

Inside the Courts An Update From Skadden Securities Litigators

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Ninth Circuit Finds That Information Obtained Through FOIA Requests May Constitute Corrective Disclosure

On November 3, 2020, in the second decision addressing the standards for pleading loss causation under the Securities Exchange Act of 1934 in the last month, the Ninth Circuit reversed in part the dismissal of a securities fraud class action, holding that information obtained through a Freedom of Information Act (FOIA) request can be a “corrective disclosure” for purposes of pleading loss causation if the FOIA information revealed new information to the market. See *Grigsby v. BofI Holding, Inc.*, No. 19-55042 (9th Cir. Nov. 3, 2020).

BofI is a nationwide bank that offers various financial services. In 2016, the SEC allegedly issued a pair of investigatory subpoenas to BofI related to possible money laundering. The next year, in response to a *New York Post* article reporting the investigation, BofI issued a press release denying any knowledge of an investigation into money laundering. Subsequently, the *Post* published information obtained through a FOIA request to the SEC allegedly showing that BofI knew about the investigation when it issued its press release denying such knowledge.

Purported BofI shareholders brought claims under Sections 10(b) and 20(a) of the Securities Exchange Act, alleging BofI defrauded investors by denying knowledge of the SEC investigation. The district court dismissed these claims for failure to plead loss causation, holding that because the information published by the *Post* purportedly showing the falsity of BofI’s press release was publicly available to anyone through a FOIA request to the SEC, disclosure of that information could not be a “corrective disclosure” sufficient to plead loss causation. The court reasoned that “information about a company that is available from its federal regulator through the FOIA is publicly available to an information-hungry market.”

The Ninth Circuit reversed the district court’s conclusion on this issue. The court rejected the district court’s general conclusion that information available through FOIA can never establish loss causation. The court reasoned that because FOIA information is only disclosed by the government if requested, and not all FOIA requests are granted, courts cannot assume that information known to government regulators is also known to the market. Applying its reasoning to this case, the court held that the record did not

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permit the conclusion that the information published in the *Post* article had been previously disclosed to the market, and therefore the plaintiffs adequately pled loss causation.

The decision in *Grigsby* suggests that not all information that is theoretically accessible to the public has necessarily been disclosed to the public in a way that could affect the market

price of a security. Therefore, while the court did not state a bright-line rule, defendants seeking to challenge a plaintiff's loss causation allegations — in the Ninth Circuit at the pleading stage — should consider pointing to prior public disclosures of the information, instead of to the theoretical public accessibility of the information.