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Citing Counsel's Opinion about the Merits of Legal Proceedings in SEC Filings

*By Wendy Gerwick Couture**

I. Introduction

This essay focuses on a narrow issue: whether, and how, issuers should cite counsel's opinion when expressing opinions about the merits of legal proceedings in filings with the Securities and Exchange Commission.

Issuers currently have three general approaches when expressing opinions about the merits of legal proceedings:

Approach A: state counsel's opinion.

Approach B: state the issuer's opinion with citation to counsel's opinion as a basis thereof.

Approach C: state the issuer's opinion without citation to counsel's opinion as a basis thereof.

This essay argues that issuers should choose Approach B.

To reach this recommendation, this essay proceeds in six parts. Part II identifies the mandatory disclosures that relate to the merits of legal proceedings. Part III explains how counsel's opinion about the merits of legal proceedings informs the aforementioned disclosures. Part IV provides examples of issuer disclosures under Approaches A, B, and C. Part V reviews the SEC staff's historical treatment of this issue via the review and comment process. Part VI analyzes three key considerations that should inform an issuer's choice among Approaches A, B, and C: (1) the issuer's potential securities fraud liability for opinions about the merits of legal proceedings; (2) the risk of exposing counsel to private civil securities fraud liability as a primary violator; and (3) the risk of waiving the attorney-client privilege and attorney work product protection. Finally, drawing from the preceding parts, Part VII argues that, when expressing opinions about the merits of legal proceedings, an issuer should state its opinion with citation to counsel's opinion as a basis thereof.

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II. Mandatory Disclosures about the Merits of Legal Proceedings

The underlying merits of legal proceedings are relevant to several disclosure obligations.¹ The merits directly implicate Item 103 Legal Proceedings disclosures and U.S. GAAP Loss Contingencies disclosures. In addition, the underlying merits of legal proceedings affect whether they must also be discussed in Item 303 Management Discussion & Analysis (“MD&A”) and Item 503(c) Risk Factors.

Item 103 of Regulation S-K requires issuers to “[d]escribe briefly any material legal proceedings, other than routine litigation incidental to the business, to which the registrant or any of its subsidiaries is a party or of which any of their property is subject.”² Item 103 does not require issuers to directly discuss the merits of particular legal proceedings,³ but the materiality trigger for disclosure necessitates an assessment of the merits of the proceedings. As explained by the Supreme Court, when analyzing the materiality of contingent or speculative events, materiality depends “upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity.”⁴ As applied to legal proceedings, the probability of an unfavorable outcome depends on the underlying merits of the proceedings.⁵

Second, GAAP requires disclosure of material loss contingencies,⁶ including certain legal proceedings. In short, a company must accrue a loss contingency if it is “probable” that a liability has been incurred and the amount of loss can be reasonably estimated.⁷ If necessary for the financial statements not to be misleading, the company must also disclose the nature of the accrual and, in some circumstances, the amount accrued.⁸ If the loss contingency is not accrued, it must nonetheless be disclosed if there is at least a “reasonable possibility” that a liability has been incurred.⁹ Such a disclosure must include both the nature of the contingency and an “estimate of the possible loss or range of loss or a statement that such an estimate cannot be made.”¹⁰ A company “may make an assertion that any amount beyond what’s been accrued is not material to the financial statements.”¹¹ In addition, the SEC staff permits estimated loss to be aggregated in a logical manner.¹²

The GAAP assessments of probability of material loss, reasonable possibility of material loss, and estimated loss necessarily depend on the merits of the underlying proceedings.¹³ In addition, an issuer’s explanatory footnote about its accounting treatment of a legal proceeding might need to directly discuss the underlying merits. For example, the Accounting Standards Codification

includes the following illustrative disclosure with respect to an accrued loss contingency, which includes an opinion about the underlying merits:

On March 15, 19X1, Entity B filed a suit against the company claiming patent infringement. While the company believes it has meritorious defenses against the suit, the ultimate resolution of the matter, which is expected to occur within one year, could result in a loss of up to \$25 million in excess of the amount accrued.¹⁴

Therefore, qualitative disclosures about the underlying merits of legal proceedings may be required to explain an issuer's accounting treatment of legal proceedings.¹⁵

Item 303 of Regulation S-K requires companies to discuss, in their MD&A, any known trends or any known demands, commitments, events, or uncertainties that are reasonably expected to have a material impact on results of operations, liquidity, or capital resources.¹⁶ As the SEC reminded issuers in its "Dear CFO" Sample Letter, legal proceedings potentially implicate this standard.¹⁷ Likewise, Item 503(c) of Regulation S-K requires disclosure of the most significant factors that make an investment in an issuer's securities speculative or risky,¹⁸ which could include legal proceedings. For example, in recent guidance about cybersecurity disclosures, the SEC reminded issuers that "litigation, regulatory investigation, and remediation costs associated with cybersecurity incidents" should be considered when evaluating the need for cybersecurity risk factor disclosure.¹⁹ The underlying merits of legal proceedings affect whether their potential impact on the issuer are so great that they must be disclosed in one or both of these sections.²⁰

These various disclosure requirements do not perfectly overlap, either with respect to the legal proceedings that must be disclosed or with respect to the contents of required disclosures. As for the legal proceedings that must be disclosed, the SEC has created a helpful table comparing the disclosure triggers under Item 103 and under GAAP.²¹ The table shows that, depending on the circumstances, each standard is potentially more expansive than the other.²² Likewise, the SEC has noted that the MD&A disclosure requirement may pre-date any accounting recognition of a loss contingency from a legal proceeding.²³ As for the contents of required disclosures, each required disclosure serves a distinct purpose.²⁴ Despite these differences, issuers often incorporate their litigation loss contingency disclosures by reference into their Item 103 disclosures.²⁵ Notably, as part of the SEC's Disclosure Effectiveness Initiative, the SEC has requested comment on the potential merging of Item 103 and legal proceeding-related loss contingency disclosures into a unified standard.²⁶

III. Counsel's Opinions about the Merits of Legal Proceedings Inform Issuers' Disclosures

Unsurprisingly, litigation counsel's opinions about the merits of legal proceedings inform issuers' disclosures about those proceedings. Indeed, if an issuer expressed a legal opinion without consulting counsel, the opinion could be misleadingly incomplete because "[i]n the context of the securities market, an investor, though recognizing that legal opinions can prove wrong in the end, still likely expects such an assertion to rest on some meaningful legal inquiry."²⁷ Similarly, if an issuer expressed a legal opinion that diverged from counsel's opinion, without disclosing that divergence to investors, it could potentially give rise to omissions liability because a reasonable investor would expect an issuer to base its legal opinions, at least partially, on the opinions of counsel.²⁸

