

## US Supreme Court: Pure Omissions Not Actionable Under Rule 10b-5(b)

April 18, 2024

On April 12, 2024, the [US Supreme Court reversed the US Court of Appeals for the Second Circuit's decision in \*Macquarie v. Moab Partners\*](#) and held that a pure omission cannot form the basis of a securities fraud claim under Rule 10b-5(b). SCOTUS made clear that an omission is only actionable if it renders an affirmative statement materially misleading. Its ruling reiterates its 2011 holding in [Matrixx v. Siracusano](#) that “§10(b) and Rule 10b-5(b) do not create an affirmative duty to disclose any and all material information. Disclosure is required under these provisions only when necessary ‘to make ... statements made, in the light of the circumstances under which they were made, not misleading.’” As noted by Macquarie, had the Supreme Court ruled the other way, it could have “open[ed] the floodgates to potentially crippling private class action liability.”

The Supreme Court's decision resolves a circuit split regarding whether a company can be held liable under Rule 10b-5(b) solely for failing to make a disclosure required by a Securities and Exchange Commission (SEC) rule – Item 303 of Regulation S-K. Item 303 requires companies to disclose, in the management's discussion and analysis (MD&A) sections of their periodic SEC filings, any known trends or uncertainties that are reasonably likely to have a material impact on the company's financial condition and results of operations. The Second Circuit's ruling, which had held that a failure to disclose information required by Item 303 can amount to an actionable “omission” under Section 10(b), conflicted with rulings by the Third, Ninth, and Eleventh Circuits, which held that it cannot.

The decision by SCOTUS also limits Rule 10b-5(b) liability in certain circumstances – and is a reminder that silence is generally not actionable under Rule 10b-5. It is worth mentioning, though, that pure omissions can still trigger liability under Section 11 of the Securities Act of 1933, so companies should keep in mind that a failure to include disclosure required by Item 303 in one or more reports that are incorporated by reference into a registration statement can still trigger liability under Section 11 with respect to a securities offering under that registration statement. Additionally, the SEC can bring enforcement actions for violations of Item 303.

### Background

This case began as a putative class action complaint filed in and later [dismissed by the US District Court for the Southern District of New York](#). The plaintiff alleged that the defendants violated Rule 10b-5(b), which bars knowingly false or misleading statements. The defendant company, through a subsidiary, operates large “bulk liquid storage terminals.” The plaintiff claimed that the defendants failed to disclose the impact that pending regulations restricting the use of a certain refined petroleum product would have on the company's business. Although the plaintiff did not allege that this omission rendered any of the company's affirmative statements false or misleading, the plaintiff claimed that the omission violated Item 303 and served as an independent basis for liability.

The district court disagreed. It found that the plaintiff had failed to allege that the defendants' failure to discuss the impact of the fuel oil regulation was material and, more importantly, had failed to show that any impact had taken effect before the class period began, and so had failed to allege a violation of Item 303.

[A panel of the Second Circuit reversed the district court's decision](#), finding that the plaintiff had adequately alleged a violation

of Item 303. Moreover, it found the plaintiff sufficiently alleged the defendants **knowingly** misled the market in large part because they were required to, but did not, discuss the oil regulations' potential impact in their Item 303 disclosures. The court revived the plaintiff's claims, including its Rule 10b-5(b) claim, largely on this basis.

## Supreme Court's decision

Justice Sonia Sotomayor delivered the unanimous opinion of the Supreme Court, holding that pure omissions are not actionable under Rule 10b-5(b). The ruling explained that a pure omission "occurs when a speaker says nothing, in circumstances that do not give any particular meaning to that silence." In contrast, half-truths, which can form the basis of a Rule 10b-5(b) claim, are "representations that state the truth only so far as it goes, while omitting critical qualifying information."

The Supreme Court heavily relied on the statutory language of Rule 10b-5 to reach its decision. The rule prohibits omitting a material fact necessary "to make the statements made ... not misleading." In contrast, Section 11 imposes liability for failure to speak because it prohibits a registration statement that "omit[s] to state a material fact required to be stated therein." The ruling found that the difference in language signaled intent to impose liability for pure omissions under Section 11, but not under Rule 10b-5(b).

SCOTUS also addressed its 1988 decision in [Basic v. Levinson](#), which held that "[s]ilence, absent a duty to disclose, is not misleading under Rule 10b-5." The Supreme Court clarified that a duty to disclose does not automatically render silence misleading under Rule 10b-5(b). A violation of Item 303 can only support a Rule 10b-5(b) claim if the omission renders an affirmative statement misleading, consistent with the rule's plain language.

Finally, the Supreme Court rejected the plaintiff's argument that without liability for pure omissions, there will be "broad immunity any time an issuer fraudulently omits information Congress and the SEC require it to disclose." It explained that the SEC can still investigate and enforce violations of its regulations.

## Significance

There is no liability under Rule 10b-5(b) based solely on an omission of information required to be disclosed under Item 303 of Regulation S-K, where such omission does not render the existing disclosure misleading in any material respect. As such, companies and individuals across the US are protected from Rule 10b-5(b) liability – though not, as discussed above, Section 11 liability or SEC enforcement actions – where they do not expressly or impliedly speak on a topic. The decision emphasizes the importance of assessing whether statements could be construed as being misleading by omission. Such analysis is often a complicated process that is greatly assisted by seeking the advice of experienced counsel.

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