cir. 2003)). That involves an assessment of whether "the disclosure of the omitted fact or misrepresentation would have been viewed by the reasonable investor as having significantly altered the total mix of information made available." *EP Medsystems, Inc., v. EchoCath, Inc.*, 235 F.3d 865, 872 (3d Cir. 2000) (internal quotation marks and brackets omitted).

Second, we assess the materiality of a statement "at the time and in the light of the circumstances under which it is made." *Seinfeld*, 461 F.3d at 369 (quoting 17 C.F.R. § 240.14a-9(a)). So "liability cannot be imposed on the basis of subsequent events," *In re NAHC*, 306 F.3d at 1330, and the Monday morning quarterback remains on the bench.

3. The Second Amended Complaint Plausibly Alleges Actionable Omissions

With the rules set, we turn to the words in the complaint and in the governing regulations.

i. SEC Regulations and Interpretive Guidance

The Shareholders allege M&T violated Section 14(a) because the Joint Proxy omitted material "risk factors" as required by Item 105, such as the condition of M&T's regulatory compliance program, and its failure to disclose such risks made other statements misleading. As with statutory interpretation, our review of a regulation centers on the ordinary meaning of the text "and the court must give it effect, as the court would any law." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). That analysis uses all the "'traditional tools' of construction." *Id*. (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, *Inc*., 467 U.S. 837, 843 n.9 (1984)). The text of Item 105 directs issuers to:

> [w]here appropriate, provide under the caption "Risk Factors" a discussion of the most significant factors that make an investment in the registrant or offering speculative or risky. This discussion must be concise and organized logically. Do not present risks that could apply generically to any registrant or

> any offering. Explain how the risk affects the registrant or the securities being offered. Set forth each risk factor under a subcaption that adequately describes the risk. . . . The registrant must furnish this information in plain English.

17 C.F.R. § 229.105. While "regulations can sometimes make the eyes glaze over," *Kisor*, 139 S. Ct. at 2415, readers easily understand Item 105 to require issuers to disclose the most significant factors known to make an investment speculative or risky. And those factors should be (a) concise and organized; (b) specific, not generic; and (c) include an explanation connecting the risks to the offer.[10] 17 C.F.R. § 229.105.

Language in guidance from the SEC details these requirements. *See Kisor*, 139 S. Ct. at 2415 (discussing the traditional "legal toolkit" of "text, structure, history, and purpose of a regulation"); *see also Krieger v. Bank of Am., N.A.*, 890 F.3d 429, 438–39 (3d Cir. 2018) (discussing agency guidance to inform ordinary meaning). A 1999 legal bulletin is particularly helpful. *See* SEC Division of Corporation Finance: Updated Staff Legal Bulletin No. 7, "Plain English Disclosure," Release No. SLB-7, 1999 WL 34984247 (June 7, 1999). Under the section titled "Risk Factor Guidance," the

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[10] The parties do not argue that Section 229.105 creates an independent cause of action. *Cf. Oran v. Stafford*, 226 F.3d 275, 287–88 (3d Cir. 2000) (concluding that Item 303 does not create an independent cause of action for private plaintiffs). And we note that neither the language of Section 229.105, nor the SEC's interpretative guidance suggests that it does. *Id.* at 287. So our inquiry turns on whether the duty of disclosure mandated by Item 105, if violated, constitutes a material omission or misrepresentation under the standards of Section 14(a) and its regulations.

SEC explains that "issuers should not present risks that could apply to any issuer or any offering." *Id.* at *1. The SEC also explains that Item 105 risk factors fall loosely into three broad categories:

> **Industry Risk** — risks companies face by virtue of the industry they're in. For example, many [real estate investment trusts] run the risk that, despite due diligence, they will acquire properties with significant environmental issues.
>
> **Company Risk** — risks that are specific to the company. For example, a [real estate investment trust] owns four properties with significant environmental issues and cleaning up these properties will be a serious financial drain.
>
> **Investment Risk** — risks that are specifically tied to a security. For example, in a debt offering, the debt being offered is the most junior subordinated debt of the company.
>
> When drafting risk factors, be sure to specifically link each risk to your industry, company, or investment, as applicable.

Id. at *5–6.

The bulletin includes a few illustrations contrasting a generic discussion with a satisfactory disclosure. *Id.* at *1, *6–7. Here's one example:

> **Before:**
>
> *Competition*
>
> The lawn care industry is highly competitive. The Company competes for commercial and retail customers with national lawn care

service providers, lawn care product manufacturers with service components, and other local and regional producers and operators. Many of these competitors have substantially greater financial and other resources than the Company.

After:

Because we are significantly smaller than the majority of our national competitors, we may lack the financial resources needed to capture increased market share.

Based on total assets and annual revenues, we are significantly smaller than the majority of our national competitors: we are one-third the size of our next largest national competitor. If we compete with them for the same geographical markets, their financial strength could prevent us from capturing those markets.

For example, our largest competitor did the following when it aggressively expanded five years ago:

- launched extensive print and television campaigns to advertise their entry into new markets;
- discounted their services for extended periods of time to attract new customers; and
- provided enhanced customer service during the initial phases of these new relationships.

> Our national competitors likely have the financial resources to do the same, and we do not have the financial resources needed to compete on this level.
>
> ***Because our local competitors are better positioned to capitalize on the industry's fastest growing markets, we may emerge from this period of growth with only a modest increase in market share, at best.***
>
> Industry experts predict that the smaller, secondary markets throughout the mid-west will soon experience explosive growth. We have forecasted that about 17% of our future long-term growth will come from these markets. However, because it is common practice for lawn care companies in smaller markets to acquire customers through personal relationships, our competitors in nearly half of these mid-west markets are better positioned to capitalize on this anticipated explosive growth. Unlike us, these local competitors live and work in the same communities as their and our potential customers.
>
> For the foreseeable future, the majority of our sales people who cover these markets will work out of our two mid-west regional offices because we lack the financial resources to open local offices at this time. As a result, we may substantially fail to realize our forecasted 17% long-term growth from these markets.

Id. at *6. In short, while Item 105 seeks a "concise" discussion, free of generic and generally applicable risks, it requires more than a short and cursory

overview and instead asks for a full discussion of the relevant factors.[11] 17 C.F.R. § 229.105. That, as we will see, is where the Joint Proxy fell, in a word, short.

ii. Interpretative Guidance from Other Courts

Two cases considering the scope of adequate disclosures under Item 105 are also instructive. In *Silverstrand Investments v. AMAG Pharmaceuticals, Inc.*, the First Circuit identified plausible allegations that a pharmaceutical company's offering documents failed to adequately convey risks associated with a clinical drug. 707 F.3d 95, 108 (1st Cir. 2013). In the offering, the company included details about the FDA approval process and the results of clinical trials. *Id.* at 98–99. But the company did not disclose almost two dozen "Serious Adverse Events" it had reported to the FDA. *Id.* at 99. Instead, the offering noted only "ongoing FDA regulatory requirements" that carry the risk of "restrictions on our ability to market and sell" and other "sanctions." *Id.* Reviewing both the language of the regulation and the SEC's interpretive guidance, the First Circuit held that "a complaint alleging omissions of Item [105] risks needs to allege sufficient facts to infer that a registrant knew, as of the time of an offering, that . . . a risk factor existed." *Id*. at 103. And given the many adverse reports the company submitted to the FDA, the court concluded

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[11] As the SEC explains, "[t]he goal of plain English is clarity, not brevity. Writing disclosure in plain English can sometimes increase the length of particular sections of your prospectus. You will likely reduce the length of your plain English prospectus by writing concisely and eliminating redundancies — not by eliminating substance." *See* SEC Legal Bulletin No. 7, 1999 WL 34984247, at *5.

the allegations "more than suffice" to plead a plausible claim of undisclosed risk. *Id.* at 104.