For example, when preparing Item 103 Legal Proceedings disclosures, an issuer's disclosure counsel should request status updates from litigation counsel and prepare a proceedings report.²⁹ Then, based on the status of each legal proceeding, disclosure counsel should determine whether disclosure is required and, if so, the content thereof.³⁰

Litigation counsel's opinions are also taken into account when preparing loss contingency disclosures. First, litigation counsel might provide information about legal proceedings directly to the issuer to aid in the preparation of loss contingency disclosures.³¹ Second, the issuer's auditor typically solicits information from litigation counsel via a letter of audit inquiry.³² Indeed, according to Public Company Accounting Oversight Board standards, "[a] letter of audit inquiry to the client's lawyer is the auditor's primary means of obtaining corroboration of the information furnished by management concerning litigation, claims, and assessments."³³ Counsel's responsive disclosure of confidential information to an auditor—who is a third party—risks waiving the attorney-client privilege and attorney work product protection.³⁴ As such, counsel should limit the response to the parameters outlined in the 1975 American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information. Under the ABA Statement of Policy, counsel "should normally refrain from expressing judgments as to outcome except in those relatively few clear cases where it appears to the lawyer that an unfavorable outcome is either 'probable' or 'remote'."³⁵ In addition, "it is appropriate for the lawyer to provide an estimate of the amount or range of potential loss (if the outcome should be unfavorable) only if he believes that the probability of inaccuracy of the estimate or range of potential loss is slight."³⁶ Counsel's compliance with the ABA Statement of Policy should serve as

“the basis for the auditor not probing further (into counsel’s litigation analysis) in its audit.”³⁷

IV. Differing Approaches to Citing Counsel’s Opinion about the Merits of Legal Proceedings

Although issuers rely on counsel’s opinion when drafting disclosures about the merits of legal proceedings, they differ with respect to whether, and how, to cite counsel’s opinion in the disclosures themselves. Most issuer disclosures about the merits of legal proceedings follow one of three approaches:

Approach A: state counsel’s opinion.

Approach B: state the issuer’s opinion with citation to counsel’s opinion as a basis thereof.

Approach C: state the issuer’s opinion without citation to counsel’s opinion as a basis thereof.

Examples of each approach follow.

(a). Statement of Counsel’s Opinion

As an example of a disclosure under Approach A, Colgate-Palmolive Company, in the Legal Proceedings and Loss Contingency disclosures contained in its Form 10-K filed in 2016, stated counsel’s opinion about the merits of allegations in a specific legal proceeding:

The Company is a defendant in a lawsuit pending in Utah federal court brought by N8 Medical, Inc. (“N8 Medical”), Brigham Young University (“BYU”) and N8 Pharmaceuticals, Inc. (“N8 Pharma”) (collectively, “plaintiffs”). . . . In the third quarter of 2015, plaintiffs completed a submission of documents in the litigation alleging damages of approximately \$2,500 million. 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.³⁸

As another example, Altria Group Inc., in the Risk Factors and Loss Contingency disclosures contained in its Form 10-K filed in 2016, stated counsel’s opinion about the merits of legal proceedings overall:

Altria Group, Inc. and its subsidiaries have achieved substantial success in managing litigation. Nevertheless, litigation is subject to uncertainty, and significant challenges remain. It is possible that the consolidated results of operations, cash flows or financial position of Altria Group, Inc., or the businesses of one or more of its subsidiaries, could be materially adversely affected in a particular fiscal quarter or fiscal year by an unfavorable outcome or settlement of certain pending litigation. 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. Each of the companies has defended, and will continue to defend, vigorously against litigation

challenges.³⁹

As a third example, Brownie's Marine Group, Inc., in the Legal Proceedings and Loss Contingency disclosures contained in its 10-K filed in 2016, stated its insurer's counsel's opinion about whether a legal proceeding implicated applicable disclosure requirements:

As previously disclosed, we are co-defendants under an action filed by an individual in June 2013 in the Circuit Court of Broward County claiming personal injury resulting from use of a Brownie's Third Lung. Plaintiff has claimed damages in excess of \$1,000,000. The insurance carrier's legal counsel indicates unfavorable outcome is possible, but not probable. We believe such claim is without merit and intend to continue to aggressively defend such action.⁴⁰

(b). Statement of Issuer's Opinion With Citation to Counsel's Opinion as a Basis Thereof

As an example of a disclosure under Approach B, CME Group Inc., in the Legal Proceedings and the Loss Contingency disclosures contained in its Form 10-K filed in 2016, expressed an opinion about the merits of a specific legal proceeding with citation to counsel's opinion as a basis thereof:

In 2008, Fifth Market, Inc. (Fifth Market) filed a complaint against CME Group and CME in the Delaware District Court seeking a permanent injunction against CME's Globex system and unquantified enhanced damages for what the plaintiff alleges is willful infringement of two patents, in addition to costs, expenses and attorneys' fees . . . Based on its investigation to date and advice from legal counsel, the company believes this suit is without merit and continues to defend itself vigorously against these charges.⁴¹

As another example, Community Trust Bancorp Inc., in the Legal Proceedings and Loss Contingency disclosures contained in its Form 10-K filed in 2018, expressed a general opinion about the merits of legal proceedings overall with citation to counsel's opinion as a basis thereof.

CTBI and subsidiaries, and from time to time, our officers, are named defendants in legal actions arising from ordinary business activities. Management, after consultation with legal counsel, believes any pending actions are without merit or that the ultimate liability, if any, will not materially affect our consolidated financial position or results of operations.⁴²

As a third example, First Niagara Financial Group, Inc., in the Loss Contingency disclosures contained in its Form 10-K filed in 2016, expressed an opinion about whether legal proceedings implicated applicable disclosure requirements with citation to counsel's opinion as a basis thereof.

In the ordinary course of our business there are various threatened and pending legal proceedings against us. Based on our review and

consultation with our outside legal counsel, we believe that the aggregate liability, if any, arising from such litigation would not have a material adverse effect on our Consolidated Financial Statements at December 31, 2015.⁴³

(c). Statement of Issuer's Opinion Without Citation to Counsel's Opinion as a Basis Thereof

As an example of a disclosure under Approach C, Vitamin Shoppe, Inc., in the Legal Proceedings and Loss Contingency disclosures contained in its Form 10-K filed in 2018, expressed an opinion about the merits of a specific legal proceeding without citing counsel's opinion as a basis thereof:

In addition, on or about August 22, 2017, a federal securities class action suit was filed in the United States District Court in the District of New Jersey against Vitamin Shoppe and certain officers and directors on behalf of purchasers of Vitamin Shoppe common stock between March 1, 2017 and August 6, 2017 . . . We believe this lawsuit is without merit, and we are vigorously defending the lawsuit.⁴⁴

As another example, Twilio Inc., in the Risk Factors, Legal Proceedings, and Loss Contingency disclosures contained in its Form 10-K filed in 2018, expressed a general opinion about the merits of legal proceedings overall without citing counsel's opinion as a basis thereof.

