



# WEIL'S SCOTUS TERM IN REVIEW

April 12, 2024

## Supreme Court Closes the Floodgates— Narrows Item 303 Claims

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Today, the Supreme Court unanimously held in *Macquarie Infrastructure Corp. v. Moab Partners* that a pure omission of a disclosure required by Item 303 of Regulation S-K does not support an investor claim under Section 10(b) of the Securities Exchange Act of 1934.

Section 10(b) prohibits manipulation and deception in the purchase and sale of securities, which the SEC has defined in Rule 10b-5(b) to include “mak[ing] any untrue statement of a material fact or . . . omit[ting] to state a material fact necessary in order to make the statements made . . . not misleading.” Item 303 of Regulation S-K requires issuers to disclose, in certain of their public filings, “known trends or uncertainties” that are “reasonably likely to have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations.”

The federal courts of appeals have disagreed on whether a private plaintiff may bring a Section 10(b) claim based solely on a defendant’s failure to make a required disclosure under Item 303. While some federal courts of appeals have held that a failure to make a required disclosure can form the basis of a Section 10(b) claim only when the omission renders an issuer’s other affirmative statements materially misleading, the Second Circuit in this case held that a failure to disclose under Item 303 standing alone can give rise to a Section 10(b) claim, even in the absence of any affirmative statements rendered misleading by the failure to disclose.

In a unanimous opinion by Justice Sotomayor, the Court reversed the Second Circuit and held that a pure failure to make a required disclosure under Item 303 does not give rise to a section 10(b) claim. In the case on review, stockholders had sued Macquarie Infrastructure Corp. for allegedly failing to disclose under Item 303 the potential risk to its business posed by pending United Nations regulations. The Second Circuit reversed the district court’s dismissal of the claim, holding that the plaintiff’s allegations established a failure to make a required disclosure under Item 303 and thereby established a Section 10(b) claim.

The Court disagreed and reversed the Second Circuit, holding that Rule 10b-5(b) “covers half-truths, not pure omissions, because it requires identifying affirmative assertions (*i.e.*, ‘statements made’) before determining if other facts are needed to make those statements ‘not misleading.’” Thus, “[t]he failure to disclose information required by Item 303 can support a Rule 10b-5(b) claim only if the omission renders affirmative statements made misleading.” The Court rejected the notion that a regulatory duty to disclose renders silence misleading. Such a rule, the Court explained, would “shift[] the focus of [Rule 10b-5(b)] and §10(b) from fraud to disclosure.”

The Court’s decision in *Moab* narrows the threat of liability to issuers for failure to disclose “known trends or uncertainties,” exposing them to private liability under Section 10(b) only if the plaintiff is able to identify an affirmative statement rendered misleading by the failure to disclose. Violations of Item 303, however, may still lead to liability under Sections 11 and 12 of the Securities Act of 1933 (provided the other elements of those claims are met) and enforcement actions by the SEC.

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