Compare those facts to *City of Pontiac Policemen's and Firemen's Retirement System v. UBS AG*, 752 F.3d 173, 183–84 (2d Cir. 2014), alleging that UBS engaged in a tax evasion scheme. Following the indictment of UBS employees, the company disclosed "multiple legal proceedings and government investigations" showing exposure "to substantial monetary damages and legal defense costs," along with "criminal and civil penalties, and the potential for regulatory restrictions." *Id.* at 184 (internal brackets omitted). Not enough, argued plaintiffs, claiming UBS was also required to disclose that the fraudulent activity was, in fact, still ongoing. *Id.* The Second Circuit sharply disagreed because "disclosure is not a rite of confession, and companies do not have a duty to disclose uncharged, unadjudicated wrongdoing." *Id.* (internal quotation marks and footnote omitted). To the contrary, by disclosing the litany of possible problems that could flow from these investigations, UBS complied with the directive of Item 105. *Id.*

Both decisions rest soundly on the text of Item 105. First, a cause of action for failing to disclose a material risk naturally requires an allegation that a known risk factor existed at the time of the offering. *Silverstrand*, 707 F.3d at 103. Second, in keeping with Item 105's call for a concise, not all-inclusive disclosure, registrants need not list speculative facts or unproven allegations, even if they fit within one of the identified factors. *City of Pontiac*, 752 F.3d at 184. And the two standards reflect the outcomes. The registrant in *Silverstrand* allegedly knew that the FDA would scrutinize the reported effects of its product, a gaze that carried specific risks to their business. So allegations

of failing to disclose that factor was enough to state a claim. Compare that to the filer in *City of Pontiac* who packed the proxy with a host of risks focused on the company, its practices, the problems, and the possible penalties. Asking for more, as the Second Circuit noted, would create a new obligation grounded in guesswork.

iii. M&T's Disclosure in the Joint Proxy Lacks Description and Context of Its Compliance Risks

With these parameters, the shortcomings in M&T's proxy become clear. M&T omitted company-specific detail about its compliance program. Yet M&T knew that the state of its compliance program would be subject to extensive review from federal regulators. And it understood that failure to pass regulatory scrutiny could sink the merger. Taken together, M&T had a duty to disclose more than generic information about the regulatory scrutiny that lay ahead. Instead, and contrary to the ordinary language of Item 105, it offered breadth where depth is required.

Start with the allegations about the BSA/AML compliance program. The Joint Proxy stated that "[c]ompletion of the merger . . . [is] subject to the receipt of all [regulatory] approvals," a process that includes review of "the effectiveness of the companies in combatting money laundering." (App. at A1017–18.) It noted that "we cannot be certain when or if we will obtain [the regulatory approvals] or, if obtained, whether they will contain terms, conditions, or restrictions not currently contemplated." (App. at A1017). And, "[l]ike all businesses, M&T is subject to operational risk, which represents the risk of loss resulting from human error, inadequate or failed internal processes and systems, and external events."

(App. at A0245.) Such "[o]perational risk," the Joint Proxy noted, "also encompasses reputational risk and compliance and legal risk, which is the risk of loss from violations of, or noncompliance with, laws, rules, regulations, prescribed practices or ethical standards, as well as the risk of noncompliance with contractual and other obligations." (App. at A0245.) And "[a]lthough M&T seeks to mitigate operational risk through a system of internal controls . . . , no system of controls . . . is infallible." (App. at A0246). Any "[c]ontrol weaknesses or failures or other operational risks could result in charges, increased operational costs, harm to M&T's reputation or foregone business opportunities." (App. at A0246.)

So M&T identified that the merger hinged on obtaining regulatory approval. And it singled out that determining the effectiveness of its BSA/AML program would be crucial to obtaining that approval. In fact, in "*every case* under the Bank Merger Act" the "[Federal Reserve] Board must take into consideration . . . records of compliance with anti-money-laundering laws."[12] (App. at 1083 (emphasis added).) As M&T

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[12] Other sources similarly support this conclusion. In its 2010 BSA/AML Examination Manual, the Federal Financial Institutions Examination Council ("FFIEC") called Title III of the USA PATRIOT Act "arguably the single most significant AML law that Congress enacted since the BSA itself." FFIEC, Bank Secrecy Act/ Anti-Money Laundering Examination Manual 8 (2010), https://www.occ.treas.gov/static/ots/exam-handbook/ots-exam-handbook-1400.pdf.

In both the 2010 Manual and the updated 2014 Manual, the FFIEC warned that bank management "must be vigilant" in BSA/AML compliance and stated: "Banks should take reasonable and prudent steps to combat money laundering and terrorist financing and to minimize their vulnerability to the risk associated with such activities. Some banking organizations have

even noted, the Board is responsible for evaluating BSA/AML compliance under the authority of two separate statutes: Section 4 of the Bank Holding Company Act of 1956 and Section 18(c) of the Federal Deposit Insurance Act. (App. at A1018.) And so we have no difficulty concluding that the regulatory review process posed a significant risk to the merger that would make it speculative or risky. Put another way, M&T mentioned that regulatory hoops stood between the proposed merger and a final deal.

But M&T failed to discuss just how treacherous jumping through those hoops would be. Instead, M&T offered information generally applicable to nearly any entity operating in a regulated environment. In fact, M&T said that: "[l]ike all businesses," it was subject to regulatory risk. (App. at A0245.) Contrary to Item 105's directive, M&T's explanation of the regulatory review process offered no details and no more than "[g]eneric or boilerplate discussions [that] do not [explain] . . . the risks." *Silverstrand*, 707 F.3d at 103.

Indeed, M&T's generic statement about money laundering compliance is not far from the risk statement offered in SEC guidance as *inadequate*. As recommended by the SEC's guidance, M&T should have "specifically link[ed]" its general statements to "each risk to [its] industry, company, or investment" using details that connected the pending merger review to

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damaged their reputations and have been required to pay civil money penalties for failing to implement adequate controls within their organization resulting in noncompliance with the BSA." *See* FFIEC, Bank Secrecy Act/Anti-Money Laundering Examination Manual 10 (2010), https://www.occ.treas.gov/static/ots/exam-handbook/ots-exam-handbook-1400.pdf, *and* FFIEC, Bank Secrecy Act/Anti-Money Laundering Examination Manual 6 (2015) (V2), https://bsaaml.ffiec.gov/manual.

its existing and anticipated business lines.[13] SEC Legal Bulletin No. 7, 1999 WL 34984247, at *6. But such concise and plain discussions of the significance of regulatory review, framed in the context of M&T's particular business and industry, are absent from the Joint Proxy. As a result, the Shareholders have plausibly alleged that had M&T disclosed the state of its BSA/AML program in the context of regulatory scrutiny that program would face, "there is a substantial likelihood that a reasonable shareholder would [have] consider[ed] it important in deciding how to vote."[14] *Seinfeld*, 461 F.3d at 369.

M&T's discussions about the problems surrounding its consumer checking practice are likewise deficient. Here, the Shareholders claim that M&T was, in fact, aware of the malpractice. The Second Amended Complaint alleges that M&T's faulty practice—first offering free checking, then switching customers to accounts carrying fees—pre-dated the merger agreement. The Joint Proxy did not mention the non-compliant practice or the company's steps to remediate the action. And unlike the BSA/AML deficiencies,

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[13] The only specificity on the subject appears in M&T's incorporated 2011 Annual Report stating, in sharp contrast, that it had in place "approved policies and procedures believed to comply with the USA Patriot Act." (App. at A1028.)

[14] M&T insists that even if the Proxy Statement warnings could insufficiently state the BSA/AML deficiencies, at least the "supplemental disclosures" ensured that "no reasonable shareholder would have been misled about the regulatory hurdles the merger faced." (Response Br. at 35.) But the supplemental disclosures plausibly failed to cure the defect that had already occurred given the omitted risks—both on the lateness of its release and the sufficiency of the information conveyed. Least to say, the effect of the supplemental disclosures raises an issue of fact, which precludes dismissal for now.

M&T did not later attempt to cure its omission—even as it became aware that the merger faced indefinite delays upon learning of the regulatory investigation into the BSA/AML deficiencies. The Shareholders ask that we infer that the consumer checking practices cast doubt on M&T's controls and compliance systems, and posed an independent regulatory risk to the merger material enough that a reasonable shareholder would consider it important in deciding how to vote. On these facts, that inference is reasonable.

iv. Concision is Not Clairvoyance

M&T contends that this appeal "presents the question whether filers of stock-based merger proxies are obligated, . . . to predict regulatory action before it occurs." (Appellees' Supp. Br. at 1.) Indeed, Item 105 does not. Another regulation, Item 103, does require disclosure of potential or present litigation or regulatory enforcement. 17 CFR § 229.103. So the "risk factors" requiring disclosure under Item 105 are separate from legal risks under Item 103. But M&T's contention assumes that *only* risks that are, or later blossom into, regulatory enforcement actions require disclosure. Item 105 is not so narrowly drawn, and we cannot read a line into the law where one does not exist. *See Rotkiske v. Klemm*, 140 S. Ct. 355, 360–61 (2019) ("It is a fundamental principle of statutory interpretation that 'absent provision[s] cannot be supplied by the courts.'") (quoting Scalia & Garner, *supra*, at 94).

