Notes

RETHINKING *JANUS*: PRESERVING PRIMARY-PARTICIPANT LIABILITY IN SEC ANTIFRAUD ENFORCEMENT ACTIONS

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ABSTRACT

The Securities and Exchange Commission relies heavily on the securities laws' antifraud provisions in fulfilling its role as watchdog of the U.S. securities markets. But the Supreme Court's decision in Janus Capital Group, Inc. v. First Derivative Traders *has frustrated the SEC's efforts to keep fraud at bay. There the Court drastically narrowed the scope of actors who can qualify as primary participants in misrepresentations perpetrated in connection with the purchase or sale of securities under Rule 10b-5(b). This Note argues that* Janus*'s holding creates an incongruence in the SEC's ability to enforce the securities laws' misrepresentation provisions, with the SEC's ability to prosecute misrepresentations now varying depending on the stage of securities dealings at which the misrepresentation occurred. This result runs counter to the SEC's purpose in creating Rule 10b-5 and to Congress's desire that the SEC enjoy broad authority to pursue fraudsters. This Note analyzes solutions for curing this incongruence, including the SEC's recent bid for judicial deference to its interpretations of the relevant regulations and statutes.*

INTRODUCTION

The Securities and Exchange Commission (SEC or the Commission) has long been the primary overseer of the U.S. securities markets. Among the most important regulatory tools at the Commission's disposal are the provisions targeting fraudulent

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conduct perpetrated at the various stages of securities dealings. These primary antifraud provisions, Section 17(a) of the Securities Act of 1933 (Securities Act)[1] and Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act),[2] deal, respectively, with fraudulent activities occurring in the "offer and sale" of a security, and those occurring in subsequent "purchase or sale" of a security on secondary markets, such as the New York Stock Exchange and the NASDAQ. Following the Supreme Court's decision in *Janus Capital Group, Inc. v. First Derivative Traders*,[3] however, the SEC is at risk of having an incongruent ability to prosecute fraudsters depending on the stage of securities dealings at which their actions took place.

In *Janus*, the Supreme Court limited the scope of actors who can be held liable as primary participants under SEC Rule 10b-5(b),[4] promulgated under Section 10(b) of the Exchange Act, for making materially misleading statements or omissions in connection with the purchase or sale of a security.[5] In addressing a Rule 10b-5(b) claim brought by private litigants under Rule 10b-5's implied private right of action, the Court held that to "make" an untrue statement within the meaning of Rule 10b-5(b) requires having "ultimate authority over the statement, including its content and whether and how to communicate it."[6]

Janus's "ultimate authority" rule has bred uncertainty regarding the SEC's ability to pursue primary participants under the federal securities antifraud provisions. This uncertainty stems mainly from the fact that *Janus* involved a suit brought under Rule 10b-5's implied *private* right of action.[7] In such cases, the Court consistently interprets

1. 15 U.S.C. § 77q(a)(2) (2012).

2. *Id.* § 78j(b). For an overview of the Exchange Act's enactment, see generally Steve Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 STAN. L. REV. 385 (1990).

3. Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296 (2011).

4. 17 C.F.R. § 240.10b-5(b) (2015). Rule 10b-5(b) makes it

> unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange . . . [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

Id.

5. *Janus*, 131 S. Ct. at 2302 (holding that misstatement liability under Rule 10b-5(b) is proper only for those with "ultimate authority over the statement, including its content and whether and how to communicate it").

6. *Id.*

7. *Id.* at 2299.

securities laws restrictively to give "narrow dimensions . . . to a right of action Congress did not authorize when it first enacted the statute."[8] The SEC, by contrast, enjoys Congress's explicit blessing to bring enforcement suits against those who violate the securities laws, including Rule 10b-5.[9] The Court's approach to implied private rights of action under these securities laws therefore raises the question of whether *Janus* was meant to interpret what "make" means only in the context of private securities litigation under Rule 10b-5,[10] or whether the Court's interpretation was meant to apply with equal force to the SEC.[11] But concluding that *Janus* applies to SEC enforcement actions brought under Rule 10b-5(b) only raises the question of why the Court interpreted "make" in the manner it did—by relying on precedents that do not affect the SEC. This Note offers an explanation for the Court's methodology by considering the SEC's intentions in promulgating Rule 10b-5 and Congress's reactions to other judicial interpretations in implied private-right-of-action suits.

This Note also takes a fresh look at whether *Janus* should apply to other theories used by the SEC to target misrepresentations: enforcement actions brought under Section 17(a)(2) and those brought via a scheme-liability theory under Rule 10b-5(a) and (c). Section 17(a)(2), like Rule 10b-5(b), provides the SEC with the ability to prosecute actors for misrepresentations. But two differences are significant. First, Section 17(a)(2) prohibits misrepresentations "in the offer and sale of securities," and does not apply to the postdistribution purchase of securities on the secondary markets, which is Rule 10b-5(b)'s domain. Second, rather than prohibiting "mak[ing] any untrue statement of a material fact,"[12] as Rule 10b-5(b) does, Section 17(a)(2) prohibits "obtain[ing] money or property *by*

8. Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 167 (2008).

9. *See generally* Securities Exchange Act of 1934, 48 Stat. 881, 15 U.S.C. §§ 78a–78kk (2012) (establishing the SEC's broad enforcement authority of securities laws).

10. *See* Donald C. Langevoort, *Lies Without Liars?* Janus Capital *and Conservative Securities Jurisprudence*, 90 WASH. U. L. REV. 933, 941 (2013) (arguing that in *Janus* "we are being told what 'make' means *in the context of private securities litigation* under Rule 10b-5, leaving open how it is to be construed in the context of public enforcement").

11. *See* Bryan P. King, *The Effects of an Undefined "Ultimate Authority" Standard for Rule 10b-5 Claims:* Janus Capital Group, Inc. v. First Derivative Traders, 16 N.C. BANKING INST. 405, 430 (2012) ("While the SEC has wider authority to bring suits under Rule 10b-5 than individuals in private actions, the Court did not provide one definition of the word 'make' for private actions, and a separate definition for SEC actions.").

12. 17 C.F.R. § 240.10b-5(b) (2015).

means of any untrue statement of a material fact."[13] Given, however, that both provisions are designed to perform the same function, just at different stages of securities dealings,[14] many scholars have questioned whether *Janus*'s narrow interpretation of Rule 10b-5(b) also applies to Section 17(a)(2). *Janus*'s application, if any, to Rule 10b-5(a) and (c) scheme-liability claims also warrants attention given that not applying the ultimate authority rule to such claims could allow the SEC to prosecute the conduct Rule 10b-5(b) forbids while avoiding *Janus*'s constraints. Congress's approach to the scope of the federal securities laws provides additional insight into *Janus*'s reach by exposing Congress's preferences regarding the appropriate scope of the SEC's power to enforce the antifraud provisions.

This Note proceeds in four Parts. Part I focuses on the relevant statutory background for *Janus* and the precedents invoked to support the ultimate authority rule. Part II analyzes the *Janus* opinion itself and the various factors motivating the Court's formulation of the ultimate authority rule. Part III analyzes *Janus*'s impact on the various theories by which the SEC can target misrepresentations, including a Rule 10b-5(b) enforcement action, a scheme-liability theory via Rule 10b-5(a) and (c), and a Section 17(a)(2) enforcement action. These inquiries show that applying *Janus* to SEC enforcement actions under Rule 10b-5(b) creates an incongruence between the SEC's ability to prosecute actors for misrepresentations in connection with the purchase of securities under Rule 10b-5(b) and those in connection with the offer of securities under Section 17(a)(2). Part IV proposes solutions to this gap, including the SEC's recent bid to secure judicial deference for its interpretations concerning *Janus*'s reach.

I. *JANUS*'S ROOTS: THE SECURITIES LAWS' ANTIFRAUD PROVISIONS AND PRIVATE-ACTION JURISPRUDENCE

Understanding *Janus* and appreciating its implications for the SEC's enforcement authority requires a grasp of both the relevant statutory provisions and the precedent used to support the Court's holding. This Part first describes the securities laws' antifraud provisions, Section 17(a) of the Securities Act[15] and Section 10(b) of

13. 15 U.S.C. § 77q(a)(2) (2012).
14. *See infra* notes 131–32 and accompanying text.
15. 15 U.S.C. § 77q(a)(2) (2012).

the Exchange Act,[16] and their key differences. It then introduces the private-action precedent the Court relied on in *Janus* to interpret "make" in Rule 10b-5.

A. The Securities Laws' Antifraud Provisions

The Securities Act regulates the offer and sale of securities. The Act's antifraud provision, Section 17(a), makes it unlawful to engage in certain conduct at this stage of securities dealings. Section 17(a)(1) prohibits "employ[ing] any device, scheme, or artifice to defraud."[17] Section 17(a)(2), the misrepresentation provision, prohibits "obtain[ing] money or property by means of any untrue statement of a material fact or any [material] omission."[18] And Section 17(a)(3) prohibits "engag[ing] in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."[19]

The Exchange Act regulates the trading of securities on secondary markets[20] and seeks to eliminate abuses in trading of securities after their initial distribution.[21] Section 10(b) of the Exchange Act[22] is the key antifraud provision of the federal securities laws applying to postdistribution trading. This Section authorizes the SEC[23] to promulgate antifraud rules that proscribe the use of "any manipulative or deceptive device or contrivance" "in connection with the purchase or sale of any security."[24] The Commission used this

16. *Id.* § 78j(b).

17. *Id.* § 77q(a)(1).

18. *Id.* § 77q(a)(2).

19. *Id.* § 77q(a)(3).

20. Robert M. Lawless, Stephen P. Ferris & Bryan Bacon, *The Influence of Legal Liability on Corporate Financial Signaling*, 23 J. CORP. L. 209, 218 (1998) ("[T]he 1934 Act governs the trading of securities in the secondary markets, such as the New York Stock Exchange or the NASDAQ.").

