No. 13-435

In the Supreme Court of the United States

OMNICARE, INC., ET AL., PETITIONERS

v.

LABORERS DISTRICT COUNCIL CONSTRUCTION INDUSTRY PENSION FUND, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF VACATUR AND REMAND

ANNE K. SMALL
General Counsel
MICHAEL A. CONLEY
Deputy General Counsel
JOHN W. AVERY
Deputy Solicitor
DOMINICK V. FREDA
Senior Litigation Counsel
STEPHEN G. YODER
Senior Counsel
Securities and Exchange Commission
Washington, D.C. 20549

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
MALCOLM L. STEWART
Deputy Solicitor General
NICOLE A. SAHARSKY
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether, in a suit under Section 11 of the Securities Act of 1933, 15 U.S.C. 77k, a plaintiff who seeks to impose liability for a statement of opinion in a registration statement, and who alleges that the opinion lacks a reasonable basis, must also allege that the maker of the statement did not subjectively hold that opinion.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

Statutes and regulations: Page

Statutes and regulations—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 13-435

OMNICARE, INC., ET AL., PETITIONERS

v.

LABORERS DISTRICT COUNCIL CONSTRUCTION INDUSTRY PENSION FUND, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF VACATUR AND REMAND

INTEREST OF THE UNITED STATES

The United States, through the Department of Justice and the Securities and Exchange Commission (SEC or Commission), administers and enforces the federal securities laws. This case concerns Section 11 of the Securities Act of 1933, 15 U.S.C. 77k, which authorizes private suits when a registration statement includes any "untrue statement of a material fact" or "omit[s] to state a material fact" that is "necessary to make the statements therein not misleading." The question presented is whether a plaintiff whose Section 11 suit is premised on an issuer's statement of opinion must allege that the maker of the statement did not subjectively hold that opinion. The resolution of that question will affect private actions under Sec-

tion 11, which are an important means of ensuring accuracy in registration statements, as well as Commission stop orders under Section 8 of the Act, 15 U.S.C. 77h. The Court's disposition of this case also may affect the enforcement, by the government and by private parties, of numerous other federal securities laws that prohibit material misstatements and omissions. The United States therefore has a substantial interest in this Court's resolution of the question presented.

STATEMENT

1. The Securities Act of 1933 (Act), ch. 38, 48 Stat. 74, requires an issuer of a security offered to the public through the mails or in interstate commerce to register its offering with the Commission. See 15 U.S.C. 77e.[1] The registration statement must contain certain information about the issuer and the security, and it must be signed by the issuer, its officers, and the majority of its board of directors. 15 U.S.C. 77f, 77g. A prospectus used to market the security must include much of the information from the registration statement. 15 U.S.C. 77e, 77j.

A registration statement generally becomes effective 20 days after filing. 15 U.S.C. 77h(a). The Commission may issue a "stop order" delaying the effectiveness of a registration statement that "includes any untrue statement of a material fact" or that "omits to state any material fact" that is "necessary to make the statements therein not misleading." 15 U.S.C. 77h(d).

The Act also establishes an express private right of action for material misstatements or omissions in

[1] This requirement is subject to limited exceptions not at issue here. See 15 U.S.C. 77d.

registration statements. Section 11 of the Act provides that "any person acquiring" a security may sue the issuer, its directors, its underwriters, and others if "any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. 77k(a). Section 12 establishes a similar cause of action for material misstatements or omissions in prospectuses. See 15 U.S.C. 77*l*.

Section 11 "was designed to assure compliance with the disclosure provisions of the Act by imposing a stringent standard of liability on the parties who play a direct role in a registered offering." *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 381-382 (1983) (footnote omitted). A plaintiff "need only show a material misstatement or omission" in the registration statement "to establish his prima facie case." *Id.* at 382. An issuer may avoid liability only if the plaintiff knew of the untruth or omission when he acquired the security. 15 U.S.C. 77k(a). A director, underwriter, or individual defendant may establish certain limited affirmative defenses, including that, after a "reasonable investigation," he had "reasonable ground to believe" and "did believe" that the statements in the registration statement were true. 15 U.S.C. 77k(b)(3)(A).

2. Petitioner Omnicare, Inc., is the nation's largest provider of pharmaceutical care for the elderly and other residents of long-term care facilities. Pet. App. 5a. Respondents are investors who purchased Omnicare stock during a December 2005 public offering. *Id.* at 6a. In conjunction with that public offering,

Omnicare filed a registration statement with the Commission. *Ibid.*

In February 2006, respondents filed this lawsuit against Omnicare and several of its officers and directors (petitioners in this Court). Pet. App. 5a, 7a. In the operative complaint (see *id.* at 6a & n.2), respondents alleged that petitioners are liable under Section 11 for certain statements in the registration statement. *Id.* at 6a-7a. Those statements read:

> We believe that our contracts with pharmaceutical manufacturers are legally and economically valid arrangements that bring value to the healthcare system and the patients that we serve. * * *
>
> We believe our contract arrangements with other healthcare providers, our pharmaceutical suppliers and our pharmacy practices are in compliance with applicable federal and state laws.

J.A. 201-203 (para. 46) (emphasis omitted) (quoting registration statement); see J.A. 191-192, 226-227 (paras. 27, 91).

In respondents' view, those statements were false and misleading because Omnicare had entered into unlawful kickback arrangements with pharmaceutical manufacturers. J.A. 185-186, 203-226 (paras. 10, 47-90). Respondents further alleged that none of petitioners had "made a reasonable investigation or possessed reasonable grounds" to believe that the statements in the registration statement were truthful and complete. J.A. 274 (para. 183). Respondents also "disclaim[ed] any allegation" of "fraud or intentional or reckless misconduct." J.A. 273 (para. 178).

3. The district court granted petitioners' motion to dismiss the Section 11 claim. Pet. App. 28a-41a. In

the court's view, "statements regarding a company's belief as to its legal compliance are considered 'soft' information and are generally not actionable," unless the complaint alleges that the makers of the statements "knew the statements were untrue at the time they were made." *Id.* at 38a (citation omitted). The court concluded that respondents had not alleged such knowledge here. *Id.* at 38a-40a.

4. The court of appeals reversed. Pet. App. 3a-27a. The court noted that "Section 11 provides for strict liability" and "does not require a plaintiff to plead a defendant's state of mind." *Id.* at 12a. The court concluded that, in order to state a Section 11 claim based on a statement of opinion, the plaintiff need only allege that the opinion was "objectively false" and need not also allege that the statement was "disbelieved by the defendant at the time it was expressed." *Id.* at 16a (citation omitted). The court rejected petitioners' argument that, under *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083 (1991), a Section 11 plaintiff who alleges a false or misleading statement of opinion must allege (and ultimately prove) that the defendant did not genuinely believe the opinion. Pet. App. 16a-19a.

SUMMARY OF ARGUMENT

A statement of opinion is actionable under Section 11 of the Securities Act, 15 U.S.C. 77k, if it lacked a basis that was reasonable under the circumstances, even if it was sincerely held.

A. Section 11 creates an express cause of action for a registration statement that "contained an untrue statement of material fact" or "omitted to state a material fact * * * necessary to make the statements therein not misleading." 15 U.S.C. 77k(a). A

statement of opinion generally conveys (1) that the maker of the statement genuinely holds the opinion and (2) that the opinion has a basis that is reasonable under the circumstances. If either is not true, the statement may be misleading. Although what constitutes a material omission depends on the circumstances, in the context of a registration statement, a statement of opinion generally implies it has a reasonable basis. That is especially true when the opinion is one about the lawfulness of the company's own conduct.

Petitioners contend that a statement of opinion is actionable under Section 11 only if it is not sincerely held, on the theory that the only fact expressly stated by the opinion is that the speaker holds that opinion. Petitioners overlook that Section 11 applies to both misstatements and omissions.

Because an opinion can be misleading either because it is insincere or because it lacks foundation, the court of appeals correctly held that a Section 11 plaintiff need not allege that the defendant disbelieved the opinion. But the court erred in suggesting that a statement of opinion is actionable whenever it is ultimately proved incorrect. Section 11 liability should be determined based on the facts at the time the statement was made, not at a later time.

