Labaton Keller Sucharow

Investor Alert

The Supreme Court Dismisses Facebook's Writ of Certiorari for Review of Item 105 Risk Factor Disclosures as Improvidently Granted

On November 22, 2024, the Supreme Court issued its first opinion of the November term—a single line order that dismissed Facebook's writ of certiorari as improvidently granted, just sixteen days following oral argument by the parties and the United States (as amicus).[1] As explained in Labaton's previous Investor Alert,[2] Facebook filed a petition for writ of certiorari that presented the following question: "Are risk disclosures false or misleading when they do not disclose that a risk has materialized in the past, even if that past event presents no known risk of ongoing future business harm?"[3] Plaintiffs argued in their briefing, and at argument, that neither party actually disputed the question presented, as written, because neither party disagreed with the concept that a corporation does not have a duty to disclose information relating to a past event that presents no risk of ongoing or future harm to the business because for example, if a risk posed no possible harm to a company, the nondisclosure of that risk could be immaterial to investors.[4] The parties did strongly disagree, however, over Facebook's request for a finding that Item 105 risk factor disclosures were categorically excluded from liability under the federal securities laws when the warned of hypothetical risk had materialized in the past but the harm from that materialized risk had not yet been publicly realized or acknowledged.

During the November 6, 2024 oral argument, several justices were skeptical of Facebook's position because a determination of a statement's falsity and materiality calls for a fact intensive analysis that is not well suited for a categorical rule such as the one proposed by Facebook. For example, Justice Sonia Sotomayor challenged Facebook's contention during argument that it was not asking for a categorical brightline rule, stating:

> ***[Y]ou keep accusing the Ninth Circuit of an absolute rule, but I'm hearing your absolute rule*. Your absolute rule is— or categorical rule, you say it in your brief at page 19: "Risk disclosures under 105 make no implied representation about a company's past experiences." Later, you say: "Forward-looking risk disclosures do not make any implied assertion about previous events and the present risk of harm they create." So you're —*you want a different categorical rule . . . .*[5]**

Similarly, Justice Amy Coney Barrett responded to the position articulated by Facebook—that

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[1] *Facebook, Inc. v. Amalgamated Bank, et al.*, 604 U.S. (2024) (No. 23-980).

[2] Michael P. Canty, Lauren A. Ormsbee & Charles J. Stiene, *Investor Alert: Facebook Seeks Supreme Court Review of Item 105 Risk Factor Disclosures*, Labaton Keller Sucharow LLP (Nov. 4, 2020).

[3] Petition for Writ of Certiorari, *Facebook, Inc. v. Amalgamated Bank, et al.*, No. 23-980 (March 4, 2024).

[4] Response to Petition for Writ of Certiorari, at 11-22, *Facebook, Inc. v. Amalgamated Bank, et al.*, No. 23-980 (April 29, 2024).

[5] Transcript of Oral Argument at 20-21, *Facebook, Inc. v. Amalgamated Bank, et al.*, 604 U.S. (2024) (No. 23-980).

Item 105 is forward looking and the regulation itself does not require the disclosure of previous events—by stating:

> **[I]t seems to me, based on a lot of the hypotheticals that you've gotten and the ones written in the briefs, that it's about more than just the regulatory context but also about the context of the business, the nature of the risk, et cetera, which makes it not easily susceptible to a categorical rule.** [6]

Ultimately, while it is impossible to know the reasoning behind the November 22 decision, the justices in effect determined that Facebook's petition for certiorari should not have been taken up, dismissing the appeal as "improvidently granted."[7] This Supreme Court order is a victory not only for investors, but also for lower courts tasked with assessing a complaint's allegations on a case-by-case basis. As Justice Elena Kagan explained to Facebook's counsel during oral argument, whether an Item 105 risk disclosure is materially misleading is an "inquiry [that] is more contextual than your position allows for."[8] Encapsulated best by counsel for Plaintiffs, "it's always case-dependent, and it's always fact-specific."[9]

Labaton Keller Sucharow's lawyers are available to address any questions you may have regarding these developments. Please contact the Labaton Keller Sucharow lawyer with whom you usually work or the contacts below.

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[6] *Id.* at 41-42.

[7] *Facebook, Inc. v. Amalgamated Bank, et al.*, 604 U.S. (2024) (No. 23-980).

[8] Transcript of Oral Argument at 10, *Facebook, Inc. v. Amalgamated Bank*, 604 U.S. (2024) (No. 23-980).

[9] *Id.* at 73.