Third Circuit Clarifies Requirements Applicable to Risk Factor Disclosures in Merger Proxies

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Securities transactions are subject to a three-tier system of enforcement: oversight by Congress, supervision by regulators such as the Securities and Exchange Commission ("SEC"), and pursuit of private causes of action by private plaintiffs and their attorneys. *Jaroslawicz* v. *M&T Bank Corp.,* 2020 WL 3278679, at *1 (3d Cir. June 18, 2020). On June 18, 2020, the United States Court of Appeals for the Third Circuit issued a decision concerning the third of these tiers and vacated the dismissal of a securities fraud claim brought pursuant to Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a). The Court focused its analysis on Item 105 of SEC Regulation S-K relating to risk factors and held that Item 105 disclosures must be specific, in plain English, and framed in the context of the disclosing entity's industry or business; mere boilerplate and generic discussions do not suffice. *Id.* at *9.

The Court reversed a dismissal of claims based on alleged material omissions and affirmed dismissal of claims based on allegedly misleading statements of opinion in a proxy statement/prospectus filed on Form S-4. In so doing, the Court also took the opportunity to "reiterate the longstanding limitations on securities fraud actions that insulate issuers from second-guesses, hindsight clarity, and a regime of total disclosure." *Id.* at *1.

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