B. In *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083 (1991), this Court recognized that a statement of opinion may be materially misleading either because it is not genuinely held or because it lacks foundation. The Court considered whether directors' statements, in a proxy solicitation, that they believed a proposed merger would result in a high value and fair price for stock were actionable under Section 14(a) of the Securities Exchange Act, 15 U.S.C. 78n(a),

and SEC Rule 14a-9, 17 C.F.R. 240.14a-9. The Court determined that such statements of belief can be materially significant to investors because investors expect the directors to draw on their knowledge and experience and to act in the shareholders' interests. 501 U.S. at 1091. The Court then concluded that the statements were misleading because the jury had found that the directors did not actually believe them and the Court found sufficient evidence to establish that the directors lacked a "factual basis" for their beliefs. *Id.* at 1090, 1093-1094.

Virginia Bankshares did not hold that subjective insincerity always must be present to make a statement of opinion actionable. Because the Court accepted the jury's finding that the directors' statements of belief were insincere, it did not consider whether such a finding is required in every case.

C. Common-law courts recognized that a statement of opinion may be an actionable misrepresentation when it was not genuinely held or when it lacked foundation. Although the general common-law rule was that a statement of opinion regarding a commercial transaction was not actionable, common-law courts recognized numerous exceptions to that rule. A statement of opinion could be actionably false if it was not the speaker's opinion and the recipient was entitled to rely on such an opinion. A statement of opinion also could be misleading if it implied a foundation that was lacking. Modern tort law continues to reflect these two principles. See 3 Restatement (Second) of Torts §§ 525 cmt. d, 539 & cmts. a & b (1977).

D. Imposing Section 11 liability for statements of opinion that are not genuinely held or lack a reasonable basis furthers Congress's intent and fulfills the

Securities Act's purposes. The Act focuses on disclosure of information to potential investors. The registration statement plays a foundational role. It must be filed before any security can be sold, and if it contains any material misrepresentations or omissions, the Commission may prevent sale of the security and a purchaser of the security may sue for damages.

In enacting Section 11, Congress built on common-law principles to create a far-reaching cause of action. Congress imposed liability not only for misstatements, but also for omissions, and it rejected the rule of caveat emptor, instead placing the burden of disclosure on the issuer's directors and officers. And Congress dispensed with proof of scienter, reliance, and causation, permitting only limited affirmative defenses once it was established that a registration statement included a material misstatement or omission.

Imposition of liability for a statement of opinion that is not genuine or that lacks a reasonable basis is consistent with this scheme, because it ensures that registration statements are both literally true and do not omit information that would matter to a reasonable investor. Petitioners are correct that imposing liability under Section 11 based on later events (as the court of appeals suggested) would disserve the Act's purposes. But petitioners go too far in the other direction, because under their view, directors and officers who state opinions that lack foundation could avoid Section 11 liability so long as they genuinely held the opinions.

E. The Commission has consistently recognized that a genuinely held statement of opinion may be materially misleading when it lacks a reasonable basis. In a series of adjudications, the Commission has

explained that "[g]roundless opinions come within the ambit of false or misleading statements prohibited by the securities laws," even if the speaker "personally believes" the statement, because investors expect that the opinions are "responsibly made on the basis of actual knowledge and careful consideration." *Alexander Reid & Co.*, No. 8-7105, 1962 WL 68464, at *4 (Feb. 8, 1962). The Commission has applied these principles in imposing a stop order to prevent a registration statement from becoming effective, see *Hamilton Oil & Gas Corp.*, No. 24D-2258, 1961 WL 61074, at *8, *14 (July 25, 1961); in regulating broker-dealers, see *Richard J. Buck & Co.*, No. 3-417, 1968 WL 86080, at *6 (Dec. 31, 1968), aff'd *sub nom. Hanly* v. *SEC*, 415 F.2d 589 (2d Cir. 1969); *Alexander Reid & Co.*, 1962 WL 68464, at *4; and in issuing a cease-and-desist order to prevent use of misleading documents regarding an initial public offering, see *Gold Props. Restoration Co.*, No. 3-7735, 1992 WL 211480, at *5 (Aug. 27, 1992).

These decisions reflect a consistent interpretation of similar statutory language, and they comport with common-law principles and the purposes of the Act. Accordingly, they should be given significant weight. See *SEC* v. *Zandford*, 535 U.S. 813, 819-820 (2002). For all of these reasons, the Court should vacate the court of appeals' judgment and remand this case for further proceedings.

ARGUMENT

A STATEMENT OF OPINION IS ACTIONABLE UNDER SECTION 11 IF IT LACKED A REASONABLE BASIS UNDER THE CIRCUMSTANCES, EVEN IF THE OPINION WAS GENUINELY HELD

At issue in this case are statements of opinion in Omnicare's December 2005 registration statement. In the view of the United States, statements of opinion may be actionable under Section 11, either because the maker of the statement did not actually hold the opinion stated or because the statement lacked a basis that was reasonable under the circumstances in which the statement was made. The court of appeals therefore correctly held that a plaintiff need not allege subjective disbelief to recover under Section 11 for a statement of opinion. The court erred, however, in holding that a statement of opinion is actionably false whenever it is ultimately determined to be wrong. Because the court of appeals applied an erroneous legal standard, this Court should vacate the judgment below and remand for further proceedings.

A. A Statement Of Opinion Is Actionable Under Section 11 If It Either Misrepresents The Speaker's Actual Belief Or Conveys A False Impression As To The Nature Or Extent Of The Inquiry On Which The Statement Was Based

1. Section 11 creates an express cause of action for material misstatements or omissions in a registration statement. It provides that "any person acquiring" a security may sue the issuer, its officers and directors, and others if "any part of" the security's registration statement, "when such part became effective, contained an untrue statement of a material fact" or

"omitted to state a material fact * * * necessary to make the statements therein not misleading." 15 U.S.C. 77k(a).

A statement of opinion generally conveys the facts that (1) the maker of the statement genuinely holds the opinion, and (2) there is a basis for the opinion that is reasonable under the circumstances. See, *e.g.*, *Weiss* v. *SEC*, 468 F.3d 849, 855 (D.C. Cir. 2006). First, a statement of opinion typically constitutes an express assertion that the speaker actually holds the stated belief. Thus, if a corporate director states, "I believe that my company's conduct is lawful," she represents as fact that she holds a certain view about the legality of the company's conduct. If the director actually believes the company's conduct to be unlawful, then she has made "an untrue statement of material fact." 15 U.S.C. 77k(a).

Second, a statement of opinion implies the existence of a basis for the opinion that is reasonable under the circumstances. If a company says in a registration statement, "We believe our conduct is lawful," it implies that it has a reasonable basis for that conclusion. If there is no such basis, the speaker has "omitted to state a material fact," 15 U.S.C. 77k(a)—the lack of foundation for the opinion—that is necessary to make the statement not misleading.[2] For example, if the company states that its conduct is lawful without having conducted any legal analysis, the statement of opinion is incomplete because it fails to apprise the

---

[2] A statement of opinion that lacks a reasonable basis also can be viewed as one that implies a statement that is untrue. See, *e.g.*, *Virginia Bankshares*, 501 U.S. at 1095-1096 (noting that there may be "something false or misleading in what the statement expressly or impliedly declares about its subject").

reader that no such analysis occurred. The company's statement of opinion may likewise be misleading if the company's lawyers have questioned the legality of its conduct and the statement contains no reference to that fact.

What constitutes a material omission from a statement of opinion depends on the circumstances under which the opinion is offered. In their daily lives, individuals often express off-the-cuff opinions on myriad subjects as to which they possess, and are understood to possess, no special expertise. A registration statement, however, is a formal document filed with the Commission as a legal prerequisite to the sale of a security to the public. See 15 U.S.C. 77e(a), 77f. The information required in a registration statement generally consists of facts, not opinions. See 15 U.S.C. 77g(a), 77aa Sched. A. Because the registration statement is so important, Section 11 imposes far-reaching liability on issuers and corporate officers for material misstatements and omissions. If an issuer volunteers a statement of opinion in a registration statement, the reader would naturally expect that the issuer has undertaken a significant investigation and has concluded that the opinion has a solid foundation. That is especially true where, as here, the statement concerns the issuer's own compliance with the law, so that the issuer has every incentive to conduct a thorough investigation.