21. Combatting fraud in the secondary securities markets is the primary focus of the Exchange Act. Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881, 881 (1934) (describing the Exchange Act's purpose as to "prevent inequitable and unfair practices on such exchanges and markets").

22. 15 U.S.C. § 78j(b).

23. *Id.*; *see also id.* § 78w(a) (stating that the Commission has the "power to make such rules and regulations as may be necessary or appropriate to implement the provisions of this chapter for which they are responsible or for the execution of the functions vested in them by this chapter").

24. *Id.* § 78j(b). In its entirety, Section 10(b) makes it unlawful

> to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement[,] any manipulative or deceptive device or contrivance in

grant to create Rule 10b-5,[25] which over time became the "primary private remedy for fraud available under the Securities Exchange Act."[26] This Rule implements the Commission's authority under Section 10(b) in three ways. Rule 10b-5(a) prohibits "employ[ing] any device, scheme, or artifice to defraud."[27] Rule 10b-5(b), the misrepresentation provision at issue in *Janus*, prohibits "mak[ing] any untrue statement of a material fact or [omitting] to state a material fact necessary in order to make the statements made . . . not misleading."[28] Finally, Rule 10b-5(c) prohibits "engag[ing] in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person."[29]

The format and language of Rule 10b-5 bears a striking resemblance to that of Section 17(a) of the Securities Act, and for good reason. Indeed, "the SEC's 'only purpose' in adopting Rule 10b-5 was to make the same prohibitions contained in Section 17(a)—which applies in connection with the '*offer* and sale' of a security—applicable to 'purchasers' of securities as well."[30] If Rule 10b-5 was intended to essentially apply Section 17(a) to purchasers of securities on secondary markets, should *Janus*'s interpretation of Rule 10b-5 be imported to Section 17(a)?

B. Janus*'s Private-Action Precedent*

The Court has been consistent in giving "narrow dimensions . . . to a right of action Congress did not authorize when it first enacted the statute."[31] This desire to constrain the scope of liability under the implied right of action guided the Court's interpretation of Rule 10b-5(b)'s "make" in *Janus*.[32] Indeed, the two cases the Court relied on to

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> contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Id.

25. 17 C.F.R. § 240.10b-5 (2015).

26. THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION § 12.3[1] (6th ed. 2009).

27. 17 C.F.R. § 240.10b-5(a).

28. *Id.* § 240.10b-5(b).

29. *Id.* § 240.10b-5(c).

30. SEC v. Kelly, 817 F. Supp. 2d 340, 345 (S.D.N.Y. 2011) (citing Birnbaum v. Newport Steel Corp., 193 F.2d 461, 463 (2d Cir. 1952); SEC v. Tex. Gulf Sulphur Co., 401 F.2d 833, 855 (2d Cir. 1968)).

31. Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 167 (2008).

32. Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296, 2303 (2011) ("Our holding accords with the narrow scope that we must give the implied private [right of action]." (citing *Stoneridge*, 552 U.S. at 167)).

reach its holding in *Janus—Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*[33] and *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*[34]—were responsive to concerns present solely in claims brought under implied private rights of action.

1. *Restricting Aiding-and-Abetting Liability:* Central Bank of Denver. In *Central Bank*, the Supreme Court held for the first time—while addressing a suit brought under Section 10(b)'s implied private right of action—that liability under Section 10(b) does not extend to aiders and abettors.[35] From the outset the Court stressed the type of action at issue, asking the parties to address a question not presented in the petition: "Whether there is an implied private right of action for aiding and abetting violations of Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b–5."[36] In answering this question, the Court narrowed the scope of liability under Section 10(b) and Rule 10b-5 on two grounds: the statutory language and concerns for aider-and-abettor liability's impact on the element of reliance that private plaintiffs must prove.

Addressing the statutory language, the Court emphasized that "the text of the statute controls," and thus "the private plaintiff may not bring a 10b-5 suit against a defendant for acts not prohibited by the text of Section 10(b)."[37] Because the statute's "proscription does not include giving aid to a person who commits a manipulative or deceptive act," the Court reasoned that liability under Section 10(b) does not extend to aiders and abettors.[38] Second, and though the Court's focus on the statute's text apparently binds the SEC to the same degree it does private plaintiffs,[39] the Court buttressed its

33. Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994).

34. Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148 (2008).

35. *Cent. Bank*, 511 U.S. at 177. The SEC defines aiders and abettors as those who "provide[] substantial assistance to another person in violation of a provision of this chapter, or of any rule or regulation issued under this chapter." 15 U.S.C. § 78t(e) (2012).

36. Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 508 U.S. 959, 959 (1993) (mem.).

37. *Cent. Bank*, 511 U.S. at 173; *see also id.* at 177 ("It is inconsistent with the settled methodology in § 10(b) cases to extend liability beyond the scope of conduct prohibited by the statutory text.").

38. *Id.* at 177.

39. Justice Stevens voiced this very concern in his dissent:

> [T]his case concerns only the existence and scope of aiding and abetting liability in suits brought by private parties under § 10(b) and Rule 10b-5. The majority's rationale, however, sweeps far beyond those important issues. The majority leaves

holding by referencing a concern attendant only upon private actions. Significantly to the Court, that Section 10(b) liability does not reach aiders and abettors necessarily follows from the need to preserve the requirement that private plaintiffs "show reliance on the defendant's misstatement or omission to recover under 10b-5."[40] That is, because an aider and abettor has not "engaged in such a proscribed act, but merely assisted in its commission, to permit recovery against such a defendant would allow the plaintiff to circumvent the reliance requirement which the Court has repeatedly held was a part of the plaintiff's case."[41] The Court therefore concluded that aiding-and-abetting liability was improper because "the defendant could be liable without any showing that the plaintiff relied upon the aider and abettor's statements or actions."[42]

2. *The Reliance Requirement:* Stoneridge Investment Partners. In *Stoneridge*, the Court granted certiorari to resolve the circuit split regarding "when, if ever, an injured investor may rely upon § 10(b) to recover from a party that neither makes a public misstatement nor violates a duty to disclose but does participate in a scheme to violate § 10(b)."[43] The plaintiff sued Scientific Atlanta, Inc. (Scientific-Atlanta) for participating in a scheme to violate Section 10(b),[44] alleging that Scientific-Atlanta entered into fraudulent contracts with Charter Communications, Inc. (Charter) that helped Charter inflate

> little doubt that the Exchange Act does not even permit the *SEC* to pursue aiders and abettors in civil enforcement actions under § 10(b) and Rule 10b-5.

Id. at 199–200 (Stevens, J., dissenting); *see also* Joel Seligman, *The Implications of* Central Bank, 49 BUS. LAW 1429, 1435 (1994) (stating that "it appears highly probable that the lower courts will conclude that the logic of *Central Bank* equally applies to SEC and private aiding and abetting claims under [S]ection 10(b)").

40. *Cent. Bank*, 511 U.S. at 180 (citing Basic Inc. v. Levinson, 485 U.S. 224, 242 (1988)). A private plaintiff bringing a Section 10(b) and/or Rule 10b-5 action must establish the following: "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 157 (2008).

41. James D. Cox, *Just Desserts for Accountants and Attorneys After* Bank of Denver, 38 ARIZ. L. REV. 519, 520 (1997); *see also Cent. Bank*, 511 U.S. at 180 ("[The plaintiff's] argument would impose 10b-5 aiding and abetting liability when at least one element critical for recovery under 10b-5 is absent: reliance. . . . Allowing plaintiffs to circumvent the reliance requirement would disregard the careful limits on 10b-5 recovery mandated by our earlier cases.").

42. *Cent. Bank*, 511 U.S. at 180.

43. *Stoneridge*, 552 U.S. at 156.

44. *Id.* at 155.

its revenue and operating cash flow.[45] Charter then included this inflated number on financial statements filed with the SEC and reported to the public[46] financial statements that Scientific-Atlanta had no hand in preparing or disseminating.[47] Scientific-Atlanta's own financial statements listed the transactions in accordance with generally accepted accounting principles.[48]

In its decision, the Court addressed the issue solely in terms of the reliance element of the plaintiff's cause of action.[49] The Court reiterated that "[r]eliance by the plaintiff upon the defendant's deceptive acts is an essential element of the § 10(b) private cause of action."[50] But nothing Scientific-Atlanta did "made it necessary or inevitable for Charter to record the transactions as it did."[51] In such circumstances, "the investors cannot be said to have relied upon any of [Scientific-Atlanta's] deceptive acts in the decision to purchase or sell securities," and primary liability under Section 10(b) was therefore inappropriate.[52] Following its methodology in *Central Bank*, the Court displayed a desire to prevent expansion of the implied private right of action and invoked various policy considerations in support of its holding.[53] Its inquiry again focused on policy concerns attendant only to suits brought under the implied private right of action.[54] For example, expanding the scope of liability would "expose a new class of defendants to [the] risks" of frivolous lawsuits brought to extort settlements.[55]

45. *Id.* at 153–55.

46. *Id.* at 155.

47. *Id.*

48. *Id.*

49. *Id.* at 159 (holding that "respondents' acts or statements were not relied upon by the *investors*, and that, as a result, liability cannot be imposed upon respondents" (emphasis added)).

50. *Id.*

51. *Id.* at 161.

52. *Id.* at 166–67.

53. *See id.* at 167 ("This conclusion is consistent with the narrow dimensions we must give to a right of action Congress did not authorize when it first enacted the statute . . . ."); *see also id.* at 165 ("Concerns with the judicial creation of a private cause of action caution against its expansion. The decision to extend the cause of action is for Congress, not for us. Though it remains the law, the § 10(b) private right should not be extended beyond its present boundaries.").

