Securities Regulation Daily Wrap Up, FRAUD AND MANIPULATION—2d Cir.: SIFMA backs Goldman Sachs's bid for rehearing of class certification decision, (May 27, 2020)

Securities Regulation Daily Wrap Up

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By Mark S. Nelson, J.D.

SIFMA argued in an amicus brief that a divided Second Circuit opinion upholding the certification of a class against Goldman Sachs could have the effect of making such certifications nearly automatic in future cases.

Goldman Sachs Group, Inc. earlier in May 2020 asked the Second Circuit panel that rejected the firm's effort to decertify a securities fraud class action against the firm to rehear the case or, alternatively, for the entire Second Circuit to rehear the case because of alleged errors made by the majority opinion upholding the district court's class certification order. The underlying case arose from allegations that Goldman Sachs failed to disclose that a hedge fund picking assets for a collateralized debt obligation (CDO) offering could bet against the CDO contrary to statements by Goldman Sachs about the propriety of its investment methods. The Securities Industry and Financial Markets Association (SIFMA) and the Bank Policy Institute have now joined Goldman Sachs's rehearing bid by filing a joint amicus brief highlighting many of the same errors cited by Goldman Sachs's petition in support of rehearing (*Arkansas Teacher Retirement System v. Goldman Sachs Group, Inc.*, May 19, 2019).

In its rehearing petition, Goldman Sachs emphasized that no court had ever certified a class in a securities class action predicated on the inflation maintenance theory and grounded in general statements attributed to the defendant. The Supreme Court in *Halliburton II* had concluded that a defendant in a securities class action case may, under the *Basic* reliance presumption, seek to rebut evidence of price impact at the class certification stage. Second Circuit precedent speaks of rebutting price impact by "any showing" that breaks the chain between the misrepresentation and the company's stock price drop.

According to Goldman Sachs, the majority in the Second Circuit decision overreached by allowing the class certification to proceed on the basis of generalized statements by Goldman Sachs. As examples, Goldman Sachs cited the following statements: (1) "Our clients' interests always come first"; (2) "We are dedicated to complying fully with the letter and spirit of the laws, rules and ethical principles that govern us"; and (3) "Integrity and honesty are at the heart of our business."

SIFMA's amicus brief puts the matter in even more stark relief by asserting that the Second Circuit decision, if it is allowed to stand, could increase securities class action litigation, undermine the *Basic* framework, and make class certification nearly automatic. SIFMA said it was especially concerned that the type of generalized statements Goldman Sachs made are common in the financial industry. SIFMA, like Goldman Sachs, would have the Second Circuit panel (or the full Second Circuit) reconsider the matter with emphasis on the dissent from the panel decision.

Specifically, SIFMA argued that judges in securities class action cases should consider the nature of allegedly misleading statements made by a defendant even at the risk that a district judge's evaluation may involve some "overlap" with the merits of the case. In the panel decision, the Second Circuit majority had rejected the dissenting judge's view on the ground that the dissent would improperly have district judges decide merits issues at the class certification stage.

The case is No. 18-3667.

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Companies: Arkansas Teacher Retirement System; Goldman Sachs Group, Inc.

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