2. Petitioners contend (Br. 14-16) that a statement of opinion is actionable under Section 11 only if the speaker does not sincerely hold the belief stated. They assert (Br. 14-15) that Section 11 "imposes liability only for untrue statements of material *fact*," and that "[t]he only *fact* conveyed by a statement of opin-

ion or belief" is "that the speaker held the stated belief." But Section 11 does not limit liability to express misrepresentations of fact; it also applies if a registration statement "omit[s] to state a material fact * * * necessary to make the statements therein not misleading." 15 U.S.C. 77k(a).

A statement of opinion can be misleading either because of what it expressly states or because of what it omits. At least in circumstances where readers and listeners would expect a speaker to conduct a reasonable inquiry before expressing a particular opinion, a statement of opinion that lacks a reasonable basis and fails to mention that lack of foundation has "omitted" a fact that is "necessary" to make the statement of opinion not misleading. Congress imposed liability for such omissions in Section 11 to ensure that a company seeking to sell a security to the public tells "the whole truth" in its registration statement, rather than providing incomplete statements and half-truths. H.R. Rep. No. 85, 73d Cong., 1st. Sess. 2 (1933) (quoting President Franklin D. Roosevelt's statement) (House Report).

Although petitioners acknowledge (Br. 20-21) that a statement of opinion can be misleading when it lacks a factual basis, they assert that this is so only if the statement "contain[s] an explicit representation about the factual basis for the belief." Section 11 is not so limited, however, because it imposes liability both for factual misstatements and for omissions that render a literally-accurate statement misleading. Petitioners also assert (Br. 16) that, so long as Omnicare "did in fact hold the stated belief" that its conduct was lawful, then no "other 'fact' * * * would need to be disclosed in order to render the statement 'not mislead-

ing.'" But the assertion (particularly in a formal document like a registration statement) that Omnicare believes its contracts are lawful implies that the company has a reasonable basis for so believing. If no such reasonable basis exists, Omnicare's omission of that fact from its registration statement renders its statement of opinion misleading.

3. Because a statement of opinion may be false or misleading in two different ways, the court of appeals was correct to hold that respondents were not required to plead or prove Omnicare's subjective disbelief in the opinions it stated. See Pet. App. 15a-17a. The court's stated reasons for that holding, however, were incomplete. The court explained that, because Section 11 does not require proof of scienter, "once a false statement has been made, a defendant's knowledge is not relevant to a strict liability claim." *Id.* at 16a. It is true that Section 11 does not require a plaintiff to prove any state of mind to recover; Section 11 imposes near-absolute liability on the issuer, 15 U.S.C. 77k(a), and what amounts to negligence liability on individual defendants, 15 U.S.C. 77k(a) and (b). Where the allegedly false or misleading statement is one of opinion, however, proof of the defendant's state of mind is directly relevant to whether that statement is "untrue." As explained above, statements of opinion are often express representations about the views the speaker holds, and the truth or falsity of such a representation logically depends on whether the speaker subjectively held the stated opinion.

The court of appeals also erred in suggesting that a statement of opinion is actionably false whenever the stated opinion is ultimately found to be incorrect. See Pet. App. 11a, 16a, 20a-22a. In ordinary parlance, the

statement "I believe X to be true" would not naturally be characterized as an "untrue statement of * * * fact" simply because X was later determined to be false. Liability under Section 11 depends, moreover, on whether "any part of the registration statement" contained a material misstatement or omission "when such part became effective." 15 U.S.C. 77k(a). Accordingly, whether a statement of opinion had sufficient basis depends on facts existing at the time the statement was made, not at a later time when a court can look back with the benefit of hindsight. See, *e.g.*, *Marx* v. *Computer Scis. Corp.*, 507 F.2d 485, 490 (9th Cir. 1974). The mere fact that an opinion is ultimately determined to be incorrect does not mean that the statement of opinion was false when made.

4. An example from outside the securities-law context illustrates these concepts. Suppose that a judge assigns a law clerk to a case some weeks before the scheduled date of oral argument, and subsequently asks the clerk on the eve of argument, "Which party do you think should prevail?" If the clerk replies, "I think the appellant has the better legal argument," the judge will reasonably infer both that the statement reflects the clerk's sincere legal judgment and that the clerk's opinion is premised on significant legal research and analysis.

If the law clerk actually believes that the appellant's legal argument is weak, but professes to hold the contrary view because he has a financial interest in the appellant's business, the statement is literally false because the clerk has claimed to hold an opinion that he did not actually believe. If the clerk sincerely believes that the appellant has the better of the argument, but the clerk's only study of the case consists of

reading a brief on-line summary of the competing legal theories, the clerk's statement of opinion may be literally true but will still be misleading, since it omits the critical fact that the clerk has not performed the expected legal analysis.[3] But if the clerk accurately communicates his subjective view of the merits, and that view is premised on reasonably diligent legal analysis, the clerk's statement of opinion would not be untrue or misleading simply because the court ultimately ruled in the appellee's favor.

B. The Court In *Virginia Bankshares* Recognized That Opinions May Be Actionable Under The Securities Laws Either If They Are Not Genuinely Held Or If They Lack Foundation

1. In *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083 (1991), the Court considered whether corporate directors can be liable under Section 14(a) of the Securities Exchange Act, 15 U.S.C. 78n(a), and SEC Rule 14a-9, 17 C.F.R. 240.14a-9, for their statements of reasons, opinions, or beliefs in a proxy solicitation. 501 U.S. at 1090-1091. Section 14(a) and Rule 14a-9 prohibit statements in proxy solicitations that are "false or misleading with respect to any material fact" or that "omit[] to state any material fact necessary in order to make the statements * * * not false or misleading." *Id.* at 1087 n.2 (quoting Rule 14a-9). At

---

[3] The situation would be different if the judge asked the clerk for his on-the-spot reaction to a newly-asserted legal argument. The clerk would still make an untrue statement of fact if he professed to hold an opinion that he did not actually believe. But, absent any contextual reason for the judge to infer that the clerk's stated opinion was premised on significant prior study, the clerk's failure to disavow such study would not be the sort of omission that would render the statement of opinion misleading.

issue in *Virginia Bankshares* were statements by the directors urging the adoption of a merger proposal and stating that the directors supported the proposal because shareholders could obtain a "high" value and a "fair" price for their stock. *Id.* at 1088. The Court concluded that those statements could be actionable under the securities laws. *Id.* at 1093-1095.

The Court first determined that statements of reason or belief may be "materially significant" to shareholders. *Virginia Bankshares*, 501 U.S. at 1090-1091. The Court explained that a reasonable investor would place weight on the directors' beliefs about the benefits of a merger because "[s]hareholders know that directors usually have knowledge and expertness far exceeding the normal investor's resources," and because the directors are "oblige[d] * * * to exercise their judgment in the shareholders' interest." *Id.* at 1091.

The Court in *Virginia Bankshares* then explained that statements of belief "are factual in two senses": "as statements that the directors do act for the reasons given or hold the belief stated," and "as statements about the subject matter of the reason or belief expressed." 501 U.S. at 1092-1093. On the first point, the Court observed that a statement of reasons or belief "purports to express what is consciously on the speaker's mind." *Id.* at 1090. On the second point, the Court explained that the directors' statements about the stock's value "are reasonably understood to rest on a factual basis that justifies them as accurate," and that the "absence" of such a basis would "render[] them misleading." *Id.* at 1093. The Court thus recognized that the directors' statements could be problematic if the directors *either* did not subjectively believe

that the merger would benefit shareholders *or* did not have a reasonable basis for the opinion stated.

Applying those principles, the Court concluded that the directors' statements in *Virginia Bankshares* were actionable under Section 14(a) and Rule 14a-9. The Court took as a given the jury's finding that the directors "did not hold the beliefs or opinions expressed," and it therefore "confine[d] [its] discussion to statements so made." 501 U.S. at 1090. The Court accordingly did not decide whether, or under what circumstances, a defendant can be liable under Section 14(a) and Rule 14a-9 for stating an opinion that *is* sincerely held. The Court then held that the plaintiffs had adduced sufficient evidence (including "provable facts about the Bank's assets" and "actual and potential levels of operation") to show that the directors had lacked a "factual basis" to make their statements "accurate." *Id.* at 1093-1094.