54. *See id.* at 161–64 (describing the policy concerns).

55. *Id.* at 163–64.

Central Bank and *Stoneridge* significantly influenced the creation of the ultimate authority rule in *Janus*[56] and helped chart the course the Court has subsequently followed in narrowly defining the scope of primary-participant liability under Section 10(b) and Rule 10b-5. *Janus*, in narrowing the scope of primary-participant liability under Section 10(b) and Rule 10b-5 in an implied private-right-of-action case, is but the Court's most recent tapering of private rights of action under the securities laws.

II. The *Janus* Decision and Ultimate Authority

In *Janus*, the Court followed the path set forth in *Central Bank* and *Stoneridge* and once again limited the scope of actors who can be held liable as primary participants under Section 10(b) and Rule 10b-5. As in those cases, concerns for preventing the expansion of the implied private right of action guided the Court's holding. The Court interpreted "make" in Rule 10b-5(b) such that only the person or entity with "ultimate authority over the statement, including its content and whether and how to communicate it" can be liable under the provision.[57]

A. *Factual Background*

Janus Capital Group created multiple mutual funds, one of which, Janus Investment Fund—a separate entity owned by mutual-fund investors—retained Janus Capital Group's wholly owned subsidiary, Janus Capital Management, as its investment advisor.[58] Janus Investment Fund issued multiple prospectuses to its investors that "represented that the funds were not suitable for market timing"[59] and could have been "read to suggest that [Janus Capital

56. *See* Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296, 2302–03 (2011) (describing the support the "ultimate authority" rule finds in *Central Bank* and *Stoneridge*).

57. *Id.* at 2302.

58. *Id.* at 2299.

59. Market timing is a trading strategy that exploits time delay in a mutual fund's daily valuation system. Disclosure Regarding Market Timing and Selective Disclosure of Portfolio Holdings, 68 Fed. Reg. 70,402, 70,403–04 (proposed Dec. 17, 2003) (to be codified at 17 C.F.R. pt. 239). Due to time delays, the values underlying calculations of the fund's net asset value (NAV) do not always accurately reflect the true value of the underlying assets. *Id.* Thus, if an event were expected to increase the price of a foreign security, an investor engaging in market timing could buy shares of a mutual fund at an artificially low NAV and sell the following day when the NAV corrects upward. *Janus*, 131 S. Ct. at 2300 n.1 (citing Disclosure Regarding Market Timing and Selective Disclosure of Portfolio Holdings, 68 Fed. Reg. at 70,403–04).

Management] would implement policies to curb the practice."[60] But New York's Attorney General filed a complaint against Janus Capital Group and Janus Capital Management alleging that the former agreed to permit market timing in several funds controlled by the latter.[61] First Derivative Traders, representing a class of Janus Capital Group stockholders, subsequently brought a suit alleging that Janus Capital Group and Janus Capital Management violated Section 10(b) and Rule 10b-5.[62]

B. The Ultimate Authority Rule

Justice Thomas framed the issue as "whether [Janus Capital Management] can be held liable in a private action under Rule 10b-5 for false statements included in Janus Investment Fund's prospectuses."[63] Because Rule 10b-5(b) makes it unlawful "[t]o make any untrue statement of a material fact" in connection with the purchase or sale of securities,[64] imposing liability required finding that Janus Capital Management "'made' the material misstatements in the prospectuses."[65] But before delving into this issue, Justice Thomas paid homage to *Stoneridge* by acknowledging the narrow construction the Court must give to Rule 10b-5's implied private right of action.[66]

The Court first looked to the dictionary to determine whether Janus Capital Management "made" the untrue statements in the prospectuses.[67] The Court concluded that "[t]o make any . . . statement" within the meaning of Rule 10b-5(b) means "to state."[68] And "[f]or purposes of Rule 10b-5, the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it."[69] Without such

60. *Janus*, 131 S. Ct. at 2300.

61. *Id.*

62. *Id.*

63. *Id.* at 2301.

64. 17 C.F.R. § 240.10b-5(b) (2015).

65. *Janus*, 131 S. Ct. at 2301.

66. *Id.* at 2302 (stating that "we are mindful that we must give 'narrow dimensions . . . to a right of action Congress did not authorize when it first enacted the statute and did not expand when it revisited the law'" (quoting Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 167 (2008))).

67. *Id.* (consulting the Oxford English Dictionary).

68. *Id.*

69. *Id.*

"ultimate authority," the defendant could only suggest what to say, not "make" the statement.[70]

Departing from the dictionary, the Court argued that the ultimate authority rule necessarily followed from *Central Bank*'s holding "that Rule 10b-5's *private right of action* does not include suits against aiders and abettors."[71] Though the SEC is expressly authorized to bring suits against entities that contribute "substantial assistance" to the making of a statement but do not actually make it, private parties cannot.[72] From this the Court reasoned that interpreting "make" broadly as "including persons or entities without ultimate control over the content of a statement" would undermine the limits placed on the implied private right of action in *Central Bank* by rendering aiders and abettors virtually nonexistent.[73]

Justice Thomas found further support in *Stoneridge* for the Court's narrow interpretation of "make."[74] In *Stoneridge*, the complaint was dismissed in view of the fact the plaintiffs could "not have relied on the entities' undisclosed deceptive acts"[75] because—significantly to Justice Thomas—"nothing [the defendants] did made it necessary or inevitable for [the company] to record the transactions

70. *Id.* Contributing to the confusion stemming from *Janus*, it is unclear from this language whether "the Court [is] construing the Rule, *or just the right of action*." Langevoort, *supra* note 10, at 938 (emphasis added). That is, although the opinion focused on defining a specific word in Rule 10b-5, the Court repeatedly called attention to the *private* nature of the action at issue and stressed the "narrow dimensions" it must be given. The implication being that if the Court was interpreting the Rule, then the SEC is bound by the "ultimate authority" rule. If, however, the Court was interpreting the right of action, then the SEC's enforcement authority is unaffected.

71. *Janus*, 131 S. Ct. at 2302 (emphasis added) (citing Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 180 (1994)).

72. *Id.* (citing 15 U.S.C. § 78t(e) (2012)). The U.S. Code provides that

> any person that knowingly or recklessly provides substantial assistance to another person in violation of a provision of this chapter, or of any rule or regulation issued under this chapter, shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided.

15 U.S.C. § 78t(e).

73. *Janus*, 131 S. Ct. at 2302. Despite the Court's allusion to a broader aiding-and-abetting enforcement power in SEC actions than exists in private actions, it is worth noting that if *Janus*'s ultimate authority rule applies to SEC actions, the Commission's aiding-and-abetting authority would likewise be narrowed. After all, an aider and abettor cannot exist without a primary violator. And *Janus* undoubtedly limits the pool of those who can be considered primary participants.

74. *See id.* at 2303 (stating that "[t]his interpretation is further supported by our recent decision in *Stoneridge*").

75. *Id.* (citing Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 166–67 (2008)).

as it did."[76] Without ultimate authority over a statement "it is not 'necessary or inevitable' that any falsehood will be contained in the statement."[77]

Interestingly, Justice Thomas used the principle of narrowing, or at least not expanding, the scope of the implied private right of action as bookends for the rule's formulation. Indeed, in his last argument in support of the Court's interpretation of "make" he noted that the "holding also accords with the narrow scope that [the Court] must give the implied private right of action."[78] At the outset, Justice Thomas acknowledged that the Court "must give 'narrow dimensions . . . to a right of action Congress did not authorize when it first enacted the statute.'"[79] He further observed that "[c]oncerns with the judicial creation of a private cause of action caution against its expansion."[80] Bookending its interpretation of "make" in this manner further clouds whether "the Court [was] construing the Rule, or just the private right of action."[81]

Janus's ultimate authority rule greatly narrows the class of individuals who can be deemed primary participants in a misrepresentation under Rule 10b-5(b). This rule resulted largely from the Court's desire to give continuing force to its holdings in *Central Bank* and *Stoneridge*. Thus, *Janus* and its ultimate authority rule are properly viewed as the Court's most recent effort to curb expansion of the judicially created implied private right of action. The Court did not make clear, however, the limits of *Janus*'s reach.

III. THE SEC'S INCONGRUENT ANTIFRAUD ENFORCEMENT AUTHORITY POST-*JANUS*

Janus raises three questions regarding the ultimate authority rule's applicability to SEC enforcement actions. The first is whether the ultimate authority rule applies to Rule 10b-5(b) misrepresentation actions brought by the SEC, or is instead cabined to those that are brought by private plaintiffs under the implied private right of action. If *Janus* binds the SEC in Rule 10b-5(b) enforcement actions, then the scope of actors who can be held liable in such actions has been

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76. *Id.* (alteration in original) (quoting *Stoneridge*, 552 U.S. at 161).
77. *Id.*
78. *Id.* (citing *Stoneridge*, 552 U.S. at 167).
79. *Id.* at 2302 (quoting *Stoneridge*, 552 U.S. at 167).
80. *Id.* (quoting *Stoneridge*, 552 U.S. at 165).
81. Langevoort, *supra* note 10, at 938.

narrowed. As a result, the Commission's power to prosecute misrepresentations perpetrated in connection with the purchase of a security on the secondary markets has been drastically reduced.[82] The second is whether the SEC can avoid *Janus*'s narrowing effect on Rule 10b-5(b) claims by using scheme liability under Rule 10b-5(a) and (c) to prosecute conduct that cannot meet the ultimate authority test. Finally, the third is whether the ultimate authority rule also applies to Section 17(a)(2) misrepresentation actions brought by the SEC since both Rule 10b-5(b) and Section 17(a)(2) were intended to serve the same purpose, just at different stages of securities dealings.[83] Finding that *Janus* applies to Rule 10b-5(b) but not Section 17(a)(2) would mean that the SEC now has less ability to prosecute misrepresentations perpetrated in connection with the purchase of securities than in the offer of those same securities.