To be clear, we do not hold that the regulatory enforcement actions by themselves required M&T to disclose these issues.[15] Later litigation or regulatory

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[15] Our decision in *General Electric Co. v. Cathcart* does not aid M&T. In *Cathcart*, we held that "speculative disclosure [of

enforcement does not create a retroactive duty to disclose. But like the defendants in *Silverstrand*, M&T knew the regulators would be looking into its compliance program, and specifically its BSA/AML effectiveness. They said so themselves. And they knew the failure to obtain regulatory approval would be significant, possibly fatal, to the merger. Yet, unlike the defendants in *City of Pontiac*, M&T offered little more than generic statements about the process of regulatory review. The Shareholders also allege that M&T knew that its consumer checking program skirted regulatory standards, as they claim M&T curtailed its misconduct shortly after signing the merger agreement. Like BSA/AML compliance, we can

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potential legal claims] is not required under Section 14(a)." 980 F.2d at 935. But *Cathcart* arose from the alleged failure to disclose hypothetical future legal claims, particularly claims against individual directors and officers—not against the company itself. *Id.* at 935–36. We concluded that the defendants had no duty to disclose potential liability without pending or threatened litigation. *Id.* at 931. In doing so, we found that a reasonable shareholder would not find the possibility of future claims against directors and officers to be material—as opposed to litigation against the company—unless it ripened into pending or threatened litigation. *Id.* at 936–37 (concluding that otherwise requiring General Electric to disclose potential litigation against all of its 280,000 employees would "bury the shareholders in [an] avalanche of trivial information"). And *Cathcart* distinguished its determination of materiality in the context of liability of directors and officers from materiality in the context of mergers, "in which the shareholders would understandably focus on the operation of the company as a whole." *Id.* at 937. Here, it was not the future threat of regulatory action that triggered the need for disclosure under Item 105. Rather, it was the failure to disclose the risks associated with the compliance program. It is thus plausible to conclude that a reasonable shareholder would consider the failure of M&T's internal compliance program on these issues to be a material element about the company's operations.

infer this practice posed a separate and significant regulatory risk to the merger, as personal checking is a principal business component of any consumer bank. And so regulatory review of a bank's consumer checking practices as part of a merger would not be unexpected. But whether M&T had actual knowledge of the shortcomings in its BSA/AML compliance or its consumer checking practices is of no moment; it is the risk to the merger posed by the regulatory inspection itself that triggered the need for disclosures under Item 105. And the Shareholders have stated allegations that support a reasonable inference that the omission of information related to these risks was material, as evidenced by the threat to the merger caused by the pervasiveness of these deficiencies. This theory may not survive discovery, but it is enough for plaintiffs to meet their pleading burden.

As a result, the Second Amended Complaint plausibly alleges that the BSA/AML deficiencies and consumer checking practices posed significant risks to the merger before M&T issued the Joint Proxy. And based on these allegations, it's also plausible that disclosing the weaknesses present in M&T's BSA/AML and consumer compliance programs "would have been viewed by the reasonable investor as having significantly altered the total mix of information made available." *EP Medsystems, Inc.*, 235 F.3d at 872 (internal quotation marks omitted). Thus, the Shareholders have met their pleading burden.

B. The Shareholders Allege No Misleading Opinions

We agree with the District Court that the Shareholders failed to allege an actionably misleading opinion statement. The Supreme Court's decision in *Omnicare* provides the relevant framework, holding

that an opinion statement is misleading if it "omits material facts" about the "inquiry into or knowledge concerning a statement of opinion." 575 U.S. at 189. But liability attaches only "if those facts conflict with what a reasonable investor would take from the statement itself." *Id*. Alleging an actionable claim under this theory "is no small task," *id.* at 194, because a reasonable investor "understand[s] that opinions sometimes rest on a weighing of competing facts; indeed, the presence of such facts is one reason why an issuer may frame a statement as an opinion."[16] *Id.* at 189–90.

The Shareholders' allegations do not meet this rigorous benchmark. First, they point to M&T's opinion on when it believed the merger might close and the state of its BSA/AML compliance program in its 2011 Annual Report.[17] The Shareholders argue both are misleading because the opinions turned out to be wrong. But *Omnicare* rejected that premise, holding "a[] [plaintiff] cannot state a claim by alleging

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[16] We have not considered whether *Omnicare* applies to claims brought under the Exchange Act and under Section 14(a). But it is unnecessary to resolve that question here. Even assuming *Omnicare*'s holding applies, the Shareholders have failed to allege an actionably misleading opinion.

[17] The Joint Proxy states that "[a]lthough we currently *believe* we should be able to obtain all required regulatory approvals in a timely manner, we cannot be certain when or if we will obtain them or, if obtained, whether they will contain terms, conditions or restrictions not currently contemplated that will be detrimental to or have a material adverse effect on M&T or its subsidiaries after the completion of the merger." (App. at A1009 (emphasis added); *see also* App. at A1017).) It adds "[t]he Registrant and its impacted subsidiaries have approved policies and procedures that are *believed* to be compliant with the USA Patriot Act." (App. at A1028 (emphasis added).)

only that an opinion was wrong . . . ." 575 U.S. at 194. As there is no allegation that M&T offered an insincere opinion, it "is not an untrue statement of material fact, regardless [of] whether an investor can ultimately prove the belief wrong." *Id.* at 186 (internal quotation marks omitted).

Second, the Shareholders allege the Joint Proxy omitted facts about the process M&T followed to form its opinions. They allege, again in conclusory fashion, that M&T and Hudson acted negligently in reviewing M&T's compliance program. The Second Amended Complaint alleges that while "M&T conducted intensive due diligence" of Hudson "from June 2012 through August 27, 2012," by contrast, Hudson did not begin its "reverse due diligence" until August 20, 2012, which lasted "at most five business days." (App. at A0935.) These efforts, the Shareholders allege, were not enough, and show that the opinion statements were insufficient. But the Shareholders omit particular facts about the banks' conduct.

To begin, the Joint Proxy disclosed the duration of the due diligence efforts. "[T]o avoid exposure for omissions," a speaker "need only divulge an opinion's basis, or else make clear the real tentativeness of its belief." *Omnicare*, 575 U.S. at 195. Thus, even if a reasonable investor would have expected the banks to conduct diligence over a longer period, the Joint Proxy provided enough information to understand what the banks did, information enough to decide how to vote. And, in any event, general allegations of negligence do not suffice. *See id.* at 195–96. In all, the opinions flowed from the Joint Proxy's description of the increased scrutiny across the industry. Cautionary language surrounds the opinions, warning of the uncertainty of projections about regulatory approval.

Under *Omnicare*, these opinions inform, rather than mislead, a reasonable investor. And so we will affirm the District Court's dismissal of the Shareholders' misleading opinion claims.

IV. CONCLUSION

We conclude with caveats, cautions, and qualms. First, that the Shareholders have adequately pleaded facts that, if true, might warrant remedy naturally says nothing at this stage of the litigation about their ultimate truth. Second, that M&T might have pursued different choices managing its business is not the focus of our decision. Rather, it is that M&T had an obligation to speak concisely about the risks surrounding their plans.

Finally, our application of now well-established principles of securities fraud class actions does not alleviate our worry over the many well-argued doubts about these kinds of aggregate claims. *See*, *e.g.*, John C. Coffee, Jr., Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation, 106 Colum. L. Rev. 1534, 1536 (2006) (explaining "class actions produce wealth transfers among shareholders that neither compensate nor deter"). Despite reams of academic study, steady questions from the courts, and periodic Congressional attention, the number of securities class actions continues to rise each year.[18] Whether that tide represents an efficient current or

[18] "Since 2012, securities-fraud suits have steadily increased each year; most recently, there was a 7.5% year-over-year increase in 2016 and an additional 15.1% jump in 2017." Congress, the Supreme Court, and the Rise of Securities-Fraud Class Actions, 132 Harv. L. Rev. 1067, 1070 (2019) (citing Cornerstone Research, Securities Class Action Filings: 2017 Year in Review 39 (2018)).