Having considered the situation where the statement of opinion both "misstate[s] the speaker's reasons and also mislead[s] about the stated subject matter," the Court went on to consider an alternative scenario not before the Court—a statement of belief that is "open to objection only" because it is "a misstatement of the psychological fact of the speaker's belief in what he says." *Virginia Bankshares*, 501 U.S. at 1095. The Court stated that "proof of mere disbelief or belief undisclosed should not suffice for liability under § 14(a)." *Id.* at 1096. The Court explained that "it would be rare to find a case with evidence solely of disbelief or undisclosed motivation without further proof that the statement was defective as to its subject matter," and that imposing liability based on subjective disbelief alone would unduly ex-

pand Section 14(a)'s implied private right of action. *Ibid.*

2. The *Virginia Bankshares* Court recognized the common-sense proposition that a company cannot escape liability for making misleading statements simply by couching them as opinions. The Court also recognized that a statement of opinion or belief can be false or misleading *either* because it is not genuinely held *or* because it lacks foundation. Section 11, like Section 14(a) and Rule 14a-9, imposes liability both for false statements of material fact and for omissions that render the explicit statements misleading. Compare 15 U.S.C. 77k with 15 U.S.C. 78n(a) and 17 C.F.R. 240.14a-9. Whether contained in a proxy solicitation or a registration statement, a director's statement of opinion can be materially misleading either because it is "knowingly false" or because it is "misleadingly incomplete." *Virginia Bankshares*, 501 U.S. at 1095.[4]

---

[4] Although the Court in *Virginia Bankshares* recognized that a statement of opinion can be misleading in two different ways, it stated in dicta that Section 14(a) does not impose liability if the only objection to the opinion is that it was not sincerely held. 501 U.S. at 1095-1096. Because respondents appear to have disavowed any contention that Omnicare did not subjectively believe the opinions it stated (J.A. 273 (para. 178)), this case presents no occasion for the Court to decide whether the same rule should apply under Section 11. There are good reasons, however, not to apply the Court's dicta about Section 14(a) to Section 11. As the *Virginia Bankshares* Court recognized, under modern tort law, a statement of opinion can be an actionable misrepresentation either because it does not reflect the speaker's actual belief or because it lacks foundation. See 501 U.S. at 1092-1093. The Court departed from that common-law principle because of a perceived need to narrow the Section 14(a) implied cause of action. *Id.* at 1096. Section 11, by contrast, includes an express private right of action

3. Petitioners read *Virginia Bankshares* to hold that, in order for a statement of opinion to be actionable under Section 14(a), the plaintiff must establish that the speaker did not actually hold that opinion. Pet. Br. 16-19. Petitioners rely (Br. 17-18) on the Court's observation that "[a] statement of belief may be open to objection only * * * as a misstatement of the psychological fact of the speaker's belief in what he says." 501 U.S. at 1095. Petitioners construe that observation to reflect the Court's legal conclusion that a statement of opinion is actionable under the securities laws "only" if it "misstate[s]" that "psychological fact."

Read in context, however, the quoted language was making a quite different point. In the sentence preceding the quoted language, the Court explained that the directors' "statements of reasons" in *Virginia Bankshares* itself were objectionable in two different respects because they both "misstate the speaker's reasons and also mislead about the stated subject matter." 501 U.S. at 1095. The Court's ensuing observation that "[a] statement of belief may be objectionable only in the former respect" (*ibid.*) simply reflected the Court's recognition that, in a different (hypothetical) case, the plaintiff's only proffered basis for impugning a particular statement of opinion might be the defendant's subjective insincerity. Indeed, because the Court went on to state in dicta that subjective disbelief alone would *not* render a statement of opinion actionable under Section 14(a), the quoted language cannot plausibly be read to suggest that

---

that was intended to encompass conduct beyond common-law fraud. See 15 U.S.C. 77k; see also pp. 27-29, *infra*.

such disbelief is the *only* valid basis for imposing liability.

C. Common-law Courts Imposed Liability For Statements Of Opinion That Either Were Not Genuinely Held Or Lacked A Reasonable Basis Under The Circumstances

1. The general rule at common law was that "a misrepresentation cannot be made of a matter of opinion," because the "person addressed * * * is assumed to be equally able to form his opinion, and to come to a correct judgment in respect to the matter." 2 John Norton Pomeroy, Jr., *A Treatise on Equity Jurisprudence* § 878, at 1813-1814 (4th ed. 1918) (Pomeroy); see also 2 Thomas M. Cooley, *A Treatise on the Law of Torts* § 352, at 567 (D. Avery Haggard ed., 4th ed. 1932) (Cooley). That principle was based on the doctrine of caveat emptor, and on the principle that courts of equity would not intervene where matters of opinion were "equally open to the inquiries of both parties" and "neither could be presumed to trust the other." 1 Joseph Story, *Commentaries on Equity Jurisprudence* § 269, at 266 (14th ed. 1918).

Despite that general rule, the common law identified certain circumstances in which a statement of opinion could be an actionable misrepresentation. First, a statement of opinion could be actionably false if it did not accurately reflect the speaker's actual opinion. A "statement that such an opinion exists" is an "affirmation *of a fact*," and if "[t]he existence of an opinion" is a "fact material to the proposed transaction" and "is untrue," then "it is a misrepresentation." Pomeroy § 878, at 1814-1815. If the person stating the opinion was an "expert[]" or had "special knowledge" of the transaction, "the other party ha[d]

a right to rely on [the opinion] without bringing his own judgment to bear." Cooley § 352, at 573 (citation omitted). A similar principle applied when there was a special "relationship between the parties," such as when "one party stands in a fiduciary capacity toward the other," in which case "the latter will naturally repose confidence in his opinions." 2 Fowler V. Harper et al., *Harper, James, and Gray on Torts* § 7.8, at 506 (3d ed. 2006) (Harper). The same was true of other relationships involving a "great disparity in knowledge." *Id.* at 506-507. In all those circumstances, "[t]he expression of opinion must be an honest one"; if a person "express[es] * * * a dishonest opinion to one entitled to rely upon it," then "an action will lie." Cooley § 352, at 572-573.

Second, common-law courts recognized that statements of opinion could actionably be false or misleading if they implied a foundation for the opinion that in fact was lacking. A statement of opinion may "imply the possession of information about the existence of external facts" justifying the opinion, and "as the implication of external facts increases," so does the "justification for reliance," especially where "there is also disparity of knowledge or expertise." Harper § 7.8, at 509. An opinion also may "create liability" if it "implies * * * the non-existence of the fact which makes the statement false" but the speaker actually knows that such facts exist. Story § 269, at 268 n.5.

2. Common-law misrepresentation decisions reflect those principles. In one leading case, a buyer of a hotel was permitted to rescind the contract because the seller had told the buyer that the current tenant was "a most desirable tenant," even though the tenant

was struggling financially. *Smith* v. *Land & House Prop. Corp.*, (1884) 28 Ch. D. 7 (C.A.) at 7-10 (Eng.). The seller argued that its statement was not actionable because it was "a mere expression of opinion." *Id.* at 10 (quoting party's argument). The court disagreed, holding that the seller had made a "misrepresentation of a specific fact." *Id.* at 15 (opinion of Bowen, L.J.); see *id.* at 13 (opinion of Baggallay, L.J.); *id.* at 17 (opinion of Fry, L.J.). As Lord Justice Bowen explained, "it is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact," because there is no liability for a statement of opinion when "the facts are equally well known to both parties." *Id.* at 15. But when "the facts are not equally known to both sides," then "a statement of opinion by the one who knows the facts best * * * impliedly states that [the speaker] knows facts which justify his opinion." *Ibid.*

In the context of a criminal fraud conviction, Judge Learned Hand explained that "[s]ome utterances are in such form as to imply knowledge at first hand, and the utterer may be liable, *even though he believes them*, if he has no knowledge on the subject." *Knickerbocker Merch. Co.* v. *United States*, 13 F.2d 544, 546 (2d Cir.) (emphasis added), cert. denied, 273 U.S. 729 (1926). Similarly, several state supreme courts applied the rule set out by Lord Justice Bowen in *Smith* to impose liability for statements of opinion that lacked foundation. For example, the Alabama Supreme Court found a statement of opinion about whether land would be suitable for use as a dairy fraudulent because "[i]f the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often

the statement of a material fact, for he impliedly states that he knows facts which justify his opinion." *Shepherd* v. *Kendrick*, 181 So. 782, 784 (1938) (quoting *Smith*, (1884) 28 Ch. D. at 15 (opinion of Bowen, L.J.)); see, *e.g.*, *Kefuss* v. *Whitley*, 189 N.W. 76, 81-82 (Mich. 1922) (relying on Lord Justice Bowen's explanation to assess liability for statements as to the value and salability of a tract of land).