A. Janus*'s Impact on the SEC's Ability to Prosecute Fraud Perpetrated in Connection with the Purchase of Securities: Section 10(b) and Rule 10b-5(b)*

At the threshold, the nontextual considerations underlying the Court's interpretation of Rule 10b-5(b) in *Janus* do not apply to SEC enforcement actions brought under the same provision. The Court left multiple hints rendering it plausible that *Janus* can be interpreted differently depending on who brings the action. For starters, the Court's own framing of the issue at hand was whether the defendant "can be held liable *in a private action* under . . . Rule 10b-5."[84] And following its articulation of the ultimate authority rule, the Court approvingly noted that its "holding accords with the narrow scope that we must give the implied private right of action."[85] It therefore would appear that the Court was interpreting the meaning of "make" as it applies specifically in private actions.[86]

82. *See* 17 C.F.R. § 240.10b-5 (2015) (stating that the proscribed fraudulent activity must be "in connection with the purchase or sale of any security").

83. *See* SEC v. Kelly, 817 F. Supp. 2d 340, 345 (S.D.N.Y. 2011) (stating that "the SEC's 'only purpose' in adopting Rule 10b-5 was to make the same prohibitions contained in Section 17(a)—which applies in connection with the '*offer* and sale' of a security—applicable to 'purchasers' of securities as well" (citing Birnbaum v. Newport Steel Corp., 193 F.2d 461, 463 (2d Cir. 1952); SEC v. Tex. Gulf Sulphur Co., 401 F.2d 833, 855 (2d Cir. 1968)).

84. *Janus*, 131 S. Ct. at 2299.

85. *Id.* at 2303.

86. *See* Langevoort, *supra* note 10, at 941 ("For all these reasons . . . we are being told what 'make' means *in the context of private securities litigation* under Rule 10b-5, leaving open how it is to be construed in the context of public enforcement.").

Perhaps more telling in this regard is the Court's effort to demonstrate the ultimate authority rule's consistency with prior holdings designed to preserve requirements applicable only to actions brought by private parties. The concerns regarding various aspects of transaction causation—that is, reliance[87]—that guided the Court's decisions in *Central Bank* and *Stoneridge* fit poorly with SEC enforcement actions in which causality is not a predicate to establishing a violation.[88] Further, in SEC actions there need not be any concern that "a broader reading of 'make' . . . would substantially undermine *Central Bank*['s]" prohibition on aiding-and-abetting liability[89] because the SEC enjoys Congress's explicit blessing to bring suits against aiders and abettors under Section 10(b) and Rule 10b-5.[90] Thus, reading "make" more broadly when the SEC is the plaintiff would not upset *Central Bank*'s holding that "Rule 10b-5's *private right of action* does not include suits against aiders and abettors."[91] Similarly inapplicable to SEC actions is the Court's concern that without the ultimate authority requirement reliance could be bypassed because "it is not 'necessary or inevitable' that any falsehood will be contained in the statement."[92] Liability could not be imposed in contravention of *Stoneridge*'s "necessary or inevitable" reliance-driven requirement when the SEC is the plaintiff because, again, the SEC need not prove such elements.

That *Janus*'s ultimate authority rule "follows from" holdings that do not even affect the SEC's enforcement authority,[93] and that were significantly influenced by the need to preserve a requirement that the SEC is not required to prove, lends further credence to the argument that the Court was construing "make" within the realm of private securities litigation.[94]

87. Because reliance has long been conceptualized as requiring "but for" causation, the reliance requirement has been alternatively termed transaction causation. Donald C. Langevoort, *Reading* Stoneridge *Carefully: A Duty-Based Approach to Reliance and Third-Party Liability Under Rule 10b-5*, 158 U. PA. L. REV. 2125, 2131 n.20 (2010).

88. *See* HAZEN, *supra* note 26, § 12.10 ("Reliance is an element of a private suit under Rule 10b-5, but not in enforcement actions brought by the government.").

89. *Janus*, 131 S. Ct. at 2302

90. Private Securities Litigation Reform Act of 1995 § 104, 15 U.S.C. § 78t(e) (2012); *see also Janus*, 131 S. Ct. at 2302 ("Such [aiding-and-abetting] suits may be brought by the SEC.").

91. *Janus*, 131 S. Ct. at 2302 (emphasis added).

92. *Id.* at 2303.

93. *Id.* at 2302 (stating that the ultimate authority rule "follows from" *Central Bank*).

94. *See* Langevoort, *supra* note 87, at 2127–28 (stating in his analysis of *Stonebridge* that the "Court's choice of reliance as the crucial element indicates the Court's comfort with having

Additionally, the policy concerns that lead the *Janus* Court to acknowledge the "narrow scope" it must give the implied private right of action are nonexistent when the SEC is the plaintiff. One chief driver behind the Court's desire to avoid expanding the scope of liability under Section 10(b) and Rule 10b-5 is that private litigation under these provisions "presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general."[95] Expanding the scope of liability under Rule 10b-5 presents more occasion for nuisance or strike suits—"meritless suits brought by class action plaintiffs' lawyers to extort settlement and attorneys' fees"[96]—a concern present only when private parties are the plaintiffs.[97] This concern has influenced the Court's interpretation of Rule 10b-5 as far back as 1975, when in *Blue Chip Stamps v. Manor Drug Stores*[98] the Court cited this concern to support limiting standing in private Rule 10b-5 suits to actual "purchasers" or "sellers" within the definitions of the Exchange Act.[99] *Central Bank* echoed this concern in restricting the scope of Rule 10b-5 by interpreting Section 10(b) as not permitting liability for aiders and abettors,[100] as did

different liability outcomes in Rule 10b-5 cases depending on whether the action is an SEC enforcement or criminal prosecution (where reliance is not required) or private litigation (where it is)").

95. Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 189 (1994) (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 739 (1975)).

96. Amanda M. Rose, *Life After SLUSA: What Is the Fate of Holding Claims?*, 69 DEF. COUNS. J. 455, 455 (2002). The Court articulated this threat in *Blue Chip Stamps*:

> [E]ven a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment. The very pendency of the lawsuit may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit.

Blue Chip Stamps, 421 U.S. at 740.

97. *See Blue Chip Stamps*, 421 U.S. at 740 (expressing concern for "the danger of vexatious litigation which could result from a widely expanded class of plaintiffs under Rule 10b-5," including the "potential for nuisance or 'strike' suits").

98. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975).

99. *Id.* at 748–49; *see also* Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring The Relationship Between Public and Private Enforcement of Rule 10b-5*, 108 COLUM. L. REV. 1301, 1320 (2008) (noting that the Court's decision in *Blue Chip Stamps* to "deny[] standing to enforce Rule 10b-5 to nonpurchasers and nonsellers of securities . . . was explicitly motivated by a concern about 'strike suits'").

100. *Cent. Bank*, 511 U.S. at 188–90 (expressing that private litigation under Rule 10b-5 presents "a danger of vexatiousness" (quoting *Blue Chip Stamps*, 421 U.S. at 739) and "requires secondary actors to expend large sums even for pretrial defense and the negotiation of settlements").

Stoneridge.[101] This anti-strike-suit justification for narrowing the scope of who can be prosecuted as a primary participant, however, does not support limiting the SEC's enforcement authority because, notably, the SEC lacks the attorneys' fee incentives that encourage strike suits in the first place.[102]

Finally, the additional policy considerations of judicial restraint and legislative primacy, both of which influenced the Court's decisions in the cases cited in support of *Janus*'s rule, are concerns unique to suits brought under the implied private right of action. As *Stoneridge* emphasized, "Concerns with the judicial creation of a private cause of action caution against its expansion. The decision to extend the cause of action is for Congress, not for us."[103] Even further, expanding the "implied private right of action" directly "conflicts with the authority of Congress under Art. III to set the limits of federal jurisdiction."[104] But these concerns dissipate when Congress has in fact expressly authorized the action,[105] prompting the Fourth Circuit to note that "[e]xplicit congressional prohibitions simply operate in a different universe than the one inhabited by *Janus*."[106] Indeed, the Court has not expressed similar skepticism against expansion of the SEC's enforcement authority, which is expressly provided for under Section 10(b) and Rule 10b-5.[107]

101. Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 163–64 (2008) (listing the policy concerns supporting the Court's interpretation, including that expanding the scope of Section 10(b)'s private right of action could extend its coverage into the realm of ordinary business operations, thus shifting securities offerings away from U.S. capital markets, and that "extensive discovery and the potential for uncertainty and disruption in a lawsuit could allow plaintiffs with weak claims to extort settlements from innocent companies").

102. *See* SEC v. Steffes, F. Supp. 2d 601, 617 n.12 (N.D. Ill. 2011) ("Whereas private parties have a financial incentive to initiate 'strike' suits and drag deep-pocketed defendants into court on allegations of fraud in hopes of obtaining a lucrative settlement, the SEC's statutory task is to protect the investing public by policing the securities markets and preventing fraud." (quoting SEC v. Tambone, 550 F.3d 106, 119 (1st Cir. 2008))).

103. *Stoneridge*, 552 U.S. at 165 (citing *Cent. Bank*, 511 U.S. at 173; Va. Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1102 (1991)).

104. *Id.* at 164–65 (quoting Cannon v. Univ. of Chi., 441 U.S. 677, 746–47 (1979) (Powell, J., dissenting)); *see also id.* at 164 (stating that expanding the scope of the implied private right of action "runs contrary to the established principle that the jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation" (quoting *Cannon*, 441 U.S. at 747)).

105. *See* Prousalis v. Moore, 751 F.3d 272, 278 (4th Cir. 2014) (analyzing the policy concerns of judicial restraint and legislative primacy that underlay *Janus*'s interpretation).

