



Last month, the US Supreme Court granted certiorari to decide an MD&A liability case. The Supreme Court doesn't weigh in on public company disclosure often so this is a big deal.

The case – [\*Macquarie Infrastructure Corp. v. Moab Partners, L.P.\*](#) – is about whether companies can be held liable through a private cause of action for failure to make a Regulation S-K Item 303 disclosure. Since MD&A is one of those rare SEC disclosure requirements that can elicit forward-looking information – management has to identify "known trends or uncertainties that have had or that are reasonably likely to have a material favorable or unfavorable impact" on the company's financial performance – the decision will be closely watched next year.

*Macquarie* is a Second Circuit decision that held that "Item 303 can serve as the basis for ... a claim under Section 10(b) if the other elements have been sufficiently pleaded." The petition for writ of certiorari highlighted

that decisions from the Third, Ninth and Eleventh Circuits differed in their view, finding that Item 303 does not create a duty to disclose for purposes of Section 10(b) and Rule 10b-5.

Amicus briefs likely will be filed in November with the case being argued early next year...

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