OPTIMAL ISSUER DISCLOSURE OF OPINIONS

*Wendy Gerwick Couture**

Abstract

This Article adds to the scholarly literature about the optimal level of disclosure by issuers of securities by proposing a new theoretical framework that encompasses not only the choice between silence and disclosure, which has been widely discussed, but also the subsidiary decision between disclosure as an opinion and as a statement of fact, which has been ignored. This framework informs the Securities and Exchange Commission's ongoing review of mandatory disclosure rules and contextualizes the potential impacts of the Supreme Court's recent decision in Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund,[1] *which clarified that differential liability standards apply depending on whether a disclosure is expressed as an opinion or as a statement of fact. In addition, this Article, drawing from a collection of 1,264 post-*Omnicare *opinion disclosures, provides an in-depth qualitative review of the types of disclosures that issuers are choosing to express as opinions rather than as statements of fact. Finally, this Article analyzes these post-*Omnicare *opinion disclosures under the proposed theoretical framework and concludes that several discrete adjustments are required to incentivize optimal issuer disclosure decisions.*

INTRODUCTION

The regulation of public companies' securities disclosures is in a dynamic state. The Securities and Exchange Commission ("SEC") is

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* Wendy Gerwick Couture is a Professor of Law at the University of Idaho, where she teaches securities regulation, business associations, and white collar crime.

1. Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 135 S. Ct. 1318, 1327, 1332 (2015).

in the midst of a Congressionally-mandated comprehensive review of mandatory disclosure rules,[2] which invokes the deep body of legal scholarship about the optimal level of disclosure by issuers of securities. Under the classic articulation, the optimal level of issuer disclosure is achieved when the marginal social benefits of disclosure equal the marginal social costs.[3]

This articulation, however, is incomplete. By assuming that disclosure is a binary decision between remaining silent and disclosing, the articulation fails to recognize that there is a subsidiary decision that issuers must make when choosing to speak: whether to express the disclosure as an opinion or as a statement of fact. For example, if an issuer elects to make a disclosure about the relative resolution of the TVs that it manufactures, the issuer must choose whether to express the disclosure as an opinion—"we believe the TVs we manufacture have the highest resolution available on the market"—or as a statement of fact—"the TVs we manufacture have the highest resolution available on the market."[4] These two statements, which convey information about the TVs' relative resolution with differing levels of certainty, also differ with respect to their marginal social benefits (*e.g.*, the usefulness of the disclosure to investors) and their marginal social costs (*e.g.*, the investigation costs of the company). The importance of this distinction was highlighted by the Supreme Court's recent decision in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*,[5] which clarified that differential liability standards apply depending on whether a disclosure is expressed as an opinion or as a statement of fact.

In this Article, I propose an analytical framework that encompasses not only an issuer's choice between silence and disclosure, but also the issuer's choice between disclosure as an opinion and as a statement of fact: the Issuers' Disclosure

2. Business and Financial Disclosure Required by Regulation S-K, SEC Release No. 34-77599 (April 13, 2016) (seeking comment on business and financial disclosure requirements in Regulation S-K); Fixing America's Surface Transportation Act ("FAST Act"), Pub. L. No. 114-94, 129 Stat. 1785, § 72003 (2015) (mandating that the SEC study the modernization and simplification of Regulation S-K); SEC Report on Review of Disclosure Requirements in Regulation S-K (Dec. 2013), https://www.sec.gov/news/studies/2013/reg-sk-disclosure-requirements-review.pdf (evaluating the requirements of Regulation S-K for public companies for public companies generally, as a first step towards addressing their impact on Emerging Growth Companies); Jumpstart Our Business Startups Act ("JOBS Act"), Pub. L. No. 112-106, 126 Stat. 313, § 108 (2012) (directing the SEC to study the modernization and simplification of registration requirements for Emerging Growth Companies).

3. *E.g.*, Merritt B. Fox, *Retaining Mandatory Disclosure: Why Issuer Choice is Not Investor Empowerment*, 85 VA. L. REV. 1335, 1339 (1999).

4. *Omnicare*, 135 S. Ct. at 1318 (2015) (providing these examples).

5. *Id.*

Framework. This framework draws on the implications of *Omnicare*'s holdings and should inform the SEC's ongoing review of mandatory disclosure rules.

This Article proceeds in four parts. Drawing on the existing scholarship about the optimal level of securities disclosure, Part I proposes the Issuers' Disclosure Framework. This framework theorizes the optimal choices for both issuer disclosure decisions: (1) the decision whether to remain silent or disclose ("Decision A"); and (2) the subsidiary decision whether to disclose as an opinion or as a statement of fact ("Decision B"). Under this framework, it is optimal for issuers to remain silent about some topics (including immaterial information), to express some disclosures as opinions (including disclosures whose informational value derives from the speaker's state of mind), and to express some disclosures as statements of fact (including disclosures where the marginal benefits of certainty exceed the marginal costs of attaining it).

In Part II, I overlay onto the Issuers' Disclosure Framework the competing pressures that affect whether issuers make optimal choices with respect to Decisions A and B: (1) market forces; (2) direct and indirect costs of disclosure; (3) risk from inaccuracy or misleading incompleteness; (4) risk from nondisclosure; and (5) risk from violating a mandated form of disclosure. To the extent these pressures are not calibrated to incentivize optimal issuer choices, potential adjustments are identified that could incentivize issuers to make optimal decisions: (1) influence Decisions A and B by adjusting the direct or indirect costs of disclosure; (2) influence Decisions A and B by adjusting the risk from inaccurate or misleadingly incomplete disclosure; (3) influence Decision A by adjusting the risk from nondisclosure; and (4) influence Decision B by adjusting the risk associated with violating a mandated form of disclosure.

Part III analyzes the potential impacts of the Supreme Court's holdings in *Omnicare* on the Issuers' Disclosure Framework. In *Omnicare*, the Court clarified the differential liability standards for issuers' statements of opinion as opposed to statements of fact: (1) an opinion is actionable as an untrue statement of material fact only if the opinion was disbelieved by the speaker; and (2) an opinion gives rise to omissions liability to the extent the issuer fails to disclose a fact showing that the company lacked the basis for expressing the opinion that a reasonable investor would expect.[6] In order to assess the potential impact of these holdings on Decisions A and B, I

6. *Id.* at 1327, 1332.

perform a qualitative analysis of 1,967 pre- and post-*Omnicare* issuer opinion disclosures. Drawing therefrom, I conclude that *Omnicare*'s impact on the pressures affecting issuers' disclosure decisions was minimal, which is unsurprising in light of the countervailing nature of *Omnicare*'s holdings and the strength of the other pressures affecting issuer decision-making. With respect to Decision A, *Omnicare* may have slightly increased the pressure on issuers to remain silent rather than disclose opinions. With respect to Decision B, it may have slightly increased the incentive for issuers to express disclosures as opinions rather than as statements of fact.

Finally, Part IV applies the Issuers' Disclosure Framework to issuers' post-*Omnicare* disclosure decisions. Drawing from a collection of 1,264 post-*Omnicare* opinion disclosures, I catalogue the breadth of subjects about which issuers are currently expressing opinions, demonstrate how the Issuers' Disclosure Framework applies to those disclosures, and analyze whether issuers are making optimal disclosure decisions. I conclude that, while most of these disclosures are optimally expressed as opinions, several adjustments to the pressures affecting issuer decision-making are warranted. In particular, I contend that adjustments are required to incentivize issuers to make disclosures about the adequacy or suitability of their physical properties for existing operations (Decision A) and to do so as statements of fact (Decision B). I also argue that, although issuers are already making the optimal choice to disclose management reports on the effectiveness of internal controls over financial reporting (Decision A), adjustments are warranted to incentivize issuers to express those reports as statements of fact rather than as opinions (Decision B).

I. ISSUERS' DISCLOSURE FRAMEWORK

A. Optimal Level of Issuer Disclosure

Under the classic articulation, the optimal level of issuer disclosure, both at the time of issuance and on an ongoing basis, is achieved when the marginal social benefits of disclosure equal the marginal social costs.[7]

Issuer disclosure—by ensuring that investors and the market have accurate and comprehensive information about the company—benefits society in several interrelated ways.[8] First, issuer disclosure

7. *E.g.*, Fox, *supra* note 3, at 1339.

8. *See* Business and Financial Disclosure Required By Regulation S-K, SEC Release No. 34-

promotes price accuracy,[9] which furthers the efficient allocation of capital.[10] Second, issuer disclosure protects investors by enabling them to make informed decisions.[11] Third, issuer disclosure reduces agency costs by providing shareholders with information about the performance of the board and management,[12] which "assist[s] in both the effective exercise of the shareholder franchise and shareholder enforcement of the management's fiduciary duties."[13] These societal benefits of disclosure are interrelated. For example, even if a particular investor does not read an issuer's disclosures, if those disclosures promote accuracy in securities pricing, the investor is nonetheless protected by trading at a "fair" price.[14]

77599, at 13-14 (Apr. 13, 2016) (summarizing the various benefits of corporate disclosure).

9. *Accord* Alan R. Palmiter, *Pricing Disclosure: Crowdfunding's Curious Conundrum*, 7 OHIO ST. ENTREPREN. BUS. L.J. 373, 427 (2012) (describing "[h]elping investors translate information into prices" as "the fundamental role of securities law"); Marcel Kahan, *Securities Laws and the Social Costs of "Inaccurate" Stock Prices*, 41 DUKE L.J. 977, 979 (1992) (characterizing the creation of "stock markets in which the market price of a stock corresponds to its fundamental value" as the "principal goal of securities laws"); Donald Langevoort, *Information Technology and the Structure of Securities Regulation*, 98 HARV. L. REV. 747, 781 (1985) [(hereinafter Langevoort, *Information Technology*]) ("By providing investors with the information necessary to make knowledgeable investment decisions, mandatory disclosure is designed to ensure that the market price truly reflects the intrinsic value of the security.").

10. Merritt B. Fox, Randall Morck, Bernard Yeung, & Artyom Durnev, *Law, Share Price Accuracy, and Economic Performance: The New Evidence*, 102 MICH. L. REV. 331, 339 (2003) ("Greater share price accuracy at a time when an issuer contemplates implementing a new project by means of a share offering will bring the issuer's cost of capital more in line with the social cost of investing society's scarce savings in the contemplated project. As a result, these savings are allocated more efficiently, going more to the most promising proposed projects in the economy."); James Dow & Gary Gorton, *Stock Market Efficiency and Economic Efficiency: Is There a Connection?*, LII JOURNAL OF FIN. 1087, 1105 (1997) ("[T]he prospective role is to provide information to the manager. If there is relevant information for the investment decision that is not already contained within the firm, then in equilibrium the manager will use stock prices to help make the investment decision and stock prices will themselves reflect this.").

11. Stephen Choi, *Regulating Investors Not Issuers: A Market-Based Proposal*, 88 CAL. L. REV. 279, 280 (2000) ("Securities regulation in the United States revolves around investor protection. Unscrupulous promoters, for example, may seek to defraud investors by convincing them to put their money into worthless investments. Alternatively, promoters may attempt to guide investors into investments where the risks are both high and difficult to assess.").

12. Paul G. Mahoney, *Mandatory Disclosure as a Solution to Agency Problems*, 62 U. CHI. L. REV. 1047, 1048 (1995); *see also* John C. Coffee, Jr., *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 VA. L. REV. 717, 752 (1984) ("[A] mandatory disclosure system should reduce the average agency costs of corporate governance. To the extent that this reduction occurs, even fully diversified investors benefit because, in effect, we are reducing an element of systemic risk that portfolio diversification cannot itself eliminate.").

13. Fox, Morck, Yeung, & Durnev, *supra* note 10, at 339-40.

14. George J. Benston, *Required Disclosure and the Stock Market: An Evaluation of the Securities Exchange Act of 1934*, 64 AM. ECON. REV. 132, 151-52 (1973) ("The concept of fairness is difficult to define operationally . . . . Nevertheless, the stock market could be considered 'fair' if the prices of securities at any point in time are unbiased estimates of their intrinsic value . . . . Then whenever an investor decides to buy or sell or hold a security, he can be assured that the market price has discounted completely the financial information."); *see* Fox, *supra* note 3, at 1338 ("More

At the same time, however, issuer disclosure imposes societal costs. The marginal costs of a particular disclosure include both direct costs, such as the costs of compiling the information and preparing the disclosure report,[15] and indirect costs, such as competitive costs due to competitors' ability to benefit from the disclosure[16] and the lost productivity of management due to the diversion of time.[17]

This classic articulation of optimal issuer disclosure, while providing a helpful theoretical framework, erroneously assumes that the disclosure decision is a binary choice between silence and disclosure. Rather, an issuer has a subsidiary choice about the form of disclosure—as an opinion or as a statement of fact—which merits a more nuanced analysis.

B. Optimal Issuer Disclosure of Opinions

Issuers have three options when considering whether to make a disclosure: (1) remain silent; (2) express the disclosure as an opinion; or (3) express the disclosure as a statement of fact.

Silence is self-explanatory. Because there are myriad reasons why a company might choose to remain silent, silence is a messy signal that does not necessarily convey that the withheld information is negative.[18]

The distinction between a statement of opinion and a statement of fact depends on the degree of certainty with which the statement is

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information about the issuer and the resulting increase in its share price accuracy produces social benefits in the form of improved selection of new investment projects, improved managerial performance, and reduced investor risk.").

15. Alan R. Palmiter, *Toward Disclosure Choice in Securities Offerings,* 1999 COLUM. BUS. L. REV. 1, 12 (1999) ("There are direct costs: the issuer pays for assembling mandatory information, retaining accountants to certify financial information, and hiring inside and outside lawyers to format and present it.").

16. *Id*. ("Regulatory compliance imposes competitive costs: public disclosure, ostensibly meant for investors, can harm the issuer's business when used by competitors, particularly privately-held competitors that do not make reciprocal public disclosures.").

17. *Id.* ("There are indirect opportunity costs: compliance with mandatory disclosure diverts management attention from the issuer's business . . . .").

18. Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669, 687 (1984) ("Because of these 'good' reasons for nondisclosure, investors cannot infer unambiguously that no news is bad news . . ."); Joseph A. Franco, *Why Antifraud Prohibitions Are Not Enough: The Significance of Opportunism, Candor and Signaling in the Economic Case For Mandatory Securities Disclosure*, 2002 COLUM. BUS. L. REV. 223, 264 (2002) ("When the total amount of information is undefined and open-ended, the disadvantaged party cannot readily infer that information is being concealed merely from observing the counterparty's public disclosure."); Fox, *supra* note 3, at 1361 ("Silence is not a complete substitute for affirmatively disclosing a lack of good news because the market knows the issuer could choose a low-disclosure regime for reasons other than a lack of good news.").

expressed. In *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*,[19] the Supreme Court explained that "[a] fact is 'a thing done or existing' or '[a]n actual happening,'" while an opinion is "'a belief[,] a view,' or a 'sentiment which the mind forms of persons or things.'"[20] The Court further clarified: "Most important, a statement of fact ('the coffee is hot') expresses certainty about a thing, whereas a statement of opinion ('I think the coffee is hot') does not."[21]

By including an opinion signal, like "we think" or "we believe," which communicates to investors that a statement is uncertain, a company can effectively transform a statement of fact into a statement of opinion.[22] For example, in *Omnicare*, the Court classified a CEO's statement that "[t]he TVs we manufacture have the highest resolution available on the market" as a statement of fact, and a CEO's statement that "I believe (or I think) the TVs we manufacture have the highest resolution available on the market" as a statement of opinion.[23]

By omitting an opinion signal, a company can transform a statement of opinion into a statement of fact; however, the absence of an opinion signal should not always compel the classification of a disclosure as a statement of fact if the statement nonetheless conveys the requisite uncertainty.[24] On the one hand, if the content of a disclosure is capable of being ascertained with certainty (such as the relative resolution of a company's TVs), the disclosure is a statement of fact if the company does not include an opinion signal to convey that the disclosure is expressed without certainty. On the other hand, if a reasonable investor would understand that the content of a disclosure is inherently uncertain (such as a prediction about the future), the disclosure should be classified as an opinion even absent an opinion signal.

These three options can be expressed pictorially as follows, with

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19. Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 135 S. Ct. 1318 (2015).

20. *Id.* at 1325 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 782 (1927)).

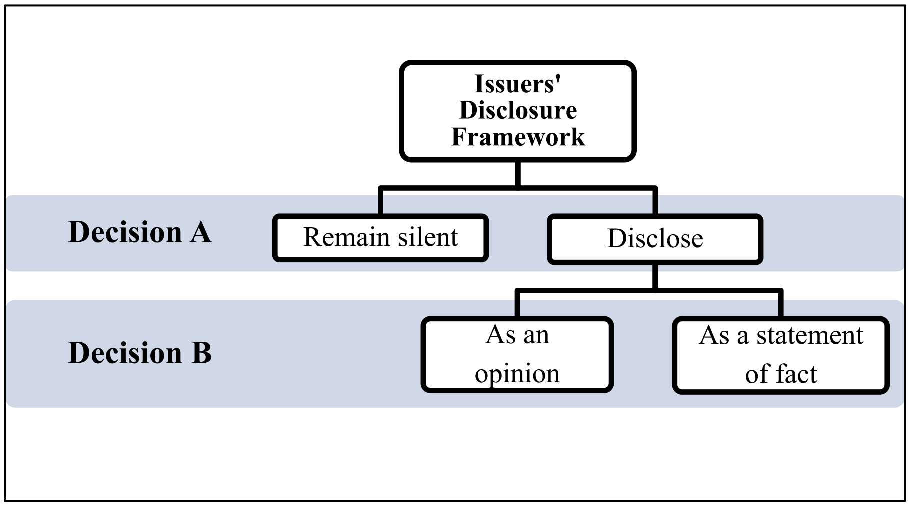
21. *Id.*

22. Wendy Gerwick Couture, *False Statements of Belief As Securities Fraud*, 43 SEC. REG. L.J. 351, 354 (2015) [(hereinafter, Couture, *False Statements*]) ("After *Omnicare*, although one court has suggested otherwise, it seems clear that a statement of fact can be transformed into a statement of opinion merely by adding the preface 'I think' or 'I believe.'").

23. *Omnicare*, 135 S. Ct. at 1326.

24. Couture, *False Statements*, *supra* note 22, at 355 ("The better rule post-*Omnicare* is to examine the certainty of the statement from the perspective of a reasonable investor: if a reasonable investor would interpret the statement as expressing a lack of certainty—either because the statement includes introductory language like 'I believe' or 'I think' or because the subject matter is inherently uncertain—then the statement should be categorized as an opinion.").

Decision A as the choice between silence and disclosure and Decision B as the subsidiary choice between disclosure as an opinion and as a statement of fact.



1. Optimal Decision A

The optimal disclosure decision depends on the marginal costs and benefits of a disclosure. With respect to Decision A, silence rather than disclosure is the optimal issuer choice if the marginal costs of speaking exceed the marginal benefits thereof. This situation arises in two contexts: (1) the potential disclosure (regardless of its form as an opinion or as a statement of fact) would have nonexistent or negligible informational value, such that even moderate marginal costs inevitably would exceed the marginal benefits of disclosure; or (2) despite its informational value, the potential disclosure (regardless of its form as an opinion or as a statement of fact) would be so costly that its marginal costs would exceed its marginal benefits.

Most immaterial information—which no reasonable investor would consider important in making in investment decision and which does not significantly alter the "'total mix' of information made available"[25]—falls into the first category. For example, issuers should remain silent rather than disclosing the individual salaries of low-level employees or the exact location of the board's next meeting because this information has negligible informational value, such that

25. Basic Inc. v. Levinson, 485 U.S. 224, 232 (1988).

even moderate marginal disclosure costs would exceed the marginal benefits. On the other hand, material but unduly costly information falls into the second category. For example, if issuers disclosed audited financial statements on a quarterly basis rather than annually,[26] these disclosures would undoubtedly have informational value, but the marginal costs of quarterly auditing would likely exceed the marginal benefits thereof.

When the SEC adopts a mandatory disclosure rule, it engages in this cost-benefit analysis.[27] Indeed, the SEC's recent reconsideration of the CEO pay ratio disclosure rule exemplifies the Decision A analysis.[28] The rule requires public companies to disclose the ratio of the median annual total compensation of all employees (other than the CEO) to the annual total compensation of the CEO.[29] Proponents of the rule argue that the ratio provides material information to investors[30] and that its marginal costs do not exceed its marginal benefits,[31] while detractors contend that the informational value is negligible[32] and exceeded by the costs of calculating the ratio.[33]

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26. SEC Division of Corporate Finance, Financial Reporting Manual, at §§ 1100, 1120, 1320 (updated Nov. 9, 2016), https://www.sec.gov/divisions/corpfin/cffinancialreportingmanual.pdf (explaining that companies must disclose audited annual financial statements and unaudited interim period financial statements).

27. The SEC and the D.C. Circuit disagree about whether this cost-benefit analysis is mandatory or voluntary. *Compare* SEC Division of Risk, Strategy, and Financial Innovation & Office of the General Counsel, Letter to the Staff of the Rulewriting Divisions and Offices (March 16, 2012), https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf ("No statute expressly requires the Commission to conduct a formal cost-benefit analysis as part of its rulemaking activities. But as SEC chairmen have informed Congress since at least the early 1980s—and as rulemaking releases since that time reflect—the Commission considers potential costs and benefits as a matter of good regulatory practice whenever it adopts rules."), *with* Bus. Roundtable v. SEC, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011) ("We agree with the petitioners and hold the Commission acted arbitrarily and capriciously for having failed once again . . . adequately to assess the economic effects of a new rule. Here the Commission inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters.").

28. *See* SEC, Public Statement, Reconsideration of CEO Pay Ratio Implementation (Feb. 6, 2017), https://www.sec.gov/news/statement/reconsideration-of-pay-ratio-rule-implementation.html.