106. *Id.*

107. *See* 15 U.S.C. § 78u (2012) (giving the SEC authority to, among other things, initiate investigations into violation, and bring suit to enjoin "any person [who] is engaged or is about to

At least one court of appeals has used *Janus*'s reliance on private-action precedent to confine the ultimate authority rule to private actions. The Fourth Circuit directly addressed the applicability of *Janus* to nonprivate Rule 10b-5(b) misrepresentation claims, albeit in a unique context. In *Prousalis v. Moore*[108] the Fourth Circuit held that a federal prisoner seeking habeas relief on the grounds that the conduct for which he was convicted is no longer criminal could not find refuge in *Janus*.[109] Thomas Prousalis was a securities lawyer who pled guilty to securities fraud, including a Rule 10b-5(b) misstatement claim.[110] Following *Janus*, Prousalis sought habeas relief, contending that *Janus* rendered the conduct for which he was convicted no longer criminal because he did not "make" the false statements within the meaning of the ultimate authority rule.[111] The Fourth Circuit held that *Janus*'s interpretation of "make" was "inapplicable outside the context of the 10b-5 implied private right of action," and therefore did not affect Prousalis's criminal convictions.[112] The Fourth Circuit overcame the fact that *Janus*'s holding rested significantly on a straightforward textual interpretation of "make" by noting that the meaning of even plain statutory language depends on "context."[113] To apply *Janus*'s definition of "make" outside the context present there "would render the Supreme Court's discussion of private rights of action largely superfluous."[114]

engage in acts or practices constituting a violation of any provision of this chapter, the rules or regulations thereunder"); 17 C.F.R. § 202.5(a) (2015) ("The Commission may, in its discretion, make such formal investigations and authorize the use of process as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of the federal securities laws . . . ."). Also, the SEC can, in its discretion, take one or more of the following actions: "Institution of administrative proceedings looking to the imposition of remedial sanctions, initiation of injunctive proceedings in the courts, and, in the case of a willful violation, reference of the matter to the Department of Justice for criminal prosecution." *Id.* § 202.5(b).

108. Prousalis v. Moore, 751 F.3d 272 (4th Cir. 2014).

109. *Id.* at 273.

110. *Id.* at 273–74. The U.S. Code subjects certain violators of Rule 10b-5 to criminal penalties. 15 U.S.C. § 78ff(a) ("Any person who willfully violates any provision of this chapter . . . or any rule or regulation thereunder the violation of which is made unlawful . . . shall upon conviction be fined not more than $5,000,000, or imprisoned not more than 20 years, or both . . . .").

111. *Prousalis*, 751 F.3d at 275.

112. *Id.* at 276.

113. *Id.* at 277–78 (quoting King v. St. Vincent's Hosp., 502 U.S. 215, 221 (1991)).

114. *Id.* at 278.

The Fourth Circuit thus concluded that *Janus* was construing the private right of action, as opposed to the Rule itself.[115]

Despite the Fourth Circuit's framing of *Janus* and pervasive language to the contrary, history hints that *Janus* should *not* be read as limited to private litigation.[116] Congress has acted swiftly in the past to "reestablish the SEC's broader enforcement authority" following opinions that, like *Janus*, resulted from textual interpretations shaped by the desire to constrain the implied private right of action under Rule 10b-5.[117] For example, following *Central Bank*'s dispensing of aiding-and-abetting liability in a private suit brought under Section 10(b) and Rule 10b-5, Congress in 1995 explicitly provided the SEC with the ability to prosecute such actors.[118] Similarly, the Court's holding in *Morrison v. National Australia Bank*[119]—another private-right-of-action case—that Rule 10b-5 does not apply to transactions occurring outside the United States' borders[120] prompted Congress to provide the SEC with broader extraterritorial jurisdiction.[121] Such reactions support two separate inferences, both leading to the same result: reading the Court's textual interpretations in Section 10(b) and Rule 10b-5 implied private-action cases as applying to the SEC is nothing new.

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115. *Id.*; *see also* Mary P. Hansen, *Fourth Circuit Holds Supreme Court's* Janus *Rule Not Applicable to Criminal Cases*, NAT'L L. REV. (May 19, 2014), http://www.natlawreview.com/article/fourth-circuit-holds-supreme-court-s-janus-ruling-not-applicable-criminal-cases [http://perma.cc/BTQ2-4FAW] ("Given the Fourth Circuit's reliance on the lack of any indication that the U.S. Supreme Court intended for *Janus* to extend beyond private actions, *Prousalis* may signal a victory not only for criminal prosecutors, but also for the SEC.").

116. *See* Langevoort, *supra* note 10, at 939 (looking to historical cases to determine whether *Janus* can be limited to private actions).

117. *Id.*

118. *See supra* note 90. Congress's preference for affording the SEC broader enforcement authority than that of private litigants is illustrated by the fact that former SEC Chairman Arthur Levitt testified before the Senate Securities Subcommittee, cited *Central Bank*, and recommended that aiding-and-abetting liability in private claims be established. *Abandonment of the Private Right of Action for Aiding and Abetting Securities Fraud/Staff Report on Private Securities Litigation: Hearing Before the Subcomm. on Sec. of the S. Comm. on Banking, Hous., & Urban Affairs*, 103d Cong. 13–14 (1994) (statement of Arthur Levitt, Chairman, Securities and Exchange Commission) [hereinafter *Private Right of Action Hearing*].

119. Morrison v. Nat'l Austl. Bank, 561 U.S. 247 (2010).

120. *Id.* at 273.

121. S*ee generally* Richard W. Painter, *The Dodd-Frank Extraterritorial Jurisdiction Provision: Was it Effective, Needed or Sufficient?*, 1 HARV. BUS. L. REV. 195 (2011) (discussing in depth the *Morrison* decision and Congress's response of broadening SEC extraterritorial jurisdiction through Section 929P of the Dodd-Frank Wall Street Reform and Consumer Protection Act).

One explanation is that Congress's quick nullification of the holdings in *Central Bank* and *Morrison* as applied to the SEC evidences Congress's own acceptance that these holdings applied with equal force to the Commission. Another explanation is that Congress acted as it did due to the Court's willingness in the past to extend its text-based holdings to the SEC. In this vein, Congress's reactions represent its conclusion that the Court would likely apply these holdings to the SEC as well. This latter explanation finds support in the Court's decision in *Aaron v. SEC*[122] to extend its text-based holding in *Ernst & Ernst v. Hochfelder*[123] to SEC actions, thus requiring the SEC to prove in any Section 10(b) and Rule 10b-5 enforcement actions that the defendant acted with scienter.[124] Either way, reading private-action cases with holdings based on textual interpretations—a class of which *Janus* is a member—"as not limited to private litigation, notwithstanding extensive language in the opinion to the contrary, may be becoming a habit."[125] This seems especially true given that the Court has not hesitated in the past to explicitly reserve the question of whether its textual interpretations in private actions apply to the SEC, as it did in *Ernst & Ernst*.[126]

Indeed, that the SEC itself has conceded that *Janus* applies to SEC actions brought under Rule 10b-5(b) speaks to the weakness of arguments for its inapplicability.[127] Thus, unless and until the SEC or Congress demonstrates that it did not intend for the SEC to be so

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122. Aaron v. SEC, 446 U.S. 680 (1980).

123. Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976).

124. *Aaron*, 446 U.S. at 701–02. The Court in *Aaron* described *Ernst & Ernst* as holding "that a private cause of action for damages will not lie under § 10(b) and Rule 10b-5 in the absence of an allegation of scienter." *Id.* at 689. And in *Ernst & Ernst* the Court expressly reserved the question of whether the SEC, like private plaintiffs, needs to prove scienter. *See Ernst & Ernst*, 425 U.S. at 193 n.12 ("Since this case concerns an action for damages we also need not consider the question whether scienter is a necessary element in an action for injunctive relief under § 10(b) and Rule 10b-5."); *see also Aaron*, 446 U.S. at 685 (stating that in *Ernst & Ernst*, the Court "expressly reserved the question whether scienter must be alleged in a suit for injunctive relief brought by the Commission").

125. Langevoort, *supra* note 10, at 939.

126. *Ernst & Ernst*, 425 U.S. at 193 n.12.

127. *See, e.g.*, SEC v. Brown, 878 F. Supp. 2d 109, 122 (D.D.C. 2012) (noting the SEC's concession that "as a result of the Supreme Court's decision in *Janus*, the Second Claim for Relief against [the defendant] can no longer rest on violations of subsection Rule 10b-5(b)"); SEC v. Kelly, 817 F. Supp. 2d 340, 343 (S.D.N.Y. 2011) ("The SEC concedes that *Janus* foreclosed its ability to assert a misstatement claim under subsection (b) of rule 10b-5 against [the defendants]."); SEC v. Daifotis, No. C 11–00137 WHA, 2011 WL 3295139, at *2 (N.D. Cal. Aug. 1, 2011) ("[N]o one argues that claim one should be dismissed *entirely* as to either defendant after *Janus*.").

bound,[128] the Commission must deal with the narrow scope now given to its authority to pursue primary participants for misrepresentations perpetrated in connection with the purchase of securities on the secondary markets.