"muddled logic and armchair economics," *Halliburton,* 573 U.S. at 297 (Thomas, J., concurring), is the sort of question that deserves a more searching inquiry. In the meantime, we will affirm the District Court's dismissal of the Shareholders' claims that M&T made misleading opinion statements, and vacate the dismissal of the claims about M&T's risk disclosure obligations.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civ. No. 15-897-RGA

DAVID JAROSLAWICZ, Individually and on behalf of all others similarly situated,

Plaintiffs,

v.

M&T BANK CORPORATION, HUDSON CITY BANCORP, INC., ROBERT G. WILMERS, RENÉ F. JONES, MARK J. CZARNECKI, BRENT D. BAIRD, C. ANGELA BONTEMPO, ROBERT T. BRADY, T. JEFFERSON CUNNINGHAM III, GARY N. GEISEL, JOHN D. HAWKE, JR., PATRICK W.E. HODGSON, RICHARD G. KING, JORGE G. PEREIRA, MELINDA R. RICH, ROBERT E. SADLER, JR., HERBERT L. WASHINGTON, DENIS J. SALAMONE, MICHAEL W. AZZARA, VICTORIA H. BRUNI, DONALD O. QUEST, JOSEPH G. SPONHOLZ, CORNELIUS E. GOLDING, WILLIAM G. BARDEL, and SCOTT A. BELAIR,

Defendants.

MEMORANDUM OPINION

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Kevin R. Shannon, Esq. of Potter Anderson & Corroon, Wilmington, DE; Tracy Richelle High, Esq. and Christen M. Martosella, Esq. of Sullivan & Cromwell LLP, New York, NY. Counsel for Defendants Hudson City Bancorp, Inc., Denis J. Salamone, Victoria H. Bruni, Donald O. Quest, Joseph G. Sponholz, Scott A. Belair, Michael W. Azzara, William G. Bardel, and Cornelius E. Golding.

October 27, 2017

/s/ Richard G. Andrews

ANDREWS, U.S District Judge:

Plaintiffs are former stockholders of Hudson City Bancorp before it merged with M&T Bank Corporation. (D.I. 72 ¶ 26). Defendants are Hudson City, M&T, and their directors and officers at the time of the merger. (*Id.* at ¶¶ 27-53). Pending before the court is Defendants' motion to dismiss Plaintiffs' second amended class action complaint (the "complaint"). (D.I. 75). The complaint alleges that Defendants violated Section 14(a) of the Securities Exchange Act of 1934 (the "1934 Act") by failing to make mandatory disclosures and making misleading disclosures in the proxy statement (the "Proxy") issued in connection with the merger. (D.I. 72 ¶¶ 129-54). For the reasons discussed below, Defendants' motion is granted and the complaint is dismissed without prejudice.

I. BACKGROUND

Plaintiffs argue that Defendants violated Section 14(a) by failing to disclose that M&T was not in compliance with certain banking regulations, which would delay regulatory approval and consequently the closing of the merger. Plaintiffs' arguments are based on disclosures in the Proxy, an April 12, 2013 press release, and an April 15, 2013 earnings conference call, the last two items referred to by Plaintiffs as the "April Disclosures." This section provides a rough timeline of events before discussing in more detail the contents of the Proxy and the April Disclosures.

A. Timeline of Events

On August 27, 2012, Defendants executed a merger agreement pursuant to which M&T would acquire Hudson City, and Hudson City stockholders could

elect to receive either shares of M&T stock or cash having a roughly equivalent value. (D.I. 72 ¶ 58). Hudson City filed a preliminary Proxy with the SEC on October 15, 2012 that became effective on February 22, 2013. (*Id.* at ¶ 11). At the time the Proxy became effective, Defendants expected the merger to close in the second quarter of 2013. (D.I. 77-1 at 103). On April 12, 2013, Defendants issued a press release announcing delays in closing the merger due to additional time needed to obtain regulatory approval from the Federal Reserve Board. (D.I. 72 ¶ 90). According to the press release, the Federal Reserve had raised "concerns" about "M&T's procedures, systems and processes relating to M&T's Bank Secrecy Act and anti-money-laundering compliance program." (*Id.* at ¶ 11). M&T would need additional time to "demonstrate its efficacy to the satisfaction of the Federal Reserve and otherwise meet any other regulatory requirements that may be imposed in connection with these matters." (*Id.* at ¶ 90). On April 15, 2013, M&T had its first quarter 2013 earnings conference call during which it discussed the contents of the press release. (*Id.* at ¶ 91).

On April 18, 2013, Hudson City stockholders voted to approve the merger. (*Id.* at ¶ 6). Over a year later, on October 9, 2014, the Consumer Financial Protection Bureau ("CFPB") announced that it had taken action against M&T for violating consumer disclosure laws by offering free checking, but then switching customers to accounts which carried fees. (*Id.* at ¶¶ 7-8). A year after that, on September 30, 2015, the Federal Reserve approved the merger. (*Id.* at ¶ 117). The complaint alleges that the Federal Reserve delayed its approval due to M&T's non-compliance with the Bank Secrecy Act and anti-money-laundering regulations ("BSA/AML Regulations") and violations of the

consumer disclosure laws (the "Consumer Regulations") addressed by the CFPB. (*Id.* at ¶¶ 4, 117). The merger closed on November 1, 2015. (*Id.* at ¶ 6).

B. The Proxy Disclosures

The complaint alleges that the italicized portions of the following statements were misleading. The first statement discusses compliance and appears in M&T's annual report on Form 10-K for the year ended December 31, 2011, which was incorporated into the Proxy by reference. The second statement discusses timing and appears in the Proxy.

> [The USA Patriot Act] imposes obligations on U.S. financial institutions, including banks and broker dealer subsidiaries, to implement and maintain appropriate policies, procedures and controls which are reasonably designed to prevent, detect and report instances of money laundering . . . . In addition, provisions of the USA Patriot Act require the federal financial institution regulatory agencies to consider the effectiveness of a financial institution's anti-money laundering activities when reviewing bank mergers and BHC acquisitions. Failure of a financial institution to maintain and implement adequate programs to combat money laundering and terrorist financing could have serious legal and reputational consequences for the institution. *The Registrant and its impacted subsidiaries have approved policies and procedures that are believed to be compliant with the USA Patriot Act.*

(D.I. 72 ¶ 80 (alterations and emphasis in original)).

> *Although we currently believe we should be able to obtain all required regulatory approvals in a timely manner*, we cannot be certain when or if we will obtain them or, if obtained, whether they will contain terms, conditions or restrictions not currently contemplated that will be detrimental to or have a material adverse effect on M&T or its subsidiaries after the completion of the merger.

(*Id.* at ¶ 81 (emphasis in original)). Several other sections of the Proxy discussed timing for closing the merger. For example, the section quoted by Plaintiffs refers to another section of the Proxy, titled "The Merger—Regulatory Approvals Required," for more details. That section states:

> There can be no assurances that the regulatory approvals discussed above will be received on a timely basis . . . . In recent similar transactions, the Federal Reserve Board has taken a longer time to render a decision on applications than the typical time period for approval set forth in the Federal Reserve Board's regulations.

(D.I. 77-1 at 101). In addition, the section titled "Effective Time of the Merger" warns "there can be no assurance as to when or if the merger will occur." (*Id.* at 103).

C. The April Disclosures

The April Disclosures discussed the seriousness of the Federal Reserve's concerns and the timing of the merger close. In the earnings conference call on April 15, 2013, M&T's CFO René Jones had the following dialogue with a caller about the Federal Reserve's findings:

> [Caller Question]: Has there been [an] MOU or cease-and-desist order or any other form of written agreement established with the Fed regarding the BSA or the anti-money-laundering issue?
>
> [M&T Answer]: . . . if you think about how it works as an industry matter, formal enforcement actions are disclosed by the appropriate regulator, while some informal regulatory matters such as MOUs and so forth are disclosed by the institution if they're material from a securities law perspective. We didn't wait to receive any formal findings before disclosing this issue last Friday. And as such, we're not really aware of any sort of final outcomes or conclusions from the regulators. We did this in part because of its impact on Hudson City and we tried to be as proactive as we possibly could.

