

Generic ESG Statements Remain Under Fire: Class Certification Granted for the Third Time as the Saga of the Goldman Sachs Securities Litigation Continues

Update

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Back in June, we [analyzed](#) the Supreme Court's decision in *Goldman Sachs Group v. Arkansas Teacher Retirement System*, which examined the extent to which a corporation's arguably generic public statements could form the basis of a securities fraud action. Although the Supreme Court advised that the generic nature of alleged misstatements should be given weight when deciding class certification, last week the Southern District of New York found the statements at issue non-generic enough to certify the *Goldman Sachs* plaintiff class on remand. In light of these decisions, companies should be wary of issuing disclosures and making other public ESG statements that may be less generic or aspirational than they appear.

The *Goldman Sachs* Litigation

In *Goldman Sachs*, a class of investors alleged they were misled by Goldman's written public statements concerning corporate governance issues—*i.e.*, the "G" in ESG, or Environmental, Social and Governance. The particular statements in *Goldman Sachs* concerned the company's conflicts of interest policies, including Goldman's claims that "Our clients' interests always come first"; "Integrity and honesty are at the heart of our business"; and "We have extensive procedures and controls that are designed to identify and address conflicts of interest."

In its June 2021 [opinion](#), the Supreme Court confirmed that defendant corporations bear the burden of establishing that their public statements did not impact the firm's stock price, but also acknowledged that the generic nature of the statements should be included in a court's assessment of that impact. The Supreme Court remanded the case to the Second Circuit, directing it to reconsider its affirmance of class certification under this holding.

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The case made its way back to U.S. District Judge Paul A. Crotty, who last week ruled once again that the case could proceed as a class action. Revisiting the evidence following the Supreme Court's "fresh guidance," Judge Crotty held that the evidence presented still supported a conclusion that the alleged misstatements impacted Goldman's stock price.

Directly addressing the Supreme Court's guidance with respect to generic statements, Judge Crotty stated that while "some of the statements at issue are more generic than others," Goldman's alleged misstatements were "not so generic as to diminish their power to maintain pre-existing price inflation"—including, in particular, Goldman's specific statements regarding its "extensive procedures and controls" for identifying and addressing conflicts of interest. Judge Crotty also found that the existence of similar statements made by Goldman's competitors supported a finding that Goldman's statements influenced the company's stock price, since "it seems unlikely that Goldman's conspicuous failure to conform . . . would be irrelevant to investors."

Analysis

When the Supreme Court first issued its decision over the summer, many commentators inferred that the landscape had shifted, and that plaintiff-investors would now face a tougher hurdle at the class certification stage when suing over allegedly misleading generic statements. Yet the Supreme Court's holding left the door open for district courts to certify such class actions where there is evidence of price impact, as Judge Crotty appears to have done.

Only time will tell whether Judge Crotty's decision becomes the norm, where cases are certified based upon ESG statements issuers consider generic, or if other courts take the *Goldman Sachs* ruling as a directive to deny certification based on such statements. Barring a settlement, the case is likely to make its way back up to the Second Circuit, and perhaps again to the Supreme Court.

Regardless, the Supreme Court's *Goldman Sachs* opinion and the district court's discussion of the potential impact of generic ESG statements should be considered when companies make disclosures and other public-facing ESG statements to investors. As the distinction between objectively actionable statements and generic, aspirational, or forward-looking statements becomes less clear, companies in every industry should remain mindful of the need to scrutinize disclosures and statements closely.

Bracewell has a multi-disciplinary team focused on ESG issues. We advise and support our clients drawing on our expertise in environmental strategies, securities matters, regulatory issues, government enforcement, labor and employment, commercial litigation, and crisis management, and we are at the forefront of the transition to sustainable energy. Please contact your Bracewell team member for more information.