We intend to vigorously defend ourselves against these lawsuits and believe we have meritorious defenses to each matter in which we are a defendant.⁴⁵

As a third example, Apple Inc., in the Legal Proceedings and Loss Contingency disclosures contained in its 10-K filed in 2017, expressed a general opinion about whether legal proceedings implicated applicable disclosure requirements without citing counsel's opinion as a basis thereof.

In the opinion of management, there was not at least a reasonable possibility the Company may have incurred a material loss, or a material loss in excess of a recorded accrual, with respect to loss contingencies for asserted legal and other claims. However, the outcome of litigation is inherently uncertain. Therefore, although management considers the likelihood of such an outcome to be remote, if one or more of these legal matters were resolved against the Company in a reporting period for amounts in excess of management's expectations, the Company's consolidated financial statements for that reporting period could be materially adversely affected.⁴⁶

V. SEC Staff's Historical Treatment of Opinions about the Merits of Legal Proceedings

The SEC staff, via the review and comment process, has not frequently discussed the degree to which issuers should, or should

not, cite counsel's opinions when expressing opinions about the merits of legal proceedings. The staff's historical treatment of this issue, however, is rather surprising.

On multiple occasions in the mid-2000s,⁴⁷ with the most recent example occurring in 2008,⁴⁸ the SEC staff expressed the view that issuers are not qualified to express opinions about the merits of legal proceedings because they are legal conclusions. The SEC staff's proposed remedy was usually expressed in the alternative: (1) omit the merits opinion (to the extent the opinion was voluntarily disclosed); or (2) name the counsel on whose expertise the issuer was relying (and, to the extent required, obtain counsel's consent to be named as an expert therein).

For example, in 2006, reviewing iPayment Inc.'s Form S-4 registration statement, the SEC staff made the following comment about the issuer's Legal Proceedings disclosures:

We note that in many of the proceedings listed you state that the claims "are without merit" or that the company believes it has "meritorious defenses" to the claims asserted. These statements are legal conclusions that the company is not qualified to make. If they are based on the advice from litigation counsel, please state this, identify counsel and include a consent from counsel. Otherwise, please remove these statements.⁴⁹

In response, iPayment removed these opinions from its Legal Proceedings disclosures but retained them in its Loss Contingency disclosures.⁵⁰

As another example, in 2007, reviewing Smith International Inc.'s Form 10-K, which was incorporated by reference into a Form S-8 registration statement,⁵¹ the SEC staff made the following comment about the issuer's Loss Contingency disclosures:

We note that management relies upon the opinion of legal counsel in making judgments regarding whether a loss is probable and can be reasonably estimated to determine if an accrual is necessary. Please review the disclosure to name the external legal advisors relied upon and provide their consent as an expert. Refer to Section 7(a) of the Securities Act of 1933.⁵²

Smith International responded by replacing the phrase "the opinion of outside legal counsel" with the phrase "discussions with outside legal counsel" in future filings.⁵³

The SEC staff's position on this issue appears to have evolved since 2008, however.⁵⁴ Indeed, as discussed above in Part IV, issuers routinely cite the opinions of counsel as a basis for opinions about the merits of legal proceedings, without naming counsel; in addition, issuers routinely express their own opinions about the merits of legal proceedings without citing counsel's opinion as a basis thereof. Since 2008, SEC staff comments, rather than focusing on the propriety of issuers' expressions of merits opinions,

with or without citation to counsel, have instead requested that issuers explain the basis for opinions about the merits of legal proceedings, particularly Loss Contingency disclosures.⁵⁵

In addition, even in the mid-2000s, it was unclear whether the SEC staff took the same position with respect to periodic reports as the one taken for registration statements. Although one such comment was made with respect to a Form 10-K that was not incorporated by reference into a registration statement,⁵⁶ the remainder of staff comments of this ilk arose during the review of registration statements or periodic filings incorporated therein. On the one hand, because registration statements and periodic reports use integrated disclosure standards⁵⁷ and because the SEC requires experts to be named in both types of filings,⁵⁸ these comment letters were arguably instructive with respect to periodic reports. On the other hand, because the Securities Act explicitly requires the consent of experts while the Exchange Act does not,⁵⁹ perhaps the SEC staff differentiated between the two types of filings.

In sum, although these historical SEC staff comments are rather surprising, it is unlikely that SEC staff continues to take this position, particularly in the context of periodic reporting. Therefore, this essay proceeds by identifying the other counter-vailing considerations that might affect issuers' decisions about whether, and how, to cite counsel's opinion when expressing opinions about the merits of legal proceedings.

VI. Considerations Affecting the Citation of Counsel's Opinion about the Merits of Legal Proceedings

When an issuer is deciding whether, and how, to cite counsel's opinion when expressing opinions about the merits of legal proceedings, three key considerations come into play: (1) the issuer's potential securities fraud liability for materially misleading disclosures; (2) the attorney's potential securities fraud liability for materially misleading opinions; and (3) the risk of waiver of the attorney-client privilege and attorney work product protection. These considerations should affect issuers when choosing among Approaches A, B, and C (described above in Part IV).

(a). Issuer's Potential Securities Fraud Liability for Materially Misleading Disclosures

The first consideration potentially affecting whether, and how, an issuer should cite counsel's opinion when expressing an opinion about the merits of legal proceedings is the degree to which such citation might affect the issuer's potential liability for securities fraud.