(D.I. 77-6 at 8). With respect to timing, the April 12, 2013 press release stated in relevant part:

> M&T and Hudson City believe that the timeframe for closing the transaction will be extended substantially beyond the date previously expected. M&T and Hudson City intend to extend the date after which either party may elect to terminate the merger agreement if the merger has not yet been completed from August 27, 2013 to January 31, 2014, but there can be no assurances that the merger will be completed by that date.

(D.I. 72 ¶¶ 90). Jones made similar statements about timing in the conference call, including:

- "[I]f you look at recent merger activity in the banking sector, the trend seems to be that it's taking notably longer to get regulatory approvals. Said another way, we don't take regulatory approval for granted." (D.I. 77-6 at 4).
- "[T]o be able to complete the merger we'll need to obtain the regulatory approvals which by their nature are pretty uncertain. But if we can do so, we'll try to get them as soon as possible. But that said, we've not really provided you with a specific date at this time. And I would say that from our perspective it really seems prudent for us to really not to engage in that discussion until maybe later towards the end of the summer." (*Id.* at 9).
- "[I]n terms of talking about timing, you just can't do it." (*Id.* at 11).

II. STANDARD OF REVIEW

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), Plaintiffs must plead facts sufficient to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009). The court must accept all well-pleaded factual allegations in the complaint as true, and view them in the light most favorable to the Plaintiffs. *In re Fisker Auto. Holdings, Inc.*, 2017 WL 492996, at *2 (D. Del. Feb. 7, 2017). But the court need not accept as true allegations in the complaint contradicted by documents on which the complaint relies. *In re: Enzymotec Sec. Litig.*, 2015 WL 8784065, at *11 (D.N.J. Dec. 15, 2015). The court's review is limited to the allegations in the complaint, exhibits attached to the complaint,

documents incorporated by reference, and items subject to judicial notice. *Mayer v. Belichick*, 605 F.3d 223, 230 (3d Cir. 2010).

Defendants argue that the complaint is also subject to the heightened pleading standard of the Private Securities Litigation Reform Act of 1995 (the "PSLRA") codified at 15 U.S.C. § 78u-4(b)(1). (D.I. 76 at 8). In resolving the motion to dismiss the prior complaint, the court ruled that Plaintiffs' claims were not subject to the PSLRA's heightened pleading standard, because the claims sounded in negligence. (D.I. 70 at 7). The court sees no reason to revisit this issue when Defendants do not rely on the heightened pleading standard to argue that Plaintiffs failed to state a claim, and the court finds that dismissal is warranted even under Fed. R. Civ. P. 8.

III. DISCUSSION

Section 14(a), and Rule 14a-9 promulgated thereunder, prohibit a corporation from issuing a proxy "containing any statement which . . . is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading." 15 U.S.C. § 78n(a)(1); 17 C.F.R. § 240.14a-9(a). Plaintiffs argue that Defendants violated Section 14(a) in three ways: (1) by failing to disclose significant "risk factors" as required under Item 503 of Regulation S-K, (2) by making misleading opinion statements, and (3) by making "belated disclosures" a few days before the stockholder vote. (D.I. 78 at 10-13). Before addressing each of these theories, the court must first explain why it rejects Plaintiffs' various arguments that the motion to dismiss is procedurally improper.

A. Procedural Arguments

Plaintiffs argue that this motion to dismiss is procedurally improper in various ways. (D.I. 78 at 6-10). First, Plaintiffs argue that the court should construe the motion to dismiss as an untimely motion for reargument of the previous motion to dismiss the first amended complaint. (*Id.* at 6-7). But, there was no reason for Defendants to seek reargument. The court granted Defendants' previous motion. (D.I. 70). Second, Plaintiffs argue that the law of the case doctrine requires that the court to deny the motion to dismiss. (*Id.* at 9 n. 14) The law of the case doctrine provides that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988). But the doctrine "does not limit the power of trial judges to reconsider [its own] prior decisions." *Williams v. Runyon*, 130 F.3d 568, 573 (3d Cir. 1997). In addition, "[i]nterlocutory orders remain open to trial court reconsideration, and do not constitute the law of the case." *United States ex rel. Petratos v. Genentech Inc.*, 855 F.3d 481, 493 (3d Cir. 2017) (internal punctuation omitted) (*quoting Perez-Ruiz v. Crespo-Guillen*, 25 F.3d 40, 42 (1st Cir. 1994)).

Finally, Plaintiffs argue that this motion is barred by Fed. R. Civ. P. 12(g)(2), which prohibits a party from filing successive motions that "rais[e] a defense or objection that was available to the party but omitted from its earlier motion." (D.I. 78 at 9-10). Plaintiffs, however, run afoul of the requirements of Rule 12(g)(2), because the defenses raised on this motion were neither "available" nor "omitted" from the previous motion. Some of the defenses challenge the sufficiency of new allegations in the amended complaint, so

those defenses were not previously available. Other defenses reiterate defenses raised in the previous motion, so they were not previously omitted. Accordingly, the court does not find Defendants' motion to dismiss to be procedurally improper.

B. Mandatory Disclosures Under Item 503

Plaintiffs argue that Defendants violated Section 14(a) by omitting from the Proxy significant risk factors required under Item 503(c).[1] (D.I. 78 at 11). Item 503(c) requires the prospectus to provide under the caption "risk factors" a "concise discussion" of "the most significant factors that make the offering speculative or risky." 17 C.F.R. § 229.503(c). Plaintiffs argue that Defendants violated Item 503(c) by not disclosing that "the Merger would be delayed or denied (or that M&T would suffer sanctions) due to the Consumer Violations, and the substantial deficiencies in BSA/AML compliance." (D.I. 78 at 11). Plaintiffs' claim fails, however, because "[i]t is indisputable that there can be no omission where the allegedly omitted facts are disclosed." *In re JP Morgan Auction Rate Sec. (ARS) Mktg. Litig.*, 2014 WL 4953554, at *17 (S.D.N.Y. Sept. 30, 2014). Here, there is a section of the Proxy

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[1] Item 503(c) does not always apply to proxy statements filed under the Securities Exchange Act of 1934. *See* Alan R. Bromberg et al., *Bromberg & Lowenfels on Securities Fraud* 5-401 (2d ed. 2017) ("By its terms, Item 503(c) is not applicable to filings under the 1934 Act."). The parties, however, agree that Item 503(c) applies here, because the merger consideration included securities registered under the Securities Act of 1933. (D.I. 83). As a result, the Proxy had to include information required by Form S-4. 17 C.F.R. § 240.14a-101, Item 14. Form S-4 incorporates the disclosure requirements of Item 503 of Regulation S-K. *See* Form S-4, p. 6 (Item 3).

titled "risk factors" (*see* D.I. 63-1 at 27) that concisely states in relevant part:

- "Regulatory Approvals May Not Be Received, May Take Longer than Expected or May Impose Conditions that Are Not Presently Anticipated or Cannot Be Met." (*Id.* at 29).
- "[G]overnmental entities may impose conditions on the granting of such approvals. Such conditions or changes and the process of obtaining regulatory approvals could have the effect of delaying completion of the merger . . . . The regulatory approvals may not be received at any time, [and] may not be received in a timely fashion. . . ." (*Id.*).
- "M&T is subject to operational risk, which represents the risk of loss resulting from human error, inadequate or failed internal processes and systems, and external events. Operational risk also encompasses reputational risk and compliance and legal risk, which is the risk of loss from violations of, or noncompliance with, laws, rules, regulations, prescribed practices or ethical standards, as well as the risk of noncompliance with contractual and other obligations." (*Id.* at 40).
- "Although M&T seeks to mitigate operational risk through a system of internal controls which are reviewed and updated, no system of controls, however well designed and maintained, is infallible. Control weaknesses or failures or other operational risks could result in charges, increased operational costs, harm to M&T's reputation or foregone business opportunities." (*Id.* at 41).