In this regard, one plausible reason for the Court's choice of interpretative methodology in *Janus*—relying on private-action precedent to narrowly interpret the text of a Rule equally applicable to the SEC—is that it sought to spur the SEC or Congress into clarifying its intent via amendment to Rule 10b-5(b).[129] Such an approach would be in line with the Court's decisions in *Central Bank* and *Morrison*, both of which were quickly followed by congressional action.[130]

This explanation for *Janus*'s unusual methodology also makes sense considering the context of Rule 10b-5's adoption. Indeed, "the SEC's 'only purpose' in adopting Rule 10b-5 was to make the same prohibitions contained in Section 17(a)—which applies in connection with the '*offer* and sale' of a security—applicable to 'purchasers' of securities as well."[131] As one of the Rule's authors recounted about its creation: "I looked at Section 10(b) and I looked at Section 17, and I put them together, and the only discussion we had there was where 'in connection with the purchase or sale' should be . . . ."[132] If the SEC truly meant for Rule 10b-5(b) to serve the same function as Section 17(a)(2) but in connection with the purchase of securities, it would not have intended Rule 10b-5(b) to cover a much narrower subset of

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128. *See infra* Part IV (discussing actions the SEC or Congress can take to reinstate equilibrium in the former's ability to prosecute fraudsters for misrepresentations occurring in the "offer and sale" of a security, and those occurring in subsequent "purchase or sale" of a security on the secondary markets).

129. *See* Langevoort, *supra* note 10, at 942 ("That may be the Court's goal [in *Janus*], invoking something akin to a penalty default interpretation, like *contra proferentem* in contract law, simply to provoke the Commission or Congress to clarify its intent through an amendment to Section 10(b) or Rule 10b-5.").

130. *See* 15 U.S.C. § 78t(e) (2012) (providing the SEC with authority to pursue aiders and abettors of Section 10(b) and Rule 10b-5 violations post-*Central Bank*'s holding that private Section 10(b) suits do not reach aiding-and-abetting liability); *id.* § 78aa(b) (providing the SEC with broader extraterritorial jurisdiction after *Morrison*'s curbing of the territorial reach of the implied private right of action); *see also* Langevoort, *supra* note 10, at 942 (stating that if *Janus* is read as a penalty default interpretation to provoke Congressional or Commission action, then "[i]n this regard, *Janus* bears a substantial affinity to both *Central Bank* and *Morrison*, both of which did provoke a congressional response").

131. *Kelly*, 817 F. Supp. 2d at 345 (citing Birnbaum v. Newport Steel Corp., 193 F.2d 461, 463 (2d Cir. 1952); SEC v. Tex. Gulf Sulphur Co., 401 F.2d 833, 855 (2d Cir. 1968)).

132. Milton V. Freeman, *Administrative Procedures*, 22 BUS. LAW. 891, 922 (1967).

conduct than Section 17(a)(2).[133] Thus, by interpreting "make" narrowly the Court could have been signaling that Congress or the SEC should take action to bring the SEC's enforcement authority into equilibrium with regards to misrepresentations at the various stages of securities dealings. As it stands, "the Court is effectively saying in *Janus* . . . that 'make' was meant by the SEC to have a more restrictive meaning than what was in the statutory text from which the Rule was drawn," which "is implausible given the context of the Rule's adoption."[134] Moreover, as developed below, post-*Janus* the SEC has less ability to prosecute as primary participants those who utilize a misrepresentation in connection with the purchase of a security than those who do so in connection with the offer of a security.

B. Circumventing Janus*? Using Scheme Liability Under Rule 10b-5(a) and (c) to Prosecute Fraud Perpetrated in Connection with the Purchase of Securities*

Such heavy emphasis on "make" necessarily raises the issue of whether, or to what extent, *Janus* is restricted to subsection (b) of Rule 10b-5. Can the SEC circumvent *Janus*'s ultimate authority rule by alleging that the misrepresentation is part of a larger fraudulent scheme under Rule 10b-5(a) and (c), each of which uses different verbs?[135] Under such a theory, the SEC could "restructure [its] complaints to allege schemes to defraud or deceptive acts and practices rather than misrepresentations or omissions."[136] Since subsections (a) and (c) apply to the purchase of securities, such a tactic would curb *Janus*'s effect of drastically reducing the pool of available primary participants in misrepresentations perpetrated at that stage of securities dealings.

Such tactics, however, are likely to fail, and indeed have failed. Even before *Janus*, lower courts "routinely rejected the SEC's attempt[s] to bypass the elements necessary to impose 'misstatement' liability under subsection (b) by labeling the alleged misconduct a

133. *See* SEC v. Stoker, 865 F. Supp. 2d 457, 465 (S.D.N.Y. 2012) (citing SEC v. Tambone, 550 F.3d 106, 127 (1st Cir. 2008)) (stating that Section 17(a)(2)'s language "plainly covers a broader range of activity" than does Rule 10b-5(b)).

134. Langevoort, *supra* note 10, at 940.

135. 17 C.F.R. § 240.10b-5(a), (c) (2015). These verbs are "engage" and "employ," respectively.

136. Langevoort, *supra* note 10, at 963.

'scheme' rather than a 'misstatement.'"[137] These courts were cognizant of the temptation to resort to "something akin to scheme liability to re-litigate issues foreclosed under a straightforward misrepresentation claim"[138] and thus refused to allow subsections (a) and (c) to be used as a "back door into liability" for those who could not be proven to be primary participants in a misrepresentation under subsection (b).[139] This trend continued in the period after *Janus*. For example, the U.S. District Court for the Southern District of New York declined to allow the SEC to avoid *Janus* by alleging scheme liability where the purpose and effect of the scheme was to make a public misrepresentation or omission.[140] The SEC, finding no refuge in subsections (a) and (c), thus appears relegated to using Rule 10b-5(b) to pursue claims for misrepresentations made in connection with the purchase of securities. But the SEC has not gone silently into the night on this issue.[141]

C. Janus*'s Impact on the SEC's Ability to Prosecute Fraud Perpetrated in Connection with the Offer of Securities: Section 17(a)(2) of the Securities Act*

Post-*Janus*, an important incongruence has arisen with respect to the SEC's authority to bring enforcement actions for misrepresentations in connection with the offer of securities under the Securities Act and in connection with the purchase of securities under the Exchange Act. This incongruence results from the

137. *Kelly*, 817 F. Supp. 2d at 343; *see also, e.g.*, Lentell v. Merrill Lynch & Co., 396 F.3d 161, 177 (2d Cir. 2005) ("[W]here the sole basis for [market manipulation] claims is alleged misrepresentations or omissions, plaintiffs have not made out a market manipulation claim under Rule 10b–5(a) and (c) . . . ."); SEC v. Lucent Techs., 610 F. Supp. 2d 342, 359–61 (D.N.J. 2009) (holding that the SEC "cannot breathe new life into the defunct primary liability claims" by asserting a scheme claim based on misrepresentations); SEC v. KPMG LLP, 412 F. Supp. 2d 349, 377–78 (S.D.N.Y. 2006) ("Because the core misconduct is in fact a misstatement, it would be improper to impose primary liability on Yoho by designating the alleged fraud a 'manipulative device' rather than a 'misstatement.'"); SEC v. PIMCO Advisors Fund Mgmt., 341 F. Supp. 2d 454, 467 (S.D.N.Y. 2004) (declining to find scheme liability where "the only allegations at issue relate to publication of material misrepresentations or omissions").

138. Langevoort, *supra* note 10, at 965.

139. *In re* Parmalat Sec. Litig., 376 F. Supp. 2d 472, 503 (S.D.N.Y. 2005); *see also* Langevoort, *supra* note 10, at 966 (stating that the courts that have considered the question held that "complaints about misrepresentations . . . must be treated as such, no matter which prong of the rule is invoked").

140. *Kelly*, 817 F. Supp. 2d at 343.

141. *See infra* Part IV.A (explaining the SEC's recent interpretation of Rule 10b-5(a) and (c) scheme liability as permitting prosecution of misrepresentations that also fall within Rule 10b-5(b)).

differences between Section 17(a)(2) of the Securities Act and Rule 10b-5(b) promulgated under Section 10(b) of the Exchange Act.[142] Section 17(a)(2), like Rule 10b-5(b), prohibits misrepresentations; but, instead of prohibiting *making* an untrue statement, Section 17(a)(2) prohibits obtaining money or property "*by means of* any untrue statement."[143] Despite this difference, split has developed among lower courts as to the applicability of *Janus*'s ultimate authority rule to Section 17(a)(2) enforcement actions brought by the SEC.

The majority of courts confronted with the opportunity to import *Janus*'s interpretation of "make" to Section 17(a)(2)'s "by means of" language in SEC enforcement actions have declined the invitation.[144] For example, in *SEC v. Stoker*[145] the defendant moved to dismiss the SEC's Section 17(a)(2) claim, arguing, *inter alia*, that *Janus* applied to

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142. Courts have interpreted the textual differences between Rules 10b-5(b) and Section 17(a)(2) in a manner resulting in the latter capturing a broader range of conduct than the former even pre-*Janus*. *See, e.g.*, SEC v. Stoker, 865 F. Supp. 2d 457, 465 (S.D.N.Y. 2012) (stating that Section 17(a)(2)'s language "plainly covers a broader range of activity" than does Rule 10b-5(b)). Additionally, Section 17(a)(2) has long required only a showing of negligence, whereas a Rule 10b-5 violation requires a showing of scienter. Aaron v. SEC, 446 U.S. 680, 701–02 (1980). Lastly, following *Central Bank* courts developed two primary tests for determining who made a statement within the meaning of 10b-5(b) so as to be liable as a primary participant. One such test, the bright-line attribution test, required that a statement be attributed to the party in order for that party to be a primary participant. *See* Pac. Mgmt. Co. v. Mayer Brown LLP, 603 F.3d 144, 148 (2d Cir. 2010) ("Absent attribution, plaintiffs cannot show that they relied on defendants' *own* false statements, and participation in creation of those statements amounts, at most, to aiding and abetting . . . ."). *But see In re* Software Toolworks, Inc. Sec. Litig., 50 F.3d 615, 628–29 (9th Cir. 1994) (utilizing the alternative substantial participation test and allowing culpability for false statements where a party substantially participated in the preparation of the statements).

143. 15 U.S.C. § 77q(a)(2) (2012).