Issuers face potential securities fraud liability for materially misleading opinions, including opinions about the merits of legal

proceedings.⁶⁰ Indeed, merits opinions are similar to legal compliance opinions, which have been the subject of high-profile litigation.⁶¹ As recently clarified by the Supreme Court in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, opinions are potentially actionable under two liability pathways (assuming the other elements of the claim are also satisfied): (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.⁶² Although *Omnicare* addressed liability under § 11 for alleged misrepresentations in registration statements, its reasoning likely applies equally to liability under § 10(b) and Rule 10b-5, at least to the extent these claims are premised on disclosures in SEC filings.⁶³

The safe harbor for forward-looking statements potentially protects issuers from liability for some opinions about the merits of legal proceedings, assuming the statements are accompanied by meaningful cautionary language.⁶⁴ This protection is not complete, however. First, the safe harbor does not apply to statements that are “included in a financial statement prepared in accordance with generally accepted accounting principles.”⁶⁵ Second, the applicability of the safe harbor to present-tense opinions about the merits of legal proceedings is not certain.⁶⁶ Finally, the safe harbor does not apply in SEC enforcement actions.⁶⁷

Most relevant to this essay, an issuer’s citation to counsel’s opinion as a basis for the issuer’s opinion about the merits of legal proceedings could lessen the issuer’s liability risk under *Omnicare*’s second liability pathway. (This assumes, of course, that the expressed merits opinion is consistent with counsel’s opinion.) As explained by the Supreme Court, in order for an opinion to give rise to omissions liability, the issuer must omit “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.”⁶⁸ If an issuer discloses the basis for its opinion, it undercuts the argument that a reasonable person would have understood the opinion to rest on additional undisclosed bases that were not, in fact, present. In other words, as the Supreme Court stated, “to avoid exposure for omissions . . . , an issuer need only divulge an opinion’s basis.”⁶⁹

Therefore, one potential way for an issuer to insulate an opinion about the merits of legal proceedings from omissions liability is to state the basis for the opinion, which would include

the opinion of counsel. In other words, the potential for securities fraud liability should incentive issuers to choose Approaches A or B (which include a citation to counsel's opinion) rather than Approach C (which does not).

(b). Attorney's Potential Securities Fraud Liability for Materially Misleading Opinions

A second consideration potentially affecting whether, and how, an issuer should cite counsel's opinion when expressing an opinion about the merits of legal proceedings is the degree to which such citation might expose counsel to securities fraud liability.

The SEC has broad enforcement authority against an attorney who engages in fraudulent conduct.⁷⁰ Although there is not a private right of action for aiding and abetting securities fraud,⁷¹ the SEC can pursue attorneys as aiders and abettors.⁷² In addition, if an attorney provides an auditor with inaccurate or misleading legal analysis, the attorney could be liable for violating SEC Rule 13b2-2(b)'s prohibition on directly or indirectly taking "any action to coerce, manipulate, mislead, or fraudulently influence any independent public or certified public accountant engaged in the performance of an audit . . . of the financial statements . . . that are required to be filed with the Commission."⁷³ An issuer's decision whether, or how, to cite counsel's opinion in an SEC filing is unlikely to affect an attorney's liability in an SEC enforcement action because an attorney's behind-the-scenes fraudulent conduct, regardless of whether counsel's role is disclosed to investors, can expose the attorney to liability.

Most relevant to this essay is the question of whether the citation of counsel's opinion in an SEC filing could potentially subject the attorney to private civil liability as a primary violator. Only the person who "makes" a fraudulent statement is subject to private liability for securities fraud.⁷⁴

As the Supreme Court held in *Janus Capital Group v. First Derivative Traders*, the "maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it."⁷⁵ The Court stated that "[a]ttribution within a statement or implicit from surrounding circumstances is strong evidence that statement was made by—and only by—the party to whom it is attributed."⁷⁶ Further, the Court, explaining how its ruling in *Janus* was consistent with its prior decision in *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*,⁷⁷ noted that it is relevant whether the public could have relied on the defendant's deception.⁷⁸ Applying this interpretation of "maker," the Court held that an investment advisor was not a primary violator where the investment advisor

did not file the allegedly deceptive prospectuses with the SEC, “[n]or did anything on the face of the prospectuses indicate that any statements therein came from [the investment advisor] rather than [the issuer].”⁷⁹

Applying *Janus* to issuers’ opinions about the merits of legal proceedings, disclosures under Approaches B and C would not subject counsel to potential liability as a primary violator. Under Approach C, counsel’s opinion is not even referenced, and thus counsel’s role as akin to a mere drafter, who is not within the scope of liability under *Janus*.⁸⁰ Under Approach B, although the issuer cites counsel’s opinion as a basis for the issuer’s opinion, the disclosure does not “attribute” the opinion to counsel; the attorney does not have “ultimate authority” over the issuer’s expressed opinion; and the public would not rely on the attorney’s undisclosed opinion.⁸¹

Disclosures under Approach A, however, might expose counsel to primary liability under *Janus*.⁸² Under this approach, the disclosure actually states counsel’s opinion. As the Court noted in *Janus*, attribution is strong evidence that the statement was made by the person to whom it is attributed.⁸³ Moreover, an issuer should not include a statement of counsel’s opinion in an SEC filing without the attorney’s consent,⁸⁴ and thus counsel arguably has “ultimate authority” over the statement.⁸⁵ Further, unlike the defendants’ undisclosed deceptive acts in *Stoneridge*, the public could rely on counsel’s opinion itself because it is disclosed.⁸⁶ Finally, although issuers choosing Approach A do not usually name the counsel whose opinion is stated, counsel of record in legal proceedings is publicly available information.

Therefore, the risk that an attorney might be exposed to private civil securities fraud liability as a primary violator should incentivize issuers (and their counsel) to choose Approaches B or C rather than Approach A when expressing opinions about the merits of legal proceedings.

(c). Risk of Waiver of the Attorney-Client Privilege and Attorney Work Product Protection

A third consideration potentially affecting whether, and how, an issuer should cite counsel’s opinion when expressing an opinion about the merits of legal proceedings is the risk of waiving the attorney-client privilege or attorney work product protection.

The attorney-client privilege protects confidential communications between the client and the attorney made for the purpose of obtaining or providing legal advice.⁸⁷ The attorney work product protection protects an attorney’s “written statements, private memoranda and personal recollections”⁸⁸ prepared in anticipation

of litigation or for trial, with heightened protection afforded to work product revealing an attorney's mental processes.⁸⁹

Both of these protections can be waived by disclosure. The attorney-client privilege is waived if the client voluntarily discloses the confidential communication to a third party.⁹⁰ The attorney work product protection is waived if the protected materials are voluntarily shared with an adversary.⁹¹

The scope of waiver is potentially broader than the information disclosed, especially with respect to the attorney-client privilege. It is possible that the waiver of the attorney-client privilege could extend to other materials relating to the same subject matter.⁹²

The risk of waiving the attorney-client privilege and attorney work product protection has been widely discussed in the context of an attorney's response to audit request letters.⁹³ Indeed, as discussed above in Part III, concerns about waiver underlie the ABA Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information.⁹⁴ These same concerns apply to the disclosure of counsel's opinion about the merits of legal proceedings in SEC filings.

