

**SEC RULE 412 PRECLUDES CLAIM CHALLENGING
REGISTRATION STATEMENTS BASED ON
SUPERSEDED STATEMENTS IN INCORPORATED FILINGS**

On April 18, 2012, the United States District Court for the Southern District of New York issued an opinion in *In re General Electric Co. Securities Litigation*, No. 09-CIV-1951, granting reconsideration of a January 2012 partial denial of a motion to dismiss. In so doing, the Court dismissed all claims brought under the Securities Act of 1933, thereby eliminating all 26 underwriter defendants and 16 director defendants from the case. The Court relied on the application of SEC Rule 412 to render statements in prior incorporated filings superseded. It also held that opinions were inactionable in the absence of allegations of subjective falsity, as were GAAP violations when the complaint failed to plead quantitative materiality. Willkie represented the underwriter defendants in the litigation.

Background

In 2009, the State Universities Retirement System of Illinois, the lead plaintiff, brought a putative class action against General Electric Co. (“GE”) and the underwriters of an October 2008 \$12 billion GE common stock offering. The plaintiff alleged, pursuant to the Securities Act of 1933, that the offering documents were false and misleading as to GE’s ability to maintain its AAA credit rating, its continued ability to pay a quarterly \$0.31 dividend, its accounting and prospects, and its ability to sell commercial paper. In January 2012, Judge Richard Holwell, in one of his last decisions on the bench, dismissed many of the 1933 Act claims but sustained those relating to GE’s commercial paper and to GE’s accounting for certain assets.

The defendants moved for reconsideration of the two remaining 1933 Act claims, and subsequently the case was reassigned to Judge Denise Cote following Judge Holwell’s retirement from the bench.

The Reconsideration Decision

On reconsideration, the Court held that “[t]he January Opinion improperly relied on statements that were not incorporated into the Offering Documents, and on statements that were modified and superseded by later statements.” Notably, plaintiff relied on statements in GE’s prior Form 10-Ks for 2005 to 2007, which were incorporated by reference into the offering documents. Those 10-Ks had characterized commercial paper markets as “reliable,” and impaired access as “unlikely.” But the October 2008 prospectus supplement itself described “current levels of market disruption and volatility,” the prospect of “further deterioration in the commercial paper and other credit markets,” and that “there can be no assurance that such markets will continue to be a reliable source of short-term financing for GE Capital.” As the Court explained, SEC Rule 412, promulgated in 1982, provides that when the substance of a statement in the prospectus

“modifies or replaces” a prior statement in an incorporated filing, the prior statement “shall not be deemed to constitute part of the registration statement,” regardless of whether the prospectus expressly states that it has modified or superseded that prior statement. Applying SEC Rule 412, the Court ruled that GE’s description of “ongoing events in the financial crisis” in the prospectus “modifies GE’s earlier statements on the likelihood of impaired access to commercial paper markets and reliability of commercial paper.” The superseded statements, therefore, “are not deemed to constitute part of the Offering Documents,” and are thus not actionable under the 1933 Act.

The Court further granted reconsideration because the January opinion did not address the impact of *Fait v. Regions Financial Corporation*, 655 F.3d 105 (2d Cir. 2011), on the actionability of opinions. Under *Fait*, plaintiffs cannot attack opinions unless they adequately allege subjective falsity, that is, that the speaker disbelieved the statement at the time he made it. Because the plaintiff in *GE* disclaimed any form of knowing misconduct with regard to its 1933 Act claims, it could not allege that any opinion was made with subjective falsity.

Also of note, the Court found that “[t]he January Opinion wrongly concluded that GE’s alleged reclassification of assets in violation of GAAP gave rise to material misrepresentations in the Offering Documents.” Even if the defendant did violate GAAP and the complaint “successfully makes out a claim that GE’s valuation was inflated,” the accounting claim must still be dismissed unless the complaint makes “a plausible allegation as to *how much* this valuation was inflated and that this amount was material.” Without such facts, it is impossible to assess whether there was “a substantial likelihood that a reasonable shareholder” would have considered such a misstatement “important in deciding how to act.”

Conclusion

The Court’s reconsideration decision in *In re General Electric Co. Securities Litigation* marks the first time that a court has applied the plain meaning of SEC Rule 412 to dismiss claims based on statements in earlier incorporated filings that, in substance, were later effectively superseded by the offering documents. Importantly, the decision recognizes that offering documents need not expressly state that they are superseding outdated earlier statements in incorporated documents.

The decision also makes clear that allegations of GAAP violations standing alone are insufficient to establish liability under the securities laws. Under Federal Rule of Civil Procedure 8 and *Ashcroft v. Iqbal*, allegations about unquantified amounts of GAAP violations do not plausibly allege materiality.

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