144. *See, e.g.*, SEC v. Sentinel Mgmt. Grp., No. 07-C-4684, 2012 WL 1079961, at *15 (N.D. Ill. Mar. 20, 2012) (finding *Janus* inapplicable to Section 17(a) claims due to the differences in wording between Rule 10b-5 and Section 17(a), and because the policy concerns regarding implied private rights of action underlying *Janus* are not present in Section 17(a) actions); SEC v. Pentagon Capital Mgmt., 844 F. Supp. 2d 377, 422 (S.D.N.Y. 2012) ("Nor does *Janus* apply to SEC enforcement claims pursuant to Section 17(a) of the Securities Act."), *aff'd in part, vacated in part*, 725 F.3d 279 (2d Cir. 2013); SEC v. Mercury Interactive, LLC, No. 5:07–cv–02822–WHA, 2011 WL 5871020, at *3 (N.D. Cal. Nov. 22, 2011) ("This Court agrees with those decisions that have concluded that *Janus* may not be extended to statutes lacking the very language that *Janus* construed."); SEC v. Geswein, No. 5:10CV1235, 2011 WL 4565861, at *2 (N.D. Ohio Sept. 29, 2011) (declining to extend *Janus* to a Section 17(a) claim because the provision lacks the term "make"); SEC v. Daifotis, No. C 11–00137 WHA, 2011 WL 3295130, at *5 (N.D. Cal. Aug. 1, 2011) (same).

145. SEC v. Stoker, 865 F. Supp. 2d 457 (S.D.N.Y. 2012).

claims brought under Section 17(a).[146] The court, however, held otherwise for two main reasons, the first being textual, the second purposive. The court noted that proving a violation of Rule 10b-5 and Sections 17(a)(1)–(3) requires proof of essentially the same elements, but nonetheless concluded that differences in the language dictate different results.[147] Although *Janus* undertook a textual analysis of the word "make," concluding it means "to state," Section 17(a)(2) prohibits obtaining money "by means of," that is "by use," of an untrue statement.[148] Thus, according to the court, Section 17(a)(2)'s language "plainly covers a broader range of activity" than does Rule 10b-5(b) because a defendant is liable under Section 17(a)(2) if he "obtains money or property *by use* of a false statement, whether prepared by himself or by another."[149] Second, the court highlighted that *Janus*'s ultimate authority rule resulted from the need to read Rule 10b-5 narrowly due to the concerns attendant to implied private rights of action.[150] In contrast, Section 17(a)(2) does not give rise to such concerns because Section 17(a) does not support a private right of action, explicitly or implicitly.[151]

Notwithstanding the absence of "make" in Section 17(a)(2), at least one court has held that *Janus* does in fact restrict the SEC's enforcement authority under Section 17(a)(2).[152] The first case to apply *Janus* to Section 17(a) of the Securities Act was *SEC v. Kelly*.[153] The court first acknowledged that the Supreme Court in *Janus* did not address liability under Section 17(a), but then noted that numerous courts have held that the elements of Section 17(a) and

146. *Id.* at 464.

147. *Id.* at 464–65 (citing Aaron v. SEC, 446 U.S. 680, 695–97 (1980)).

148. *Id.* at 464 (citing SEC v. Tambone, 550 F.3d 106, 127 (1st Cir. 2008)). In *Tambone*, the First Circuit held that under Section 17(a)(2), "[l]iability attaches so long as the statement is *used* 'to obtain money or property,' regardless of its source." *Tambone*, 550 F.3d at 127.

149. *Stoker*, 865 F. Supp. 2d at 465 (citing *Tambone*, 550 F.3d at 127).

150. *Id.* (citing Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296, 2302 (2011)).

151. *Id.* (citing Finkel v. Stratton Corp., 962 F.3d 169, 174 (2d Cir. 1992)).

152. *See, e.g.*, SEC v. Kelly, 817 F. Supp. 2d 340, 345 (S.D.N.Y. 2011) ("Because subsection (2) of Section 17(a) and subjection (b) of Rule 10b–5 are treated similarly, it would be inconsistent for *Janus* to require that a defendant have made the misleading statement to be liable under subsection (b) . . . but not under subsection (2) . . . ."); SEC v. Perry, No. CV-11-1309 R, 2012 WL 1959566 at *8 (C.D. Cal. May 31, 2012) (citing *Kelly* with approval in finding that *Janus* applies to Section 17(a) claims).

153. SEC v. Kelly, 817 F. Supp. 2d 340 (S.D.N.Y. 2011). Strangely, the *Stoker* court's only acknowledgement of *Kelly*'s earlier and opposite holding is a single "but see" citation. *Stoker*, 865 F. Supp. 2d at 466.

Rule 10b-5 claims are "essentially the same."[154] The court further reasoned that "the SEC's 'only purpose' in adopting Rule 10b-5 was to make the same prohibitions contained in Section 17(a)—which applies in connection with the '*offer* and sale' of a security—applicable to 'purchasers' of securities as well."[155] Although not directly addressing the absence of "make" in Section 17(a)'s text, the court broadly concluded that because Section 17(a) and Rule 10b-5 are similarly focused they should be interpreted in the same manner with respect to the scope of primary liability.[156] Because succeeding on a misrepresentation claim under either provision requires that "the SEC . . . prove the defendant *made* materially false statements or omissions,"[157] inconsistency would result if the SEC had to prove that the defendant made the misleading statement per *Janus* in Rule 10b-5 actions, but not have to prove that the defendant made the misleading statement per *Janus* in Section 17(a)(2) actions.[158] As a result, the court essentially imported "make" into the Securities Act's antifraud provision and dismissed the case because the SEC had not plead that the defendants made any misleading statements.[159]

One aspect noticeably absent from the court's analysis in *Kelly* is any consideration of the policy concerns that guided the Supreme Court's interpretation in *Janus*, and whether such concerns are present when the SEC is the plaintiff.[160] Not only are the concerns attendant to implied private rights of action—that is, judicial restraint, legislative primacy, and vexatious litigation—absent in SEC enforcement actions, but a court interpreting Section 17(a)(2) would have no need to interpret it narrowly to conform with private-action precedent as the Supreme Court did in *Janus*. Because Section

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154. *Kelly*, 817 F. Supp. 2d at 345 (citing SEC v. Monarch Funding Corp., 192 F.3d 295, 308 (2d Cir. 1999); SEC v. First Jersey Sec. Inc., 101 F.3d 1450, 1467 (2d Cir. 1996); SEC v. Tex. Gulf Sulphur Co., 401 F.2d 833, 855 n.22 (2d Cir. 1968); SEC v. Power, 525 F. Supp. 2d 415, 419 (S.D.N.Y. 2007)).

155. *Id.* (citing Birnbaum v. Newport Steel Corp., 193 F.2d 461, 463 (2d Cir. 1952); *Tex. Gulf Sulphur Co.*, 401 F.2d at 855).

156. *Id.*

157. *Id.* (citing SEC v. McGinn, Smith & Co., 752 F. Supp. 2d 194, 212–13 (N.D.N.Y. 2010); SEC v. Glob. Telecom Servs., LLC, 325 F. Supp. 2d 94, 111 (D. Conn. 2004); SEC v. Espuelas, 699 F. Supp. 2d 655, 659–63 (S.D.N.Y. 2010)).

158. *Id.*

159. *Id.*

160. *See* SEC v. Sentinel Mgmt. Grp., No. 07 C 4684, 2012 WL 1079961, at *15 (N.D. Ill. Mar. 20, 2012) ("However, the court in *Kelly* did not expressly consider the policy reasons underlying the *Janus* decision, and we are therefore unpersuaded by the court's reasoning.").

17(a)(2) does not include a private right of action, the provision need not be interpreted narrowly to preserve a reliance requirement. Nor is there a need to interpret it narrowly to preserve a previous prohibition on aiding-and-abetting liability given that the SEC is expressly authorized to pursue aiders and abettors of Section 17(a) primary violations.[161] And though the SEC may need to prove that the defendant made materially false statements or omissions under both Section 17(a)(2) and Rule 10b-5(b), Section 17(a)(2)'s "by means of" language could, as the court in *Stoker* found, nonetheless be interpreted as covering a broader range of conduct than Rule 10b-5(b)'s "make." Just as the presence of "make" in Rule 10b-5(b) works to bind the SEC to *Janus*'s interpretation, the absence of "make" in Section 17(a)(2) saves the SEC from *Janus*'s constraints.

Additionally, the court in *Kelly* was correct that "the SEC's 'only purpose' in adopting Rule 10b-5 was to make the same prohibitions contained in Section 17(a)—which applies in connection with the '*offer* and sale' of a security—applicable to 'purchasers' of securities as well."[162] This recognition, however, should not have spurred the court to likewise constrain Section 17(a)(2) as *Janus* does Rule 10b-5(b). Rather, this recognition better supports the previously stated idea that the Supreme Court interpreted "make" as it did to provoke the SEC or Congress into amending Rule 10b-5(b) to match the broader Section 17(a)(2). Rule 10b-5(b)'s roots in Section 17(a)(2) should not be taken for the opposite suggestion, that the latter should be interpreted to match the narrower formulation of the former. As shown below, Congress has been explicit in its preference for broad SEC enforcement authority.

D. Janus*'s Impact on the SEC's Enforcement Authority Under Section 17(a)(2) and Congressional Intent*

Congress's attitude towards both the SEC's enforcement authority and the scope of implied private rights of action under the securities laws also bear on the issue. Congress has repeatedly expanded the SEC's enforcement powers while simultaneously

161. *See* 15 U.S.C. § 77o(b) (2012) ("[A]ny person that knowingly or recklessly provides substantial assistance to another person in violation of a provision of this subchapter, or of any rule or regulation issued under this subchapter, shall be deemed to be in violation of such provision to the same extent" as the primary participant).