Issuers who choose Approaches B and C when expressing opinions about the merits of legal proceedings do not risk waiving the attorney-client privilege or attorney work product protection. Under neither approach is counsel's communication or counsel's work product actually disclosed. Merely citing counsel's opinion as a basis for the issuer's opinion is not akin to citing the advice of counsel as an affirmative defense in litigation, which risks waiver.⁹⁵

Issuers who choose Approach A, however, risk waiving the attorney-client privilege and attorney work product protection. Counsel's opinion about the merits of legal proceedings is both a confidential attorney-client communication⁹⁶ and attorney work product revealing the attorney's mental processes.⁹⁷ If an issuer discloses counsel's opinion about the merits of a legal proceeding in a public SEC filing, that likely constitutes disclosure to a third party (thus waiving the attorney-client privilege) and disclosure to an opposing party (thus waiving the work product protection).

In light of potentially broad scope of these waivers, issuers should choose Approaches B or C rather than Approach A when expressing opinions about the merits of legal proceedings.

VII. Conclusion

Balancing the considerations discussed in Part VI, issuers should choose Approach B when expressing opinions about the merits of legal proceedings in SEC filings: an issuer should state the issuer's opinion with citation to counsel's opinion as a basis thereof. Under this approach, the issuer potentially insulates

itself from omissions liability under *Omnicare* by disclosing the basis for its opinion about the merits of legal proceedings; the disclosure would not expose the attorney to potential civil securities fraud liability as a “maker” under *Janus*; and the disclosure would not risk waiving the attorney-client privilege or attorney work product protection. This recommendation assumes that, as discussed above in Part V, the SEC staff does not object to this disclosure choice during the review and comment process.

A remaining open policy question is whether Approach B is the optimal disclosure decision in light of the goals of securities disclosure.⁹⁸ If not, the SEC could revise the disclosure rules discussed above in Part II to mandate a different form of disclosure, the SEC staff could adopt a different disclosure policy pursuant to the review and comment process discussed above in part V, or the competing considerations discussed above in Part VI could be adjusted to incentivize issuers to choose a different approach. In the meantime, however, when expressing opinions about the merits of legal proceedings in SEC filings, issuers should cite counsel’s opinion as a basis thereof.

NOTES:

¹See SEC, Speech, Mary Jo White, The Path Forward on Disclosure (Oct. 15, 2013), at <https://www.sec.gov/news/speech/spch101513mjw> (“There is an entire section often labeled ‘Legal Proceedings,’ in which you can find the major law suits filed against the company, the investigations it is facing by federal and state authorities, and the likely settlements into which the company expects to enter. Not surprisingly, the information appears elsewhere—namely, in the risk factors, in the MD&A and in the notes to the financial statements.”).

²17 C.F.R. § 229.103. Note, however, that some environmental matters must be disclosed even if they are not material. *Id.* at Instruction 5.

³*In re Boston Scientific Corp. Securities Litigation*, 490 F. Supp. 2d 142, 154 (2007) (“BSC met the requirement of Item 103 of Regulation S-K by disclosing the potential risk of the pending Medinol litigation . . . Having met this requirement, BSC was under no duty to inform the investment community of its own internal assessments of its prospects for settling the Medinol litigation.”), *rev’d in part on other grounds*, *Mississippi Public Employees’ Retirement System v. Boston Scientific Corp.*, 523 F.3d 75 (1st Cir. 2008); *In re SeaChange Int’l, Inc. Securities Litig., No. Civ.A. 02-12116-DPW*, 2004 WL 240317, at *8 (D. Mass. Dec. 6, 2004) (“Here, the Prospectus mentions the nCUBE litigation in general descriptive terms, as required by Item 103 . . . SeaChange was not obligated to predict the outcome or estimate the impact of the nCUBE litigation.”).

⁴*Basic Inc. v. Levinson*, 485 U.S. 224, 238 (1988) (quoting *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 849 (2d Cir. 1968)).

⁵SEC Release No. 10110, Disclosure Update and Simplification, 2016 WL 4233835, at *34 (July 13, 2016) (explaining that the likelihood of a negative outcome for the issuer is relevant to whether Item 103 requires disclosure of a legal proceeding).

⁶Financial Accounting Standards Board, Accounting Standards Codification

450-10-20 (defining a “loss contingency” as an “existing condition, situation, or set of circumstances involving uncertainty as to possible loss to an entity that will ultimately be resolved when one or more future events occur or fail to occur”).

⁷Financial Accounting Standards Board, Accounting Standards Codification 450-20-25-2.

⁸Financial Accounting Standards Board, Accounting Standards Codification 450-20-50-1.

⁹Financial Accounting Standards Board, Accounting Standards Codification 450-20-50-3.

¹⁰Financial Accounting Standards Board, Accounting Standards Codification 450-20-50-4.

¹¹NYC Bar Program, *Litigation Contingency Reporting: Where Are We With FASB And The SEC? New FASB Exposure Draft And SEC Scrutiny*, The Metropolitan Corporate Counsel (Apr. 2011), available at <http://ccbjournal.com/articles/13689/nyc-bar-program-litigation-contingency-reporting-where-are-we-fasb-and-sec-new-fasb-e> (summarizing the remarks of Wayne Carnall, Chief Accountant, SEC Division of Corporate Finance, at a program presented to the New York City Bar Association on January 28, 2011).

¹²*Id.* (“The standard does not get into the issue about whether you have to describe each estimate individually or whether you can describe them in the aggregate. The staff has not objected to companies providing estimates in the aggregate.”); CAQ SEC Regulations Committee—Joint Meeting With SEC Staff, *Highlights* (June 24, 2010), at <https://www.thecaq.org/sites/default/files/june-24-2010.pdf> (“In response to a question, Mr. Carnall indicated that the disclosure can be aggregated in a logical manner vs. separate disclosure for each asserted claim.”).

¹³SEC Release No. 10110, *Disclosure Update and Simplification*, 2016 WL 4233835, at *34 (July 13, 2016) (explaining that the likelihood of loss is relevant to whether FASB ASC 450-20 requires disclosure of a legal proceeding).

¹⁴Financial Accounting Standards Board, Accounting Standards Codification 450-20-55-37 (emphasis added).