3. Modern tort law continues to reflect the view that a statement of opinion may be misleading for either of the two reasons discussed above. The Second Restatement of Torts recognizes that the "holding of an opinion" is a "fact" that can be misrepresented. 3 Restatement (Second) of Torts § 525 cmt. d (1977) (Restatement). "[A]n expression of opinion is itself always a statement of at least one fact—the fact of the belief, the existing state of mind, of the one who asserts it." W. Page Keeton et al., *Prosser and Keeton on Torts* § 109, at 755 (5th ed. 1984) (Prosser and Keeton).

Even when an opinion is sincerely held, however, a person who expresses it can sometimes be held liable at common law if his statement of opinion implies the existence of a reasonable predicate that in fact is lacking. The Second Restatement explains: "A statement of opinion as to facts not disclosed and not otherwise known to the recipient may, if it is reasonable to do so, be interpreted by him as an implied statement" that the speaker "knows facts sufficient to justify" the opinion, or that he at least does not know facts "incompatible with his opinion." Restatement § 539; see *id.* § 539 cmt. a. A statement of opinion thus may "carry with it an implied assertion" that the speaker "know[s] facts which justify it." Prosser and Keeton

§ 109, at 760. That is especially true "when the maker [of the statement] is understood to have special knowledge of the facts unknown to the recipient." Restatement § 539 cmt. b. If a person is "reasonably understood" as conveying that he has a basis for his opinion, "he is subject to liability if he has not made [an] examination, or if he has not found facts that justify the opinion." *Ibid.*

4. In discussing Section 11's common-law antecedents (Pet. Br. 21-22), petitioners overlook the substantial body of law recognizing that statements even of sincerely-held opinions can be actionable if they imply a foundation that is lacking. See pp. 22-25, *supra*. Petitioners cite decisions stating that "knowledge of [a statement's] falsity" is required to establish fraud, *Howard* v. *Riggs Nat'l Bank*, 432 A.2d 701, 706 (D.C. 1981); see *Seymour* v. *Chicago & Nw. Ry.*, 164 N.W. 352, 354 (Iowa 1917), but that is because scienter is an element of common-law fraud, not because subjective disbelief is the only way in which a statement of opinion can be misleading. Indeed, the sources upon which petitioners rely recognize that whether a statement of opinion is misleading "depends on the circumstances in which the statement is made," and that a person can be liable for such a statement if it "amounts to an implied assertion that the speaker knows facts justifying the opinion" and such facts are lacking. 37 C.J.S. *Fraud* § 21, at 200-201 (2014).

D. Imposing Section 11 Liability For Statements Of Opinion That Are Not Genuinely Held Or Lack A Reasonable Basis Furthers Congress's Intent And Fulfills The Act's Purposes

1. Congress enacted the Securities Act of 1933, ch. 38, 48 Stat. 74, in the aftermath of the 1929 stock

market crash and during the Great Depression. House Report 1-3. The Act was the first national regulation of securities, and it focused on disclosure of information to the government and to potential investors. It was enacted after President Franklin D. Roosevelt urged Congress to require that "every issue of new securities to be sold in interstate commerce" be "accompanied by full publicity and information," where the "burden of telling the whole truth" would be "on the seller." *Id.* at 1-2 (quoting President's statement).

The linchpin of the Act is the requirement of a registration statement. See House Report 7 (noting the "basic importance" of the registration statement). The Act makes it unlawful to offer a security or to transmit a prospectus to potential buyers unless a registration statement containing certain information and signed by certain corporate officers is in effect. See §§ 5(a) and (b), 6(a), 7, 48 Stat. 77-78 (15 U.S.C. 77e(a) and (b), 77f(a), 77g). The registration statement must be filed with the Commission, and if it is incomplete or contains any material misstatement or omission, the Commission may issue a stop order and prevent the sale of the security. See § 8(a) and (d), 48 Stat. 79-80 (15 U.S.C. 77h(a) and (d)). Under the provision at issue here, a purchaser of the security also may sue for any material misrepresentations or omissions in the registration statement. See § 11, 48 Stat. 82-83 (15 U.S.C. 77k). Congress applied similar rules to prospectuses, requiring that they contain certain information and authorizing a cause of action for material misstatements or omissions. See §§ 10, 12, 48 Stat. 81, 84 (15 U.S.C. 77j, 77*l*). Together, these provisions embody a policy of "full and fair disclosure"

so that investors can make an "accurate judgment upon the value of the security." House Report 3.

2. The Act's imposition of civil liability for material misstatements or omissions in a registration statement was premised on, but went well beyond, common-law fraud principles. Although some courts had imposed liability for misstatements in the sales of securities, their "piecemeal" approach had proved unsatisfactory, Harry Shulman, *Civil Liability and the Securities Act*, 43 Yale L.J. 227, 227 (1933) (Shulman), and the "reach of strict fraud doctrine" was "far too short" to fulfill the goals of the 1933 Act. *Regulation of Stock Market Manipulation*, 56 Yale L.J. 509, 516 (1947). Accordingly, in fashioning the Act's civil-liability provisions, Congress "borrowed heavily from the background of the common law" (*id.* at 511) but also broadened liability in several important respects.

Congress rejected the common-law "rule of caveat emptor" and placed the burden of disclosure on the issuer and its officers. House Report 2 (quoting President Roosevelt's statement); see, *e.g.*, *SEC* v. *Capital Gains Research Bureau*, 375 U.S. 180, 186 (1963). Rather than treat the issuance of a security as an arm's-length transaction where the parties are on equal footing, Congress recognized that an issuer's directors have particular knowledge about the company. Also, the Act imposes liability for material omissions as well as for material misstatements. Under the common law, issuers sometimes could avoid liability by "omitting mention of a variety of matters and confining [the] circular and prospectus to truthful description of the show window without taking the investor through the store behind it." Shulman 242. The Act went further, requiring issuers to provide "a

picture not simply of the show window, but of the entire store." *Ibid.*

The Act also imposes a standard of care on directors, underwriters, and other persons involved in preparing the registration statement. Although some courts (including this Court) had, in individual cases, imposed duties of care on persons selling securities, see, *e.g.*, *Dickerman* v. *Northern Trust Co.*, 176 U.S. 181, 203-204 (1900), the "system as a whole" had "failed miserably in imposing those essential fiduciary standards that should govern persons whose function it was to handle other people's money." James M. Landis, *The Legislative History of the Securities Act of 1933*, 28 Geo. Wash. L. Rev. 29, 30 (1959). The Act holds the issuer and its officers to "the high standards of trusteeship," on the theory that "those responsible for statements upon the face of which the public is solicited to invest its money" must provide the public with full information. House Report 3, 5, 9; see H.R. Conf. Rep. No. 152, 73d Cong., 1st Sess. 26 (1933). That standard is embodied in the "reasonable belief" affirmative defense, which assesses reasonableness from the standard "of a person occupying a fiduciary relationship." Act § 11(b)(3) and (c), 48 Stat. 82-83 (15 U.S.C. 77k(b)(3) and (c)).[5]

---

[5] In 1934, Congress amended Section 11's affirmative defense to provide that "the standard of reasonableness shall be that required of a prudent man in the management of his own property." Securities Exchange Act of 1934, ch. 404, § 206(c), 48 Stat. 907. That change did not effect a departure from fiduciary standards. See H.R. Conf. Rep. No. 1838, 73d Cong., 2d Sess. 41 (1934) (provision was amended to use "the accepted common law definition of the duty of a fiduciary").