29. 17 C.F.R. § 229.402(u) (2017); 15 U.S.C. § 78n(i) (2012).

30. *E.g.*, Comment Letter from Lynne L. Dallas, Professor of Law, University of San Diego School of Law (March 21, 2017), https://www.sec.gov/comments/pay-ratio-statement/payratiostatement.htm (identifying and explaining that "there are many reasons why the CEO-employee pay ratio is material to investors").

31. *Id.* (explaining that "the SEC has given companies considerable flexibility in computing their ratio").

32. *E.g.*, Comment Letter from Thomas W. Farley, President, New York Stock Exchange (May 10, 2017), https://www.sec.gov/comments/pay-ratio-statement/payratiostatement.htm (contending that "many of our listed companies question that value of this information and are concerned that the disclosure will not be meaningful to stakeholders").

33. *Id.* (explaining that the "general consensus of views of our listed companies is that . . .

2. Optimal Decision B

If the marginal costs of a potential disclosure do not exceed its marginal benefits, the issuer must proceed to the subsidiary Decision B. Disclosure as an opinion rather than a statement of fact is the optimal choice in two contexts: (1) the informational value of the disclosure would actually be enhanced by its expression as an opinion rather than as a statement of fact; or (2) the costs of attaining the level of certainty required to express the disclosure as statement a fact rather than as an opinion would be so great that the marginal costs of the disclosure would exceed its marginal benefits if so expressed. Conversely, disclosure as a statement of fact rather than as an opinion is optimal if two elements are present: (1) the informational value of the disclosure would be enhanced by its expression as a statement of fact rather than as a statement of opinion; and (2) the costs of attaining the level of certainty required to express the disclosure as a statement of fact would not be so great that the marginal costs of the disclosure would exceed its marginal benefits if so expressed.

The informational value of a disclosure is enhanced by its expression as an opinion in two contexts. First, if the disclosure relates to something inherently uncertain or subjective, a disclosure as a statement of opinion would have more informational value than a disclosure as a statement of fact because an opinion would more clearly convey the presence of uncertainty or subjectivity.[34] As an example, a disclosure about the uncertain impact of new regulation would be better expressed as an opinion rather than as a statement of fact because an opinion would convey the uncertainty of the impact. Second, if the informational value of the disclosure emanates from the speaker's state of mind itself, such as the speaker's philosophy with respect to a topic, a disclosure as a statement of opinion would be more valuable than a disclosure as a statement of fact because it would more precisely convey that information.[35]

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certain requirements of the final rule are overly complex and unduly costly in many respects").

34. *See Omnicare*, 135 S. Ct. at 1328 ("A reasonable person understands, and takes into account, the difference we have discussed above between a statement of fact and one of opinion. She recognizes the import of words like 'I think" or "I believe,' and grasps that they convey some lack of certainty as to the statement's content.").

35. *See* Wendy Gerwick Couture, *Opinions Actionable As Securities Fraud*, 73 LA. L. REV. 381, 407 (2013) [hereinafter Couture, *Opinions*] (arguing "that opinions have 'something special' about them—the mental processes of the speaker").

3. Example of Issuers' Disclosure Framework

Consider the hypothetical example in *Omnicare* of a CEO's statement, on behalf of the issuer, about the relative resolution of the TVs that it manufactures.[36] At the outset, under Decision A, the issuer faces the decision about whether to remain silent or speak. As discussed above, silence would be optimal in two scenarios: (1) the potential disclosure would have nonexistent or negligible informational value, such that even moderate marginal costs inevitably would exceed the marginal benefits of disclosure; or (2) despite its informational value, the potential disclosure would be so costly to accomplish that its marginal costs would exceed its marginal benefits. The first scenario is inapplicable here because a reasonable investor would likely consider information about the relative competitiveness of a company's products to be significant when making an investment decision, regardless of whether expressed as an opinion or as a statement of fact. Therefore, the inquiry should proceed under the second scenario, centering on the whether the marginal costs of making this disclosure (either as an opinion or as a statement or fact) would exceed the marginal benefits.

Assuming that the optimal decision under Decision A is disclosure, the issuer must proceed to the subsidiary Decision B. As discussed above, disclosure as an opinion rather than as a statement of fact is the optimal choice in two scenarios: (1) the informational value of the disclosure would actually be enhanced by its expression as an opinion rather than as a statement of fact; or (2) the costs of attaining the level of certainty required to express the disclosure as statement a fact rather than as an opinion would be so great that the marginal costs of the disclosure would exceed its marginal benefits if so expressed. The first scenario is inapplicable here because the informational value of a disclosure about the relative resolution of the company's products would not be enhanced by its expression as a statement of opinion rather than a statement of fact. The subject matter is not inherently uncertain or subjective. Nor does the informational value of the disclosure emanate from the speaker's state of mind itself—investors would care about the TVs' relative resolution, not the CEO's belief about the relative resolution. Therefore, the inquiry should proceed under the second scenario, focusing on whether the costs of attaining certainty about the TVs' relative resolution would exceed the marginal benefits of expressing the statement with certainty.

36. *Omnicare*, 135 S. Ct. at 1326.

II. PRESSURES ON ISSUERS' DISCLOSURE FRAMEWORK

When an issuer is facing Decision A (whether to remain silent or disclose) and the subsidiary Decision B (whether to disclose as an opinion or as a statement of fact), there are five primary sources of pressure affecting the issuer's disclosure decisions, which might not be calibrated to ensure that the issuer makes optimal choices: (1) market forces; (2) direct and indirect costs of disclosure; (3) risk from inaccuracy or misleading incompleteness; (4) risk from nondisclosure; and (5) risk from violating a mandated form of disclosure. The first three pressures affect both Decisions A and B; the fourth affects only Decision A; and the fifth affects only Decision B.

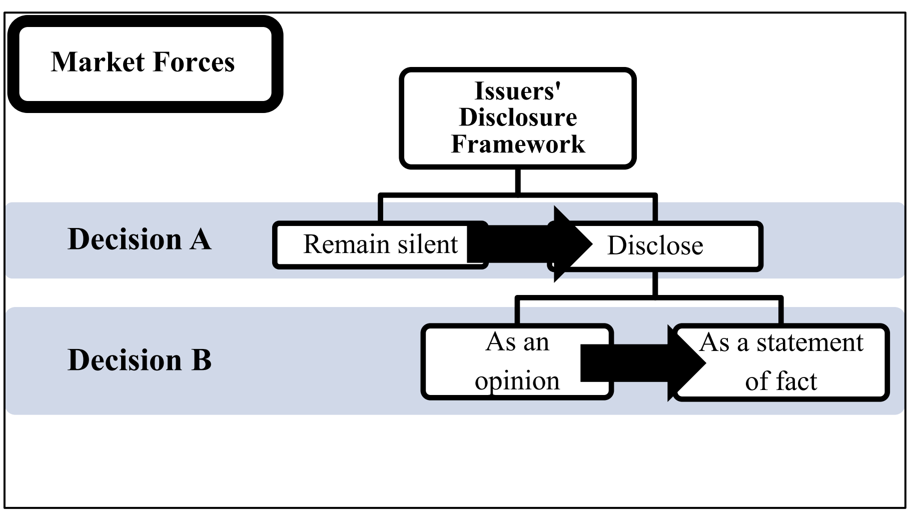
The strength of these competing pressures, and thus the issuer's resultant disclosure decisions, vary depending on the disclosure at issue. Most importantly, these pressures play out quite differently if the potential disclosure at issue is mandatory under SEC rules rather than voluntary.

Finally, if these competing pressures result in non-optimal disclosure choices by issuers, all but the first pressure (market forces) can be adjusted in order to incentivize optimal decision-making.

A. Pressures Affecting Issuers' Disclosure Decisions

1. Market Forces

Market forces affect both Decisions A and B, incentivizing issuers to disclose rather than remain silent and to disclose as a statement of fact rather than as an opinion. These pressures can be depicted pictorially as follows:



Market forces incentivize issuers to disclose rather than remain silent. Absent disclosure, both at the time of issuance and on an ongoing basis, investors may not invest in a firm's securities at all or will discount those securities because of the lack of information.[37] The *Omnicare* Court explained this impact as follows: "Sellers (whether of stock or other items) have strong economic incentives to . . . well, *sell* (*i.e.,* hawk or peddle). Those market-based forces push back against any inclination to underdisclose."[38]

By extension, market forces also incentivize issuers to make their disclosures more meaningful to investors. With respect to disclosures whose informational value is heightened by expressing them with certainty, investors will reward issuers who make those disclosures as statements of fact rather than as opinions. Recognizing this incentivizing effect, Justice Scalia, in his *Omnicare* concurrence, dismissed the notion that issuers might express matters about which they are experts—such as cash on hand or the number of shares of common stock outstanding—as opinions rather than as statements of fact: "But of course a registration statement would never preface such items, within the expertise of the management, with a 'we believe that.'"[39] Consistent with the intuitive notion that investors value certainty in disclosure, finance research using textual analysis shows that a firm's usage of fewer uncertain words (like "believe")[40] is correlated with a more positive market reaction.[41]

2. Issuer Costs of Disclosure

The direct and indirect costs of disclosure[42] impose countervailing pressures on Decisions A and B, incentivizing issuers to remain silent rather than to disclose and, if disclosing, to do so in the form of an opinion rather than a statement of fact. Issuers can avoid disclosure costs altogether by remaining silent. If disclosing, however, issuers

37. *See* Palmiter, *supra* note 15, at 6 ("[I]ssuers in public offerings often disclose information voluntarily beyond that required so as to increase investor confidence."); Easterbrook & Fischel, *supra* note 18, at 684 ("A firm that wants the highest possible price when it issues stock must take all cost-justified steps to make the stock valuable in the aftermarket, so it must make a believable pledge to continue disclosing.").

38. *Omnicare*, 135 S. Ct. at 1332.

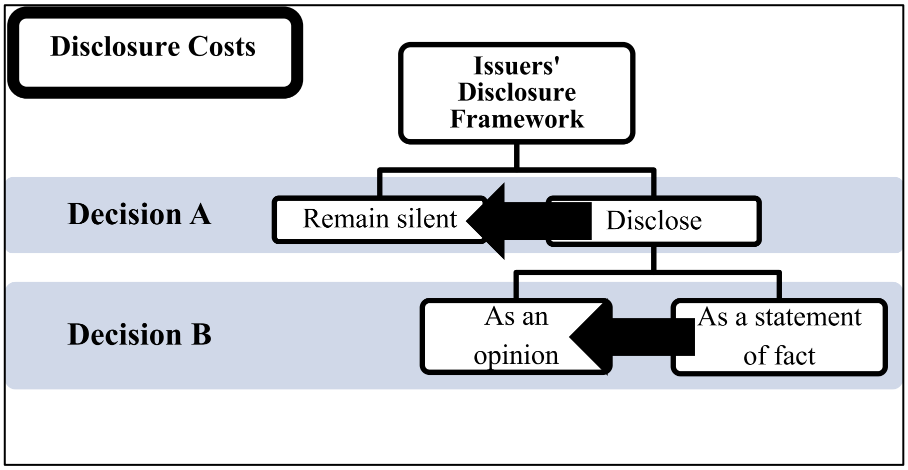
39. *Id.* at 1335.

40. Tim Loughran & Bill McDonald, 66 J. OF FIN. 35, 45 (2011) (creating a list of 285 words used in 10-Ks "denoting uncertainty, with emphasis on the general notion of imprecision rather than exclusively focusing on risk"); see Tim Loughran & Bill McDonald, Master Dictionary, http://www3.nd.edu/~mcdonald/Word_Lists.html (including "believe" as an uncertain word).

41. *Id.* at 55 ("Firms using fewer negative, uncertain, modal strong, and modal weak words realize a more positive reaction from the market in the filing date event window.").

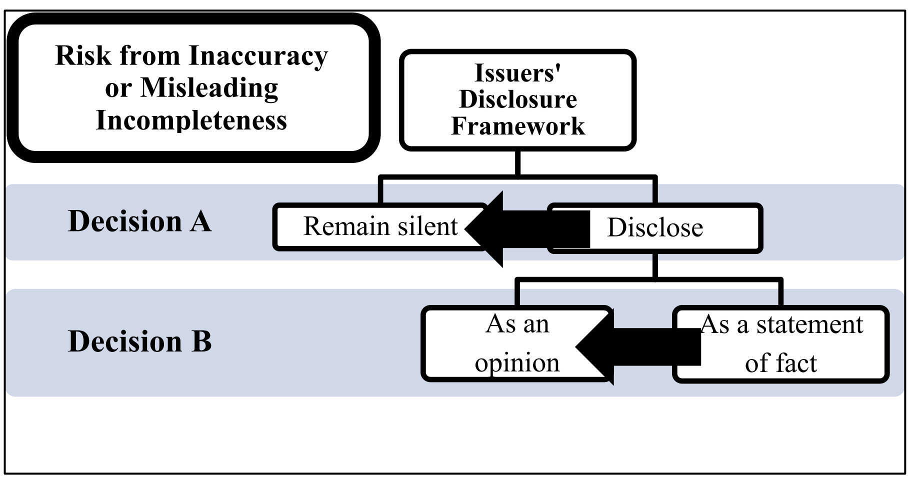
42. *See*, *supra*, notes 15-17.

can lessen many of these costs (such as the costs of compilation and the degree of competitive disadvantage) by expressing disclosures with less certainty, as opinions rather than as statements of fact.[43]



3. Risk from Inaccuracy or Misleading Incompleteness

A third pressure affecting both Decisions A and B is the risk associated with inaccurate or misleadingly incomplete disclosure. This risk arises from the potential for liability and from the specter of SEC review. This pressure can be depicted pictorially as follows:



43. *See* Sudip Gupta & Ryan D. Israelsen, *Hard and Soft Information: Firm Disclosure, SEC Letters, and the JOBS Act*, at 1 (2015), https://www.rhsmith.umd.edu/files/Documents/Centers/CFP/pastconfpapers/ipo_jobs_act_041215.pdf ("While hard information is typically more credible than soft information, it is normally more costly to produce and disseminate.").

a. Liability Risk from Inaccuracy or Misleading Incompleteness

With respect to Decision A, the risk of civil liability for inaccurate or misleadingly incomplete disclosure incentivizes issuers to remain silent rather than voluntarily disclose information.[44] By choosing to speak, an issuer faces the potential for liability if the disclosure is inaccurate or misleadingly incomplete.

Key liability provisions[45] include §§ 11, 12(a)(2), and 17(a)(2) of the Securities Act and § 10(b) of the Exchange Act (including Rule 10b-5 promulgated thereunder), which potentially impose civil liability on issuers for (1) making an untrue statement of material fact;[46] or (2) failing to disclose a material fact necessary to make other disclosures not misleading.[47] Although these causes of action share a common core of imposing liability for inaccurate or misleadingly incomplete disclosure, their elements and availability differ to some degree. Securities Act § 11 imposes strict liability on issuers for inaccurate or misleadingly incomplete statements in

44. *E.g.*, Wendy Gerwick Couture, *The Collision Between the First Amendment and Securities Fraud*, 65 ALA. L. REV. 903, 966–67 (2014) (describing how, in light of the newfound potential for liability under § 11, credit rating agencies refused to consent to the inclusion of credit ratings in registration statements for asset-backed securities).

45. Note that, in addition to these provisions, § 13(a) and § 15(d) of the Exchange Act, 15 U.S.C. §§ 78m(a) (2012) & 78o(d) (2010), and the rules promulgated thereunder, which mandate the filing of periodic reports, may impose an "implicit truthfulness requirement" that is independently actionable by the SEC. SEC v. Jensen, 835 F.3d 1100, 1113 (9th Cir. 2016). Rule 12b-20 explicitly provides the SEC with a cause of action for misleadingly incomplete disclosures in periodic reports. 17 C.F.R. § 240.12b–20 (1965).

46. § 11(a) of the Securities Act, 15 U.S.C. § 77k (1998) (imposing liability if a registration statement "contained an untrue statement of material fact"); § 12(a)(2) of the Securities Act, 15 U.S.C. § 77l(a)(2) (2000) (imposing liability if a prospectus or related oral communication "includes an untrue statement of a material fact"); § 17(a)(2) of the Securities Act, 15 U.S.C. § 77q(a)(2) (2000) (making it unlawful "to obtain money or property by means of any untrue statement of a material fact"); § 10(b) of the Exchange Act, 15 U.S.C. § 78j(b) (2010) (prohibiting "any manipulative or deceptive device or contrivance"); Rule 10b-5(b), 17 C.F.R. § 240.10b-5(b) (1951) (making it unlawful "to make any untrue statement of material fact").

47. § 11(a) of the Securities Act, 15 U.S.C. § 77k(a) (1998) (imposing liability if a registration statement "omitted to state a material fact . . . necessary to make the statements therein not misleading"); § 12(a)(2) of the Securities Act, 15 U.S.C. § 77l(a)(2) (2000) (imposing liability if a prospectus or related oral communication "omits to state a material fact necessary in order to make the statements, in the light of the circumstances in which they were made, not misleading"); § 17(a)(2) of the Securities Act, 15 U.S.C. § 77q(a)(2) (2000) (making it unlawful "to obtain money or property by means of . . . any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading"); § 10(b) of the Exchange Act, 15 U.S.C. § 78j(b) (2010) (prohibiting "any manipulative or deceptive device or contrivance"); Rule 10b-5(b), 17 C.F.R. § 240.10b-5(b) (1951) (making it unlawful "to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading").

registration statements.[48] Securities Act § 12(a)(2) imposes strict liability on issuers for inaccurate or misleadingly incomplete statements in prospectuses, subject to a "reasonable care" defense,[49] which translates into a quasi-negligence standard.[50] Securities Act § 17(a)(2) imposes liability on issuers for negligently making inaccurate or misleadingly incomplete statements in the offer or sale of securities.[51] Rule 10b-5, which has a scienter element,[52] imposes liability on issuers for inaccurate or misleadingly incomplete statements in connection with any securities transaction.[53] Injured investors have a private right of action under Securities Act §§ 11[54] and 12(a)(2)[55] and under Rule 10b-5,[56] while Securities Act § 17(a)(2) is enforceable only by the SEC.[57] These different, but often overlapping, liability provisions incentivize silence over disclosure; only by speaking does an issuer risk liability for inaccurate or misleadingly incomplete speech.

With respect to Decision B, the risk of liability for inaccurate or misleadingly incomplete disclosure also incentivizes issuers to express disclosures in the form of opinions rather than statements of fact. There are three key reasons why disclosures expressed as opinions rather than as statements of fact are more insulated from liability under the above provisions: (1) disclosures expressed as opinions are less likely to be actionable as untrue statements of

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48. § 11 of the Securities Act, 15 U.S.C. § 77k (1998); Herman & MacLean v. Huddleston, 459 U.S. 375, 382 (1983) ("Liability [under § 11] against the issuer of a security is virtually absolute, even for innocent misstatements.").

49. § 12(a)(2) of the Securities Act, 15 U.S.C. § 77l(a)(2) (2000).

50. 2 THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION § 7:45 ("It is clear that section 12(a)(2)'s requirement of "reasonable care" imparts some sort of negligence standard and that it is not necessary for the purchaser to show any type of scienter on the seller's part.").

51. Aaron v. SEC, 446 U.S. 680, 697 (1980) ("It is our view, in sum, that the language of § 17(a) requires scienter under § 17(a)(1), but not under § 17(a)(2) or § 17(a)(3)."); SEC v. Dain Rauscher, Inc., 254 F.3d 852, 856 (9th Cir. 2001) ("Violations of Sections 17(a)(2) and (3) require a showing of negligence.").

52. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 201 (1976).

53. Rule 10b-517, 17 C.F.R. § 240.10b-5 (applying to any communication "in connection with the purchase or sale of any security").

54. § 11(a) of the Securities Act, 15 U.S.C. § 77k(a) (1998) (granting a private right of action to "any person acquiring such security").

55. § 12(a)(2) of the Securities Act, 15 U.S.C. § 77l(a)(2) (2000) (granting a private right of action to "the person purchasing such security from him").

56. Superintendent of Ins. of State of N. Y. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971) ("It is now established that a private right of action is implied under § 10(b).").

57. Finkel v. Stratton Corp., 962 F.2d 169, 175 (2d Cir. 1992) ("Given that nothing in the language or history of the section suggests a different mental state requirement for private and SEC actions under § 17(a), the lack of any evidence of Congressional intent to create a private right of action, and the overwhelming trend in our sister circuits, we conclude that there is no private right of action under § 17(a).").

material fact; (2) disclosures expressed as opinions have a narrower pathway to omissions liability for misleading incompleteness; and (3) disclosures expressed as opinions are less likely to be material. Each of these reasons is addressed in turn.

The first liability pathway under these provisions is premised on an issuer's making an untrue statement of material fact. In *Omnicare*, the Supreme Court clarified that a statement of opinion only qualifies as an untrue statement of material fact if it is disbelieved by the speaker.[58] The Court explained that a statement of opinion "explicitly affirms one fact: that the speaker actually holds the stated belief."[59] Although *Omnicare* addressed liability for alleged misrepresentations in registration statements under Securities Act § 11, its reasoning applies equally to liability under Securities Act §§ 12(a)(2) and 17(a)(2) and under Rule 10b-5, at least to the extent these claims are premised on disclosures in registration statements or other SEC filings like periodic reports.[60] As a result of this *Omnicare* holding, disclosures expressed as opinions are less likely to be actionable as untrue statements of material fact. The disbelief requirement adds a scienter element to Securities Act § 11 claims, which are otherwise strict liability claims; it raises the mental state element in Securities Act § 12(a)(2) and § 17(a)(2) claims from negligence to disbelief; and it raises the applicable scienter level for Rule 10b-5 claims from recklessness[61] to disbelief.[62]

The second liability pathway under these provisions is premised on an issuer's failure to disclose a material fact necessary to make other

58. *Omnicare*, 135 S. Ct. at 1327 ("[A] sincere statement of pure opinion is not an 'untrue statement of material fact.'").