¹⁵See Catherine T. Dixon, *SEC Disclosure and Corporate Governance: Financial Reporting Challenges for 2011*, Harvard Law School Forum on Corporate Governance and Financial Regulation, at <https://corpgov.law.harvard.edu/2011/03/15/sec-disclosure-and-corporate-governance-financial-reporting-challenges-for-2011/> (March 15, 2011) (“If management cannot estimate the amount of loss or a range of losses for a material contingency deemed ‘reasonably possible’ (or a group of similar contingencies that may be aggregated, as discussed below), it should so disclose and provide a qualitative explanation of the relevant facts and circumstances that go beyond the predominantly factual discussion required in the section of the annual report relating to litigation (Item 3 of Form 10-K, calling for disclosure of the information required by Item 103 of Regulation S-K).”).

¹⁶17 C.F.R. § 229.303.

¹⁷See SEC, *Sample Letter Sent to Public Companies on Accounting and Disclosure Issuers Related to Potential Risks and Costs Associated with Mortgage and Foreclosure-Related Activities or Exposures* (Oct. 2011), at <https://www.sec.gov/divisions/corpfin/guidance/cforeclosure1010.htm> (reminding issuers to consider whether “litigation risks and uncertainties” must be discussed in MD&A).

¹⁸17 C.F.R. § 229.503(c).

¹⁹SEC Release No. 10459, Statement & Guidance on Public Company Cybersecurity Disclosures, 2018 WL 993646 at *6 (Feb. 21, 2018).

²⁰See Catherine Dixon, SEC Disclosure and Corporate Governance: Financial Reporting Challenges for 2011, Harvard Law School Forum on Corporate Governance and Financial Regulation (March 15, 2011), at <https://corp.gov.law.harvard.edu/2011/03/15/sec-disclosure-and-corporate-governance-financial-reporting-challenges-for-2011/> (“Management should re-evaluate the status of pending or threatened litigation . . . on a regular basis in light of the Staff’s view that, as a given matter progresses, the available information on potential losses both expands and sharpens, and therefore may trigger one or more of an MD&A, financial statement footnote and/or risk factor disclosure obligation.”).

²¹SEC Release No. 10110, Disclosure Update and Simplification, 2016 WL 4233835, at *34 (July 13, 2016).

²²*Id.*

²³SEC, Current Accounting and Disclosure Issues in the Division of Corporation Finance (Nov. 30, 2006), at <https://www.sec.gov/divisions/corpfin/cfacctdisclosureissues.pdf> (“However, the need to discuss such matters in MD&A will often precede any accounting recognition when the registrant becomes aware of information that creates a reasonable likelihood of a material effect on its financial condition or results of operations, or when such information is otherwise subject to disclosure in the financial statements, as occurs when the effect of a material loss contingency becomes reasonably possible.”).

²⁴See CAQ SEC Regulations Committee—Joint Meeting with SEC Staff, Highlights (Sept. 21, 2010), at <https://www.thecaq.org/sec-regulations-committee-highlights-september-21-2010> (“Mr. Carnall also commented that the loss contingency disclosure requirements of GAAP and Item 103, Legal Proceedings, of Regulation S-K have different objectives. Mr. Carnall observed that attempts to satisfy both objectives through an integrated set of disclosure often result in lengthy factual recitations rather than focusing on the underlying loss contingency, the related exposure and the likelihood of loss.”).

²⁵SEC Release No. 10110, Disclosure Update and Simplification, 2016 WL 4233835, at *33 (July 13, 2016) (“In practice, to comply with Regulation S-K, issuers commonly repeat some or all of the disclosures provided in the notes to the financial statements under U.S. GAAP or include a cross-reference thereto.”).

²⁶*Id.* at *33–36.

²⁷*Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1328 (2015) (“If the issuer makes that statement without having consulted a lawyer, it could be misleadingly incomplete.”); see also Sale & Langevoort, “We Believe”: *Omnicare*, Legal Risk Disclosure and Corporate Governance, 66 *Duke L.J.* 763, 794 (2016) (“In the context of *Omnicare*-like statements, directors who meet their obligations will discuss their legal-belief statements with the lawyers.”).

²⁸*Omnicare*, 135 S. Ct. at 1328–29 (“Similarly, if the issuer made the statement in the face of its lawyers’ contrary advice . . . , the investor again has cause to complain: He expects not just that the issuer believes the opinion (however irrationally), but that it fairly aligns with the information in the issuer’s possession at the time.”).

²⁹See Broc Romanek, Legal Proceedings Disclosure Handbook: Practice Guide & Toolkit (Aug. 2017), at TheCorporateCounsel.net (detailing common in-house processes for determining whether legal proceeding disclosure is required).

³⁰*Id.*

³¹*Id.* (“But, this doesn’t mean counsel doesn’t quantify/help the issuer quantify in the context of providing FAS 5 disclosure advice.”).

³²Public Company Accounting Oversight Board, Auditing Standards 2505.06 (“An auditor ordinary does not possess legal skills and, therefore, cannot make legal judgments concerning information coming to his attention. Accordingly, the auditor should request the client’s management to send a letter of inquiry to those lawyers with whom management consulted concerning litigation, claims, and assessments.”).

³³Public Company Accounting Oversight Board, Auditing Standards 2505.08.

³⁴*See* Swider, Note, *Toeing the Line: The Delicate Balance Attorneys Must Maintain When Responding to Auditor Inquiry Request Letters*, 50 *Ind. L. Rev.* 969 (2017).

³⁵American Bar Association Statement of Policy Regarding Lawyers’ Responses to Auditors’ Request for Information, para. 4 (Dec. 1975).

³⁶*Id.*

³⁷Broc Romanek, *Legal Proceedings Disclosure Handbook: Practice Guide & Toolkit* (Aug. 2017), at TheCorporateCounsel.net.

³⁸Colgate-Palmolive Company, Form 10-K (filed on Feb. 18, 2016) (Item 3 Legal Proceedings and Note 13 Commitments and Contingencies) (emphasis added).

³⁹Altria Group Inc., Form 10-K (filed on February 25, 2016) (Item 1A Risk Factors and Note 18 Contingencies) (emphasis added).

⁴⁰Brownie’s Marine Group, Inc., Form 10-K (filed on March 30, 2016) (Item 3 Legal Proceedings and Note 15 Commitments and Contingencies) (emphasis added).

⁴¹CME Group Inc., Form 10-K (filed on Feb. 26, 2016) (Item 3 Legal Proceedings and Note 13 Contingencies) (emphasis added).

⁴²Community Trust Bancorp Inc., Form 10-K (filed on February 28, 2018) (Item 3 Legal Proceedings and Note 20 Commitments and Contingencies) (emphasis added).