Section 11 departed from common-law fraud requirements in other respects as well. Rather than require proof of scienter, Congress imposed "virtually absolute" liability for issuers of a security, and placed "the burden of demonstrating due diligence" on directors, underwriters, and others. *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 382 (1983). A Section 11 plaintiff also need not prove either that he reasonably relied on the issuer's actionable statements or that those statements caused the plaintiff's loss. Shulman 248. Section 11 thus imposes a "heav[y] legal liability" on an issuer and its representatives, one that Congress thought justified because such persons have a "particularly heavy" "moral responsibility to the public." House Report 9.

3. Imposition of liability for a statement of opinion that either is not genuinely held or lacks a reasonable basis is consistent with the Act's design. The Act imposes liability when a registration statement "contain[s] an untrue statement of a material fact *or* omit[s] to state a material fact * * * necessary to make the statements therein not misleading." 15 U.S.C. 77k(a) (emphasis added). Congress's use of the disjunctive makes clear that, even if all statements of fact contained in a registration statement are literally true, the issuer may nevertheless be held liable if its failure to disclose other facts renders the explicit statements misleading. In addition, the Act's imposition of fiduciary standards on corporate officers reflects Congress's view that such officers have both specialized knowledge and an obligation to act in shareholders' interest. See Cooley § 352, at 573; Harper § 7.8, at 506; see also *Virginia Bankshares*, 501 U.S. at 1091. Because investors would reasonably

expect that issuers' statements of opinion are premised on an adequate factual foundation, an issuer's failure to disclose that no such foundation exists can cause the harms that Section 11 was intended to prevent.

4. Petitioners contend (Br. 32-38) that the court of appeals' approach would disserve the Act's purposes by imposing "liability by hindsight." In that respect, petitioners are correct. Section 11 liability depends on the registration statement's accuracy when the statement becomes effective, 15 U.S.C. 77k, because Congress's concern was that investors must be able to make an informed decision at the time of the public offering. House Report 3-4, 7, 9. To impose Section 11 liability on an issuer or its officers simply because a statement of opinion in a registration statement ultimately was proved false, even though the opinion was genuinely and reasonably held, would effectively treat the statement of opinion as a guarantee. The Act does not go that far. Rather, so long as an opinion expressed in a registration statement is sincerely held and is premised on an inquiry that is reasonable under the circumstances, a subsequent determination that the stated opinion was incorrect would not imply that the issuer's statement was either false or misleading.

For those reasons, the court of appeals misconstrued the Act by suggesting that a statement of opinion is actionable under Section 11 whenever the stated opinion is ultimately found to be incorrect. Petitioners go too far in the opposite direction, however, by arguing that statements of opinion are actionable *only* when the stated beliefs are not sincerely held. Petitioners' approach disregards Congress's decision to prohibit material omissions as well as express false

statements of fact. And, contrary to petitioners' contentions (Br. 34, 36), imposing Section 11 liability for opinions that are subjectively believed but that lack any reasonable foundation would pose no serious threat of "unpredictable" or "massive" liability. The issuer decides when to submit a registration statement, and if the issuer chooses to volunteer an opinion about its business, it is reasonable for investors to expect both that the opinion is honestly held and that it is premised on an inquiry sufficient to make it worthy of investor credence.

E. The SEC Has Consistently Recognized That Statements Of Opinion That Are Not Genuine Or That Lack A Reasonable Basis May Be Actionable Under The Securities Laws

1. The Commission's longstanding practice is consistent with the foregoing principles. For more than 50 years, the Commission has imposed liability in formal adjudications for statements of opinion made in bad faith or without a reasonable basis.

In *Hamilton Oil & Gas Corp.*, No. 24D-2258, 1961 WL 61074 (July 25, 1961), the Commission issued a stop order suspending the effectiveness of a registration statement because the statement included several opinions that lacked a reasonable basis. Without expressing a view on whether the opinions were sincerely held, the Commission explained that a statement of opinion that "anticipated income" would "be sufficient to defray the current operating expenses of the company" lacked a reasonable basis and "was so out of line with the company's past experience that it must be considered false." *Id.* at *14. The Commission also found it misleading for the registration statement to announce the expectations that the company would be

listed on the American Stock Exchange and that the stock would be worth $5 per share by a certain date, without also disclosing known facts that undercut those predictions. *Id.* at *8.

The Commission likewise has held that, under the anti-fraud provisions of the Securities Act and the Exchange Act, a broker-dealer who states an opinion to his customer in bad faith or without a reasonable basis has made a false statement. In *Alexander Reid & Co.*, No. 8-7105, 1962 WL 68464 (Feb. 8, 1962), the Commission held that "[g]roundless opinions come within the ambit of false or misleading statements prohibited by the securities laws," and it observed that a contrary approach would "run[] counter to the objectives of the Securities laws." *Id.* at *4. The Commission explained that "[a] broker-dealer in his dealings with customers impliedly represents that his opinions and predictions respecting a stock * * * are responsibly made on the basis of actual knowledge and careful consideration." *Ibid.* The Commission found it insufficient that the "dealer personally believes the representation for which he has no adequate basis," because the lack of sufficient basis rendered the statement misleading. *Ibid.*

Applying the same principles in *Richard J. Buck & Co.*, No. 3-417, 1968 WL 86080 (Dec. 31, 1968), aff'd *sub nom. Hanly* v. *SEC*, 415 F.2d 589 (2d Cir. 1969), the Commission censured a broker-dealer that had made "optimistic representations * * * without disclosure of known or reasonably ascertainable adverse information which rendered them materially misleading." *Id.* at *6. The Commission explained that the individual making the "optimistic or favorable representations" was "under a duty to disclose the

known or then reasonably ascertainable facts" that undercut the representations, in order to "enable the customer to assess the weight to be given to the optimism of the salesman and make an informed judgment on whether to purchase or retain the stock." *Ibid.* Similarly, in *Gold Props. Restoration Co.*, No. 3-7735, 1992 WL 211480 (Aug. 27, 1992), the Commission imposed a cease-and-desist order because documents disseminated to the public in connection with an initial public offering contained opinions that lacked foundation. The Commission explained that "[t]he gold reserves and estimates of value contained in each of these documents were materially false and misleading, because, among other things, the Respondents had no reasonable basis for the statements." *Id.* at *5.

2. The Commission's longstanding view that a statement of opinion is misleading when it lacks a reasonable basis under the circumstances is entitled to deference. Although only one of the Commission's formal adjudications (*Hamilton Oil & Gas Corp.*) concerned statements of opinion in a registration statement, all of the adjudications involved provisions that prohibit material misstatements or omissions. See 15 U.S.C. 77h(d), 77q(a)(2), 78j(b); 17 C.F.R. 240.10b-5(b). Those interpretations reflect a consistent and reasonable view of similar statutory language, and they comport with common-law concepts and the purposes of the securities laws. Accordingly, they should be given significant weight. See *SEC* v. *Zandford*, 535 U.S. 813, 819-820 (2002).

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
MALCOLM L. STEWART
Deputy Solicitor General
NICOLE A. SAHARSKY
Assistant to the Solicitor General

ANNE K. SMALL
General Counsel
MICHAEL A. CONLEY
Deputy General Counsel
JOHN W. AVERY
Deputy Solicitor
DOMINICK V. FREDA
Senior Litigation Counsel
STEPHEN G. YODER
Senior Counsel
Securities and Exchange Commission

JUNE 2014

APPENDIX

1. 15 U.S.C. 77e provides:

Prohibitions relating to interstate commerce and the mails

(a) Sale or delivery after sale of unregistered securities

Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) Necessity of prospectus meeting requirements of section 77j of this title

It shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security with respect to which a registration statement has been filed under this subchapter, unless such prospectus meets the requirements of section 77j of this title; or

(2) to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection (a) of section 77j of this title.