59. *Id.* at 1326.

60. *See*, *e.g.*, City of Dearborn Heights Act 345 Police & Fire Retirement Sys. v. Align Technology, Inc., 856 F.3d 605, 616 (9th Cir. 2017) ("Although *Omnicare* concerned Section 11 claims, we conclude that the Supreme Court's reasoning is equally applicable to Section 10(b) and Rule 10b-5 claims."); *see also* Hillary A. Sale & Donald C. Langevoort, *"We Believe": Omnicare, Legal Risk Disclosure and Corporate Governance*, 66 DUKE L.J. 763, 781-782 (2016) (citing case law) (reasoning that, because of the textual similarities between § 11 and Rule 10b-5 and because "[r]easonable investors are unlikely to read registration statements and 10-Ks very differently," *Omnicare*'s rulings likely apply to Rule 10b-5 claims premised on SEC filings); Couture, *False Statements*, *supra* note 22, at 355 (citing case law) (concluding that, based on the textual similarities between § 11 and Rule 10b-5, *Omnicare*'s rulings likely apply equally to actions under Rule 10b-5).

61. *See* Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 319 n.3 (2007) ("We have previously reserved the question whether reckless behavior is sufficient for civil liability under § 10(b) and Rule 10b-5 . . . Every Court of Appeals that has considered the issue has held that a plaintiff may meet the scienter requirement by showing that the defendant acted intentionally or recklessly, though the Circuits differ on the degree of recklessness required . . . The question whether and when recklessness satisfies the scienter requirement is not presented in this case.").

62. Couture, *Opinions*, *supra* note 35, at 394–95 ("The subjective falsity requirement, when applied, effectively raises the applicable scienter level. Both subjective falsity and scienter address the defendant's state of mind when making the allegedly false statement.").

disclosures not misleading. Whether an issuer's omission of a material fact is actionable depends on what a reasonable investor "would naturally understand a statement to convey beyond its literal meaning."[63] When the statement at issue is a statement of fact, "representations that state the truth only so far as it goes, while omitting critical qualifying information—can be actionable misrepresentations."[64] When the statement at issue is a statement of opinion, the omissions pathway is narrower, focusing solely on the basis for the issuer's opinion. A plaintiff must "identify particular (and material) facts going to the basis for the issuer's opinion—facts about the inquiry the issuer did or did not conduct or the knowledge it did or did not have—whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context."[65] Therefore, disclosures expressed as opinions are less likely to give rise to omissions liability, even though both statements of opinion and statements of fact can give rise to omissions liability if they are misleadingly incomplete.

Finally, these provisions impose liability only to the extent that an alleged misrepresentation or omission is material.[66] As defined by the Supreme Court, a fact is material if "there is a substantial likelihood that a reasonable [investor] would consider it important" in making an investment decision.[67] In another articulation, there must be a substantial likelihood that the fact would have been viewed by a reasonable investor as "having significantly altered the 'total mix' of information made available."[68] Because a statement of opinion conveys a degree of uncertainty not present in a statement of fact, it is less likely that a reasonable investor would consider the opinion itself, or its basis, to be significant in making an investment decision.[69] Indeed, courts routinely characterize statements of opinion as "mere puffery" and dismiss liability claims premised thereon because the alleged misrepresentations are immaterial as a matter of law.[70]

63. *Omnicare*, 135 S. Ct. at 1332.

64. Universal Health Servs., Inc. v. United States, 136 S. Ct. 1989, 2000 (2016) (citing Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 44 (2011)).

65. *Omnicare*, 135 S. Ct. at 1332.

66. § 11(a) of the Securities Act, 15 U.S.C. § 77k(a) (1998); § 12(a)(2) of the Securities Act, 15 U.S.C. § 77l(a)(2) (2000); § 17(a)(2) of the Securities Act, 15 U.S.C. § 77q(a)(2) (2000); Rule 10b-5(b), 17 C.F.R. § 240.10b-5 (1951).

67. *Omnicare*, 135 S. Ct. at 1333 (quoting TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)).

68. Basic Inc. v. Levinson, 485 U.S. 224, 232 (1988) (quoting *TSC Industries,* 426 U.S. at 449).

69. *See Omnicare*, 135 S. Ct. at 1326 (explicitly adding the caveat that an alleged opinion is only actionable "assuming the misrepresentation were material").

70. Couture, *Opinions*, *supra* note 35, at 421-22 (providing examples).

b. SEC Review Risk from Inaccuracy or Misleading Incompleteness

The SEC review and comment process also poses a risk associated with inaccurate or misleadingly incomplete disclosure, incentivizing issuers to remain silent rather than disclose information and, if disclosing, to express statements with uncertainty.

The SEC staff in the Division of Corporation Finance selectively reviews registration statements and periodic reports for accuracy, among other things.[71] For example, the SEC staff has flagged apparently inaccurate disclosures about the par value of outstanding shares,[72] the effects of an alternative methodology of accounting,[73] the potential for dilution,[74] and even the company's phone number.[75] If the SEC staff identifies an inaccurate or misleadingly incomplete disclosure, it issues a comment letter regarding the deficiency.[76] The comment letter begins a dialogue with the company, which continues until either the company convinces the SEC staff that the disclosure is accurate or the company revises the disclosure.[77] Registration statements are not effective until this process is resolved, which can result in significant delay or even cancellation of an offering because of "adverse changes in market conditions."[78] Although periodic

71. SEC, Division of Corporation Finance, Filing Review Process, https://www.sec.gov/divisions/corpfin/cffilingreview.htm; *see also* Zahn Bozanic, J. Richard Dietrich & Bret A. Johnson, *SEC Comment Letters and Firm Disclosure*, at 31 (June 2017) (forthcoming in the Journal of Accounting and Public Policy), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2989164 (finding that comment letters are associated with a decrease in optimistic tone).

72. Nuance Resources Corp., SEC Staff Comment Letter, 2007 WL 9400212 (June 13, 2007) ("However, recording the debit to capital in the manner depicted appears to yield an inaccurate figure for the par value associated with the number of shares outstanding.").

73. Gol Intelligent Airlines Inc., SEC Staff Comment Letter, 2007 WL 9390615 (Feb. 16, 2007) ("Also, you state that the alternative method results in more expense being recorded earlier in the lease and less expense being recorded later in the lease. This is not an accurate description of the effects of the alternative method, which would be most accurately described as resulting in expense being recognized in proportion to the use of the aircraft.").

74. Shimoda Marketing, Inc., SEC Staff Comment Letter, 2007 WL 9401298 (Apr. 21, 2006) ("Disclosure states that there will be an immediate decrease to new investors of $0.78 per share if 600,000 shares are sold in the primary offering. Thus, the statement 'For our company there would be no dilution to new shareholders, only an immediate increase in the value per share as shown in table 3.0' is inaccurate. Please revise.").

75. Health Partnership, Inc., SEC Staff Comment Letter, 2006 WL 8239219 (June 3, 2005) ("Revise the cover page to provide the company's correct telephone number. The number listed appears to be inaccurate.").

76. SEC, Division of Corporation Finance, Filing Review Process, https://www.sec.gov/divisions/corpfin/cffilingreview.htm.

77. *Id.*

78. Vijay Sekhon, *Efficient Access to Public Capital*, 40 SEC. REG. L.J. 463, 463 (2012); *see also* WGL ACCT. & REP. MANUAL § 3.27 (2017) ("A significant factor in the process is whether the time required to resolve an issue in favor of the company will significantly delay the offering, with the

reports are effective despite an ongoing SEC comment process, the process imposes remediation costs.[79] In addition, because SEC comments are publicly disclosed upon their resolution,[80] they may unsettle investors or highlight previous deficiencies to investors.[81] Finally, in the event that the staff and company are unable to resolve an alleged inaccuracy in a periodic report, the SEC staff refers the matter to the Division of Enforcement for potential further action, triggering liability risk associated with the inaccuracy or misleading incompleteness.[82]

On occasion, the SEC staff has identified disclosures expressed as statements of fact and requested that, in order to ensure accuracy, they be revised to statements of opinion.[83] The SEC staff has also occasionally requested that the issuer clarify whether a disclosure is an opinion or a statement of fact.[84] Finally, although statements of opinion are more immune to charges of inaccuracy than statements of fact, the SEC staff frequently issues comment letters requesting that companies provide the basis for asserted opinions.[85]

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possibility that the offering will commence in a fading market.").

79. Cory A. Cassell, Lauren M. Dreher & Linda A. Myers, *Reviewing the SEC's Review Process: 10-K Comment Letters and the Cost of Remediation*, 88 ACCT. REV. 1875 (2013) (identifying remediation costs of "internal resources, such as internal staff diverted from their normal activities, and external resources, such as auditor and lawyer fees").

80. SEC Division of Corporation Finance, Filing Review Process, https://www.sec.gov/divisions/corpfin/cffilingreview.htm.

81. *See* Patricia M. Dechow, Alastair Lawrence & James Ryans, *SEC Comment Letters and Insider Sales*, 91 ACCT. REV. 401, 402 (2016) (finding a negative stock negative price response to the public release of SEC comment letters about revenue recognition).

82. *See* Bozanic, Dietrich & Johnson, *supra* note 71, at 3.

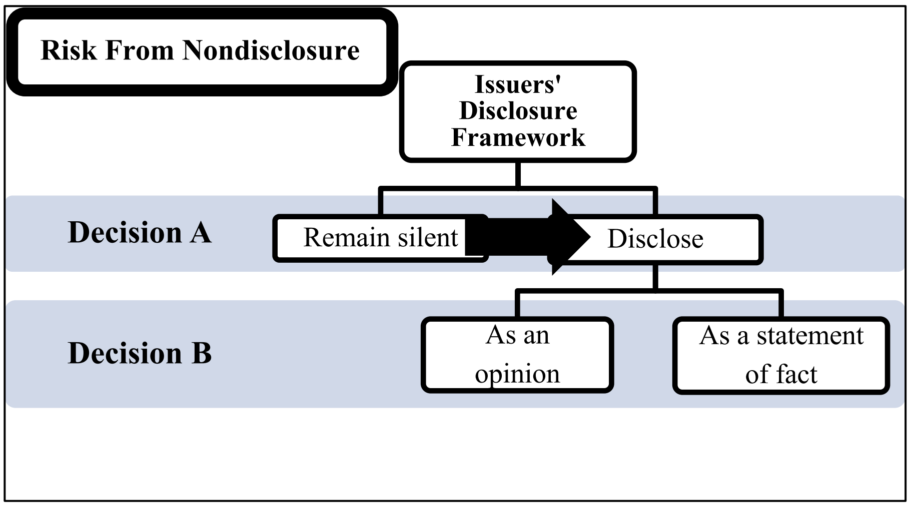
83. *E.g.*, Typhoon Tunes Inc., SEC Staff Comment Letter, 2006 WL 8245107 (March 20, 2006) ("It appears that many of the statements in this section [about the background of the industry of music distribution] are matters of opinion, rather than fact. Please revise to eliminate such statements, or to characterize them as opinion."); Gencorp Inc., SEC Staff Comment Letter, 2006 WL 8231449 (March 10, 2006) ("We reissue comment 7 with respect to your disclosure (about the reasons for the solicitation) that the company has engaged in 'value-destroying initiatives.' Please revise your disclosure to clarify that the assertion is, in fact, your opinion or belief."); World Monitor Trust III., SEC Staff Comment Letter, 2006 WL 8232013 (Jan. 26, 2005) ("Please have counsel revise paragraph 2 to clarify that the description under the caption 'Federal Income Tax Consequences' in fact constitutes its opinion.").

84. *E.g.*, Inland Monthly Income Yield Fund II, L.P., SEC Staff Comment Letter, 2006 WL 8231309 (Aug. 12, 2005) ("We note your disclosure that you do not believe the partnership agreement should restrict transfers of securities pursuant to the offer. Please clarify whether this is an opinion or a statement of fact.").

85. E.g., Infousa Inc., SEC Staff Comment Letter, 2006 WL 8246455 (Apr. 19, 2006) ("Support for opinions or beliefs should be self-evident, disclosed in the proxy materials or provided to the staff on a supplemental basis. The bases for many of the opinions you set forth in the proxy materials referenced above are not self-evident and are not disclosed. Accordingly, and with a view toward additional disclosure, for each claim you are making in this document, please state each claim as a belief and provide the staff with annotated materials adequately supporting each such belief."); Techprecision Corp., SEC Staff Comment Letter, 2007 WL 9408925 (Oct. 11, 2006) ("Provide the basis for the

4. Risk from Nondisclosure

A fourth pressure affecting Decision A is the risk associated with nondisclosure, thus incentivizing disclosure. This risk has three potential sources: (1) direct liability risk if there is omissions liability for nondisclosure; (2) indirect liability risk if nondisclosure heightens the likelihood that other disclosures will give rise to liability; and (3) SEC review risk from nondisclosure of mandated information. This pressure can be depicted pictorially as follows:



a. Direct Liability Risk from Nondisclosure

Silence, absent a duty to disclose, is not actionable.[86] But, if an issuer has a duty to disclose and remains silent, the issuer faces potential liability under Securities Act §§ 11, 12(a)(2), and 17(a)(2) (in the context of an offering) and under Rule 10b-5 (in the context of any securities transaction). If the issuer is has a duty to disclose, the potential liability risk for nondisclosure incentivizes the issuer to speak. Two sources of disclosure duties are especially applicable

statement on page 21 that 'We believe that there is an increasing demand for our services and we see that demand increasing at least in the near term, notwithstanding the decline in revenue from the quarter ended June 30, 2005 to the quarter ended June 30, 2006.'"); Stirling Acquisition Corp., SEC Staff Comment Letter, 2007 WL 9408915 (June 13, 2007) ("Please explain the basis for the second part of the following statement or remove it: 'We cannot predict whether a future acquisition will dilute the net tangible book value of our shares, but we believe such an outcome is unlikely.'"); Dynamic Leisure Corp., SEC Staff Comment Letter, 2007 WL 9398000 (Jan. 25, 2007) ("Please provide us with the basis for the following statement in the first paragraph on page 35: 'Our agreements with leading airlines, allow us to offer consumers what we believe to be the largest selection of low fares generally available to the public.' Alternatively, delete.").

86. *Basic*, 485 U.S. at 239 n.17.

here: (1) misleadingly incomplete disclosures, and (2) mandatory disclosure rules.

First, as discussed above,[87] if an issuer's other statements are misleadingly incomplete because they omit a material fact necessary to make the disclosures not misleading, the issuer has a duty to disclose. In other words, "[e]ven when there is no existing independent duty to disclose information, once a company speaks on an issue or topic, there is a duty to tell the whole truth."[88] Therefore, the risk of omissions liability premised on the failure to tell the whole truth incentives companies to comprehensively discuss chosen topics.

Second, mandatory disclosure rules give rise to an actionable duty to disclose.[89] The SEC heavily regulates the contents of registration statements, annual reports, quarterly reports, and current reports,[90] incorporating the specific disclosure rules contained in Regulations S-K and S-X.[91] To the extent an issuer is considering whether to disclose information that the SEC mandates, the liability risk associated with nondisclosure incentivizes disclosure.

Notably, there is currently a circuit court split about the degree to which an issuer's failure to comply with one disclosure rule–the Management Discussion and Analysis ("MD&A") required by Item 303 of Regulation S-K–gives rise to a duty to disclose that is potentially actionable under Rule 10b-5.[92] Assuming this issue is eventually resolved by the Supreme Court,[93] a holding that Item 303 in particular or SEC disclosure rules more broadly do not give rise to a potentially actionable duty to disclose would significantly lessen

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87. *See*, *supra*, Part II.A.3.a.

88. Meyer v. Jinkosolar Holdings Co., 761 F.3d 245, 250 (2d Cir. 2014).

89. Stratte-McClure v. Morgan Stanley, 776 F.3d 94, 102 (2d Cir. 2015) (citing authority) ("This Court and our sister circuits have long recognized that a duty to disclose under Section 10(b) can derive from statutes or regulations that obligate a party to speak."); *In re* Morgan Stanley Info. Fund Sec. Litig., 592 F.3d 347, 360 (2d Cir. 2010) ("Collectively, the language of sections 11 and 12(a)(2) creates three potential bases for liability based on registration statements and prospectuses filed with the SEC: (1) a misrepresentation; (2) an omission in contravention of an affirmative legal disclosure obligation; and (3) an omission of information that is necessary to prevent existing disclosures from being misleading.").

90. *E.g.*, 17 C.F.R. § 239.11 (2014) (Form S-1); *id.* § 240.13a–13 (2016) (Form 10-Q); *id.* § 240.15d-13 (2016) (Form 10-Q); *id.* § 249.308a (2015) (Form 10-Q); *id.* § 240.13a-1 (1997) (Form 10-K); *id.* § 240.15d-1 (1996) (Form 10-K); *id.* § 249.310 (2015) (Form 10-K); *id.* § 240.13a-11 (2016) (Form 8-K); *id.* § 240.15d-11 (2016) (Form 8-K); *id.* § 249.308 (2016) (Form 8-K).

91. 17 C.F.R. Part 229 (2012) (Regulation S-K); 17 C.F.R. Part 210 (2011) (Regulation S-X).

92. *Compare Stratte-McClure*, 776 F.3d at 100 ("We conclude, as a matter of first impression in this Court, that a failure to make a required Item 303 disclosure in a 10-Q filing is indeed an omission that can serve as the basis for a Section 10(b) securities fraud claim."), *with In re* NVIDIA Corp. Sec. Litig., 768 F.3d 1046, 1054 (9th Cir. 2014) ("We have never directly decided whether Item 303's disclosure duty is actionable under Section 10(b) and Rule 10b-5. We now hold that it is not.").

93. *See* Leidos, Inc. v. Indiana Pub. Ret. Sys., 137 S. Ct. 1395 (2017) (granting certiorari on this issue), *cert. dismissed*, 138 S. Ct. 2670 (2018).

the pressure on issuers from the risk of liability for nondisclosure.

b. Indirect Liability Risk from Nondisclosure

Issuers may also be incentivized by the liability risk associated with *other* disclosures to make additional voluntary disclosures (even if those other disclosures are not misleadingly incomplete, which would make additional disclosures mandatory rather than voluntary). For example, in order to take advantage of the safe harbor from liability for forward-looking statements, companies must accompany those statements with meaningful cautionary language.[94] Therefore, in order to alleviate the liability risk associated with forward-looking statements, companies are incentivized to make additional voluntary, cautionary disclosures.[95] Indeed, before requiring companies to make risk factor disclosures in periodic reports, the SEC recognized that many issuers were nonetheless doing so voluntarily in order to alleviate the liability risk associated with other statements.[96] The strength of this incentive to voluntarily disclose depends on the degree of litigation risk that a company faces.[97]

c. SEC Review Risk from Nondisclosure

The SEC review process described above[98] also encompasses a review of whether an issuer has complied with mandatory disclosure rules.[99] For example, the SEC staff has flagged the apparent omission of an audit report,[100] of one segment from total segment adjusted EBITDA,[101] and even of mandatory parentheticals within

94. 15 U.S.C. § 77z-2(c)(2); *id.* § 78u-5(c)(2)(A).

95. Karen K. Nelson & A. C. Pritchard, *Carrot or Stick? The Shift from Voluntary to Mandatory Disclosure of Risk Factors*, 13 J. OF EMPIR. LEGAL STUD. 266, 267 (2016) ("Thus, the safe harbor provides an important incentive for public companies to disclose risk factors.").

96. Securities Offering Reform, SEC Release No. 34-52056 (Aug. 3, 2005) ("Issuers may already include risk factor disclosure in their Exchange Act reports for varying reasons, including to take advantage of the safe harbor for forward-looking statements in Securities Act Section 27A and the 'bespeaks caution' defense developed through case law.").

97. Nelson & Pritchard, *supra* note 95, at 267 (finding that, during the period when risk factor disclosure was voluntary, "firms with greater litigation risk provide[d] more risk factor disclosure").

98. *See*, *supra*, Part II.A.3.b.

99. SEC, Division of Corporation Finance, Filing Review Process, at https://www.sec.gov/divisions/corpfin/cffilingreview.htm.

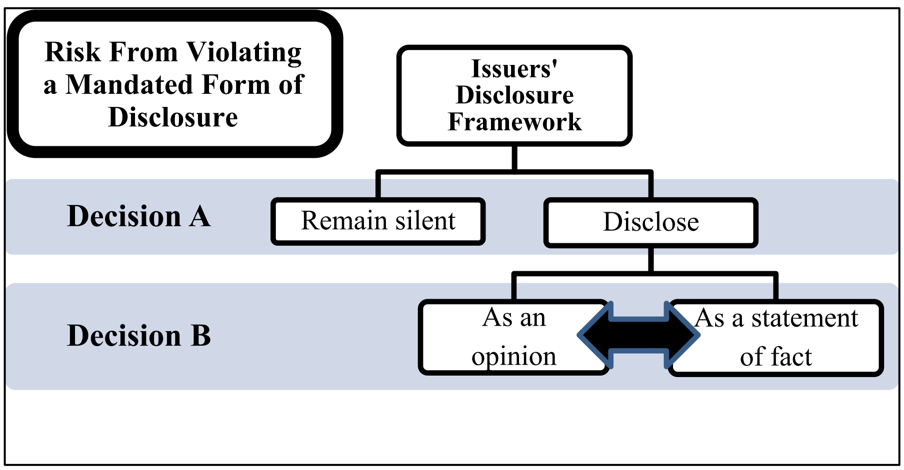
100. Carolyn River Projects Ltd., SEC Staff Comment Letter, 2007 WL 9402393 (Dec. 19, 2005) ("We note that the independent auditor's report for the period covering from inception to the period ended May 31, 2004 has been omitted from the registration statement. You must include an audit report for each period for which financial statements are required. A reference to the report is not sufficient.").