⁴³First Niagara Financial Group, Inc., Form 10-K (filed on Feb. 10, 2016) (Note 10 Commitments and Contingent Liabilities) (emphasis added).

⁴⁴Vitamin Shoppe, Inc., Form 10-K (filed on Feb. 27, 2018) (Item 3 Legal Proceedings and Note 14 Legal Proceedings) (emphasis added).

⁴⁵Twilio Inc., Form 10-K (filed on March 1, 2018) (Item 1A Risk Factors, Item 3 Legal Proceedings, and Note 10 Commitments and Contingencies) (emphasis added) (The Note 10 Commitments and Contingencies disclosure is phrased slightly differently: “The Company intends to vigorously defend itself against these lawsuits and believes it has meritorious defenses to each matter in which it is a defendant.”).

⁴⁶Apple Inc., Form 10-K (filed on November 3, 2017) (Item 3 Legal Proceedings and note 10 Commitments and Contingencies) (emphasis added).

⁴⁷*E.g.*, SEC Staff Comment Letter to Brookshire Raw Materials (U.S. Trust) (Oct. 27, 2006) (reviewing Form S-1) (“We refer to your statement that Brookshire Entities ‘will prevail on the merits.’ This is a legal conclusion that the registrant is not qualified to make. Please remove this statement or indicate that the statement is based on advice from litigation counsel, identifying

counsel. If you choose the latter option, please also file a consent from counsel with respect to this statement.”); SEC Staff Comment Letter to Wyndham Worldwide Corp. (June 7, 2006) (reviewing Form 10) (“Please revise your description of these suits to remove disclosure representing your ‘belief’ as to the strength or merit of your defenses. These are legal conclusions that you are not qualified to make. In the alternative, you may file as an exhibit to this registration statement a supporting legal opinion.”); SEC Staff Comment Letter to Fossil Inc. (Sept. 25, 2008) (reviewing Form 10-K incorporated by reference into Form S-8) (“You state that you ‘believe that [you] have meritorious defenses to these claims.’ This is a legal opinion that counsel should provide, or in the alternative you should remove this statement.”); *see also, e.g.*, SEC Staff Comment Letter to iPayment, Inc. (Oct. 13, 2006) (reviewing Form S-4); SEC Comment Letter to Affinion Group, Inc (June 6, 2006) (reviewing Form S-4); SEC Staff Comment Letter to ARC Corporate Realty Trust Inc. (May 15, 2006) (reviewing Form 10-K); SEC Staff Comment Letter to CarrAmerica Realty Corporation (May 4, 2006) (reviewing Schedule 14A); SEC Comment Letter to Host Hotels & Resorts, Inc. (Jan. 6, 2006) (reviewing Form 10-K incorporated by reference into a Form S-4).

⁴⁸SEC Staff Comment Letter to Fossil Inc. (Sept. 25, 2008) (reviewing Form 10-K incorporated by reference into Form S-8).

⁴⁹SEC Staff Comment Letter to iPayment, Inc. (Oct. 13, 2006) (reviewing Form S-4).

⁵⁰iPayment Inc., Form S-4/A (filed Nov. 9, 2006).

⁵¹Smith International Inc., Form S-8 (filed on March 2, 2007).

⁵²SEC Staff Comment Letter to Smith International Inc. (June 21, 2007) (reviewing Form 10-K).

⁵³Smith International Inc. Response to SEC Staff Comment Letter (July 2, 2007).

⁵⁴*See* Speech by SEC Staff: Remarks before the 2007 AICPA National Conference on Current SEC and PCAOB Developments (Dec. 11, 2007) (remarks by Stephanie L. Hunsaker, Associate Chief Accountant, Division of Corporation Finance) (“As noted above in the discussion of the requirements in the ‘34 Act arena—there is absolutely no requirement to make reference to an expert just because the expert was used and their findings were considered in the registration’s analysis. Rather, instead of naming the expert and obtaining the consent, the registrant could simply delete the reference to the expert.”).

⁵⁵*See* Kevin C. Smith, Alison H. Kronstadt and Tae Sang Yoo, SEC staff continues to focus on litigation contingency disclosure, Lexology (Jan 31, 2011), at <https://www.lexology.com/library/detail.aspx?g=682e826c-9a91-4c74-afd8-2d87ef766dac> (discussing trends based on a review of 250 comment letters).

⁵⁶SEC Staff Comment Letter to ARC Corporate Realty Trust Inc. (May 15, 2006) (reviewing Form 10-K) (“You state that ‘while we believe BCBSS has no basis for its position’ you cannot predict the outcome of the disputed proceedings. This is a legal conclusion that the company is not qualified to make. Please revise to omit this conclusion.”).

⁵⁷SEC Release No. AS-306, Adoption of Integrated Disclosure System, 1982 WL 90370 (Mar. 3, 1982).

⁵⁸*See* Speech by SEC Staff: Remarks before the 2007 AICPA National Conference on Current SEC and PCAOB Developments (Dec. 11, 2007) (remarks by Stephanie L. Hunsaker, Associate Chief Accountant, Division of Corporation Finance) (“There is no requirement under the ‘34 Act to obtain a consent from

an expert. However, in cases where a registrant chooses to make reference to the use of a valuation firm or other expert in a periodic report, the staff expects the expert to be named.”).

⁵⁹15 U.S.C.A. § 77g(a); 17 C.F.R. § 230.436.

⁶⁰*E.g.*, *SEC v. RPM Int'l, Inc.*, No. 16-1803, 2017 WL 4358693, at *16 (D.D.C. Sept. 29, 2017) (denying defendants’ motion to dismiss SEC’s claims that the issuer fraudulently failed to accrue a legal-proceeding-related loss contingency in its SEC filings when loss was probable and reasonably estimated); *Rosenbaum Capital LLC v. Boston Communications Grp., Inc.*, 445 F. Supp.2d 170, 175–76 (D. Mass. 2006) (denying defendants’ motion to dismiss plaintiffs’ securities fraud claims, premised on the issuer’s allegedly fraudulent statements, with respect to pending patent litigation, “that it did not infringe the patents and that it had meritorious defenses, namely that the patents were invalid based on prior art”).

⁶¹*E.g.*, *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318 (2015).

⁶²*Id.* at 1327 & 1332.

⁶³*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.”); *Tongue v. Sanofi*, 816 F.3d 199, 211–12 (2d Cir. 2016) (applying *Omnicare* to securities fraud claims premised on allegedly misleading SEC filings); *see also* Sale & 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 of Belief As Securities Fraud, 43 Sec. Reg. L.J. 351, 355 (2015) (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).