(c) Necessity of filing registration statement

It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 77h of this title.

(d) Limitation

Notwithstanding any other provision of this section, an emerging growth company or any person authorized to act on behalf of an emerging growth company may engage in oral or written communications with potential investors that are qualified institutional buyers or institutions that are accredited investors, as such terms are respectively defined in section 230.144A and section 230.501(a) of title 17, Code of Federal Regulations, or any successor thereto, to determine whether such investors might have an interest in a contemplated securities offering, either prior to or following the date of filing of a registration statement with re-

spect to such securities with the Commission, subject to the requirement of subsection (b)(2).

(e) Security-based swaps

Notwithstanding the provisions of section 77c or 77d of this title, unless a registration statement meeting the requirements of section 77j(a) of this title is in effect as to a security-based swap, it shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell, offer to buy or purchase or sell a security-based swap to any person who is not an eligible contract participant as defined in section 1a(18) of Title 7.

2. 15 U.S.C. 77f provides:

Registration of securities

(a) Method of registration

Any security may be registered with the Commission under the terms and conditions hereinafter provided, by filing a registration statement in triplicate, at least one of which shall be signed by each issuer, its principal executive officer or officers, its principal financial officer, its comptroller or principal accounting officer, and the majority of its board of directors or persons performing similar functions (or, if there is no board of directors or persons performing similar functions, by the majority of the persons or board having the power of management of the issuer), and in case the issuer is a foreign or Territorial person by its duly authorized representative in the United States; except

that when such registration statement relates to a security issued by a foreign government, or political subdivision thereof, it need be signed only by the underwriter of such security. Signatures of all such persons when written on the said registration statements shall be presumed to have been so written by authority of the person whose signature is so affixed and the burden of proof, in the event such authority shall be denied, shall be upon the party denying the same. The affixing of any signature without the authority of the purported signer shall constitute a violation of this subchapter. A registration statement shall be deemed effective only as to the securities specified therein as proposed to be offered.

(b) Registration fee

(1) Fee payment required

At the time of filing a registration statement, the applicant shall pay to the Commission a fee at a rate that shall be equal to $92 per $1,000,000 of the maximum aggregate price at which such securities are proposed to be offered, except that during fiscal year 2003 and any succeeding fiscal year such fee shall be adjusted pursuant to paragraph (2).

(2) Annual adjustment

For each fiscal year, the Commission shall by order adjust the rate required by paragraph (1) for such fiscal year to a rate that, when applied to the baseline estimate of the aggregate maximum offering prices for such fiscal year, is reasonably likely to produce aggregate fee collections under this sub-

section that are equal to the target fee collection amount for such fiscal year.

(3) Pro rata application

The rates per $1,000,000 required by this subsection shall be applied pro rata to amounts and balances of less than $1,000,000.

(4) Review and effective date

In exercising its authority under this subsection, the Commission shall not be required to comply with the provisions of section 553 of Title 5. An adjusted rate prescribed under paragraph (2) and published under paragraph (5) shall not be subject to judicial review. An adjusted rate prescribed under paragraph (2) shall take effect on the first day of the fiscal year to which such rate applies.

(5) Publication

The Commission shall publish in the Federal Register notices of the rate applicable under this subsection and under sections 78m(e) and 78n(g)[1] of this title for each fiscal year not later than August 31 of the fiscal year preceding the fiscal year to which such rate applies, together with any estimates or projections on which such rate is based.

(6) Definitions

For purposes of this subsection:

---

[1] See References in Text note below.

(A) Target fee collection amount

The target fee collection amount for each fiscal year is determined according to the following table:

2002	$377,000,000
2003	$435,000,000
2004	$467,000,000
2005	$570,000,000
2006	$689,000,000
2007	$214,000,000
2008	$234,000,000
2009	$284,000,000
2010	$334,000,000
2011	$394,000,000
2012	$425,000,000
2013	$455,000,000
2014	$485,000,000
2015	$515,000,000
2016	$550,000,000
2017	$585,000,000
2018	$620,000,000
2019	$660,000,000
2020	$705,000,000
2021 and each fiscal year thereafter.	An amount that is equal to the target fee collection amount for the prior fiscal year, adjusted by the rate of inflation.

(B) Baseline estimate of the aggregate maximum offering prices

The baseline estimate of the aggregate maximum offering prices for any fiscal year is the baseline estimate of the aggregate maximum offering price at which securities are proposed to be offered pursuant to registration statements filed with the Commission during such fiscal year as determined by the Commission, after consultation with the Congressional Budget Office and the Office of Management and Budget, using the methodology required for projections pursuant to section 907 of Title 2.

(c) Time registration effective

The filing with the Commission of a registration statement, or of an amendment to a registration statement, shall be deemed to have taken place upon the receipt thereof, but the filing of a registration statement shall not be deemed to have taken place unless it is accompanied by a United States postal money order or a certified bank check or cash for the amount of the fee required under subsection (b) of this section.

(d) Information available to public

The information contained in or filed with any registration statement shall be made available to the public under such regulations as the Commission may prescribe, and copies thereof, photostatic or otherwise, shall be furnished to every applicant at such reasonable charge as the Commission may prescribe.

(e) Emerging growth companies

(1) In general

Any emerging growth company, prior to its initial public offering date, may confidentially submit to the Commission a draft registration statement, for confidential nonpublic review by the staff of the Commission prior to public filing, provided that the initial confidential submission and all amendments thereto shall be publicly filed with the Commission not later than 21 days before the date on which the issuer conducts a road show, as such term is defined in section 230.433(h)(4) of title 17, Code of Federal Regulations, or any successor thereto.

(2) Confidentiality

Notwithstanding any other provision of this subchapter, the Commission shall not be compelled to disclose any information provided to or obtained by the Commission pursuant to this subsection. For purposes of section 552 of Title 5, this subsection shall be considered a statute described in subsection (b)(3)(B) of such section 552. Information described in or obtained pursuant to this subsection shall be deemed to constitute confidential information for purposes of section 78x(b)(2) of this title.

3. 15 U.S.C. 77g provides:

Information required in registration statement

(a) Information required in registration statement

(1) In general

The registration statement, when relating to a security other than a security issued by a foreign government, or political subdivision thereof, shall contain the information, and be accompanied by the documents, specified in Schedule A of section 77aa of this title, and when relating to a security issued by a foreign government, or political subdivision thereof, shall contain the information, and be accompanied by the documents, specified in Schedule B of section 77aa of this title; except that the Commission may by rules or regulations provide that any such information or document need not be included in respect of any class of issuers or securities if it finds that the requirement of such information or document is inapplicable to such class and that disclosure fully adequate for the protection of investors is otherwise required to be included within the registration statement. If any accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, is named as having prepared or certified any part of the registration statement, or is named as having prepared or certified a report or valuation for use in connection with the registration statement, the written consent of such person shall be filed with the registration statement. If any such person is named

as having prepared or certified a report or valuation (other than a public official document or statement) which is used in connection with the registration statement, but is not named as having prepared or certified such report or valuation for use in connection with the registration statement, the written consent of such person shall be filed with the registration statement unless the Commission dispenses with such filing as impracticable or as involving undue hardship on the person filing the registration statement. Any such registration statement shall contain such other information, and be accompanied by such other documents, as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors.

(2) Treatment of emerging growth companies

An emerging growth company—

(A) need not present more than 2 years of audited financial statements in order for the registration statement of such emerging growth company with respect to an initial public offering of its common equity securities to be effective, and in any other registration statement to be filed with the Commission, an emerging growth company need not present selected financial data in accordance with section 229.301 of title 17, Code of Federal Regulations, for any period prior to the earliest audited period pre-

sented in connection with its initial public offering; and

(B) may not be required to comply with any new or revised financial accounting standard until such date that a company that is not an issuer (as defined under section 7201 of this title) is required to comply with such new or revised accounting standard, if such standard applies to companies that are not issuers.