101. Patriot Coal Corp., SEC Staff Comment Letter, 2007 WL 9404749 (Oct. 2, 2007) ("We note that you have included totals of your segment adjusted EBITDA for all periods presented for certain

Section 1350 certifications.[102] Therefore, the risk that the SEC will initiate the comment process with respect to an omitted mandatory disclosure, thus imposing costs, incentivizes disclosure of information required by SEC rules.

5. Risk from Violating a Mandated Form of Disclosure

Although the SEC routinely regulates the form of disclosures in some respects, such as requiring certain disclosures to be expressed in "plain English,"[103] it has only occasionally wielded this tool to affect issuers' decisions about whether to express disclosures as opinions or as statements of fact. To the extent that the SEC so regulates disclosures, however, this pressure affects issuers' Decision B. This potential pressure can be depicted pictorially as follows:



A few mandatory disclosure provisions mandate, not only the content of disclosure, but also the form of disclosure. For example, the instructions to Item 404(a) of Regulation S-K, which requires the

segments, including a reconciliation of this non-GAAP measure to net income. It appears you have omitted one of your segments to arrive at your total Segment Adjusted EBITDA. Please modify your presentation of total Segment Adjusted EBITDA to include all segments you have identified and adjust your reconciliation to Net Income accordingly.").

102. Hallwood Group Inc., SEC Staff Comment Letter, 2007 WL 9402622 (Sept. 27, 2007) ("The certifications required by Rule 13a-14(a) or Rule 15d-14(a) should conform exactly to the certification set forth in Item 601(b)(31) of Regulation S-K. In that regard, please revise paragraph 4(d) in future filings to include the reference to the most recent fiscal quarter as opposed to the fourth fiscal quarter and insert the parenthetical language presently omitted. The parenthetical language should also be included in future filings on Form 10-Q.").

103. Securities Act Rule 423(d), 17 C.F.R. § 230.423(d) (2011); Plain English Disclosure, SEC Release No. 33-7497 (Jan. 28, 1998); SEC, A Plain English Handbook: How to create clear SEC disclosure documents (Aug. 1998).

disclosure of transactions with related persons, provide the following guidance for certain related-person transactions involving indebtedness:

> [D]isclosure under paragraph (a) of this Item may consist of a statement, if such is the case, that the loans to such persons:
> i. Were made in the ordinary course of business;
> ii. Were made on substantially the same terms, including interest rates and collateral, as those prevailing at the time for comparable loans with persons not related to the lender; and
> iii. Did not involve more than the normal risk of collectibility or present other unfavorable features.[104]

The SEC staff has interpreted this instruction as mandating that these Item 404(a) disclosures be expressed as statements of fact. For instance, in the first version of its registration statement, Buckhead Community Bankcorp Inc. expressed these disclosures[105] as opinions:

> *In the opinion of management* all loans and commitments to extend loans included in such transactions were made in the ordinary course of business substantially on the same terms, including interest rates and collateral, as those prevailing from time to time on comparable transactions with unaffiliated persons; are not such as are required to be classified as non-accrual, past due, restructured or creating potential problems; and do not involve more than a normal risk of collectibility or present any other unfavorable features. *In management's opinion*, the amount of extensions of credit outstanding at any time from the beginning of the last fiscal year to date to a director, executive officer or principal security holder and their associates, individually or in the aggregate, did not exceed the maximum permitted under applicable banking regulations.[106]

The SEC staff issued a comment letter requesting revision because the "representation required by Instruction 4.c to Item 404 . . . should

104. 17 C.F.R. § 229.404 (2012).

105. Buckhead Community Bankcorp Inc. made these disclosures pursuant to Item 404 of Regulation S-B, 17 C.F.R. § 228.404, which was effective from November 7, 2006 to March 14, 2009 and which has since been repealed and integrated into Regulation S-K. Smaller Reporting Co. Regulatory Relief & Simplification, Release No. 2451; 34-56994 (Dec. 19, 2007). The relevant instructions remain identical, however.

106. Buckhead Community Bancorp Inc., Registration Statement (Form S-4) (June 28, 2007) (emphasis added).

be a statement of fact, not opinion."[107] The issuer complied, amending its registration statement to express these disclosures as statements of fact:

> All loans and commitments to extend loans included in such transactions were made in the ordinary course of business substantially on the same terms, including interest rates and collateral, as those prevailing from time to time on comparable transactions with unaffiliated persons; are not such as are required to be classified as non- accrual, past due, restructured or creating potential problems; and do not involve more than a normal risk of collectibility or present any other unfavorable features. The amount of extensions of credit by FNB Forsyth outstanding at any time from the beginning of the last fiscal year to date to a director, executive officer or principal security holder and their associates, individually or in the aggregate, did not exceed the maximum permitted under applicable banking regulations.[108]

Therefore, on the rare occasions in which SEC rules require disclosure in a certain form (either as an opinion or as a statement of fact), the risk associated with the SEC review and comment process incentivizes issuers to express their disclosures in that mandated form.

B. Differential Pressures for Voluntary and Mandatory Disclosures

Although the five competing pressures that issuers face vary depending on the particular disclosure at issue, the most important variable is whether the disclosure is voluntary or mandatory under SEC rules. If a disclosure is voluntary (*i.e.*, not mandated by SEC rules), the risk from nondisclosure is lessened considerably, and the risk from violating a mandated form of disclosure is non-existent, rendering the other pressures (market forces, costs of disclosure, and risk of inaccuracy or misleading incompleteness) more important to the issuer's disclosure decision. Conversely, if the disclosure is mandated by SEC rules, these other competing pressures are less likely to affect the issuer's disclosure decision, at least with respect to Decision A. On the rare occasion that the SEC rules mandate both

107. Buckhead Community Bancorp Inc., SEC Staff Comment Letter, 2007 WL 9401203 (July 27, 2007).

108. Buckhead Community Bancorp Inc., Amendment No. 1 to Registration Statement (Form S-4) (Sept. 14, 2007).

the actual disclosure and the form of that disclosure, these competing pressures are also less likely to affect Decision B.

Even if a disclosure is mandated by SEC rules, however, the other pressures (market forces, costs of disclosure, and risk of inaccuracy or misleading incompleteness) are still potentially impactful.[109] For example, if the risk associated with violating mandatory disclosure rules is not sufficient to outweigh competing pressures, issuers may choose to violate the mandate. Indeed, although the SEC amended the executive compensation disclosure requirements in 2006 to require expanded narrative disclosure about "how and why a company arrived at specific executive compensation decisions and policies,"[110] the SEC staff continued to issue a significant number of comments about deficiencies through 2009.[111] In a November 2009 speech, Shelley Parratt, then-Deputy Director of the Division of Corporation Finance, explained this endemic noncompliance as follows:

> Based on this review, we're left with one simple conclusion. The reason for ongoing comments in these areas is not because companies do not understand the disclosure requirements—to the contrary, we believe that there is a general understanding of the rules. Rather, it seems many are reluctant to address these comment themes until we provide specific comments requesting enhanced disclosure. Anecdotal evidence suggests the same—that companies may be disinclined to disclose detailed compensation information and prepare a rigorous analytical discussion of compensation practices until we ask them to do so in a review.[112]

In other words, under Decision A, despite the pressures

109. *See* Chair Mary Jo White, Speech, The Path Forward on Disclosure (Oct. 15, 2013), https://www.sec.gov/news/speech/spch101513mjw ("We should consider all sources that may be contributing to the length and complexity of disclosure. In some cases, lengthy and complex disclosure may indeed by the direct result of the Commission's rules. . . . But, there are other causes too, such as investor demand or a company's decision to take a defensive posture and disclose more information rather than less to reduce the risk of litigation claims that there was insufficient disclosure.").

110. Report on Review of Disclosure Requirements in Regulation S-K, at 57 (Dec. 2013), https://www.sec.gov/news/studies/2013/reg-sk-disclosure-requirements-review.pdf (discussing the 2006 amendments); *see also* Executive Compensation & Related Person Disclosure; Final Rule and Proposed Rule, SEC Release No. 34-54302A (Sept. 8, 2006); Executive Compensation & Related Person Disclosure, SEC Release No. 34-54302A (Aug. 29, 2006).

111. Shelley Parratt, Speech, Executive Compensation Disclosure: Observations on the 2009 Proxy Season and Expectations for 2010 (Nov. 9, 2009), https://www.sec.gov/news/speech/2009/spch110909sp.htm.

112. *Id.*

incentivizing compliance with the executive compensation disclosure requirements (market forces and risk from nondisclosure), companies chose not to make these disclosures, likely because the competing pressures (costs of disclosure and risk from inaccuracy or misleadingly incompleteness) outweighed those pressures. In response, Parratt sought to increase the risk associated with noncompliance by warning: "Any company that waits until it receives staff comments to comply with the disclosure requirements should be prepared to amend its filings if we raise material comments."[113]

As another example of the ongoing impact of other pressures despite an SEC mandate, consider the competing pressures affecting an issuer's risk factor disclosures. Because risk factor disclosure is mandatory, companies face direct liability risk and SEC review risk associated with nondisclosure. Yet, risk factor disclosure also lessens the liability risk associated with forward-looking statements,[114] and different firms face different litigation risk. So, the strength of this additional incentive to disclose risk factors varies depending on the firm's litigation risk. Indeed, in an empirical study, Karen K. Nelson and A. C. Pritchard found that this difference in litigation risk was impactful despite the mandatory nature of risk factor disclosure: "We find that firms with high litigation risk continue to provide significantly more risk factor disclosure in the mandatory regime."[115]

C. Potential Adjustments to Pressures Facing Issuers

The above-identified countervailing pressures affect how issuers resolve Decision A (whether to remain silent or disclose) and the subsidiary Decision B (whether to disclose as an opinion or as a statement of fact). If these pressures are not appropriately calibrated, issuers may make decisions that are not optimal for society. To the extent these pressures result in non-optimal choices, adjustments to these pressures can incentivize optimal behavior. Indeed, Parratt's warning to issuers, discussed above,[116] is an example of an adjustment to the risk from nondisclosure, in an effort to affect Decision A with respect to executive compensation disclosure.

In particular, four potential adjustments to the pressures facing issuers are available to incentivize optimal behavior: (1) influence

113. *Id.*

114. *See*, *supra*, text accompanying notes 94-96.

115. Nelson & Pritchard, *supra* note 95, at 268.

116. *See*, *supra*, text accompanying notes 110-113.

Decisions A and B by adjusting the direct or indirect costs of disclosure; (2) influence Decisions A and B by adjusting the risk from inaccurate or misleadingly incomplete disclosure; (3) influence Decision A by adjusting the risk from nondisclosure; and (4) influence Decision B by adjusting the risk associated with violating a mandated form of disclosure.

1. Adjustments to Costs of Disclosure

The direct and indirect costs of disclosure can be adjusted to some degree, thus affecting Decisions A and B. Lowering disclosure costs potentially lessens the pressure on issuers to remain silent (Decision A) and to disclose in the form of opinions (Decision B), while increasing disclosure costs potentially has countervailing impacts. For example, standardization of disclosure requirements can "lead to greater economies of scale in the design of systems for the collection of such information (such as software systems), increase the size and mobility of the pool of disclosure professionals available to issuers, and lead to greater cost competition in service providers, such as independent auditors."[117] As a consequence, standardization can potentially lower disclosure costs, affecting Decisions A and B.

2. Adjustments to Risk from Inaccuracy or Misleading Incompleteness

Adjustments to the risk associated with inaccuracy or misleading incompleteness can likewise affect the pressures on issuers making Decisions A and B. With respect to liability risk, to the extent that the risk of liability for inaccuracy or misleading incompleteness is lessened, issuers are more likely to disclose (Decision A) and to do so in the form of a statement of fact (Decision B). Conversely, to the extent that the risk of liability for inaccuracy or misleading incompleteness is increased, issuers are more likely to remain silent (Decision A) or, if electing to disclose, to do so in the form of an opinion (Decision B). With respect to SEC review risk, adjusting the frequency and comprehensiveness of SEC review for inaccuracy or misleading incompleteness can likewise affect these incentives.

As an example of adjustment to the liability risk associated with inaccuracy, Congress enacted a safe harbor in 1995 that protects companies from private civil liability for certain forward-looking statements,[118] which are a subset of opinions.[119] Congress's stated

117. Franco, *supra* note 18, at 333.

118. 15 U.S.C. § 77z-2(c)(2); *id.* § 78u-5(c)(2)(A).

119. Couture, *Opinions*, *supra* note 35, at 400 ("[A]bsent a crystal ball, any prediction is

goal was to encourage companies to make forward-looking statements: "The Conference Committee has adopted a statutory 'safe harbor' to enhance market efficiency by encouraging companies to disclose forward-looking information."[120] Congress was attempting to influence Decision A by lessening the liability risk associated with forward-looking statements, and there is evidence that the lessening of this pressure induced firms to voluntarily disclose more forward-looking information. An empirical study of 523 high tech firms found that firms significantly increased the frequency and number of forecasts in the year after the safe harbor was enacted and that this increase was most pronounced for firms that, prior to the enactment, had relatively higher litigation risk.[121]

3. Adjustments to Risk from Nondisclosure

Directly or indirectly adjusting the risk associated with nondisclosure can also affect the pressures on issuers making Decision A. First, increasing disclosure mandates increases the pressure on issuers to disclose, both to avoid liability for nondisclosure and to avoid SEC comments in the review process, while decreasing disclosure mandates decreases that pressure. Second, increasing or decreasing the extent to which additional disclosures (like cautionary language) protect other statements from liability risk indirectly affects issuers' incentives to make those additional disclosures. Finally, adjusting the frequency, comprehensiveness, and implications of SEC review for non-compliance with disclosure mandates can likewise affect these incentives.

As an example of an adjustment to the direct liability risk and the SEC review risk associated with nondisclosure, the SEC added a new disclosure mandate in 2005 that requires certain reporting companies to make risk factor disclosures in their annual reports and to update those factors to reflect material changes in their quarterly reports.[122] Although many companies were already making these disclosures voluntarily, the SEC mandated these disclosures in order to "further

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necessarily subjective, requiring the speaker to infer an unknown fact (i.e., the future) from a known set of facts (i.e., the present).").

120. H.R. Conf. Rep. 104-369 (Nov. 29, 1995) ("The Conference Committee has adopted a statutory "safe harbor" to enhance market efficiency by encouraging companies to disclose forward-looking information.").

121. Marilyn F. Johnson, Ron Kasznik & Karen K. Nelson, *The Impact of Securities Litigation Reform on the Disclosure of Forward-Looking Information By High Technology Firms*, 39 J. OF ACCT. RES. 297, 298 (2001).

122. Securities Offering Reform, SEC Release No. 34-52056 p.257-58 (Aug. 3, 2005).

enhance the contents of Exchange Act reports and their value in informing investors and the markets."[123] Therefore, the addition of this disclosure mandate increased the pressure on issuers to disclose risk factors rather than remain silent.[124]

As an example of an adjustment to direct liability risk and SEC review risk in the other direction, Congress enacted the Jumpstart Our Business Startups Act ("JOBS Act") in 2012, which lessened the initial public offering ("IPO") disclosure requirements for firms categorized as "emerging growth companies" or "EGCs."[125] Among other provisions, the JOBS Act permits EGCs to disclose two years of audited financial statements (rather than three years) and to disclose two years of selected financial data (rather than five years).[126] The JOBS Act reduced the risk associated with nondisclosure of this now-voluntary information. Consistent with the reduction of this pressure on issuers, many EGCs have chosen not to disclose this information, suggesting that, once the risk from nondisclosure was reduced, the pressures favoring disclosure of this information (market forces) were outweighed for these companies by the pressures favoring nondisclosure (disclosure costs and risk from inaccuracy or misleading incompleteness).[127]

As an example of an adjustment to the SEC review risk associated with nondisclosure, in 2002, Congress mandated enhanced SEC review of periodic disclosures by issuers.[128] Section 408 of the Sarbanes-Oxley Act directed the SEC to review issuers' periodic disclosures at least once every three years,[129] with the purpose of "promoting compliance with what is largely a voluntary compliance system."[130] This adjustment to the "watchdog function of the SEC"[131] increased the risk of failing to comply with the SEC's

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123. *Id.*

124. Nelson & Pritchard, *supra* note 95, at 268 (concluding that "the SEC's mandate had a material effect on the disclosure decisions of companies that had less incentive to provide meaningful [risk factor] disclosure under the PSLRA's safe harbor provision alone").

125. Jumpstart Our Business Startups Act ("JOBS Act"), Pub. L. No. 112-106, 126 Stat. 306, Title I (b)(1)(A)(a)(2) (Apr. 5, 2012)

126. *See* Securities Act of 1933 § 7(a)(2)(A), 15 U.S.C. § 77g(a)(2)(A).

127. *See* Gupta & Israelsen, *supra* note 43, at 17 ("61 out of 159 chose to report fewer than five years of selected financial data although almost half of the firms in our sample chose to provide at least three years of audited financial statements."); *id.* ("Taken together, these results suggest that for many firms, the constraints on the production of hard information prior to the implementation of the JOBS Act were indeed binding.").

128. 15 U.S.C. § 7266.

129. Sarbanes-Oxley Act of 2002, Pub.L. 107-204, 116 Stat. 790, Title IV, § 408(c) (July 30, 2002) (codified at 15 U.S.C. § 7266).

130. Lawrence A. Cunningham, *The Sarbanes-Oxley Yawn: Heavy Rhetoric, Light Reform (and It Just Might Work)*, 35 CONN. L. REV. 915, 968 (2003).

131. *Id.*

disclosure mandates, thus potentially affecting issuers' Decision A.

4. Adjustments to Risk Associated with Violating a Mandated Form of Disclosure

Mandating the form of additional disclosures (either as an opinion or as a statement of fact), or increasing the likelihood of SEC review of existing mandated forms of disclosure, could affect the pressures on issuers when making Decision B. For example, if issuers were making a non-optimal choice to express certain disclosures as opinions, the SEC could mandate that those disclosures be expressed as statements of fact, with that mandate enforced via the SEC review process. Therefore, although the SEC has only imposed this pressure on rare occasion,[132] it is a potential adjustment tool available if issuers are making non-optimal choices with respect to Decision B.

III. *OMNICARE*'S POTENTIAL IMPACTS ON ISSUERS' DISCLOSURE FRAMEWORK

A. Omnicare*'s Potential Adjustments to Liability Risk from Inaccuracy or Misleading Incompleteness*

In *Omnicare*, the Supreme Court clarified the liability standards for statement of opinion. The Court held: (1) an opinion is actionable as an untrue statement of material fact only if the opinion was disbelieved by the speaker; and (2) an opinion can give rise to omissions liability to the extent the issuer fails to disclose a fact showing that the company lacked the basis for expressing the opinion that a reasonable investor would expect.[133] The cumulative impact of these holdings on the pressures facing issuers is uncertain because they are countervailing.

With respect to the first holding, prior to *Omnicare*, the circuit courts were split about whether a showing of disbelief was required for a statement of opinion to be actionable as an untrue statement of material fact.[134] *Omnicare* clarified that such a showing is indeed required. This holding, which made it more difficult for a statement of opinion to be actionable as an untrue statement of fact, had two potential impacts. First, with respect to Decision A, this holding potentially lessened the pressure on issuers to remain silent rather

132. *See*, *supra*, text accompanying notes 104-108.

133. *Omnicare*, 135 S. Ct. at 1327, 1332.

134. Petition for a Writ of Certiorari, Omnicare, Inc. v. The Laborers Dist. Council, No. 13-435, 2013 WL 5532735, at *13-14 (U.S. Oct. 4, 2013) (detailing the Circuit split existing at that time).

than to disclose in the form of an opinion. Second, with respect to Decision B, this holding potentially increased the incentive for issuers to make disclosures as statements of opinion rather than as statements of fact, in order to insulate those statements from liability.

With respect to the second holding, prior to *Omnicare*, omissions liability associated with statements of opinion was not widely understood to be a separate liability pathway; courts often analyzed statements of opinion only as allegedly false statements of material fact.[135] Indeed, the lower courts in *Omnicare* "erroneously conflat[ed]" the two liability pathways, ignoring the separate omissions analysis.[136] Therefore, although *Omnicare* clarified only a narrow pathway whereby opinions can give rise to omissions liability, it potentially affected Decisions A and B in a countervailing manner to the first holding. This holding potentially increased the pressure on issuers to remain silent rather than disclose in the form of an opinion and potentially decreased the benefit (from a liability perspective) of expressing a statement as an opinion rather than as a statement of fact.[137]

*B. Collection of Pre- and Post-*Omnicare *Opinions*

As part of a qualitative assessment of the potential impact of *Omnicare*'s holdings on issuer disclosure decisions, I collected 2,549 statements of opinion from the 10-Ks of 30 companies filed immediately prior and post to *Omnicare*'s issuance.[138] In order to build this collection of statements of opinion, I followed several steps.

First, I obtained the 10-K filings, immediately preceding and immediately following the issuance of *Omnicare*, of the first 30 companies listed alphabetically in the S&P 100 index, excluding any companies without both pre- and post-*Omnicare* 10-Ks.[139] I selected

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135. Sale & Langevoort, *supra* note 60, at 775 ("Before *Omnicare*, many courts assumed that opinions were fraudulent only if not genuinely believed . . .").

136. *Omnicare*, 135 S. Ct. at 1325 n.1.

137. *See* Sale & Langevoort, *supra* note 60, at 775 ("*Omnicare*'s holding that opinions may imply more than they say thus increases the scope of liability that issuers face."); James D. Cox, *"We're Cool" Statements After Omnicare: Securities Fraud Suits for Failures to Comply with the Law*, 68 SMU L. REV. 715, 724 (2015) ("Another significant impact of *Omnicare Inc.* is that it relieves the plaintiff of the burden of alleging facts of knowing noncompliance with the law; after *Omnicare Inc.*, the plaintiff can put into issue that the claim of compliance is baseless in light of pervasive violations, and hence porosity of the claimed compliance system.").

