

Supreme Court Clarifies that Pure Omissions Under Item 303 of Reg. S-K Are Not Actionable Under Rule 10b–5(b)

Client Alerts

April 16, 2024

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I. Introduction

On April 12, 2024, in *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, the US Supreme Court held that a company’s mere failure to disclose information required by management’s discussion and analysis (Item 303 of SEC Regulation S-K) cannot support a private action under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b–5(b). Instead, Rule 10b–5(b) allows private suits based only on affirmative misrepresentations and “half-truths” that are misleading because they omit critical qualifying information.

The Court’s decision resolves a circuit split. The Second Circuit had held that a failure to make a required disclosure under Item 303 could support a private securities fraud claim, even if the company did not make an otherwise misleading statement or if the omission did not render the company’s “statements made” misleading. The United States supported this position, but all other Circuits to consider the issue disagreed. The Supreme Court has now clarified, in a unanimous opinion (authored by Justice Sotomayor), that pure omissions are not actionable under Rule 10b–5(b). Notably, however, the Court reminded that private suits are still permissible based on “Item 303 violations that create misleading half-truths.” And the Court expressly left open a series of related questions such as “what constitutes ‘statements made’” under Rule 10b–5, when “a statement is misleading as a half-truth,” and “whether Rules 10b–5(a) and 10b–5(c) support liability for pure omissions.”

II. Background

Macquarie Infrastructure Corporation (Macquarie) was a publicly traded company that held a portfolio of infrastructure-related businesses.^[1] One of these businesses was a liquid storage service that, among other things, refined a petroleum product high in sulfur content called No. 6 fuel oil.^[2] In 2016, the International Maritime Organization (IMO), a United Nations Agency, formally adopted a regulation that would cap, by the beginning of 2020, the sulfur content of fuel oil used in

shipping at a level lower than the sulfur content of No. 6 fuel oil.^[3] In 2018, Macquarie's liquid storage service business experienced a drop in demand and its stock price sharply fell due to the structural decline in the No. 6 fuel oil market.^[4]

In 2019, Moab Partners L.P. (Moab), an institutional investor, filed a complaint on behalf of a putative class of Macquarie stockholders, alleging claims under Section 10(b) and Rule 10b-5 for Macquarie's failure to disclose under Item 303 the impact of the IMO regulation on its No. 6 fuel oil business.^[5] Item 303 constitutes management's discussion and analysis (MD&A), which requires a company's management to disclose "known trends or uncertainties that have had or that are reasonably likely to have a material favorable or unfavorable impact" on the company's financial performance—in other words, how management sees the business. Presumably, Macquarie's management knew that IMO regulations would have a material impact on the fuel business.^[6] Rule 10b-5, for its part, makes it unlawful for issuers to "make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading."^[7] But the plaintiff's theory was predicated on the **failure to disclose being an omission**, therefore a violation under Rule 10b-5, rather than on any existing statement made by Macquarie being materially false or Macquarie's omissions making an existing statement materially false or misleading.

The District Court for the Southern District of New York granted dismissal of the class claims, holding that the plaintiff failed to allege that any "omitted information was material" under the applicable test for assessing Item 303 violations.^[8] The Second Circuit reversed in a summary order, holding that the plaintiff had "adequately alleged a 'known trend[] or uncertaint[y]' that gave rise to a duty to disclose under Item 303."^[9] This finding, the court continued, brought the complaint within the ambit of a body of Second Circuit caselaw, holding that "[t]he failure to make a material disclosure required by Item 303 can serve as the basis... for a claim under Section 10(b) if the other elements have been sufficiently pleaded."^[10]

The Second Circuit's holding put it in conflict with all other Circuits to consider this issue, which found that a failure to disclose under Item 303 did not trigger a violation of Rule 10b-5.^[11]

III. The Supreme Court's Decision

The Supreme Court disagreed with the Second Circuit and sided with all other circuits in holding that an issuer's mere failure to disclose under Item 303 cannot result in Rule 10b-5(b) liability unless it also renders another of the issuer's affirmative statements misleading.