Other sections of the Proxy provided more detail around the risks related to the Federal Reserve's review of M&T's compliance with BSA/AML in particular. (*See*, *e.g.*, D.I. 72 ¶ 68). There was no discussion in the Proxy of risks related to the CFPB or the Consumer Violations in particular. But Plaintiffs have not plausibly alleged that either posed a significant risk at the time the Proxy issued. Instead, Plaintiffs ask the court to infer from the CFPB action taken in October 2014 that those risks existed in February 2013. (*See*, *e.g.*, D.I. 78 at 17 ("If M&T did not have proper documentation as to millions of customers in 2015, it surely did not have such information in early 2013.")). "To be actionable, a statement or omission must have been misleading at the time it was made; liability cannot be imposed on the basis of subsequent events." *In re NAHC, Inc. Sec. Litig.*, 306 F.3d 1314, 1330 (3d Cir. 2002); *see also Williams v. Globus Med., Inc.*, 869 F.3d 235, 244 (3d Cir. Aug. 23, 2017) (stating that plaintiffs cannot rely "exclusively on hindsight" to show that the challenged statements were misleading when made).

For all of these reasons, Plaintiffs have failed to state a claim based on Item 503(c).

C. Misleading Opinions Under *Omnicare*

The complaint alleges that the Proxy was materially misleading or incomplete when it stated that: (1) M&T had "approved policies and procedures that are believed to be compliant with the USA Patriot Act" (the "compliance opinion"); and (2) Defendants "currently believe we should be able to obtain all required regulatory approvals" and complete the merger "in a timely manner" (the "timing opinion"). (D.I. 72 ¶¶ 80-81). These statements are opinions and, therefore, not actionable unless Plaintiffs' claims satisfy the

standards set forth by the U.S. Supreme Court in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 135 S. Ct. 1318 (2015). Under *Omnicare*, an opinion is actionable only if: (1) the speaker did not actually hold the stated belief at the time made; (2) the opinion contains "embedded statements of fact" that were untrue; or (3) the speaker omitted material facts about its "inquiry into or knowledge concerning a statement of opinion" that "conflict with what a reasonable investor would take from the statement itself." *Id.* at 1318, 1326-29. Plaintiffs are proceeding under the third prong.[2] To state a claim under the omission prong "is no small task." *Id.* at 1332. "The investor must identify particular (and material) facts going to the basis for the issuer's opinion . . . whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context." *Id.*

Omnicare describes two ways that an omission can make an opinion misleading. One is based on knowledge and the other is based on process. First, a speaker may be liable where the proxy omits information "in the [speaker's] possession at the time" that did not "fairly align" with the opinion. *Id.* at 1329. For example, if the speaker opines that it was compliant with the law "in the face of its lawyers' contrary advice or with knowledge that the Federal Government was taking the opposite view," and the speaker does not also disclose those contrary views, then the omission could be misleading. *Id.* Here, the complaint

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[2] The claims are grounded in negligence, not fraud, meaning the complaint does not allege that Defendants did not actually hold the stated beliefs. (D.I. 72 ¶¶ 130 & 144). In addition, plaintiffs have not disputed Defendants' assertion that the opinions do not contain embedded statements of fact. (D.I. 76 at 13; D.I. 78).

does not allege that Defendants had material information in their possession at the time the Proxy issued that did not fairly align with the compliance opinion. Instead, it alleges the opposite. (*See*, *e.g*., D.I. 72 ¶ 76 ("M&T . . . failed to detect and disclose that M&T failed to legally comply with BSA/AML and PATRIOT Act requirements"); *id.* at ¶ 92 (stating that the deficiencies "were not discovered" by Defendants)).[3]

Second, a speaker may be liable if the proxy omits material facts about "how the speaker has formed the opinion" and those facts conflict with what a reasonable investor would expect from reading the opinion "fairly and in context." *Omnicare*, 135 S.Ct. at 1328-29, 1332. For example, a reasonable investor usually expects a speaker to consult with a lawyer before

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[3] Plaintiffs allege that "some executives" within M&T must have been aware of the consumer violations because these violations "were intentionally curtailed prior to the drafting of the [Proxy]." (D.I. 78 at 15). But the court cannot reasonably infer from this vague allegation that Defendants were aware of the consumer violations when plaintiffs assert in the same sentence that these violations "could have been discovered by M&T and the other Defendants." (*Id.*). The complaint also alleges that the Federal Reserve expressed "concern" before the Proxy issued, but bare allegations of concern do not plausibly show that Defendants had in their possession information that did not fairly align with the compliance opinion. *See*, *e.g.*, *Tongue v. Sanofi*, 816 F.3d 199, 212 (2d Cir. 2016) ("[F]atal to Plaintiffs' case is the absence of any serious conflict between the FDA's interim, albeit repeated, concerns about methodology and Defendants' optimism about FDA approval."); *Cf. In re Westinghouse Sec. Litig.*, 90 F.3d 696, 711 (3d Cir. 1996) ("The fact that internal auditors also recommended improvements in valuation methods and tighter standards for internal valuations does not support plaintiffs' claim that . . . [the company] fraudulently or even inaccurately represented its internal controls as adequate.").

opining that its conduct is lawful. *Id.* at 1328. If the speaker did not consult with a lawyer and the proxy omits that fact, then the speaker may be liable. *Id.* Similarly, if a CEO opines that her company's TV had the highest resolution available on the market, then a reasonable investor expects that the CEO would have reviewed her competitor' product specifications. *Id.* at 1329 n. 6. If the CEO did not review her competitors' product specifications and this information was not disclosed, then the omission could be misleading. *Id.*

Here, the complaint does not plead, as required by *Omnicare*, particular facts about what Defendants did or did not do in forming the compliance opinion. Instead, the complaint pleads hypotheticals. (*See*, *e.g.*, D.I. 72 ¶ 14 ("Had any of the defendants at that time performed adequate due diligence, they would have discovered . . . that M&T's 'Know Your Customer' obligations . . . were non-compliant"); *id.* at ¶ 79 ("A trained, independent consultant would have been able to detect that M&T had not properly validated and verified customer identities as to millions of customers through accepted sampling techniques, similar to those employed by regulators.")). Hypotheticals are not sufficient to state a claim. *See Omnicare*, 135 S.Ct. at 1333 (explaining that the complaint must allege "particular" facts not a "conclusory allegation" that defendants "lacked reasonable grounds for the belief it stated"); *Southeast Pa. Transp. Auth. v. Orrstown Fin. Serv., Inc.*, 2016 WL 7117455, at *14 (M.D. Pa. Dec. 7, 2016) (dismissing *Omnicare* claim where plaintiffs alleged that the auditor "should have known," and "any reasonable auditor would have 'discovered,'" the material weaknesses in company's internal controls

because plaintiff failed to "identify actual and material steps taken or not taken" by the auditor).[4]

Finally, "whether an omission makes an expression of opinion misleading always depends on the context," including "all its surrounding text, including hedges, disclaimers, and apparently conflicting information." *Omnicare*, 135 S.Ct. at 1330. Taking context into account, no reasonable investor would have been misled by the timing opinion. Plaintiffs cherry-picked the phrase "timely manner" out of a caveat about timing: "*Although* we currently believe we should be able to obtain all required regulatory approvals in a timely manner, *we cannot be certain when or if we will obtain them. . . .*" (D.I. 72 ¶ 81). This sentence was surrounded by other warnings in the Proxy that there were "no assurance as to when or if the merger will occur." (D.I. 77-1 at 103; *see also id.* at 101). Accordingly, the Proxy warned not only that regulatory approvals may take longer than expected, but that they may never come at all. For all of these reasons, the complaint fails to state a claim based on the compliance opinion, the timing opinion, or both.

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[4] Plaintiffs also argue that securities law (as opposed to fiduciary duty law) imposes due diligence obligations that Defendants failed to fulfill. (D.I. 72 ¶¶ 11, 57). But the sole case they cite for their proposition is inapposite. (D.I. 78 at 14). *In re WorldCom, Inc. Securities Litigation* addressed the affirmative defense under Section 11(b) available to any defendant other than the issuer if the defendant had, "after reasonable investigation, reasonable ground to believe and did believe" there were no untrue statements or misleading omissions. 346 F. Supp. 2d 628, 662 (S.D.N.Y. 2004) (*quoting* 15 U.S.C. § 77k(b)(3)(A)). The availability of an affirmative defense of due diligence does not create an affirmative duty to perform due diligence.

