
Second Circuit: Item 303 of Regulation S-K Imposes a Duty to Disclose under Section 10(b) and Rule 10b-5

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The United States Court of Appeals for the Second Circuit held last week that a company's failure to comply with the MD&A disclosure requirements in Item 303 of Regulation S-K may provide the basis for a securities fraud claim under Section 10(b) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"). Building on prior decisions, the Second Circuit expanded the scope of potential liability of companies for the omission of information regarding "known trends or uncertainties" that are reasonably expected to have a material effect on future revenues. However, the Court also confirmed that plaintiffs in Item 303 actions under Section 10(b) are required to plead, in compliance with the stringent pleading standards applicable to fraud claims, and prove, each element necessary to sustain an independent cause of action under Rule 10b-5, including, most notably, materiality and scienter. As the Court of Appeals Opinion demonstrates, when dealing in areas of judgment and opinion these burdens of pleading and proof are significant.

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