138. I excluded amended 10-Ks, focusing instead on the regularly filed 10-Ks immediately before and after *Omnicare*'s issuance. A chart identifying each opinion in the collection is posted here: http://ssrn.com/author=1070964.

139. I used the stocks in the S&P 100 Index as of December 30, 2016. I examined the filings of

large-cap companies because these firms, which tend to have more sophisticated legal counsel, are consequently more likely to be immediately responsive to changes in the law.[140] The 30 selected companies represent a broad array of industries, with 20 different Standard Industrial Classifications ("SIC") codes.[141] The SIC code with the most representation in the collection (five companies) is 2834—Pharmaceutical Preparations.[142] None of these 30 companies received an SEC staff comment letter with respect to their 10-Ks filed immediately before or after *Omnicare*.[143]

Second, I searched these 60 10-Ks for the following opinion signals: "opinion," "believe," "belief," "think," "estimation," and "consider."[144] Although these signals do not encompass the entire world of possible expressions of opinion, they are used extensively by issuers to indicate statements of opinion.

Third, I exercised judgment when deciding whether to classify statements containing these signals as opinions. I omitted all statements where, although a signal was used, no opinion was expressed. For example, I included statements in which "consider" was used synonymously with "believe" but omitted statements in

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the following companies: 3M Co. (MMM), AT&T Inc. (T), AbbVie Inc. (ABBV), Abbott Laboratories (ABT), Accenture plc A (ACN), Allergan plc (AGN), Allstate Corp. (ALL), Altria Group Inc. (MO), Amazon.com Inc. (AMZN), American Express Co. (AXP), American International Group, Inc. (AIG), Amgen Inc. (AMGN), Apple Inc. (AAPL), Bank of America Corp. (BAC), Berkshire Hathaway B (BRK.B), Biogen Inc. (BIIB), BlackRock Inc. (BLK), Boeing Co. (BA), Bristol-Myers Squibb (BMY), CVS Health Corporation (CVS), Capital One Financial (COF), Caterpillar Inc. (CAT), Celgene Corp. (CELG), Chevron Corp. (CVX), Cisco Systems Inc. (CSCO), Citigroup Inc. (C), Coca-Cola Co. (KO), Colgate-Palmolive Co. (CL), Comcast Corp. A (CMCSA), and ConocoPhillips (COP).

140. *See* Barbara A. Bliss, Frank Partnoy & Michael Furchtgott, *Information Bundling and Securities Litigation* (June 2016), at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2795164 ("[L]arge firms, which are likely to have more sophisticated legal counsel, were more likely to use positive bundling after the *Dura* ruling.").

141. *See* SEC, Division of Corporation Finance, Standard Industrial Classification (SIC) Code List, at https://www.sec.gov/info/edgar/siccodes.htm. The 20 SIC codes represented by this collection of companies are as follows: 2080 – BEVERAGES; 2111 – CIGARETTES; 2834 - PHARMACEUTICAL PREPARATIONS; 2836 - BIOLOGICAL PRODUCTS (NO DIAGNOSTIC SUBSTANCES); 2844 - PERFUMES, COSMETICS & OTHER TOILET PREPARATIONS; 2911 - PETROLEUM REFINING; 3531 - CONSTRUCTION MACHINERY & EQUIP; 3571 - ELECTRONIC COMPUTERS; 3576 - COMPUTER COMMUNICATIONS EQUIPMENT; 3721 – AIRCRAFT; 3841 - SURGICAL & MEDICAL INSTRUMENTS & APPARATUS; 4813 - TELEPHONE COMMUNICATIONS (NO RADIO TELEPHONE); 4841 - CABLE & OTHER PAY TELEVISION SERVICES; 5912 - RETAIL-DRUG STORES AND PROPRIETARY STORES; 5961 - RETAIL-CATALOG & MAIL-ORDER HOUSES; 6021 - NATIONAL COMMERCIAL BANKS; 6199 - FINANCE SERVICES; 6211 - SECURITY BROKERS, DEALERS & FLOTATION COMPANIES; 6331 - FIRE, MARINE & CASUALTY INSURANCE; and 7389 - SERVICES-BUSINESS SERVICES, NEC.

142. The five companies are: ABBV, ABT, AGN, BMY, and CELG.

143. I performed a search in the CCH SEC Staff Comment Letter Database, available on Westlaw, on July 11, 2017.

144. *See Omnicare*, 135 S.Ct. at 1326 ("I believe" and "I think") & 1334 ("in my estimation").

which "consider" was used synonymously with "deem," "treat as," "think about," or "take into account."

Fourth, I included only those statements expressing opinions on behalf of the issuer, a subsidiary of the issuer, the management, the board, or a committee of the board. Therefore, I omitted the opinions of auditors, attorneys, and other third parties.

Fifth, to the extent that the 10-K filings incorporated other SEC filings by reference (such as annual reports to shareholders or proxy statements), I searched the incorporated components of these filings using the same methodology. When examining filings incorporated by reference, I did not second-guess companies' statements about incorporation.[145]

Finally, some companies' pre-*Omnicare* 10-Ks incorporated by reference post-*Omnicare* proxy statements. I classified all such incorporated statements as having been made post-*Omnicare*, even if the proxy statement was filed the day after the *Omnicare* opinion was issued.

C. Assessment of Omnicare*'s Potential Impacts on Issuers' Disclosure Framework*

In order to assess the potentially countervailing impacts of *Omnicare*'s holdings on issuers' disclosure decisions, I then engaged in a qualitative analysis of the collection of pre- and post-*Omnicare* opinions. With respect to Decision A, I looked at whether these issuers post-*Omnicare* chose to: (1) remain silent on subjects about which they had previously expressed opinions; (2) disclose opinions on subjects about which they had previously remained silent; or (3) neither. With respect to Decision B, I looked at whether these issuers post-*Omnicare* chose to: (1) transform disclosures previously expressed as statements of fact into opinions; (2) transform disclosures previously expressed as opinions into statements of fact; or (3) neither.

1. Collection of Points of Comparison

First, because some the pre-*Omnicare* 10-Ks incorporated post-*Omnicare* statements by reference, I excluded all such statements, and their later post-*Omnicare* comparators, from my analysis. This reduced the set of examples to 1,967 statements of opinion. 1,004 of

145. Therefore, if companies failed to incorporate components that should have been incorporated, I did not treat those components as incorporated. Likewise, if companies incorporated components that were not required to be incorporated, I treated those components as incorporated.

these statements of opinion were made pre-*Omnicare*, and 963 were made post-*Omnicare*.

Second, I created a comparison chart, matching pre- and post-*Omnicare* disclosures. This resulted in 847 sets of paired opinions, 157 pre-*Omnicare* opinions without a post-*Omnicare* corollary opinion, and 116 post-*Omnicare* opinions without a pre-*Omnicare* corollary opinion. The comparison chart therefore included 1,120 points of comparison. The following chart shows the results of this comparison:

1,120 Points of Comparison	**1,004 Total Pre-*Omnicare* Opinions**	**963 Total Post-*Omnicare* Opinions**
847	847 identical or substantially similar pre- and post-*Omnicare*	847 identical or substantially similar pre- and post-*Omnicare*
150	150 omitted post-*Omnicare*	
107		107 newly added post-*Omnicare*
7	7 opinions transformed into statements of fact post-*Omnicare*	
9		9 statements of fact transformed into opinions post-*Omnicare*

2. Qualitative Assessment of Points of Comparison

For the vast majority of the points of comparison—76 percent—issuers did not adjust Decision A or Decision B post-*Omnicare*. Of the 1,120 points of comparison, 847 sets of opinions were identical or substantially similar pre- and post-*Omnicare*. This suggests that *Omnicare* had very little impact, if any, on these issuers' disclosure decisions.

I then examined each disclosure decision in context to assess whether there were any identifiable trends, however slight, pre- and post-*Omnicare*.

With respect to Decision A, 150 opinions were omitted post-*Omnicare*, and 107 opinions were newly added post-*Omnicare*. Of course, there are many reasons why an opinion would be omitted or added other than *Omnicare*'s impact. I examined each of these disclosure decisions in context in an attempt to discard those that were apparently attributable to reasons other than the impact of *Omnicare*. Of the 150 opinions omitted post-*Omnicare*, I identified 117 that should be ignored because they resulted from changed circumstances (such as the conclusion of litigation) or from substantial revision of a disclosure section (such as the deletion of an entire paragraph, which just so happened to contain an opinion). Of the 107 newly added post-*Omnicare* opinions, I identified 102 that should be disregarded because they resulted from changed circumstances (such as a new acquisition) or from substantial revision of a disclosure section (such as the addition of an entire paragraph, which just so happened to contain an opinion). Therefore, with respect to Decision A, only 33 opinions were omitted without an apparent non-*Omnicare* reason, and only five opinions were newly added without such a reason. Therefore, if *Omnicare* had any impact on Decision A, it may have slightly increased the pressure on these companies to remain silent rather than to disclose statements of opinion.

Here are several examples of opinions that companies elected to omit post-*Omnicare*, without an apparent non-*Omnicare* reason:

- In Item 1 (Business) of its 2015 and 2016 10-Ks, Allergan plc (AGN) discussed the divestiture of its western European assets. The discussion was virtually identical in both 10-Ks, except for the omission of the following sentence from the 2016 discussion: "We believe that the divestiture allowed the Company to focus on faster growth markets including Central and Eastern Europe, and other emerging markets which we believe will enhance our long-term strategic objectives."[146]
- In Item 7 (MD&A) of its 2015 and 2016 10-Ks, Altria Group, Inc. (MO) discussed the operating results of its smokeless products segment with virtually identical language, except for the omission of the following sentence from the 2016 discussion: "USSTC continues to believe that the smokeless category's growth rate is best determined over a longer time horizon and will continue to monitor industry volume closely."[147]
- In Item 1 (Business) of its 2015 and 2016 10-Ks, Caterpillar Inc. (CAT) discussed its construction industries segment in almost identical terms, except for the omission of the following sentence from the 2016 discussion: "We believe that these products have been well-received by our customers and are providing us a competitive advantage."[148]

146. *Compare* AGN 10-K SEC Filing p.6 (Feb. 28, 2015) (containing opinion), *with* AGN 10-K SEC Filing p.9 (Feb. 26, 2016) (omitting opinion).

147. *Compare* MO 10-K SEC Filing p.15 (Feb. 25, 2015), *with* MO 10-K SEC Filing p.17 (Feb. 25, 2016) (omitting opinion).

148. *Compare* CAT 10-K SEC Filing p.1 (Feb. 17, 2015) (containing opinion), *with* CAT 10-K SEC Filing p.1 (Feb. 16, 2016) (omitting opinion).

• In Item 7 (MD&A) of its 2015 and 2016 10-Ks, Citigroup Inc. (C) discussed the usage of a non-GAAP financial measure to present the results of its Latin American operations. The discussions were virtually identical, except for the omission of the following sentence from the 2016 10-K: "Citi believes the presentation of Latin America GCB's results excluding the impact of FX translation is a more meaningful depiction of the underlying fundamentals of the business."[149]

• In Item 1 (Business) of its 2015 10-K, Comcast Corporation (CMCSA) disclosed: "In addition, while we believe that we are in substantial compliance with FCC regulations, we are occasionally subject to enforcement actions at the FCC, which can result in our having to pay fines to the agency or being subject to other sanctions." In Item 1 of its 2016 10-K, Comcast made an almost identical disclosure, except for the omission of the clause containing an opinion about compliance: "We are occasionally subject to enforcement actions at the FCC, which can result in us having to pay fines to the agency or being subject to other sanctions."[150]

With respect to Decision B, seven pre-*Omnicare* opinions were transformed into statements of fact post-*Omnicare*, and nine pre-*Omnicare* statements of fact were transformed into opinions post-*Omnicare*. Again, there are many reasons why a statement of fact would be transformed into an opinion (such as a newfound uncertainty based on changed circumstances) or an opinion would be transformed into a statement of fact (such as the solidification of a previously uncertain position). I examined each of these disclosure decisions in context in an attempt to discard those that were apparently attributable to reasons other than the impact of *Omnicare*. Of the seven pre-*Omnicare* opinions that were transformed into statements of fact post-*Omnicare*, I identified two that should be ignored because they resulted from changed circumstances (such as new case law supporting a previously uncertain legal position). Based on my contextual analysis, I did not identify any apparent non-*Omnicare* reason to explain the nine pre-*Omnicare* statements of fact that were transformed into opinions post-*Omnicare*. Finally, of the 847 sets of opinions that I classified as virtually unchanged pre-and post-*Omnicare*, I identified three sets where the opinion was softened

149. *Compare* C 10-K SEC Filing p.21 (Feb. 25, 2015) (containing opinion), *with* C 10-K SEC Filing p.19 (Feb. 26, 2016) (omitting opinion).

150. *Compare* CMCSA 10-K SEC Filing p.29 (Feb. 27, 2015) (containing opinion), *with* CMCSA 10-K SEC Filing p.25 (Feb. 5, 2016) (omitting opinion).

post-*Omnicare* without an apparent non-*Omnicare* reason, but I did not identify any sets where the opinion was hardened post-*Omnicare*. Therefore, if *Omnicare* had any impact on Decision B, it may have slightly increased the incentive for these companies to soften disclosures.

Here are several examples of pre-*Omnicare* statements of fact that were transformed into statements of opinion post-*Omnicare*, without an apparent non-*Omnicare* reason:

• In Item 1 (Business) of its 2015 and 2016 10-Ks, American Express Company (AXP) discussed the expansion of its corporate cards program. In 2015, American Express expressed the growth opportunity associated with this expansion as a statement of fact: "GCP is focused on continuing to expand its business with mid-sized companies, which represent a significant growth opportunity." In 2016, American Express softened this disclosure into an opinion: "We are focused on continuing to expand our business with mid-sized companies (defined in the United States as firms with annual revenues of $10 million to $1 billion worldwide), which we believe represents a significant growth opportunity."[151]

• In Item 1 (Business) of its 2015 and 2016 10-Ks, Biogen Inc. (BIIB) discussed its research and development strategy. In 2015, Biogen discussed its targets as a statement of fact: "By applying our expertise in biologics and our growing capabilities in small molecule, antisense, gene therapy, gene editing and other technologies, we target specific medical needs where new or better treatments are needed." In 2016, Biogen softened this disclosure into an opinion: "By applying our expertise in biologics and our growing capabilities in small molecule, antisense, gene therapy, gene editing and other technologies, we target specific medical needs where we believe new or better treatments are needed."[152]

In addition, here are a few examples of pre-*Omnicare* opinions that were further softened post-*Omnicare*, without an apparent non-*Omnicare* reason:

• In Item 1A (Risk Factors) of its pre- and post-*Omnicare* 10-

151. *Compare* AXP 10-K SEC Filing p.29 (Feb. 24, 2015) (expressing as a statement of fact), *with* AXP 10-K SEC Filing p.11 (Feb. 19, 2016) (expressing as an opinion).

152. *Compare* BIIB 10-K SEC Filing p.4 (Feb. 4, 2015) (expressing as a statement of fact), *with* BIIB 10-K SEC Filing p.14 (Feb. 3, 2016) (expressing as an opinion).

Ks, Apple Inc. (AAPL) warned that its stock price is subject to volatility. Pre-*Omnicare*, Apple stated that the "Company believes its stock price reflects expectations of further growth and profitability" and that the "Company also believes its stock price reflects expectations that its cash dividends will continue at current levels or grow and that its current share repurchase program will be fully consummated." Post-*Omnicare*, Apple softened the contents of these opinions by adding the word "should", stating that the "Company believes its stock price should reflect expectations of future growth and profitability" and that the "Company also believes its stock price should reflect expectations that its cash dividend will continue at current levels or grow and that its current share repurchase program will be fully consummated."[153]

• In Item 1A (Risk Factors) of its 2015 and 2016 10-Ks, American International Group, Inc. (AIG) warned that certain of its products have guarantees that might increase the volatility of its results. In 2015, AIG expressed the following belief about the impact of its hedging program: "Finally, while we believe the impact of downturns in equity markets, increased equity volatility or reduced interest rates is offset by our economic hedging program, the occurrence of one or more of these events could result in an increase in the liabilities associated with the guaranteed benefits, reducing our net income and shareholders' equity." In 2016, AIG softened this opinion by changing "offset" to "mitigated" and by adding the warning that the offset might not be complete: "Finally, while we believe the impact of downturns in equity markets, increased equity volatility or reduced interest rates would be mitigated by our economic hedging program, the occurrence of one or more of these events could result in an increase in the liabilities associated with the guaranteed benefits that is not fully offset by the hedging program, reducing our net income and shareholders' equity."[154]

3. Summation

In sum, this qualitative analysis suggests that *Omnicare*'s impact on the pressures affecting these issuers' disclosure decisions was minimal. With respect to Decision A, *Omnicare* may have slightly

153. *Compare* AAPL 10-K SEC Filing p.18 (Oct. 27, 2014), *with* AAPL 10-K SEC Filing p.16 (Oct. 28, 2015).

154. *Compare* AIG 10-K SEC Filing p.36 (Feb. 25, 2015), *with* AIG 10-K SEC Filing p.38 (Feb. 19, 2016).

increased the pressure on these issuers to remain silent rather than disclose opinions. With respect to Decision B, it may have slightly increased the incentive for these issuers to express disclosures as opinions rather than as statements of fact. But these impacts, if any, were modest. This result is not surprising in light of the countervailing nature of the impacts of *Omnicare*'s two holdings on the risk of inaccurate or misleadingly incomplete disclosure and the strength of the other pressures facing issuers (namely, market forces, costs of disclosure, and risks of nondisclosure), which were not affected by *Omnicare*.

In addition, some of the pre-*Omnicare* 10-Ks in the collection might have been too late to reflect pre-*Omnicare* pressures, and some of the post-*Omnicare* 10-Ks in the collection might have been too early to reflect post-*Omnicare* pressures. To the extent that a company anticipated *Omnicare*'s holdings or had its principal place of business in a circuit whose controlling precedent was already largely consistent with *Omnicare*,[155] the company may have adjusted its disclosure decisions prior to *Omnicare*. To the extent that a company had not already adjusted its disclosure decisions prior to *Omnicare*, it may not have made those adjustments in its 10-K immediately following *Omnicare*'s issuance.

IV. APPLICATION OF ISSUERS' DISCLOSURE FRAMEWORK TO ISSUERS' POST-*OMNICARE* DISCLOSURES

Finally, regardless of any marginal impacts of *Omnicare*, I applied the Issuers' Disclosure Framework to issuers' disclosure decisions in a post-*Omnicare* world, with the goals of cataloging those areas in which issuers are expressing disclosures as opinions; demonstrating how the Issuers' Disclosure Framework applies to specific types of disclosure; identifying whether there are any areas in which issuers are making non-optimal disclosure decisions; and proposing any necessary adjustments to the pressures facing issuers to incentivize optimal decision-making.

*A. Collection of Issuers' Post-*Omnicare* Opinion Disclosures*

In order to assess the array of opinion disclosures post-*Omnicare*, I compiled the issuer opinions contained in the 30 tracked companies'

155. James D. Cox, Randall S. Thomas & Lynn Bai, *Do Differences in Pleading Standards Cause Forum Shopping in Securities Class Actions?: Doctrinal and Empirical Analyses*, 2009 WIS. L. REV. 421, 451 (analyzing a sample of securities class action filings and finding that 85% were filed in the circuit of the defendant firms' principal place of business).

post-*Omnicare* 10-Ks, for a total collection of 1,264 opinions.[156] I examined what types of disclosures these issuers expressed as opinions, as opposed to remaining silent or disclosing as statements of fact. The opinions at issue in *Omnicare* were risk factor disclosures about legal compliance;[157] and scholarly commentary post-*Omnicare*, while acknowledging that issuers express opinions about topics other than legal compliance, has focused on opinions about legal compliance.[158] This collection of post-*Omnicare* opinions demonstrates that companies disclose opinions about myriad topics beyond legal compliance, in multiple sections of their 10-Ks other than the risk factors section.

1. Overview of Opinions by Item

First, these companies expressed disclosures about opinions in 16 sections of their 10-Ks, not merely in their risk factor disclosures. The distribution of opinions within these companies' 10-Ks was as follows, from greatest to least:

Item 7. Management's Discussion and Analysis of Financial Condition and Results of Operations (MD&A)[159] (327 opinions)
Item 11. Executive Compensation[160] (316 opinions)
Item 8. Financial Statements and Supplementary Data[161] (238 opinions)
Item 1. Business[162] (137 opinions)
Item 10. Directors and Executive Officers of the Registrant[163] (99 opinions)

156. This number is larger than the 963 post-*Omnicare* opinions examined above in Part III.B. The opinions analyzed in Part III.B excluded those 2016 post-*Omnicare* opinions whose previous comparator also occurred post-*Omnicare* (as a consequence of incorporation by reference of a post-*Omnicare* proxy statement).

157. *Omnicare*, 135 S. Ct. at 1323.

158. *See* Sale & Langevoort, *supra* note 60, at 765 (acknowledging that, although their article focuses on compliance-related disclosures, "it applies to other disclosure issues as well"); Cox, *supra* note 137, at 719 (recognizing that, although his article focuses on legal compliance disclosures, *Omnicare* applies equally to MD&A opinions).

159. This item includes the mandatory disclosures defined in 17 C.F.R. § 229.303 (Item 303 of Reg. S-K).

160. This item includes the mandatory disclosures defined in 17 C.F.R. §§ 229.402, 229.407(e)(4) & 229.407(e)(5) (Items 402, 407(e)(4) & 407(e)(5) of Reg. S-K).

161. This item includes the mandatory disclosures defined in 17 C.F.R. Part 210 (Reg. S-X).

162. This item includes the mandatory disclosures defined in 17 C.F.R. § 229.101 (Item 101 of Reg. S-K).

163. This item includes the mandatory disclosures defined in 17 C.F.R. §§ 229.401, 229.405, 229.406, 229.407(c)(3), 229.407(d)(4) & 229.407(d)(5) (Items 401, 405, 406, 407(c)(3), 407 (d)(4) & 407 (d)(5) of Reg. S-K).