D. The April Disclosures

Plaintiffs argue in their brief that that the April disclosures were materially misleading and untimely, in violation of Section 14(a). (D.I. 78 at 10, 13, 18). There are, however, no counts in the complaint based on the April disclosures. (*See* D.I. 72 ¶¶ 129-54). Instead, the complaint alleges that the April disclosures "did not adequately cure" Defendants' Section 14(a) violations in the Proxy. This is an entirely different theory. (*Id.* at ¶¶ 140, 152). A plaintiff cannot amend its complaint through briefing. *Jaroslawicz v. M&T Bank Corp.*, 2017 WL 1197716, at *6 (D. Del. Mar. 30, 2017). Accordingly, the court will not address the substance of the parties' argument on this claim, except to briefly address Plaintiffs' authorities regarding timing.

First, Plaintiffs' rely on SEC Release No. 34-33768 and SEC Release No. 34-24296 for the proposition that "proxy laws require ample time for voters to consider the information provided." (D.I. 78 at 13). But these releases do not support Plaintiffs' assertions. SEC Release No. 34-33768 addresses a registrant's obligation under Rule 14a-13(a)(4) to distribute proxy materials to banks and brokers sufficiently in advance of the meeting date to allow those banks and brokers to forward the proxy materials to beneficial owners. 1994 WL 83914, at *1 (SEC Mar. 16, 1994). Because Defendants were not acting as record holders of stock on behalf of beneficial owners, the release is inapplicable. SEC Release No. 34-24296 addresses requirements under Rules 14d-4(c), 14d-6(d), and 13e-4(d)(2) and (e)(2) to disseminate material changes to the terms of a tender offer promptly. 1987 WL 847536, at *3 (SEC Apr. 3, 1987). M&T was not engaged in a tender offer, making this release inapplicable.

Second, Plaintiffs cite several cases where courts granted injunctions that delayed a stockholder vote for a certain number of days so that stockholders had time to receive and consider supplemental disclosures. (*See* D.I. 78 at 13). Plaintiffs argue that Defendants violated Section 14(a) by issuing the April Disclosures in less time than the length of those injunctions. (*Id.*). Plaintiffs, however, did not seek and are not seeking an injunction. The merger between M&T and Hudson City has already closed. Accordingly, the court is reluctant to find that remedies formed in the crucible of a preliminary injunction proceeding are the basis for an independent cause of action for damages under Section 14(a). If Plaintiffs want to pursue a claim based on the timing of the April Disclosures, Plaintiffs need to present authorities showing that securities law offers a post-closing remedy for this claim. *Cf. La. Mun. Police Employees' Ret. Sys. v. Crawford*, 2007 WL 625006, at *1 (Del. Ch. Feb. 13, 2007) (granting temporary restraining order where stockholder faced irreparable harm from not having "adequate time" to consider material information disclosed "almost upon the eve of a vote").

IV. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss (D.I. 75) is GRANTED. The second amended class action complaint (D.I. 72) is DISMISSED WITHOUT PREJUDICE. Plaintiffs are granted leave to amend. An appropriate order will be entered.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-3695

DAVID JAROSLAWICZ

v.

M&T BANK CORPORATION; HUDSON CITY BANCORP INC.; THE ESTATE OF ROBERT G. WILMERS, BY ITS PERSONAL REPRESENTATIVES ELISABETH ROCHE WILMERS, PETER MILLIKEN, AND HOLLY MCALLISTER SWETT; RENE F. JONES; MARK J. CZARNECKI; BRENT D. BAIRD; ANGELA C. BONTEMPO; ROBERT T. BRADY; T. JEFFERSON CUNNINGHAM, III; GARY N. GEISEL; JOHN D. HAWKE, JR.; PATRICK W.E. HODGSON; RICHARD G. KING; JORGE G. PEREIRA; MELINDA R. RICH; ROBERT E. SADLER, JR.; HERBERT L. WASHINGTON; DENIS J. SALAMONE; MICHAEL W. AZZARA; VICTORIA H. BRUNI; DONALD O. QUEST; JOSEPH G. SPONHOLZ; CORNELIUS E. GOLDING; WILLIAM G. BARDEL; SCOTT A. BELAIR,

BELINA FAMILY; JEFF KRUBLIT,

Appellants

(D. Del. No. 1-15-cv-00897)

ORDER

PRESENT: McKEE, VANASKIE, and SILER, Jr.,*
Circuit Judges

The above-captioned appeal has been scheduled for oral argument before a panel of this Court on July 17, 2018. The Court invites the Securities and Exchange Commission to file a brief as amicus curiae addressing the following questions:

(1) In the Commission's opinion, under 17 C.F.R. 229.503(c), does the board of a financial institution have a duty to conduct reasonable due diligence to ascertain "the most significant factors" that make a merger risky BEFORE preparing a proxy letter for a proposed merger?

(2) May a statement of those risks be generalized to all financial institution mergers or must those statements be specific to the risks associated with the specific merger at hand - or specific to those risks that were or could have been discovered during due diligence? In other words, can a proxy request letter meet its duty to disclose "all important information," where it gives a generalized disclaimer about the risks present in all financial institution mergers but neglects to disclose that one of the parties to the proposed merger has serious regulatory violations that could derail or significantly delay a merger?

(3) What is the Commission's opinion of how *Omnicare, Inc. v. Laborer District Council*, 135 S. Ct. 1318 (2015) affects the two questions above in the context of claims under section 10(b) of the Exchange Act?

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* Honorable Eugene E. Siler, Jr., Senior Circuit Judge for the Sixth Circuit Court of Appeals sitting by designation.

Should the Commission accept the Court's invitation, the brief by amicus curiae shall be filed on or before Friday July 13, 2018.

By the Court,

s/ Theodore A. McKee
Circuit Judge

Date: June 12, 2018

APPENDIX D

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
CORPORATION FINANCE

July 12, 2018

VIA UPS

Patricia S. Dodszuweit
Clerk of Court
United States Court of Appeals for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106-1790

Re: Informal SEC Staff Background to aid court on *Jaroslawicz v. M&T Bank Corporation*, No. 17-3695

Ms. Dodszuweit:

I am the Chief Counsel of the Division of Corporation Finance at the U.S. Securities and Exchange Commission. My division administers those sections of the federal securities laws relating to securities offerings, proxy solicitations, mergers, and corporate disclosure. I write in response to the Court's order dated June 12, 2018, which invited the Commission to file a brief as *amicus curiae* addressing three questions in the captioned appeal. Because of internal processes for seeking formal Commission approval to file an *amicus* brief, the Commission is unable to file an *amicus* brief by the July 13, 2018, deadline set forth in that order. To assist the Court in its decision, however, I offer background information regarding the legal obligations

under the federal securities laws that triggered the disclosure at issue in this case and the forms used to satisfy those obligations, as well as background on the Commission's views on Item 503(c) of Regulation S-K. I express no views on the particular legal questions raised in the matter before the Court.[1]

Filing Obligations of M&T Bank and Hudson City

In August 2012, M&T Bank Corporation announced that it would acquire Hudson City Bancorp through a merger in which cash and M&T Bank common stock would be paid to Hudson City shareholders. M&T Bank and Hudson City had several, separate filing obligations under the federal securities laws.

- Exchange Act Section 13(a). Both M&T Bank and Hudson City had previously registered securities under Section 12(b) of the Securities Exchange Act of 1934 ("Exchange Act") in order for the securities to be eligible to trade on a registered securities exchange. As a result, both registrants were required to file periodic reports under Section 13(a). One of those reports is Form 10-K, which requires the registrant to disclose material risk information pursuant to Item 503(c) of Regulation S-K.[2]

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[1] As a matter of policy, the Securities and Exchange Commission disclaims responsibility for any statement of any SEC employee. This letter expresses my views and does not necessarily reflect those of the Commission, the commissioners or other members of the staff.

[2] See Form 10-K, Part 1, Item 1A.

