

[Securities Regulation Daily Wrap Up, TOP STORY—U.S: Arguments in Leidos Reg. S-K disclosure liability case cancelled, \(Oct. 17, 2017\)](#)

Securities Regulation Daily Wrap Up

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By [Mark S. Nelson, J.D.](#)

Leidos, Inc. and Indiana Public Retirement System have jointly asked the Supreme Court to remove their case from the Court's oral argument calendar. It has been widely reported that the parties plan to settle claims that Leidos engaged in securities fraud by omitting information from its disclosures made to the Commission under Regulation S-K. The case will be held in abeyance according to an order issued by the Court and the oral argument scheduled for November 6 will not occur ([Leidos, Inc. v. Indiana Public Retirement System](#), October 17, 2017).

The *Leidos* case raised the [question](#) of whether Item 303 of Regulation S-K can give rise to [securities fraud liability](#) under Exchange Act Section 10(b) and Rule 10b-5. Item 303 spells out what a company must include in its management's discussion and analysis, including with respect to "known trends and uncertainties."

The *Leidos* case had asserted a split between the Second Circuit's opinion and two other circuits. In [Oran v. Stafford](#), then-Third Circuit Judge (now Justice) Alito, writing for the court, shut the door on Item 303 creating a private cause of action. The [Ninth Circuit](#) has cited *Oran* favorably regarding the different materiality standards under Rule 10b-5 and Item 303.

Assuming the *Leidos* case does settle, the scenario presented is akin to the *Indymac* case from a few years ago. There, the Court [dismissed](#) the grant of certiorari as having been improvidently granted even where a [proposed settlement](#) would not have resolved all claims and the parties had urged the justices to still hear the case. But the *American Pipe* tolling issue in *Indymac* returned to the Court last term in [CalPERS v. ANZ Securities, Inc.](#), where the court held that Securities Act Section 13's 3-year time limit is a statute of repose such that a pension fund that opted out of the class had filed its separate complaint too late.

In *Leidos*, the Court's [docket](#) indicates that four days after the parties filed their joint motion to take the case off the [oral argument calendar](#), the court issued an order granting the Solicitor General's request to participate as amicus curiae. Still, the Supreme Court already has an OT17 securities law [doubleheader](#) set for November 28:

- Whether amendments made to the Securities Act to prevent class action abuses preclude state court class action suits that raise only Securities Act claims ([Cyan v. Beaver County Employees Retirement Fund](#)).
- Whether the Dodd-Frank Act's whistle blower anti-retaliation provision (now part of the Exchange Act) embraces those who do not report alleged misconduct to the SEC ([Digital Realty Trust v. Somers](#)).

Beyond the two remaining OT17 cases, the Court will consider multiple certiorari petitions in the coming weeks. Among the highlights are two cases that ask the justices to decide if the SEC's administrative law judges were appointed consistent with the U.S. Constitution's Appointments Clause.

The case is [No. 16-581](#).

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Companies: Leidos, Inc.; Indiana Public Retirement System

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