Item 1A. Risk Factors[164] (77 opinions)
Item 3. Legal Proceedings[165] (19 opinions)
Item 2. Properties[166] (18 opinions)
Item 7A. Quantitative and Qualitative Disclosures About Market Risk[167] (8 opinions)
Item 14. Principal Accountant Fees and Services[168] (7 opinions)
Item 13. Certain Relationships and Related Transactions, and Director Independence[169] (6 opinions)
Item 12. Security Ownership of Certain Beneficial Owners and Management and Related Stockholder Matters[170] (5 opinions)
Item 9A. Controls and Procedures[171] (4 opinions)
Item 6. Selected Financial Data[172] (2 opinions)
Item 5. Market for Registrant's Common Equity, Related Stockholder Matters and Issuer Purchases of Equity Securities[173] (1 opinion)

The first eight items in this list accounted for 97 percent of the identified opinions.

Within Item 7 (MD&A), companies expressed opinions about many topics, including the sufficiency of liquidity,[174] the adequacy of loss reserves,[175] the appropriateness of reserve estimates,[176] the

164. This item includes the mandatory disclosures defined in 17 C.F.R. § 229.503(c) (Item 503(c) of Reg. S-K).

165. This item includes the mandatory disclosures defined in 17 C.F.R. § 229.103 (Item 103 of Reg. S-K).

166. This item includes the mandatory disclosures defined in 17 C.F.R. § 229.102 (Item 102 of Reg. S-K).

167. This item includes the mandatory disclosures defined in 17 C.F.R. § 229.305 (Item 305 of Reg. S-K).

168. This item includes the mandatory disclosures defined § 9(e) of Schedule 14A.

169. This item includes the mandatory disclosures defined in 17 C.F.R. §§ 229.404 & 229.407(a) (Items 404 & 407(a) of Reg. S-K).

170. This item includes the mandatory disclosures defined in 17 C.F.R. §§ 229.201(d) & 229.403 (Items 201(d) & 403 of Reg. S-K).

171. This item includes the mandatory disclosures defined in 17 C.F.R. §§ 229.307 & 229.308 (Items 307 & 308 of Reg. S-K).

172. This item includes the mandatory disclosures defined in 17 C.F.R. § 229.301 (Item 301 of Reg. S-K).

173. This item includes the mandatory disclosures defined in 17 C.F.R. §§ 229.201, 229.701 & 229.703 (Items 201, 701 & 703 of Reg. S-K).

174. *E.g.*, ALL 10-K SEC Filing p.91 (Feb. 19, 2016) ("We believe we have sufficient liquidity to meet these needs.").

175. *E.g.*, CVS 10-K SEC Filing p.20 (Feb. 9, 2016) ("Given our experience, we believe that our aggregate reserves for potential losses are adequate, but if . . .").

176. *E.g.*, ALL 10-K SEC Filing p.50 (Feb. 19, 2016) ("Because of our annual review, we believe that our reserves are appropriately established based on available information, technology, laws and regulations.").

reasonableness of estimates and assumptions,[177] the helpfulness of non-GAAP measures to investors,[178] the business environment,[179] and the business model.[180]

Within Item 11 (Executive Compensation), the vast majority of opinions (278 out of 316) were contained in the Compensation Discussion and Analysis ("CD&A") section. Within CD&A, companies expressed opinions about various subjects, including compensation philosophy,[181] the alignment of compensation with performance,[182] the appropriateness of performance metrics,[183] the appropriate balance of awards,[184] the appropriateness of the firms selected for peer benchmarking,[185] the rationale for not limiting compensation to that which is tax deductible,[186] the appropriateness

177. *E.g.*, MMM 10-K SEC Filing p.34 (Feb. 11, 2016) ("Management bases its estimates on historical experience and on various assumptions that are believed to be reasonable under the circumstances . . .").

178. *E.g.*, BA 10-K SEC Filing p.43 (Feb. 10, 2016) ("Management believes these core earnings measures provide investors additional insights into operational performance as unallocated pension and other postretirement benefit costs primarily represent costs driven by market factors and costs not allocable to U.S. government contracts.").

179. *E.g.*, MO 10-K SEC Filing p.23 (Feb. 25, 2016) ("Our tobacco subsidiaries believe that a significant number of adult tobacco consumers switch between tobacco categories, use multiple forms of tobacco products and try innovative tobacco products, such as e-vapor products.").

180. *E.g.*, CELG 10-K SEC Filing p.47 (Feb. 11, 2016) ("Our products are used to treat life-threatening diseases and we believe this business model enables timely delivery and adequate supply of products.").

181. *E.g.*, BMY 10-K SEC Filing (Feb. 12, 2016) (incorporated by reference from March 23, 2016 proxy statement p.43) ("We believe that an executive's compensation should be directly tied to helping us achieve our mission and deliver value to our stockholders.").

182. *E.g.*, BLK 10-K SEC Filing (Feb. 26, 2016) (incorporated by reference from Apr. 15, 2016 proxy statement p.37) ("BlackRock believes in aligning the interests of our senior-level employees, including NEOs, with those of stockholders, and in closely aligning compensation with long-term performance.").

183. *E.g.*, MO 10-K SEC Filing (Feb. 25, 2016) (incorporated by reference from Apr. 7, 2016 proxy statement p.38) ("The Compensation Committee uses adjusted diluted EPS growth and adjusted discretionary cash flow as the key financial measures in determining annual incentive awards . . . . The Compensation Committee believes that the combination of these metrics provides the best alignment between our Company's business strategy and our shareholders' interests . . . .").

184. *E.g.*, CVX 10-K SEC Filing (Feb. 25, 2016) (incorporated by reference from Apr. 7, 2016 proxy statement p.42) ("[L]ong-term incentive awards are typically awarded as 60 percent stock options and 40 percent performance shares. This combination provides a balance of awards, which the MCC believes appropriately serves both performance incentive and executive retention objectives.").

185. *E.g.*, CAT 10-K SEC Filing (Feb. 16, 2016) (incorporated by reference from Apr. 25, 2016 proxy statement p.35) ("The Committee formed the 2016 Direct Competitor Peer Group by selecting seven of the Company's competitors that, in the opinion of the Committee, compete in the same markets as the Company, or offer similar products and services as the Company, or serve the same, or similar, industries or end-users as the Company.").

186. *E.g.*, BA 10-K SEC Filing (Feb. 10, 2016) (incorporated by reference from March 18, 2016 proxy statement p.35) ("We also believe that it is important to preserve flexibility in administering compensation programs in a manner designed to promote varying corporate goals. Accordingly, we have not adopted a policy that all compensation must qualify as deductible under Section 162(m).").

of providing perquisites,[187] the assessment of compensation risk,[188] and the company's interpretation of say-on-pay votes.[189]

Within Item 8 (Financial Statements and Supplementary Data), almost all of the opinions (234 out of 238) were contained in the notes to financial statements. Within these notes, companies expressed opinions about various topics, including the adequacy of provisions for outstanding tax issues,[190] exposure to credit risk,[191] the measurement of fair value,[192] contingent liability,[193] realization of deferred tax assets,[194] accounting for inventory,[195] impairment of investments,[196] and the impact of changes in accounting standards.[197]

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187. *E.g.*, AGN 10-K SEC Filing (Feb. 26, 2016) (incorporated by reference from March 25, 2016 proxy statement p.24) ("We believe that each of these perquisites has an important business purpose.").

188. *E.g.*, AAPL 10-K SEC Filing (Oct. 28, 2015) (incorporated by reference from Jan. 6, 2016 proxy statement p.20-21) ("The Compensation Committee believes that these awards do not encourage unnecessary or excessive risk-taking because the ultimate value of the awards is tied to Apple's stock price performance over several years and because awards are subject to regular vesting schedules to help ensure that a significant component of executive compensation is tied to long-term shareholder value creation.").

189. *E.g.*, ACN 10-K SEC Filing (Oct. 30, 2015) (incorporated by reference from Dec. 11, 2015 proxy statement p.35) ("Given this strong support, which we believe demonstrates our shareholders' satisfaction with the alignment of our names executive officers' compensation with the Company's performance, the Compensation Committee determined not to implement any significant changes to our compensation programs in fiscal 2015 as a result of the shareholder advisory vote.").

190. *E.g.*, BA 10-K SEC Filing p.69 (Feb. 10, 2016) ("We believe appropriate provisions for all outstanding tax issues have been made for all jurisdictions and all open years.").

191. *E.g.*, KO 10-K SEC Filing p.84 (Feb. 25, 2016) ("We believe our exposure to concentrations of credit risk is limited due to the diverse geographic areas covered by our operations.").

192. *E.g.*, COF 10-K SEC Filing p.207 (Feb. 25, 2016) ("The model [to determine the fair value of mortgage servicing rights] incorporates assumptions that we believe other market participants use in estimating future net servicing income, including estimates of prepayment speeds, discount rate/option-adjusted spreads, cost to service, contractual servicing fee income, ancillary income and late fees.").

193. *E.g.*, BAC 10-K SEC Filing p.200 (Feb. 24, 2016) ("Based on current knowledge, management does not believe that loss contingencies arising from pending matters, including the matters described herein, will have a material adverse effect on the consolidated financial position or liquidity of the Corporation.").

194. *E.g.*, C 10-K SEC Filing p.122 (Feb. 26, 2016) ("Citi believes that the realization of the recognized net DTAs of $47.8 billion at December 31, 2015 is more-likely-than-not based upon expectations as to future taxable income in jurisdictions in which the DTAs arise and available tax planning strategies . . . that would be implemented, if necessary, to prevent a carry-forward from expiring.").

195. *E.g.*, CVS 10-K SEC Filing p.21 (Feb. 9, 2016) ("The Company believes the weighted average cost method is preferable to the retail inventory method and the FIFO cost method because it results in greater precision in the determination of cost of revenues and inventories at the stock keeping unit ("SKU") level and results in a consistent inventory valuation method for all of the Company's inventories . . . .").

196. *E.g.*, AAPL 10-K SEC Filing p.50 (Oct. 28, 2015) ("As of September 26, 2015, the Company considers the declines in market value of its marketable securities investment portfolio to be temporary in nature and does not consider any of its investments other-than-temporarily impaired.").

197. *E.g.*, T 10-K SEC Filing p.47 (Feb. 18, 2016) ("Upon initial evaluation, we believe the key changes in the standard that impact our revenue recognition relate to the allocation of contract revenues between various services and equipment, and the timing in which those revenues are recognized.").

Within Item 1 (Business), companies expressed opinions about various subjects, including business strategy,[198] competitive advantage,[199] competition,[200] brand,[201] customers,[202] research and development,[203] employee relations,[204] adequacy of raw material supply,[205] and importance of intellectual property.[206]

Within Item 10 (Directors and Executive Officers of the Registrant), companies generally expressed opinions about two topics: compliance with the beneficial ownership reporting requirements under § 16(a) of the Exchange Act[207] and qualifications of directors.[208]

Within Item 1A (Risk Factors), companies expressed opinions about various company-specific and general risks. These opinions were usually cautiously positive perspectives about the mitigation of risk. For example, companies expressed opinions that ongoing litigation against the company was not meritorious,[209] that its tax

198. *E.g.*, AAPL 10-K SEC Filing p.1 (Oct. 28, 2015) ("The Company believes a high-quality buying experience with knowledgeable salespersons who can convey the value of the Company's products and services greatly enhances its ability to attract and retain customers.").

199. *E.g.*, CAT 10-K SEC Filing p.2 (Feb. 16, 2016) ("We believe that our emissions technology provides a competitive advantage in connection with emissions standards compliance and performance.").

200. *E.g.*, BMY 10-K SEC Filing p.16 (Feb. 12, 2016) ("We believe our long-term competitive position depends upon our success in discovering and developing innovative, cost-effective products that serve unmet medical needs, together with our ability to manufacture products efficiently and to market them effectively in a highly competitive environment.").

201. *E.g.*, AXP 10-K SEC Filing p.3 (Feb. 19, 2016) ("We believe our brand and its attributes are critical to our success, and we invest heavily in managing, marketing, promotion and protecting it.").

202. *E.g.*, CVS 10-K SEC Filing p.7 (Feb. 9, 2016) ("We believe that continuing to be the first to market with new and unique products and services, using innovative marketing and adjusting our mix of merchandise to match our customers' needs and preferences is very important to our ability to continue to improve customer satisfaction.").

203. *E.g.*, BMY 10-K SEC Filing p.6 (Feb. 12, 2016) ("We invest heavily in research and development (R&D) because we believe it is critical to our long-term competitiveness.").

204. *E.g.*, KO 10-K SEC Filing p.10 (Feb. 25, 2016) ("The Company believes that its relations with its employees are generally satisfactory.").

205. *E.g.*, BRKB 10-K SEC Filing p.17 (Feb. 29, 2016) ("Management currently believes there are readily available alternative sources of raw materials and yarn.").

206. *E.g.*, CL 10-K SEC Filing p.2 (Feb. 18, 2016) ("Trademarks are considered to be of material importance to the Company's business.").

207. *E.g.*, CL 10-K SEC Filing (Feb. 18, 2016) (incorporated by reference from March 23, 2016 proxy statement p.59) ("Based on the Company's review of copies of these reports and officer and director certifications, the Company believes that all Section 16(a) filing requirements applicable to its directors and executive officers were complied with during 2015.").

208. *E.g.*, CMCSA 10-K SEC Filing (Feb. 5, 2016) (incorporated by reference from Apr. 8, 2016 proxy statement p.18) ("We believe that Mr. Bacon's significant experience in government affairs, the financial and housing industries and the non-profit, educational and philanthropic communities render him qualified to serve as one of our directors.").

209. *E.g.*, CSCO 10-K SEC Filing p.32 (Sept. 8, 2015) ("While we believe there is no legal basis for the alleged liability, due to the complexities and uncertainty surrounding the judicial process in

positions were reasonable,[210] that the company was compliant with applicable regulations,[211] that the company was well-positioned to face competition,[212] that the company was protected against cyber-attack,[213] that the company's assumptions and estimates were reasonable,[214] and that the company had adopted appropriate risk management and compliance programs.[215]

Within Item 3 (Legal Proceedings), companies usually expressed favorable opinions about the risk associated with legal proceedings, such as that claims asserted against the company were without merit,[216] that the company's litigation defenses were meritorious,[217] and that pending litigation would not have a material adverse effect on the company's financial position, cash flows, or results of operations.[218]

Within Item 2 (Properties), companies usually expressed generalized, positive opinions about the company's properties, such as that the company's facilities were suitable for the company's uses,[219] that the company's facilities were adequate to meet the

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Brazil and the nature of the claims asserting joint liability with the importer, we are unable to determine the likelihood of an unfavorable outcome against our Brazilian subsidiary and are unable to reasonably estimate a range of loss, if any.").

210. *E.g.*, AXP 10-K SEC Filing p.43 (Feb. 19, 2016) ("Although management believes our tax positions are reasonable, we are subject to audit by the Internal Revenue Service and by tax authorities in all jurisdictions in which we conduct business operations.").

211. *E.g.*, BIIB 10-K SEC Filing p.43 (Feb. 3, 2016) ("Although we believe that our safety procedures for handling and disposing of such materials comply with state, federal and foreign standards, there will always be the risk of accidental contamination or injury.").

212. *E.g.*, AAPL 10-K SEC Filing p.8 (Oct. 28, 2015) ("The Company believes it is unique in that it designs and develops nearly the entire solution for its products, including the hardware, operating system, numerous software applications and related services.").

213. *E.g.*, COF 10-K SEC Filing p.21 (Feb. 25, 2016) ("Although we believe we have a robust suite of authentication and layered security controls, including our cyber threat analytics, data encryption and tokenization technologies, anti-malware defenses and vulnerability management program, any one or combination of these controls could fail to detect, mitigate or remediate these risks in a timely manner.").

214. *E.g.*, ACN 10-K SEC Filing p.19 (Oct. 30, 2015) ("We base our estimates on historical experience, contractual commitments and on various other assumptions that we believe to be reasonable under the circumstances and at the time they are made.").

215. *E.g.*, BAC 10-K SEC Filing p.13 (Feb. 24, 2016) ("While we believe that we have adopted appropriate risk management and compliance programs, compliance risks will continue to exist, particularly as we adapt to new rules and regulations.").

216. *E.g.*, BLK 10-K SEC Filing p.27 (Feb. 26, 2016) ("BlackRock believes the claims in the lawsuits are without merit and intends to vigorously defend the actions.").

217. *E.g.*, AXP 10-K SEC Filing p.46 (Feb. 19, 2016) ("We believe we have meritorious defenses to each of these legal proceedings and intend to defend them vigorously.").

218. *E.g.*, ABT 10-K SEC Filing p.75 (Feb. 19, 2016) ("While it is not feasible to predict the outcome of such pending claims, proceedings and investigations with certainty, management is of the opinion that their ultimate resolution should not have a material adverse effect on Abbott's financial position, cash flows, or results of operations.").

219. *E.g.*, MO 10-K SEC Filing p.10 (Feb. 25, 2016) ("The plants and properties owned or leased

company's needs,[220] and that existing leases could be renewed or replaced.[221]

2. Overview of Opinions by Topic

Issuers also expressed opinions about the same subjects across items. For example, as then-SEC Chair Mary Jo White noted in a speech about potential disclosure reform, legal proceeding disclosures are often repeated "in the risk factors, in the MD&A and in the notes to the financial statements."[222] In order to capture some of these cross-item discussions, I tracked companies' disclosure of opinions about several topics across items.

First, with respect to legal compliance and legal risk, the companies in my collection expressed 86 opinions about legal compliance (including compliance with tax laws and compliance with § 16(a) reporting requirements). These opinions were contained in Item I (Business),[223] Item 1A (Risk Factors),[224] Item 3 (Legal Proceedings),[225] Item 7 (MD&A),[226] Item 8 (Financial Statements and Supplementary Data),[227] and Item 10 (Directors and Executive Officers of the Registrant).[228] Relatedly, companies expressed 170 opinions about legal risk associated with non-compliance, including

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and operated by Altria Group, Inc. and its subsidiaries are maintained in good condition and are believed to be suitable and adequate for present needs.").

220. *E.g.*, ACN 10-K SEC Filing p.21 (Oct. 30, 2015) ("We believe that our facilities are adequate to meet our needs in the near future.").

221. *E.g.*, CVS 10-K SEC Filing p.22 (Feb. 9, 2016) ("At the end of the existing lease terms, management believes the leases can be renewed or replaced by alternative space.").

222. *Accord* SEC Chair Mary Jo White, Speech, The Path Forward on Disclosure (Oct. 15, 2013), at https://www.sec.gov/news/speech/spch101513mjw.

223. *E.g.*, ABBV 10-K SEC Filing p.7 (Feb. 19, 2016) ("AbbVie believes that its operations comply in all material respects with applicable laws and regulations concerning environmental protection.").

224. *E.g.*, AMZN 10-K SEC Filing p.8 (Jan. 29, 2016) ("Although we believe these structures and activities comply with existing laws, they involve unique risks, and the PRC is actively considering changes in its foreign investment rules that could impact these structures and activities.").

225. *E.g.*, KO 10-K SEC Filing p.24 (Feb. 25, 2016) ("The Company firmly believes that the IRS' claims are without merit and plans to pursue all available administrative and judicial remedies necessary to resolve the matter.").

226. *E.g.*, ACN 10-K SEC Filing p.32 (Oct. 30, 2015) ("We believe our tax positions comply with applicable tax law and that we have adequately accounted for uncertain tax positions.").

227. *E.g.*, CVS 10-K SEC Filing p.64 (Feb. 9, 2016) ("Omnicare cooperated with this investigation and believes that it has complied with applicable laws and regulations with respect to this matter.").

228. *E.g.*, CAT 10-K SEC Filing (Feb. 16, 2016) (incorporated by reference from Apr. 25, 2016 proxy statement p.56) ("Based on a review of our records, we believes that all reports required to be filed during 2015 pursuant to Section 16(a) of the Securities Exchange Act of 1934 were filed on a timely basis.").

ongoing litigation and tax positions. These opinions were contained in Item I (Business),[229] Item 1A (Risk Factors),[230] Item 3 (Legal Proceedings),[231] Item 7 (MD&A),[232] and Item 8 (Financial Statements and Supplementary Data).[233] Many of the opinions discussed both legal compliance and legal risk, such as expressing the view that ongoing litigation against the company was without merit because the company was legally compliant.[234]

Second, consistent with the role of materiality as a mandatory disclosure trigger,[235] 112 of the opinions in the collection expressed views about the materiality, or lack thereof, of various pieces of information. For example, companies expressed opinions about whether they were in material compliance with environmental regulations,[236] whether their intellectual property was of material importance to the company's business,[237] and whether revised figures were material to previously issued financial statements.[238] They also

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229. *E.g.*, T 10-K SEC Filing p.10 (Feb. 18, 2016) ("While the outcome of any litigation is uncertain, we do not believe that the resolution of any of these infringement claims or the expiration or non-renewal of any of our intellectual property rights would have a material adverse effect on our results of operations.").

230. *E.g.*, MO 10-K SEC Filing p.5 (Feb. 25, 2016) ("Altria Group, Inc. and each of its subsidiaries named as a defendant believe, and each has been so advised by counsel handling the respective cases, that it has valid defenses to the litigation pending against it, as well as valid bases for appeal of adverse verdicts.").

231. *E.g.*, CL 10-K SEC Filing p.15 (Feb. 18, 2016) ("The Company and its legal counsel believe these damages allegations are without merit and are vigorously challenging them and defending this case on its merits.").

232. *E.g.*, AAPL 10-K SEC Filing p.57 (Oct. 28, 2015) ("The Company believes the European Commission's assertions are without merit.").