- Securities Act. As the acquirer offering securities to the target shareholders, M&T Bank was subject to Section 5 of the Securities Act of 1933 ("Securities Act"), which requires all offers to be registered unless an exemption is available. Lacking an available exemption, M&T Bank filed a Securities Act registration statement, with a prospectus, for its offer of its common stock to Hudson City shareholders as merger consideration.

  Exchange Act Section 14(a) and Regulation 14A. As companies with Section 12(b) registered securities, both M&T Bank and Hudson City had obligations to file proxy statements for their respective proposals pursuant to the federal proxy rules in Exchange Act Section 14(a) and Regulation 14A:[3]

  - NYSE rules required M&T Bank, a NYSE-listed issuer, to obtain approval from its own shareholders for the issuance of its common stock as merger consideration because the issuance would represent more than 20% of its shares outstanding before the merger;[4] and

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[3] 17 C.F.R. 240.14a-1 et seq.

[4] NYSE Rule 312.03. In addition, M&T Bank needed shareholder approval to amend the terms of several outstanding classes of preferred stock, which required amendments to its certificate of incorporation.

- o Delaware law required Hudson City, a Delaware corporation, to seek shareholder approval of the merger.[5]

Under the federal proxy rules, any person who solicits proxies from shareholders of securities registered under Exchange Act Section 12(b) must first furnish those shareholders with a proxy statement containing the information required by Schedule 14A (unless an exemption is available). Schedule 14A does not call for disclosure under Item 503(c) of Regulation S-K.

The Joint Prospectus/Proxy Statement

Rather than filing separate Securities Act registration statement and proxy statements to comply with these filing obligations, M&T Bank filed a single Form S-4 that served as its Securities Act registration statement as well as proxy statements for both M&T Bank and Hudson City.[6] The ability to file this joint prospectus/proxy statement is based on General Instruction E.1 of Form S-4. This instruction provides that if a company submits a proposal to its security holders entitled to vote on the transaction in which the registered securities are to be issued and the solicitation is subject to Regulation 14A, then:

- the prospectus may be in the form of a proxy statement and may contain the

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[5] DGCL Section 251. In addition, federal proxy rules required Hudson City to submit a non-binding advisory vote proposal to its shareholders on the "golden parachute" compensation payable to Hudson City executive officers upon completion of the merger.

[6] Form S-4 is a Securities Act registration statement that may be used to register securities to be issued in several types of transactions, including a Securities Act Rule 145 transaction involving a merger. *See* General Instruction A.1 of Form S-4, *available at* https://www.sec.gov/files/forms-4.pdf.

information required by the Form S-4 in lieu of that required by Schedule 14A (*e.g.*, risk factor disclosures required by Item 3 of Form S-4); and

- the proxy statement filed as a part of the Form S-4 is deemed to satisfy the filing obligation of Regulation 14A.[7]

M&T Bank's use of Instruction E.1 to file a joint prospectus/proxy statement for its merger is consistent with prevailing market practice.[8] Although acquirers and targets continue to have the option of filing separate Securities Act registration statements and proxy statements to satisfy their respective obligations,[9] practitioners generally file a joint prospectus/ proxy statement to avoid duplicative filings and reduce costs.

Item 3 of Form S-4 calls for "the information required by Item 503 of Regulation S-K" and other

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[7] *See* Release 33-6578 (April 23, 1985) ("The Form S-4 prospectus may serve as the proxy or information statement used in connection with the transaction. It would be deemed to meet the informational and filing requirements of the proxy or information statement rules under section 14 of the Exchange Act and Regulations 14A and 14C thereunder, where applicable to the transaction.").

[8] *See, e.g.*, Stephen I. Glover, *Business Separation Transactions: Spin-Offs. Subsidiary IPOs and Tracking Stock* ("The acquirer and the target may agree that the target's proxy materials should be combined with the acquirer's prospectus and proxy materials. In these circumstances, the parties file a joint proxy statement/prospectus.").

[9] *See* Release 33-6578 (". . . registrants may choose to use Form S-1 and have the company being acquired prepare its own proxy statement so that the company being acquired will assume liability for the information in its own proxy statement.").

specified matters. The joint prospectus/proxy statement includes offering-specific risk factors in response to Item 3. The introductory language in the joint prospectus/proxy statement directs Hudson City shareholders and M&T Bank shareholders to consider carefully these risks in deciding whether to vote in favor of the respective proposals presented to them. These offering-specific risks are divided into two sections: "Risks Related to the Merger" and "Risks Related to M&T." In addition to the offering-specific risk factor disclosure, M&T Bank and Hudson City elected to incorporate by reference disclosure from their respective Forms 10-K and 10-Q into the joint proxy statement/prospectus.[10] These periodic reports contained non-offering specific risk factor disclosures applicable to each respective company.

Lastly, although not required to do so, Hudson City separately filed a definitive proxy statement with the Commission on February 22, 2013. This proxy statement was identical to the joint prospectus/proxy statement filed by M&T Bank, including with respect to risk factor disclosures and incorporation by reference. Practitioners sometimes make this additional filing so that the target's proxy statement could be easily found in that company's EDGAR filing feed (otherwise, the Form S-4 containing the target's proxy statement would appear only in the acquirer's EDGAR filing feed because the acquirer, not the target, is the registrant for that Form S-4).

Summary of Commission Guidance on Item 503(c) of Regulation S-K

Item 503(c) of Regulation S-K requires "under the caption 'Risk Factors' a discussion of the most

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[10] See Item 11 of Form S-4.

significant factors that make the offering speculative or risky. This discussion must be concise and organized logically. Do not present risks that could apply to any issuer or any offering. Explain how the risk affects the issuer or the securities being offered. Set forth each risk factor under a subcaption that adequately describes the risk."[11]

In adopting this requirement, the Commission explained: "In many instances the securities to be offered are of a highly speculative nature. The speculative nature may be due to such factors as an absence of operating history of the registrant, an absence of profitable operations in recent periods, the financial position of the registrant or the nature of the business in which the registrant is engaged or proposes to engage. In such instances, and particularly where a lengthy prospectus cannot be avoided, there should be set forth immediately following the cover page of the prospectus a carefully organized series of short, concise paragraphs summarizing the principal factors which make the offering speculative with references to other parts of the prospectus where complete information with respect to such factors is set forth."[12]

Since the Commission first published guidance on risk factor disclosure in 1964, it has reiterated that this disclosure should be organized, concise, and focused on the "most significant" or "principal" factors that make a registrant's securities speculative or risky.[13] Indeed, in reviewing the history and purpose

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[11] 17 C.F.R. 229.503(c).

[12] Release No. 33-4666, section 18 (Feb. 7, 1964).

[13] *See* Release No. 33-4936, Section 6 (Dec. 9, 1968) ("Where appropriate to a clear understanding by investors there should be set forth immediately following the cover page of the prospectus

of many of the Regulation S-K items in 2016, the Commission characterized Item 503(c) as "direct[ing] registrants to explain how each risk affects the registrant and discourag[ing] disclosure of risks that could apply to any registrant."[14]

Respectfully submitted,

/s/ David R. Fredrickson
David R. Fredrickson
Chief Counsel/Associate Director
Division of Corporation Finance
U.S. Securities and Exchange Commission

. . . a carefully organized series of short, concise paragraphs summarizing the principal factors which make the offering one of high risk or speculative."); Release No. 33-6383, Section III.B.9 (Mar. 3, 1982) ("Registrants, where appropriate, shall set forth on the page immediately following the cover page of the prospectus . . . a discussion of the principal factors that make the offering speculative or one of high risk."); Release No. 33-8591, Section IV.A.l (July 19, 2005) ("The risk factor section is intended to provide investors with a clear and concise summary of the material risks to an investment in the issuer's securities.").

[14] Release No. 33-10064 (Apr. 13, 2016). Section IV.C.1 (further observing that Commission guidance "has emphasized that registrants should avoid 'boiler plate' risk factors, and that a discussion of risk in purely generic terms does not indicate how a risk may affect an investment in a particular registrant."); *see also* Release No. 33-7497, Section IV.C.2 (Jan. 28, 1998) ("If you include a risk factors section in your prospectus, you must . . . avoid 'boilerplate' risk factors. We believe a discussion of risk in purely generic terms does not tell investors how the risk may affect their investment in a specific company. You should place any risk factor in context so investors can understand the specific risk as it applies to your company and its operations.").

Cc (by email only):

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