First, the Court reasoned that Rule 10b-5(b) only proscribes "half-truths," not pure omissions.^[12] By its plain text, Rule 10b-5(b) prohibits the omission of facts necessary to make the "statements made... not misleading," which the Court interpreted to logically mean that the rule requires

affirmative assertions before determining whether other facts were required to make those statements “not misleading.”^[13] In other words, a pure omission is not actionable under Rule 10b–5(b). To further support this conclusion, the Court contrasted the rule’s language with that of Section 11(a) of the Securities Act of 1933, which explicitly prohibits the pure omission of material facts in registration statements.^[14]

Next, the Court rejected Moab’s argument that without private liability for pure omissions under Rule 10b–5(b), there will be “broad immunity any time an issuer fraudulently omits information Congress and the SEC require it to disclose.”^[15] The Court explained that private parties may still bring claims for Item 303 violations based on “misleading half-truths,” and the SEC may also prosecute violations of its regulations (or issue rules to provide for violations by omission).^[16]

Ultimately, the Court vacated the Second Circuit’s judgment and remanded the case for further proceedings. But the Court also noted that it was expressly not addressing other issues that had been addressed in the briefs, namely “what constitutes ‘statements made,’ when a statement is misleading as a half-truth, or whether Rules 10b–5(a) and 10b–5(c) support liability for pure omissions.”^[17]

IV. Implications and Takeaways

1. **Unified Standard for Certain 10b–5 Actions:** The *Macquarie* decision thankfully brings the Second Circuit’s law in line with all the other circuits to have considered this issue. And the Court’s unanimous decision leaves little doubt as to how the justices will address (or could address) similar claims.
2. **Does Not Change Principles-Based Disclosure Required Under MD&A:** In 2020, the SEC simplified MD&A by emphasizing the principles-based nature of Item 303 and decreasing the number of inflexible disclosures.^[18] While public companies should not read *Macquarie* as an opportunity to sidestep material disclosures, companies would do well to revisit the Item 303 Adopting Release and consider how their MD&A statements are material to their business and reflect how their disclosures allow investors to see “through the eyes of management.”^[19]
3. **Importance of Disclosure Controls and Procedures:** The decision highlights the importance of disclosure controls and procedures for public companies. Disclosure committees can be reminded about how Rule 10b–5(b) liability arises from half-truths and failure to make accurate disclosures rather than pure omissions.
4. **Open Questions Related to Liability for Future Item 303 Disclosures:** *Macquarie* does not resolve all issues related to Item 303. Going forward, lower courts will need to address the open questions the Court declined to address here—namely, what constitutes “statements

made,” when a statement is a misleading half-truth, and whether Rules 10b–5(a) and 10b–5(c) support liability for pure omissions. Depending on how those questions are answered, Item 303 may well be back up at the Court eventually. Indeed, the Court has a history of circling back to questions of securities law that it declined to address in related cases.^[20]

Footnotes

[1] Slip op. at 2.

[2] *Id.*

[3] *Id.*

[4] *Id.* at 2–3.

[5] *Id.* at 3; Brief for Respondent Moab Partners, L.P. at 10–11, *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, No. 22-1165 (2024).

[6] 17 C.F.R. § 229.303(b)(2) (2022).

[7] 17 C.F.R. § 240.10b–5(b) (2022).

[8] See *City of Riviera Beach Gen. Emps. Ret. Sys. v. Macquarie Infrastructure Corp.*, 2021 WL 4084572, at *10 (S.D.N.Y. Sept. 7, 2021).

[9] *Moab Partners, L.P. v. Macquarie Infrastructure Corp.*, 2022 WL 17815767, at *2 (2d Cir. Dec. 20, 2022) (alterations in original) (quoting 17 C.F.R. § 229.303).

[10] *Id.* (citing *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 101–04 (2d Cir. 2015)).

[11] See, e.g., *Oran v. Stafford*, 226 F.3d 275, 288 (3d Cir. 2000); *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1056 (9th Cir. 2014); *Carvelli v. Ocwen Fin. Corp.*, 934 F.3d 1307, 1330 (11th Cir. 2019).

[12] Slip op. at 5.

[13] *Id.* at 5–6.

[14] *Id.* at 6–7.

[15] *Id.* at 7.

[16] *Id.* at 7–8.

[17] *Id.* at 8 n.2.

[18] SEC, *Management’s Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information*, Release No. 33-10890; 34-90459, at 28–29 (Nov. 19, 2020) available at <https://www.sec.gov/files/rules/final/2020/33-10890.pdf>.

[19] *Id.* at 29.

[20] *See, e.g., Liu v. SEC*, 140 S. Ct. 1936, 1940 (2020) (addressing whether a disgorgement award is “equitable relief” for the purposes of 28 U.S.C. § 2462, an issue that the Court had previously declined to resolve in *Kokesh v. SEC*, 137 S. Ct. 1635, 1642 n.3 (2017)).

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