233. *E.g.*, CVS 10-K SEC Filing p.63 (Feb. 9, 2016) ("The Company believes that the allegations are without merit.").

234. *E.g.*, CSCO 10-K SEC Filing p.30 (Sept. 8, 2015) ("We have completed a thorough review of the matters and believe the asserted claims . . . are without merit, and we are defending the claims vigorously.").

235. Mary Jo White, Chair, SEC, The Path Forward on Disclosure (Oct. 15, 2013), ("After nearly a century in the making, our disclosure regime is not based entirely on line item requirements; rather, it is fundamentally grounded on the standard of 'materiality.'"); Yvonne Ching Ling Lee, *The Elusive Concept of "Materiality" Under U.S. Federal Securities Laws*, 40 WILLAMETTE L. REV. 661, 670-71 (2004) ("Regulation S-K, which relates to the financial condition and results of operations pursuant to informational disclosure requirements of the Securities Act of 1933 and Securities Exchange Act of 1934, contains numerous provisions that touch upon 'materiality.'").

236. *E.g.*, AGN 10-K SEC Filing p.21 (Feb. 26, 2016) ("We believe that our operations comply in all material respects with applicable environmental laws and regulations in each jurisdiction where we have a business presence, and we periodically audit our manufacturing and R&D facilities for compliance with all federal, state and local environmental laws and regulations.").

237. *E.g.*, ABT 10-K SEC Filing p.5 (Feb. 19, 2016) ("These, and various other patents which expire during the period 2016 to 2036, in the aggregate, are believed to be of material importance to the operation of Abbott's business.").

238. *E.g.*, AIG 10-K SEC Filing p.120 (Feb. 19, 2016) ("The Utilities and Energy amounts at December 31, 2014, have been revised from \$23.7 billion and \$12.0 billion to \$19.2 billion and \$16.5

expressed opinions about whether various risks (such as legal proceedings,[239] tax audits,[240] changes in accounting rules,[241] credit downgrades,[242] and compensation policies[243]) were likely to have a material adverse effect on the company. Interestingly, although 95 percent of the opinions in the collection (1,195 out of 1,264) were expressed in positive terms ("we believe that . . ."), 35 percent of the materiality-related opinions (39 out of 112) were expressed in negative terms ("we do not believe that . . .").

Third, companies differed in their expression of management's annual report on the effectiveness of internal controls over financial reporting.[244] Most of the companies in the collection expressed these reports as statements of fact, using the words "concluded"[245] or "determined."[246] For example, Apple Inc. expressed this disclosure as follows: "Based on the Company's assessment, management has concluded that its internal control over financial reporting was effective as of September 26, 2015 to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements in accordance with GAAP."[247] However, 6 of

billion, respectively, to conform to current industry classification, which are not considered material to previously issued financial statements.").

239. *E.g.*, BA 10-K SEC Filing p.105 (Feb. 10, 2016) ("We believe, based upon current information, that the outcome of any such government disputes and investigations will not have a material effect on our financial position, results of operations, or cash flows.").

240. *E.g.*, ACN 10-K SEC Filing F-23 (Oct. 30, 2015) ("Although the outcome of tax audits is always uncertain and could result in significant cash tax payments, the Company does not believe the outcome of these audits will have a material adverse effect on the Company's consolidated financial position or results of operations.").

241. *E.g.*, BIIB 10-K SEC Filing F-20 (Feb. 3, 2016) ("Unless otherwise discussed, we do not believe that the impact of recently issued standards that are not yet effective will have a material impact on our financial position or results of operations upon adoption.").

242. *E.g.*, KO 10-K SEC Filing p.65 (Feb. 25, 2016) ("The Company does not believe that this downgrade will have a material adverse effect on our cost of borrowing.").

243. *E.g.*, CSCO 10-K SEC Filing (Sept. 8, 2015) (incorporated by reference from Sept. 30, 2015 proxy statement p.46) ("In this regard, the Compensation Committee reviews Cisco's compensation programs for employees and executives, including the annual cash incentive plans and long-term, equity-based incentive awards, and does not believe that the compensation program creates risks that are reasonably likely to have a material adverse effect on Cisco.").

244. 17 C.F.R. § 229.308(a)(3) (2017) (requiring issuers to annually disclose "[m]anagement's assessment of the effectiveness of the registrant's internal control over financial reporting as of the end of the registrant's most recent fiscal year, including a statement as to whether or not internal control over financial reporting is effective").

245. *E.g.*, CMCSA 10-K SEC Filing p.74 (Feb. 5, 2016) ("Based on this evaluation, our management concluded that Comcast's system of internal control over financial reporting was effective as of December 31, 2015.").

246. *E.g.*, KO 10-K SEC Filing p.109 (Feb. 25, 2016) ("Based on this assessment, management determined that, as of December 31, 2015, Altria Group, Inc. maintained effective internal control over financial reporting.").

247. AAPL 10-K SEC Filing p.71 (Oct. 28, 2015).

the 30 companies softened these reports, expressing them as opinions.[248] For example, Abbott Laboratories expressed this disclosure as follows: "Based on our assessment, we believe that, as of December 31, 2015, the company's internal control over financial reporting was effective based on those criteria."[249]

*B. Analysis of Issuers' Post-*Omnicare *Disclosure Decisions*

Finally, I applied the Issuers' Disclosure Framework[250] to some of the key categories of opinions revealed in the above collection of post-*Omnicare* opinions. In particular, I applied the framework to the following categories of disclosure: (1) legal compliance and legal proceeding disclosures; (2) § 16(a) compliance disclosures; (3) discussion and analysis disclosures (contained in MD&A or CD&A); (4) disclosures about the suitability or adequacy of physical properties; and (5) disclosures about the effectiveness of internal controls over financial reporting.

This analysis serves two purposes. First, it shows how the Issuers' Disclosure Framework applies to specific types of disclosure, demonstrating the role that the framework should play in ongoing policy discussions about revising disclosure mandates. Second, it yields normative conclusions about whether the issuers in my collection are currently making optimal disclosure decisions, especially with respect to Decision B. Based on this analysis, I conclude that, although most of these issuers' disclosure decisions are optimal, several adjustments to the pressures affecting issuer decision-making are warranted.

1. Legal Compliance and Legal Proceeding Disclosures

Issuers frequently disclose opinions about whether they are legally compliant and about whether legal proceedings asserted against the company are meritorious.[251] With the exception of disclosures about § 16(a) compliance, which are discussed below,[252] these disclosures are technically voluntary, although they are intrinsically related to various mandatory disclosures. The issue of legal compliance is

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248. *See* ABT 10-K SEC Filing (Feb. 19, 2016); AMGN 10-K SEC Filing (Feb. 16, 2016); T 10-K SEC Filing (Feb. 18, 2016); CC 10-K SEC Filing (Feb. 26, 2016); KO 10-K SEC Filing (Feb. 25, 2016); COP 10-K SEC Filing (Feb. 23, 2016).

249. ABT 10-K SEC Filing p.89 (Feb. 19, 2016).

250. *See supra* Parts I & II.

251. *See*, *supra*, text accompanying notes 223-34.

252. *See infra* Part IV.B.2.

interconnected with several disclosure requirements, including the material costs and effects of compliance with environmental laws;[253] the most significant risk factors that may affect the securities;[254] the material pending legal proceedings involving the company;[255] and management's discussion of the company's financial condition, changes in financial condition, and results of operations.[256] For example, Omnicare's disclosure of legal compliance was included in its risk factor disclosures.[257] Similarly, the merits, or lack thereof, of the material legal proceedings asserted against a company are interconnected with the company's mandatory disclosure of the proceedings themselves[258] and with the company's financial statements, which must account for loss contingencies.[259]

Under Decision A, disclosure, rather than silence, about the company's legal compliance and the merits of material legal proceedings is optimal because the marginal benefits of these disclosures exceed their marginal costs.[260] On the benefits side, this information is critically important to investors in light of the potential impacts of liability for non-compliance, up to and including bankruptcy.[261] Indeed, the fact that companies routinely disclose this information voluntarily suggests that they recognize how important it is to investors. On the costs side, in light of the importance of compliance and potential liability to the company's business, management should already be monitoring these issues closely, and thus disclosing this already-compiled information should not impose significant costs.

Under Decision B, most disclosures about legal compliance and about the merits of legal proceedings are optimally expressed as

253. 17 C.F.R. § 229.101(c)(1)(xii) (2011)

254. 17 C.F.R. § 229.503(c) (2011).

255. 17 C.F.R. § 229.103 (2011).

256. 17 C.F.R. § 229.303(a) (2017).

257. Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 135 S. Ct. 1318, 1327 & 1332 (2015).

258. 17 C.F.R. § 229.103.

259. *See* Sample Letter From SEC Division of Corporate Finance Sent to Public Companies on Accounting and Disclosure Issues Related to Potential Risks and Costs Associated with Mortgage and Foreclosure-Related Activities or Exposures (Oct. 2010), ("ASC Subtopic 450-20 (SFAS 5) requires you to establish accruals for litigation and other contingencies when it is probable that a loss has been incurred and the amount of the loss can be reasonably estimated. When a loss is not both probable and estimable, an accrual is not recorded, but disclosure of the contingency is required to be made when there is at least a reasonable possibility that a loss or an additional loss has been incurred. The disclosure should indicate the nature of the contingency and give an estimate of the possible loss or range of loss or state that such an estimate cannot be made.").

260. *See supra* Part I.B.1.

261. *E.g.*, Peg Brickley, *Kaiser Gypsum Turns to Bankruptcy for Asbestos Answer*, Wall St. J. , Oct. 3, 2016.).

opinions. Because these disclosures are usually about inherently uncertain topics, their informational value is enhanced by their expression as opinions.[262]

With respect to legal compliance, to the extent that regulatory requirements are vague or ambiguous,[263] it is inherently uncertain whether a company is actually compliant. Indeed, most regulatory requirements fall into this category.[264] Therefore, to the extent that companies are discussing their compliance with regulatory requirements that are not crystalline, it is optimal to express those statements as opinions. For instance, in light of the inherent uncertainty of compliance with the vast array of applicable environmental regulations, Allergan plc appropriately expressed the following compliance disclosure as an opinion: "We believe that our operations comply in all material respects with applicable environmental laws and regulations in each jurisdiction where we have a business presence, and we periodically audit our manufacturing and R&D facilities for compliance with all federal, state and local environmental laws and regulations."[265]

With respect to the merits of legal proceedings, litigation is inherently uncertain in light of the various factors that can affect the outcome of litigation, including the judge's interpretation of the law, the prowess of each party's counsel, and the decision-making of the factfinder. Indeed, it would likely violate the rules of professional conduct for an attorney to guarantee a particular outcome in litigation.[266] Therefore, most statements about the merits of pending litigation are appropriately expressed as opinions. For instance, because of the inherent uncertainty of litigation, BlackRock, Inc. appropriately expressed the following disclosure as an opinion: "BlackRock believes the claims in the lawsuits are without merit and

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262. *See*, *supra*, Part I.B.2.

263. As an example of a vague or ambiguous regulation, consider the Supreme Court's recent analysis of whether pharmaceutical representatives are "outside salesman," so as to be outside the reach of the Fair Labor Standards Act's maximum hour and minimum wage requirements. Christopher v. SmithKline Beecham Corp., 567 U.S. 142 (2012).

264. John E. Calfee Richard, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965, 965 (1984) ("When analyzing legal standards, it is convenient to assume that the parties subject to a standard know exactly what behavior is required of them. In practice, however, such certainty is rarely present.").

265. AGN 10-K SEC Filing (Feb. 26, 2016).

266. *See* ABA Model Rule of Prof'l Conduct r. 7.1 (Am. Bar Ass'n 2009)("A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services."); Fla. Rule of Prof'l Conduct r. 4-7.13(b) (Fla. Bar Ass'n 2013) ("Deceptive or inherently misleading advertisements include, but are not limited to advertisements that contain . . . statements or information that can reasonably be interpreted by a prospective client as a prediction or guaranty of success or specific results . . .").

intends to vigorously defend the actions."[267]

Therefore, because issuers are making optimal decisions with respect to compliance disclosures about vague or ambiguous regulations and with respect to legal proceeding disclosures, no adjustments to the pressures facing issuers are necessary.[268]

2. Section 16(a) Compliance Disclosures

Issuers also frequently express their § 16(a) compliance disclosures as opinions.[269] Although these qualify as disclosures about legal compliance, which are discussed above,[270] I analyzed § 16(a) compliance disclosures separately because the Issuers' Disclosure Framework applies to them differently.

Section 16(a) of the Exchange Act[271] and the rules promulgated[272] thereunder require directors, officers, and principal shareholders to file initial statements of beneficial ownership within 10 days of becoming an insider (on Form 3); statements reflecting most changes in beneficial ownership within two business days of the transaction (on Form 4); and statements identifying transactions that should have been reported earlier on Form 4 (on Form 5).[273] These insider disclosures serve as a "weapon against the abuse of insider information,"[274] allow investors "to consider the extent of insiders' economic stake in the success of the company,"[275] and may "provide useful information as to insiders' views of the performance or prospects of the company."[276]

Issuers themselves are required, within Item 10 of their Form 10-Ks, to "identify each person who . . . failed to file on a timely basis, as disclosed in the above Forms, reports required by section 16(a) of the Exchange Act during the most recent fiscal year or prior fiscal years."[277] These mandatory disclosures serve to incentivize

267. BLK 10-K SEC Filing p.27 (Feb. 26, 2016).

268. *See supra* Part II.C.

269. *See supra* text accompanying note 207.

270. *See supra* Part IV.B.1.

271. 15 U.S.C. § 78p (2011).

272. 17 C.F.R. §§ 240.16a-1 to 240.16a-13 (2011).

273. 17 C.F.R. § 240.16a-3; SEC, Initial Statement of Beneficial Ownership of Sec (Form 3); SEC, Statement of Changes in Beneficial Ownership (Form 4); SEC, Annual Statement of Changes in Beneficial Ownership of Sec (Form 5).

274. H.R. Rep. No. 73-1383, at 13 (1934).

275. SEC Investor Bulletin, Insider Transactions and Forms 3, 4, and 5, SEC Pub. No. 137 2 (2003).

276. *Id.*

277. 17 C.F.R. § 405(a)(1) (Item 405(a)(1) of Reg. S-K) (2011).

compliance by insiders[278] and to flag delinquent filers and filings for the SEC and investors.[279] Under current regulations, issuers are not required to conduct a sufficient investigation to express their § 16(a) compliance disclosures with certainty.[280] Rather, "[t]he disclosure requirement is based on a review of the forms submitted to the registrant during and with respect to its most recent fiscal year, as specified above."[281] Accordingly, most of the companies in my collection expressed their § 16(a) compliance disclosures as opinions.[282]

With respect to Decision A, consistent with current law, issuer § 16(a) compliance disclosures are optimal because the marginal benefits of these disclosures exceed their marginal costs.[283] Indeed, when adopting this disclosure mandate, the SEC performed a cost-benefit analysis and concluded that the benefits inuring from increased compliance with § 16(a) would outweigh the costs.[284]

With respect to Decision B, issuers are making the optimal decision to express their § 16(a) compliance disclosures as opinions. Although the informational value of these disclosures would be enhanced by their expression with certainty, the marginal costs of attaining certainty would likely exceed the marginal benefits

278. Ownership Reports and Trading By Officers, Directors and Principal Security Holders, SEC Release No. 34-28869, 48 SEC Docket 0234 (Feb. 21, 1991) ("To address the non-compliance problem, Item 405 of Regulation S-K adopted today requires a registrant to disclose in proxy and information statements, Form 10-K reports, and Form N-SAR reports information regarding delinquent section 16 filings by insiders.").

279. *Id.* at 0252 ("To assist the Commission and shareholders in identifying those registrants disclosing delinquent filings or transactions by insiders, the cover page of Form 10-K has been amended.").

280. *Id.* ("A registrant does not have an obligation under Item 405 to research or make inquiry regarding delinquent section 16(a) filings.").

281. 17 C.F.R. § 229.405 note (Item 405 of Reg. S-K).

282. Only three companies expressed these mandatory disclosures as statements of fact, and even those statements were expressed cautiously: AMGN 10-K SEC Filing (Feb. 16, 2016) (incorporated by reference from Apr. 7, 2016 proxy statement p.99) ("Based solely on our review of the reports filed by Reporting Persons and written representations from certain Reporting Persons that no other reports were required for those persons, ..."); BMY 10-K SEC Filing (Feb. 12, 2016) (incorporated by reference from March 23, 2016 proxy statement p.92) ("To the best of our knowledge, during 2015 all applicable Section 16(a) filing requirements were met, ..."); and COP 10-K SEC Filing (Feb. 23, 2016) (incorporated by reference from March 28, 2016 proxy statement p.78) ("To ConocoPhillips' knowledge, based solely upon a review of the copies of such reports furnished to it and written representations of its officers and directors, ...").

283. *See supra* Part I.B.1.

284. Ownership Reports and Trading By Officers, Directors and Principal Security Holders, SEC Release No. 34-28869, 49 SEC Docket 0256 (Feb. 21, 1991) ("It appears to the Commission that, while some additional costs to issuers and insiders may result from the comprehensive restructuring of the rules under Section 16, such costs will be outweighed by the savings to insiders with respect to deferred reporting for exempt transactions and increased compliance with Section 16(a) as a result of Item 405, which will benefit issuers, shareholders, and investors.").

thereof.[285]

The informational value of § 16(a) compliance disclosures would be enhanced by their expression with certainty. Unlike compliance with broad and complex regulatory schemes (such as environmental regulations), compliance with § 16(a) is not inherently uncertain: § 16(a) imposes narrow, clear reporting requirements.[286] For example, since 2010, the SEC has issued only four no-action, interpretive, or exemptive letters about § 16(a) reporting.[287] For purposes of comparison, before the § 16(a) reporting requirements were clarified in 1991,[288] the SEC "received more requests for interpretative and no-action advice concerning the section 16 rules than any other area."[289] Moreover, the informational value of § 16(a) compliance disclosures does not emanate from the speaker's state of mind—investors and the SEC care about whether insiders complied with § 16(a), not whether the company thinks that insiders complied.

However, the marginal costs of expressing § 16(a) compliance disclosures with certainty would likely exceed the marginal benefits thereof. With respect to marginal costs, in order to express § 16(a) compliance disclosures with certainty, issuers would have to implement significant compliance programs[290] to ensure that their insiders filed all forms in a timely fashion and that any deficiencies were captured.[291] With respect to marginal benefits, the public would

285. *See supra* Part I.B.2.

286. Ownership Reports & Trading by Officers, Directors & Print Stockholders, SEC Release No. 34-26333, 1 (Dec. 2, 1988) (proposing amendments, which were largely adopted, "to revise these rules to achieve greater clarity").

287. *See* SEC, Division of Corporation Finance No-Action, Interpretive and Exemptive Letters, at https://www.sec.gov/divisions/corpfin/cf-noaction.shtml#s16 (listing the following letters related to § 16(a) compliance: Carlyle GMS Finance, SEC Interpretive Letter (Oct. 8, 2015); Davis Polk & Wardwell LLP, SEC Interpretive Letter (Jan. 28, 2013); Simon Prop. Grp., Inc., SEC Interpretive Letter (Nov. 21, 2011); Bank of Am. Corp., SEC Interpretive Letter (Apr. 29, 2011)).

288. Ownership Reports and Trading By Officers, Directors and Principal Security Holders, SEC Release No. 34-28869, 49 SEC Docket 0234 (Feb. 21, 1991).

289. Ownership Reports & Trading by Officers, Directors & Print Stockholders, SEC Release No. 34-26333, at 6 (Dec. 2, 1988); *see id.* at 6 n.35 ("Since 1971, the staff has issued over 2000 no-action letters that have addressed section 16. About 190 section 16 letters were issued in 1987 and 200 letters in the first ten months of 1988.").

290. As an example of a significant compliance regime, *see* Robert Lupone, Gen. Counsel, Siemens, *Remarks at the Georgetown Journal of Legal Ethics Symposium: Corporate Compliance: The Role of Company Counsel* (Oct. 4, 2007), *in* 21 GEO. J. LEGAL ETHICS 491, 526 (2008) ("We have audit departments, we have human resources departments, [and] we have our lawyers who are counseling our business operations day-to-day, often on site at the companies. We have compliance offices, we have compliance committees. We have regulatory affairs groups. We have compliance hotlines.").

291. *Cf.* Proposed Rules, Ownership Reports & Trading by Officers, Directors & Print Stockholders, SEC Release No. 34-26333 (Dec. 2, 1988) ("The proposed amendments should not result in any substantial increase in the compliance requirements imposed upon companies . . . . In order to fulfill their disclosure obligations, registrants would have to review the Form 3, 4, and 5 reports filed by their insiders.").

benefit to some degree from a company's unequivocal statement about its insiders' compliance with § 16(a). First, if companies conducted sufficient inquiries to express these disclosures as statements of fact, and if insiders knew that companies would engage in these inquiries, the degree of § 16(a) compliance by insiders would likely increase, which would enable the public to reap the benefits of increased compliance (*e.g.*, the enhanced disincentive for insiders to engage in insider trading). Second, the enhanced disclosure of noncompliance would make it easier for investors and the SEC to identify delinquent filers. However, using enhanced § 16(a) compliance disclosures to achieve these societal benefits would be largely duplicative of other, more direct methods that the SEC uses to achieve these goals.[292] The SEC already directly enforces the prohibition on insider trading,[293] and the SEC already uses "quantitative data sources and ranking algorithms" to identify insiders who fail to comply with § 16(a).[294] On balance, therefore, it is appropriate for companies to continue expressing their § 16(a) compliance disclosures as opinions because the marginal costs of issuers' expressing § 16(a) compliance disclosures with certainty would likely exceed the marginal benefits thereof.