(b) Registration statement for blank check companies

(1) The Commission shall prescribe special rules with respect to registration statements filed by any issuer that is a blank check company. Such rules may, as the Commission determines necessary or appropriate in the public interest or for the protection of investors—

(A) require such issuers to provide timely disclosure, prior to or after such statement becomes effective under section 77h of this title, of (i) information regarding the company to be acquired and the specific application of the proceeds of the offering, or (ii) additional information necessary to prevent such statement from being misleading;

(B) place limitations on the use of such proceeds and the distribution of securities by such issuer until the disclosures required under subparagraph (A) have been made; and

(C) provide a right of rescission to shareholders of such securities.

(2) The Commission may, as it determines consistent with the public interest and the protection of investors, by rule or order exempt any issuer or class of issuers from the rules prescribed under paragraph (1).

(3) For purposes of paragraph (1) of this subsection, the term "blank check company" means any development stage company that is issuing a penny stock (within the meaning of section 78c(a)(51) of this title) and that—

(A) has no specific business plan or purpose; or

(B) has indicated that its business plan is to merge with an unidentified company or companies.

(c) Disclosure requirements

(1) In general

The Commission shall adopt regulations under this subsection requiring each issuer of an asset-backed security to disclose, for each tranche or class of security, information regarding the assets backing that security.

(2) Content of regulations

In adopting regulations under this subsection, the Commission shall—

(A) set standards for the format of the data provided by issuers of an asset-backed security, which shall, to the extent feasible, facilitate comparison of such data across securities in similar types of asset classes; and

(B) require issuers of asset-backed securities, at a minimum, to disclose asset-level or loan-level data, if such data are necessary for investors to independently perform due diligence, including—

(i) data having unique identifiers relating to loan brokers or originators;

(ii) the nature and extent of the compensation of the broker or originator of the assets backing the security; and

(iii) the amount of risk retention by the originator and the securitizer of such assets.

(d) Registration statement for asset-backed securities

Not later than 180 days after July 21, 2010, the Commission shall issue rules relating to the registration statement required to be filed by any issuer of an asset-backed security (as that term is defined in section 78c(a)(77)[1] of this title) that require any issuer of an asset-backed security—

(1) to perform a review of the assets underlying the asset-backed security; and

(2) to disclose the nature of the review under paragraph (1).

---

[1] See References in Text note below.

4. 15 U.S.C. 77h provides:

Taking effect of registration statements and amendments thereto

(a) Effective date of registration statement

Except as hereinafter provided, the effective date of a registration statement shall be the twentieth day after the filing thereof or such earlier date as the Commission may determine, having due regard to the adequacy of the information respecting the issuer theretofore available to the public, to the facility with which the nature of the securities to be registered, their relationship to the capital structure of the issuer and the rights of holders thereof can be understood, and to the public interest and the protection of investors. If any amendment to any such statement is filed prior to the effective date of such statement, the registration statement shall be deemed to have been filed when such amendment was filed; except that an amendment filed with the consent of the Commission, prior to the effective date of the registration statement, or filed pursuant to an order of the Commission, shall be treated as a part of the registration statement.

(b) Incomplete or inaccurate registration statement

If it appears to the Commission that a registration statement is on its face incomplete or inaccurate in any material respect, the Commission may, after notice by personal service or the sending of confirmed telegraphic notice not later than ten days after the filing of the registration statement, and opportunity for hearing (at a time fixed by the Commission) within ten days

after such notice by personal service or the sending of such telegraphic notice, issue an order prior to the effective date of registration refusing to permit such statement to become effective until it has been amended in accordance with such order. When such statement has been amended in accordance with such order the Commission shall so declare and the registration shall become effective at the time provided in subsection (a) of this section or upon the date of such declaration, whichever date is the later.

(c) Effective date of amendment to registration statement

An amendment filed after the effective date of the registration statement, if such amendment, upon its face, appears to the Commission not to be incomplete or inaccurate in any material respect, shall become effective on such date as the Commission may determine, having due regard to the public interest and the protection of investors.

(d) Untrue statements or omissions in registration statement

If it appears to the Commission at any time that the registration statement includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, the Commission may, after notice by personal service or the sending of confirmed telegraphic notice, and after opportunity for hearing (at a time fixed by the Commission) within fifteen days after such notice by personal service or the sending of such telegraphic notice, issue a stop

order suspending the effectiveness of the registration statement. When such statement has been amended in accordance with such stop order, the Commission shall so declare and thereupon the stop order shall cease to be effective.

(e) Examination for issuance of stop order

The Commission is empowered to make an examination in any case in order to determine whether a stop order should issue under subsection (d) of this section. In making such examination the Commission or any officer or officers designated by it shall have access to and may demand the production of any books and papers of, and may administer oaths and affirmations to and examine, the issuer, underwriter, or any other person, in respect of any matter relevant to the examination, and may, in its discretion, require the production of a balance sheet exhibiting the assets and liabilities of the issuer, or its income statement, or both, to be certified to by a public or certified accountant approved by the Commission. If the issuer or underwriter shall fail to cooperate, or shall obstruct or refuse to permit the making of an examination, such conduct shall be proper ground for the issuance of a stop order.

(f) Notice requirements

Any notice required under this section shall be sent to or served on the issuer, or, in case of a foreign government or political subdivision thereof, to or on the underwriter, or, in the case of a foreign or Territorial person, to or on its duly authorized representative in the United States named in the registration statement,

properly directed in each case of telegraphic notice to the address given in such statement.

5. 15 U.S.C. 77k provides:

Civil liabilities on account of false registration statement

(a) Persons possessing cause of action; persons liable

In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a

statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

(b) Persons exempt from liability upon proof of issues

Notwithstanding the provisions of subsection (a) of this section no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof—

(1) that before the effective date of the part of the registration statement with respect to which his liability is asserted (A) he had resigned from or had

taken such steps as are permitted by law to resign from, or ceased or refused to act in, every office, capacity, or relationship in which he was described in the registration statement as acting or agreeing to act, and (B) he had advised the Commission and the issuer in writing that he had taken such action and that he would not be responsible for such part of the registration statement; or

(2) that if such part of the registration statement became effective without his knowledge, upon becoming aware of such fact he forthwith acted and advised the Commission, in accordance with paragraph (1) of this subsection, and, in addition, gave reasonable public notice that such part of the registration statement had become effective without his knowledge; or

(3) that (A) as regards any part of the registration statement not purporting to be made on the authority of an expert, and not purporting to be a copy of or extract from a report or valuation of an expert, and not purporting to be made on the authority of a public official document or statement, he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading; and (B) as regards any part of the registration statement purporting to be made upon his authority as an expert or purporting to be a copy of or extract from a

report or valuation of himself as an expert, (i) he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or (ii) such part of the registration statement did not fairly represent his statement as an expert or was not a fair copy of or extract from his report or valuation as an expert; and (C) as regards any part of the registration statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy of or extract from a report or valuation of an expert (other than himself), he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement of the expert or was not a fair copy of or extract from the report or valuation of the expert; and (D) as regards any part of the registration statement purporting to be a statement made by an official person or purporting to be a copy of or extract from a public official document, he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the state-

ments therein were untrue, or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement made by the official person or was not a fair copy of or extract from the public official document.

(c) Standard of reasonableness

In determining, for the purpose of paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a prudent man in the management of his own property.

(d) Effective date of registration statement with regard to underwriters

If any person becomes an underwriter with respect to the security after the part of the registration statement with respect to which his liability is asserted has become effective, then for the purposes of paragraph (3) of subsection (b) of this section such part of the registration statement shall be considered as having become effective with respect to such person as of the time when he became an underwriter.

(e) Measure of damages; undertaking for payment of costs

The suit authorized under subsection (a) of this section may be to recover such damages as shall represent the difference between the amount paid for the

security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: *Provided*, That if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) of this section for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public. In any suit under this or any other section of this subchapter the court may, in its discretion, require an undertaking for the pay-

ment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

(f) Joint and several liability; liability of outside director

(1) Except as provided in paragraph (2), all or any one or more of the persons specified in subsection (a) of this section shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

(2)(A) The liability of an outside director under subsection (e) of this section shall be determined in accordance with section 78u-4(f) of this title.

(B) For purposes of this paragraph, the term "outside director" shall have the meaning given such term by rule or regulation of the Commission.

(g) Offering price to public as maximum amount recoverable

In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public.