

Fifth Circuit Flags False Start in Challenge to SEC Gag Rule

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In January 2024, the SEC denied New Civil Liberties Alliance’s petition to halt so-called gag orders. The SEC has a procedural rule that requires it to impose these orders on individuals and companies settling with the SEC on a “neither admit nor deny” basis. The gag orders are generally included in settlement agreements and, among other things, prohibit the settling party from making any future denial of the SEC’s allegations. The history of and challenges to the SEC’s gag rule are more fully discussed in [“The SEC’s Compulsory Practice of Restraining Free Speech: ‘You Signed It, So Live With It!’”](#) *Expect Focus – Life, Annuity, and Retirement Solutions* (January 2024). Here, however, we discuss one procedural hurdle petitioners may face when challenging the SEC’s gag rule. Specifically, in March 2024, the Fifth Circuit Court of Appeals, in a different matter, declined to entertain the appeal of a trial court’s denial of a petitioner’s motion for a declaratory judgment that would strike the SEC’s gag rule language from his settlement agreement. The trial court had denied the motion to strike as procedurally improper because, it held, a party cannot seek declaratory relief by motion but instead must file a separate action for declaratory judgment. On appeal, the Fifth Circuit held it lacked jurisdiction over the appeal because the trial court’s denial of the declaratory judgment motion “did not dispose of [the petitioner’s] entire claim but merely prevented [the petitioner] from pursuing a claim through the wrong procedural vehicle.” Accordingly, the trial court’s denial was not a final decision and an appellate court, therefore, could not address the propriety of the SEC’s gag rule. Further, the appellate court noted that to exercise appellate jurisdiction in these circumstances would “dramatically undercut” the final judgment requirement and “erroneously establish that [the Fifth Circuit]

is willing to consider future post-judgment orders on procedurally improper motions denied as such.” The Fifth Circuit also recognized that the Ninth and Eleventh Circuits have found that declaratory judgment requests are “not properly before the court if raised only” through a motion. Thus, the court declined “to open that Pandora’s box of frivolous appeals.” Thus, any petitioner who seeks to challenge the SEC’s gag rule must maneuver into a procedural posture that will allow a court to proceed with its review, such as filing a complaint challenging the gag rule. Notably, Elon Musk has done just that, positing the most recent challenge to the SEC’s gag rule via a petition for certiorari to the U.S. Supreme Court seeking to lift his 2018 consent decree, which required Musk to obtain pre-approval for any Tesla-related tweets and prohibited Musk from publicly disagreeing with the SEC’s

allegations. The SEC has asked the Supreme Court to deny Musk’s petition, arguing that Musk knowingly waived his rights. Though we cannot predict what the Supreme Court will do regarding Musk’s petition, we can state with certainty that federal courts across the country will continue to examine defendants’ constitutional rights with respect to the SEC’s gag rule.

Authored By



Nader A. Amer



Natalie A. Napierala

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