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

⁶⁵15 U.S.C.A. § 77z-2(b)(2)(A); 15 U.S.C.A. § 78u-5(b)(2)(A).

⁶⁶*Compare Grobler v. Neavase Inc.*, No. 16-11038-RGS, 2016 WL 6897760, at *3 (D. Mass. Nov. 22, 2016) (“The statements that CardiAQ’s claims were ‘without merit’ or ‘baseless’ fit this definition [of forward-looking statement], because they were predictions about the future outcome of the pending litigation, and could only be invalidated by reference to the ultimate outcome of the case.”) *with Rosenbaum Capital LLC v. Boston Communications Grp., Inc.*, 445 F. Supp.2d 170, 175 & 176 n.3 (D. Mass. 2006) (analyzing whether the safe harbor protected an issuer from liability for opinions “that it did not infringe the patents and that it had meritorious defenses”) (“As a matter of strict grammar, Boston Communications’ statements speak to present belief. The Court does not resolve whether such statements might nevertheless qualify as forward-looking under the law. If any statements can so qualify, however, one would imagine that present statements of belief regarding the probability of future events, such as these, would meet the test.”); *see also* Couture, Mixed Statements: The Safe Harbor’s Rocky Shore, 39 Sec. Reg. L.J. 257, 265–67 (2011) (discussing courts’ differing treatment of statements about the present that necessarily incorporate predictions).

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

⁶⁸*Omnicare*, 135 S. Ct. at 1332.

⁶⁹*Id.*

⁷⁰See Steinberg, *The Corporate/Securities Attorney As A “Moving Target”—Client Fraud Dilemmas*, 46 Washburn L.J. 1 (2006) (analyzing various sources of potential attorney liability).

⁷¹*Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994).

⁷²15 U.S.C.A. § 78t(e).

⁷³17 C.F.R. § 240.13b2-2(b)(1).

⁷⁴17 C.F.R. § 240.10b-5(b).

⁷⁵*Janus Capital Group v. First Derivative Traders*, 564 U.S. 135, 142 (2011).

⁷⁶*Id.* at 142–43.

⁷⁷*Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008).

⁷⁸*Janus*, 564 U.S. at 144 (“We held that dismissal of the complaint was proper because the public could not have relied on the entities’ undisclosed deceptive acts . . . This emphasis suggests the rule we adopt today . . .”).

⁷⁹*Id.* at 147.

⁸⁰*Id.* at 142 (“One who prepares or publishes a statement on behalf of another is not its maker.”).

⁸¹*Id.* at 142–43.

⁸²Marc I. Steinberg, *Attorney Liability After Sarbanes-Oxley § 2.05[3]* (2017) (“The *Janus Capital* decision signifies that attorneys, bankers, and other consultants normally will be subject to Section 10(b) primary liability with respect to an affirmative statement only when they themselves author a statement, such as an attorney opinion letter or an investment banker fairness opinion that is transmitted to investors.”).

⁸³*Janus*, 564 U.S. at 142–43.

⁸⁴American Bar Association Statement of Policy Regarding Lawyers’ Responses to Auditors’ Request for Information, para. 7 (Dec. 1975) (stating that, without the lawyer’s prior written consent, the attorney’s opinion provided to auditors “is not to be quoted in whole or in part or otherwise referred to in any financial statements of the client or related documents, nor is it to be filed with any governmental agency or other person”).

⁸⁵*Janus*, 564 U.S. at 142.

⁸⁶*Id.* at 144.

⁸⁷Paul R. Rice, *The Evidence Project: Proposed Revisions to the Federal Rules of Evidence with Supporting Commentary*, 171 F.R.D. 330, 346–53 (1997) (describing the evolution of the common-law attorney-client privilege).

⁸⁸*Hickman v. Taylor*, 329 U.S. 495, 510 (1947).

⁸⁹Fed. R. Civ. P. 26(b)(3) (“If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.”); *Upjohn Co. v. United States*, 449 U.S. 383, 400 (1981).

⁹⁰Paul R. Rice, *The Evidence Project: Proposed Revisions to the Federal Rules of Evidence with Supporting Commentary*, 171 F.R.D. 330, 352 (1997).

⁹¹8 Fed. Prac. & Proc. Civ. § 2024 (3d ed. 2017) (The Work-Product Rule—Matters Protected by the Work-Product Rule) (“If documents otherwise protected by the work-product rule have been disclosed to others with an actual intention that an opposing party may see the documents, the party who made the disclosure should not subsequently be able to claim protection for the documents as work product.”).

⁹²Harding, “Show and Tell”: An Analysis of the Scope of the Attorney-Client Waiver Standards, 14 Rev. Litig. 367 (1995) (discussing the different standards that courts apply when determining the scope of the waiver of the attorney-client privilege).

⁹³*E.g.*, Swider, Note, Toeing the Line: The Delicate Balance Attorneys Must Maintain When Responding to Auditor Inquiry Request Letters, 50 Ind. L. Rev. 969, 973–74 & 983–88 (2017); Aaron J. Rigby, *The Attorney-Auditor Relationship: Responding to Audit Inquiries, the Disclosure of Loss Contingencies and the Work-Product Privilege*, Sec. Reg. L.J., vol. 35, no. 3 (2007); Steinberg, *The Corporate/Securities Attorney As A “Moving Target”—Client Fraud Dilemmas*, 46 Washburn L.J. 1, 21 (2006).

⁹⁴American Bar Association Statement of Policy Regarding Lawyers’ Responses to Auditors’ Request for Information, Preamble (Dec. 1975) (“[T]he mere disclosure by the lawyer to the outside auditor, with due client consent, of the substance of communications between the lawyer and client may significantly impair the client’s ability in other contexts to maintain the confidentiality of such communications.”).

⁹⁵*E.g.*, Belden, Note, A Guide to Waiver After *Echostar* and *Seagate*: When You Raise the Advice-of-Counsel Defense to Willful Patent Infringement, What Are You Giving Up?, 2007 Wis. L. Rev. 933 (2007).

⁹⁶*See Upjohn Co. v. United States*, 449 U.S. 383, 390, 101 S. Ct. 677, 683, 66 L. Ed. 2d 584 (1981) (“[T]he privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.”).

⁹⁷*Upjohn Co. v. United States*, 449 U.S. 383, 400 (1981) (“Rule 26 accords special protection to work product revealing the attorney’s mental processes.”).

⁹⁸*See* Wendy Gerwick Couture, *Optimal Issuer Disclosure of Opinions*,—U. Cin. L. Rev.—(forthcoming 2018) (draft available at <https://ssrn.com/abstract=3102667>).