Because issuers are making optimal disclosure decisions with respect to their § 16(a) compliance disclosures, no adjustments to the pressures facing issuers are needed.[295]

3. Discussion and Analysis Disclosures

Issuers' discussion and analysis narrative disclosures—contained in MD&A and CD&A—are replete with opinions.[296] MD&A disclosures serve three primary objectives: (1) to "provide a narrative explanation of a company's financial statements that enables investors to see the company through the eyes of management;" (2) to "enhance the overall financial disclosure and provide the context

292. *See* Ownership Reports and Trading By Officers, Directors and Principal Security Holders, SEC Release No. 34-28869, 48 SEC Docket 0235 (Feb. 21, 1991) ("Section 16 is but one weapon against insider trading.").

293. SEC Enforcement Actions: Insider Trading Cases, https://www.sec.gov/spotlight/insidertrading/cases.shtml ("Insider trading continues to be a high priority area for the SEC's enforcement program. In recent years, the SEC has filed insider trading cases against hundreds of entities and individuals, including financial professionals, hedge fund managers, corporate insiders, attorneys, and others whose illegal tipping or trading has undermined the level playing field that is fundamental to the integrity and fair functioning of the capital markets.").

294. SEC Announces Charges Against Corporate Insiders for Violating Laws Requiring Prompt Reporting of Transactions and Holdings, Press Release No. 2014-190 (Sept. 10, 2014).

295. *See supra* Part II.C.

296. *See supra* text accompanying notes 174-189.

within which financial information should be analyzed;" and (3) to "provide information about the quality of, and potential variability of, a company's earnings and cash flow, so that investors can ascertain the likelihood that past performance is indicative of future performance."[297] Similarly, CD&A disclosures are intended "to provide material information about the compensation objectives and policies for named executive officers without resorting to boilerplate disclosure" and "to put into perspective for investors the numbers and narrative that follow it."[298]

With respect to Decision A, consistent with current law, MD&A and CD&A disclosures are optimal because the marginal benefits of these disclosures exceed their marginal costs.[299] MD&A is a critical means for management to communicate directly to investors about the fundamental issues of a company's financial condition and operations.[300] CD&A is an avenue to promote "transparency regarding company compensation policies and procedures."[301] Although both sets of disclosures impose significant costs, in light of their centrality to investors' understanding of the company, those are outweighed by the benefits.[302]

With respect to Decision B, issuers are making the optimal decision to express their MD&A and CD&A disclosures in the form of opinions. The informational value of these disclosures is enhanced by their expression as opinions because their value emanates from the speaker's state of mind itself.[303] The essence of MD&A disclosures is "to give the investor an opportunity to look at the company through the eyes of management by providing both a short and long-term analysis of the business of the company."[304] Similarly, CD&A disclosures focus "on *how* and *why* a company

297. SEC Staff Interpretation, Commission Guidance Regarding MD&A of Financial Condition & Results of Operation, Release Nos. 33-8350; 34-48960; FR-72 (Dec. 19, 2003).

298. Executive Compensation and Related Person Disclosure; Final Rule & Proposed Rule, SEC Release No. 34-54302A, 71 Fed. Reg. 174 (Sept. 8, 2006).

299. *See supra* Part I.B.1.

300. SEC Staff Interpretation, Commission Guidance Regarding MD&A of Financial Condition & Results of Operation, Release Nos. 33-8350; 34-48960; FR-72 (Dec. 19, 2003) ("We believe that management's most important responsibilities include communicating with investors in a clear and straightforward manner. MD&A is a critical component of that communication.").

301. Final Rule & Proposed Rule, Executive Compensation and Related Person Disclosure, SEC Release No. 34-54302A (Sept. 8, 2006).

302. *Id.* ("While we believe that these amendments will result in significant benefits, we also recognize that the amendments to the disclosure requirements will impose additional costs. We have considered the costs and benefits in adopting these amendments.").

303. *See supra* Part I.B.2.

304. SEC Staff Interpretation, Management's Discussion & Analysis of Financial Condition and Results of Operations, SEC Release No. 34-26831 (May 18, 1989).

arrives at specific executive compensation decisions and policies."[305] In sum, the value of MD&A and CD&A disclosures derives from their revelation of the thought processes of various company actors, including management, the compensation committee, and the board. Indeed, some of the MD&A opinions included in my collection (37 out of 327) were explicitly characterized as those of "management,"[306] and many of the CD&A opinions (140 out of 278) were identified as those of the compensation committee.[307] Therefore, these disclosures, whose informational value emanates from the speaker's state of mind itself, are appropriately expressed in the form of opinions.

Because issuers are making optimal disclosure decisions with respect to their MD&A and CD&A disclosures, no adjustments to the pressures facing issuers are necessary.[308]

4. Disclosures about the Suitability or Adequacy of Physical Properties

Issuers sometimes express opinions about the suitability or adequacy of their physical properties.[309] Current regulations do not require issuers to state explicitly whether their physical properties are suitable or adequate. Rather, issuers must disclose "such information as reasonably will inform investors as to the suitability, adequacy, productive capacity and extent of utilization" of the issuers' materially important physical properties.[310] Issuers "typically disclose information about their headquarters such as the location, size and whether they own or lease the property."[311]

305. SEC Staff Observations, Division of Corporation Finance, Staff Observations in the Review of Executive Compensation Disclosure (Oct. 9, 2007); *see also* John W. White, Director, Division of Corporation Finance, Where's the Analysis?: Tackling Your 2008 Compensation Disclosures: The 2nd Annual Proxy Disclosure Conference (October 9, 2007).

306. *E.g.*, CL 10-K SEC Filing p.38 (Feb. 18, 2016) ("Management believes this [non-GAAP] measure provides investors with useful supplemental information regarding the Company's underlying sales trends by presenting sales growth excluding the external factor of foreign exchange, as well as the impact of acquisitions and divestments.").

307. *E.g.*, CVX 10-K SEC Filing (Feb. 25, 2016) (incorporated by reference from Apr. 7, 2016 proxy statement p.42) ("This combination provides a balance of awards, which the MCC [Management Compensation Committee] believes appropriates serves both performance incentive and executive retention objectives.").

308. *See supra* Part II.C.

309. *See supra* text accompanying notes 219-21.

310. 17 C.F.R. § 229.102 instr. 1 (Item 102 of Reg. S-K) (2009).

311. Business and Financial Disclosure Required by Regulation S-K, SEC Release No. 34-77599, 81-82 (Apr. 13, 2016) ("In response to Item 102, registrants typically disclose information about their headquarters such as the location, size and whether they own or lease the property . . . In addition to this disclosure, some registrants cross-reference to the discussion in the notes to the financial statements such as to the note on purchase and lease commitments or to the note on property, plant and

The SEC has long sought to make property disclosures more useful to investors. In 1996, the SEC Task Force on Disclosure Simplification recommended that the property disclosure rules be revised "in a manner that more effectively elicits disclosure of material facts regarding a registrant's principal properties, rather than lists of properties and their immaterial characteristics."[312] This recommendation was not adopted by the SEC. In 2016, the SEC issued a concept release seeking public comment on modernizing disclosure requirements, including how to improve property disclosures to make them more meaningful to investors.[313]

The companies in my collection differed with respect to their disclosures about the suitability or adequacy of their physical properties. Sixteen of the issuers in my collection expressed generalized opinions about the suitability or adequacy of their properties.[314] For example, American Express Company stated: "We believe the facilities we own or occupy suit our needs and are well maintained."[315] Three of the issuers expressed statements of fact about the suitability or adequacy of their properties.[316] For example, Colgate-Palmolive Company stated: "All of the facilities we operate are well maintained and adequate for the purpose for which they are intended."[317] Twelve issuers did not make any disclosures directly addressing the suitability or adequacy of their properties.[318]

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equipment.").

312. Levitt, Arthur, Report of Task Force on Disclosure Simplification (March 5, 1996).

313. Business and Financial Disclosure Required by Regulation S-K, SEC Release No. 34-77599, 79-83. Note that the SEC has also proposed revisions to the property disclosure requirements for mining companies, for whom physical properties are uniquely important. *See* Rule, Modernization of Property Disclosures for Mining Registrants, SEC Release No. 34-78086 (June 16, 2016).

314. The following companies expressed generalized opinions about the suitability or adequacy of their physical properties in their post-Omnicare 10-Ks: AAPL 10-K SEC Filing (Oct. 28, 2015); ABBV 10-K SEC Filing (Feb. 19, 2016); ACN 10-K SEC Filing (Oct. 30, 2015); AGN 10-K SEC Filing (Feb. 26, 2016); AIG 10-K SEC Filing (Feb. 19, 2016); AMGN 10-K SEC Filing (Feb. 16, 2016); AXP 10-K SEC Filing (Feb. 19, 2016); BA 10-K SEC Filing (Feb. 10, 2016); BAC 10-K SEC Filing (Feb. 24, 2016); MO 10-K SEC Filing (Feb. 25, 2016); CAT 10-K SEC Filing (Feb. 16, 2016); CVS 10-K SEC Filing (Feb. 9, 2016); CSCO 10-K SEC Filing (Sept. 8, 2015); CMCSA 10-K SEC Filing (Feb. 5, 2016); KO 10-K SEC Filing (Feb. 25, 2016).

315. AXP 10-K SEC Filing p.46 (Feb. 19, 2016).

316. The following companies expressed statements of fact about the suitability or adequacy of their physical properties in their post-*Omnicare* 10-Ks: ABT 10-K SEC Filing (Feb. 19, 2016); MMM 10-K SEC Filing (Feb. 11, 2016); and CL 10-K SEC Filing (Feb. 18. 2016).

317. CL 10-K SEC Filing p.11 (Feb. 18, 2016).

318. The following companies did not make express disclosures about the adequacy or suitability of their physical properties in their post-*Omnicare* 10-Ks: ALL 10-K SEC Filing (Feb. 19, 2016); AMZN 10-K SEC Filing (Jan. 29, 2016); BIIB 10-K SEC Filing (Feb. 3, 2016); BLK 10-K SEC Filing (Feb. 26, 2016); BMY 10-K SEC Filing (Feb. 12, 2016); BRKB 10-K SEC Filing (Feb. 29, 2016); T 10-K SEC Filing (Feb. 18, 2016); COF 10-K SEC Filing (Feb. 25, 2016); CELG 10-K SEC Filing (Feb. 11, 2016); CVX 10-K SEC Filing (Feb. 25, 2016); C 10-K SEC Filing (Feb. 26, 2016); and COP 10-K SEC Filing (Feb. 23, 2016).

With respect to Decision A, it is optimal for issuers to make disclosures directly addressing the suitability or adequacy of their physical properties for existing operations because the marginal benefits of these disclosures would exceed their marginal costs.[319] On the benefits side, companies are in the best position to assess their existing properties; and absent extensive and detailed disclosures about the characteristics and usage of each property, investors are unable to reach independent conclusions about those properties' suitability and adequacy. On the costs side, although the disclosures themselves would impose some costs, the requisite assessment is already a critical component of running a company.

With respect to Decision B, disclosures about the suitability or adequacy of a company's physical properties for existing operations are optimally expressed as statements of fact.[320] First, these disclosures are not more valuable when expressed as opinions rather than as statements of fact. Because it is possible to assess with a high degree of confidence whether a company's physical facilities are suitable and adequate for the company's existing operations, the disclosures are not inherently uncertain. In addition, the informational value of these disclosures does not emanate from the speaker's state of mind itself: investors care about whether a company's properties are suitable and adequate, not about the company's belief with respect to suitability and adequacy. Further, the marginal costs of achieving this level of certainty would be unlikely to exceed the marginal benefits thereof. With respect to marginal costs, assessing the adequacy and suitability of a company's physical properties is a core management function and, in a well-run company, is already occurring; thus, the marginal costs of requiring the company to make this assessment with certainty would be negligible. With respect to marginal benefits, a company's expression of certainty with respect to the adequacy or suitability of the company's physical properties would enhance the meaningfulness of this disclosure to investors, without cluttering the disclosure with unnecessary details about those properties and their usage. Therefore, the optimal issuer disclosure decision is to express disclosures about the adequacy or suitability of existing properties as statements of fact.

Because many companies are not making optimal decisions with respect to disclosures about the adequacy or suitability of their physical properties, adjustments to the pressures facing issuers are

319. *See supra* Part I.B.1.

320. *See supra* Part I.B.2.

warranted.[321] With respect to Decision A, the SEC should require issuers to make an express disclosure about suitability or adequacy of physical properties for existing operations, to be enforced with the SEC review and comment process. With respect to Decision B, the SEC should mandate that these disclosures be expressed as statements of fact, again enforcing compliance via the SEC review and comment process. These adjustments would likely be sufficient to channel issuers to optimal disclosure decisions.

5. Disclosures about the Effectiveness of Internal Controls over Financial Reporting

A sizable minority of companies in my collection (6 out of 30) expressed their management's annual report on the effectiveness of internal controls over financial reporting as opinions.[322] Public companies are required to maintain "internal control over financial reporting,"[323] which is a process designed to "provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles."[324] Although the "reasonable assurance" standard is objective,[325] it is not synonymous with "absolute assurance."[326] In other words, a restatement of a company's financials does not necessarily mean that the company's internal controls failed to meet the requisite standard of effectiveness.[327]

In addition, management must annually assess the effectiveness of

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321. *See supra* Part II.C.

322. *See supra* text accompanying notes 244-49.

323. 17 C.F.R. § 240.13a-15(a) (2007); 17 C.F.R. § 240.15d-15(a) (2007).

324. 17 C.F.R. § 240.13a-15(f); 17 C.F.R. § 240.15d-15(f).

325. Commission Guidance Regarding Management's Report on Internal Control over Financial Reporting Under Section 13(a) or 15(d) of the Sec. Exch. Act of 1934, SEC Release No. 34-55929 (June 20, 2007) ("[T]he Commission recognizes that while 'reasonableness' is an objective standard, there is a range of judgments that an issuer might make as to what is 'reasonable' in implementing Section 404 and the Commission's rules.").

326. *Id.* ("ICFR cannot provide absolute assurance due to its inherent limitations; it is a process that involves human diligence and compliance and is subject to lapses in judgment and breakdowns resulting from human failures. ICFR also can be circumvented by collusion or improper management override.").

327. *Id.* ("[T]he restatement of financial statements does not, by itself, necessitate that management consider the effect of the restatement on the company's prior conclusion related to the effectiveness of ICFR. While there is no requirement for management to reassess or revise its conclusion related to the effectiveness of ICFR, management should consider whether its original disclosures are still appropriate and should modify or supplement its original disclosure to include any other material information that is necessary for such disclosures not to be misleading in light of the restatement.").

the company's internal controls pursuant to "a suitable, recognized control framework that is established by a body or group that has followed due-process procedures, including the broad distribution of the framework for public comment."[328] The assessment framework must:

> be free from bias; permit reasonably consistent qualitative and quantitative measurements of a company's internal control; be sufficiently complete so that those relevant factors that would alter a conclusion about the effectiveness of a company's internal controls are not omitted; and be relevant to an evaluation of internal control over financial reporting.[329]

Finally, issuers are required to annually disclose "[m]anagement's assessment of the effectiveness of the registrant's internal control over financial reporting as of the end of the registrant's most recent fiscal year, including a statement as to whether or not internal control over financial reporting is effective."[330] This disclosure requirement, one of multiple reforms mandated by the Sarbanes-Oxley Act of 2002,[331] is intended to "enhance the quality of reporting and increase investor confidence in the financial markets" by "improving public company disclosure to investors about the extent of management's responsibility for the company's financial statements and internal control over financial reporting and the means by which management discharges its responsibility."[332]

If expressed as a statement of fact, management's report on the effectiveness of internal controls does not guarantee with "absolute assurance" that the controls are effective; rather, it expresses with certainty that the controls meet the objective standard of "reasonable assurance" of effectiveness. If expressed as an opinion, the report layers a degree of uncertainty over the "reasonable assurance" standard.

Current regulations do not explicitly mandate that management's report on internal control over financial reporting should be expressed as a statement of fact, but there are several indications that the report should be so expressed. First, the regulation contains the

328. 17 C.F.R. § 240.13a-15(c); 17 C.F.R. § 240.15d-15(c).

329. Management's Report on Internal Control over Financial Reporting & Certification of Disclosure in Exchange Act Periodic Reports, SEC Release No. 34-47986 (June 5, 2003).

330. 17 C.F.R. § 229.308(a)(3) (2017).

331. Sarbanes-Oxley Act of 2002 § 404(a), 15 U.S.C. § 7262(a) (2012) (directing the SEC to adopt rules mandating an annual internal control assessment).

332. Management's Report on Internal Control over Financial Reporting & Certification of Disclosure in Exchange Act Periodic Reports, SEC Release No. 34-47986 (June 5, 2003).

following prohibition, which by using the term "conclude" implies that the report should be expressed with certainty: "Management is not permitted to conclude that the registrant's internal control over financial reporting is effective if there are one or more material weaknesses in the registrant's internal control over financial reporting."[333] Second, the SEC has provided guidance that the report should be clear and unqualified.[334] To date, however, the SEC has not flagged this as an issue during the review and comment process and has, on occasion, suggested that these reports may reflect management's belief about effectiveness.[335]

With respect to Decision A, consistent with current law, issuers are making the optimal choice to disclose management reports on the effectiveness of internal controls over financial reporting because the marginal benefits likely exceed the marginal costs.[336] On the benefits side, these reports enable investors "to better evaluate management's performance of its stewardship responsibilities and the reliability of a company's financial statements."[337] In addition, they encourage "companies to devote adequate resources and attention to the maintenance of such control."[338] Further, they "should help to identify potential weaknesses and deficiencies in advance of a system breakdown."[339] As explained by the SEC, "[a]ll of these benefits will increase market efficiency by improving investor confidence in the

333. 17 C.F.R. § 229.308(a)(3).

334. Commission Guidance Regarding Management's Report on Internal Control over Financial Reporting Under Section 13(a) or 15(d) of the Sec. Exch. Act of 1934, SEC Release No. 34-55929 (June 20, 2007) ("Management should clearly disclose its assessment of the effectiveness of ICFR and, therefore, should not qualify its assessment by stating that the company's ICFR is effective subject to certain qualifications or exceptions."); Management's Report on Internal Control over Financial Reporting & Certification of Disclosure in Exchange Act Periodic Reports, SEC Release No. 34-47986 (June 5, 2003) ("If management decides to include a discussion of reasonable assurance in the internal control report, the discussion must be presented in a manner that neither makes the disclosure in the report confusing nor renders management's assessment concerning the effectiveness of the company's internal control over financial reporting unclear.").

335. *E.g.*, SEC Staff Comment Ltrs. 10467872 (C.C.H.), 2009 WL 10467872 (Jan. 8, 2009) ("If you continue to believe your disclosure controls and procedures are effective, please tell us the factors you considered and highlight for us those factors that supported your conclusion. Otherwise, please amend your Form 10-K to disclose management's revised conclusion on the effectiveness of your disclosure controls and procedures as of the end of the fiscal year and any remediation plans that have or will be enacted."); SEC Staff Comment Ltrs. 9394016 (C.C.H.), 2007 WL 9394016 (Feb. 23, 2007) ("We note that your Form 10-K filed on April 11, 2005 discloses that your disclosure controls and procedures as well as your internal controls over financial reporting were effective. Tell us why you believe that those were reasonable conclusions given the serious limitations inherent in your controls regarding inventory and its proper valuation.").

336. *See supra* Part I.B.1.

337. Management's Report on Internal Control over Financial Reporting & Certification of Disclosure in Exchange Act Periodic Reports, SEC Release No. 34-47986 (June 5, 2003).

338. *Id.*

339. *Id.*

reliability of a company's financial disclosure and system of internal control over financial reporting."[340] On the costs side, these reports require participation by "senior management, internal auditors, in-house counsel, outside counsel and audit committee members."[341] As recognized by the SEC, however, "[t]hese costs are mitigated somewhat because companies have an existing obligation to maintain an adequate system of internal accounting control."[342]

With respect to Decision B, the optimal decision is to express management's reports on the effectiveness of internal controls over financial reporting as statements of fact.[343] First, these disclosures are not more valuable when expressed as opinions rather than as statements of fact. It is possible to assess with a high degree of confidence whether a company's internal controls satisfy the objective "reasonable assurance" standard, and thus the disclosure is not inherently uncertain. In addition, the informational value of the disclosures does not emanate from the speaker's state of mind itself: investors care about whether a company's internal controls are effective, not whether management believes that they are effective. Further, the marginal costs of achieving this level of certainty would be unlikely to exceed the marginal benefits thereof. With respect to marginal costs, management is already required to assess the effectiveness of its internal controls, and performing that assessment with sufficient depth to achieve certainty is not significantly more arduous than performing that assessment to achieve belief. With respect to marginal benefits, a company's expression of certainty that the company's internal controls satisfy the objective "reasonable assurance" standard would enhance the meaningfulness of this disclosure to investors, encourage companies to devote adequate resources to its internal controls, and increase the reliability of a company's financial statements. All of these benefits would promote market efficiency and help to prevent the corporate scandals that led to the enactment of the Sarbanes-Oxley Act.

Because some companies, by expressing their management reports on the effectiveness of internal controls over financial reporting as opinions, are not making an optimal Decision B, adjustments to the pressures facing issuers are required.[344] In particular, the SEC should clarify that these disclosures must be expressed as statements of fact and enforce compliance via the SEC review and comment process.

340. *Id.*

341. *Id.*

342. *Id.*

343. *See supra* Part I.B.2.

344. *See supra* Part II.C.

These adjustments would likely be sufficient to channel issuers to optimal disclosure decisions.

CONCLUSION

This Article proposes a new theoretical framework for optimal issuer disclosure—the Issuers' Disclosure Framework—which incorporates the subsidiary decision about whether to express disclosures as opinions or as statements of fact. This Article also performs a qualitative analysis of issuers' post-*Omnicare* opinion disclosures and, drawing from the Issuers' Disclosure Framework, proposes several discrete reforms to the existing pressures affecting issuers' disclosure decisions in order to incentivize issuers to make optimal choices.