162. *Kelly*, 817 F. Supp. 2d at 345 (citing Birnbaum v. Newport Steel Corp., 193 F.2d 461, 463 (2d Cir. 1952); SEC v. Tex. Gulf Sulphur Co., 401 F.2d 833, 855 (2d Cir. 1968)).

working, with the help of the Supreme Court, to limit the scope of private actions. This supports an inference that Congress would not want the SEC's enforcement authority under Section 17(a)(2), which lacks both Rule 10b-5(b)'s language and the policy concerns that accompany private actions, to be limited by *Janus*.

In 1990, Congress vastly augmented the SEC's enforcement powers when it enacted the Securities Enforcement Remedies and Penny Stock Reform Act (Remedies Act)[163] "in order to provide additional enforcement remedies for violations" of the federal securities laws.[164] In particular, the Remedies Act was designed to "strengthen the enforcement powers of the . . . SEC and provide the agency with a broader range of remedies to protect investors and maintain the integrity of the nation's securities markets."[165] Before the Remedies Act's enactment, the SEC had limited authority to obtain financial penalties outside of insider-trading violations.[166] Due to the perceived inadequacy of the SEC's enforcement tools,[167] the Remedies Act significantly expanded the sanctions available to the SEC[168] by amending various federal securities laws[169] to provide the SEC with four new classes of remedies: cease and desist authority,

163. Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931 (codified in scattered sections of 15 U.S.C.).

164. *Id.* at 931. For an in depth discussion of the Remedies Act, see generally Ralph C. Ferrara, Thomas A. Ferrigno & David S. Darland, *Hardball! The SEC's New Arsenal of Enforcement Weapons*, 47 BUS. LAW. 33 (1991). For a look at postenactment developments, see generally Richard A. Spehr & Michelle J. Annunziata, *The Remedies Act Turns Fifteen: What Is Its Relevance Today?*, 1 N.Y.U. J.L. & BUS. 587 (2005).

165. S. REP. NO. 101-337, at 1 (1990). Likewise, the House Report for the Remedies Act stated it would provide the SEC "with new remedial authority that will enable the agency to operate its enforcement program in a more flexible manner." H.R. REP. NO. 101-616, at 13 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 1379, 1380.

166. Spehr & Annunziata, *supra* note 164, at 588.

167. *See* Ferrara et al., *supra* note 164, at 35–36 (discussing the perceived limitations on SEC enforcement authority and stating that injunctions were "ineffective with respect to certain offenders and particularly onerous for others," and disgorgement "merely required the wrongdoer to return the benefits of the illegal conduct and, thus, did not have a sufficient deterrent effect"); *see also* H.R. REP. NO. 101-616, at 16, *as reprinted in* 1990 U.S.C.C.A.N. 1379, 1384 ("Because many of the charges in the most prominent securities fraud cases of the 1980's have involved violations other than insider trading, the Commission believes that it needs the additional authority contained in [the Remedies Act] to attack the full range of fraudulent activity in the securities markets.").

168. Spehr & Annunziata, *supra* note 164, at 588.

169. These include the Securities Act of 1933, 15 U.S.C. §§ 77a–77aa (2012); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78nn (2012); Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 to -64 (2012); and Investment Advisors Act of 1940, 15 U.S.C. §§ 80b-1 to -21 (2012).

civil penalties, disgorgement of ill-gotten gains, and officer and director bars.[170]

Five years after significantly expanding the SEC's enforcement authority, and one year after the Supreme Court held in a private action that Section 10(b) and Rule 10b-5 do not support aiding-and-abetting liability, Congress acted yet again to expand the SEC's enforcement power and also to curtail the reach of private securities litigation. Congress passed the Private Securities Litigation Reform Act of 1995 (PSLRA)[171] in an effort to deter frivolous securities class actions (that is, strike suits).[172] The PSLRA heightened private plaintiffs' pleading requirements[173] and permitted the imposition of sanctions on attorneys who file securities-fraud class-action suits determined to be frivolous following mandatory judicial review of the suit.[174] Significantly, Congress declined the former SEC Chairman's request to provide for aiding-and-abetting liability in private Section 10(b) and Rule 10b-5 claims following *Central Bank*,[175] while

170. *See* Spehr & Annunziata, *supra* note 164, at 588–94 (explaining each class of new remedies).

171. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 and 18 U.S.C.).

172. *See* OFFICE OF THE GEN. COUNSEL, U.S. SEC. & EXCH. COMM'N, REPORT TO THE PRESIDENT AND THE CONGRESS ON THE FIRST YEAR OF PRACTICE UNDER THE PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995, at 5–6 (stating that the PSLRA "was intended to address concerns that had been raised about abuses believed to be associated with securities class actions"); *see also* Sharon Nelles & Hilary Huber, *Pleading Securities Fraud Claims: The Good, the Bad, and the Ugly*, 45 LOY. U. CHI. L.J. 653, 653–54 (2014) ("The purpose of the PSLRA was to 'prevent an onslaught of expensive and frivolous lawsuits when stock prices plummet, which could force corporations to settle meritless claims to avoid the expense of discovery and trial.'" (quoting *In re* Accelr8 Tech. Corp. Sec. Litig., 147 F. Supp. 2d 1049, 1053–54 (D. Colo. 2001))).

173. Nelles & Huber, *supra* note 172, at 656; *see also* 15 U.S.C. § 78u-4(b)(1)(B) (2012) (requiring a plaintiff alleging securities fraud based on misleading statements or omissions of material facts to "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed").

174. Nelles & Huber, *supra* note 172, at 659 ("[T]he PSLRA requires courts to conduct a Rule 11 inquiry upon final adjudication of the suit. If the court determines that compliance with Rule 11 is lacking, then it must impose sanctions on the plaintiff for filing a frivolous suit.").

175. *See Private Right of Action Hearing*, *supra* note 118, at 13–14 (statement of Arthur Levitt, Chairman, Securities and Exchange Commission) ("Legislation is also needed to restore aiding and abetting liability in private actions which are a necessary supplement to our overall enforcement program.").

simultaneously bestowing upon the SEC the power to pursue such actors.[176]

This decision demonstrates Congress's preference for expansion of SEC enforcement authority over that of private litigants. Despite this preference, this decision also supports that reading cases such as *Central Bank*, *Morrison*, and *Janus* "as not limited to private litigation, notwithstanding extensive language to the contrary, may be becoming a habit."[177] That is, Congress likely provided the SEC with authority to pursue aiders and abettors in anticipation that *Central Bank*'s holding would be applied to constrain the scope of the SEC's enforcement authority. The same is true of Congress providing the SEC with broader extraterritorial jurisdiction under Rule 10b-5 following the Court's interpretation of the Rule in *Morrison* as not reaching transactions occurring outside U.S. borders. Such inferred congressional acceptance of the applicability of *Central Bank* and *Morrison* to SEC enforcement actions suggests that Congress may view the Supreme Court's textual interpretations of Section 10(b) and Rule 10b-5 in private actions as applying to SEC suits. By virtue of this precedent, Congress would likely view *Janus*'s textual interpretation of Rule 10b-5(b) as applying to SEC actions brought under the Rule because the same text is present. This same inference, though, cannot be drawn with regards to *Janus*'s applicability to Section 17(a)(2), which lacks the language that Congress could conclude binds the SEC by virtue of *Janus*.

The PSLRA's passage, however, shows that Congress nonetheless envisioned the availability to the SEC of a broad pool of primary participants to prosecute under the antifraud provisions. In *Central Bank*, the Court spoke to the reach of not only Section10(b), but also Rule 10b-5(b), stating that liability does not reach aiders and abettors because "the statute prohibits only the making of a material misstatement (or omission)."[178] A primary participant is therefore one who "makes" a misrepresentation, at least in paragraph (b). This malleable formulation of what makes one a primary participant appears broader than *Janus*'s bright-line ultimate authority standard. Given that the aiding-and-abetting action still needs a primary

176. Private Securities Litigation Reform Act of 1995 § 104, 15 U.S.C. § 78t(e) (2012); *see also* Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 158 (2008) (describing this history).

177. Langevoort, *supra* note 10, at 939.

178. Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 177 (1994).

participant, the provision for an aiding-and-abetting action for the SEC can be seen as predicated on *Central Bank*'s broader formulation of primary participants. Although Congress may have implicitly accepted *Central Bank*'s applicability to the SEC, Congress may nonetheless have envisioned a broad scope of liability for the aiding-and-abetting action due to the broad pool of primary participants *Central Bank*'s formulation established. Congress's intent to provide a broad pool of primary participants from which aider-and-abettor liability can be derived supports not extending *Janus* to Section 17(a)(2).

Following the PSLRA's enactment, Congress twice again declined an invitation to give private litigants the ability to sue aiders and abettors of primary violations of the federal securities laws while simultaneously expanding the SEC's enforcement authority. First, in passing the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley),[179] Congress denied aiding-and-abetting liability to private litigants[180] but enhanced the remedies and sanctions available in SEC injunctive actions.[181] Later, under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank),[182] Congress considered and rejected a bill to extend primary liability to aiders and abettors[183] while expanding the SEC's authority to prosecute such secondary actors under the Securities Act.[184] Such a preference for the continued

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179. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified as amended in 15 U.S.C. §§ 7201–7266 and scattered sections of 11, 18, 28 and 29 U.S.C.).

180. *See* H.R. REP. NO. 107-414, at 53–54 (2002) (providing the minority view that "[a]lthough the [PSLRA] partially overturned the *Central Bank of Denver* decision by restoring some of the SEC's authority to pursue aiders and abettors of securities fraud, that legislation failed to give the victims of fraud the right to sue those who aid issuers in misleading and defrauding the public").

181. *See, e.g.*, 15 U.S.C. § 78u-4 (2012) (permitting the SEC to freeze extraordinary payments to any of the listed persons during the course of a lawful investigation involving possible violations of the federal securities laws); Sarbanes-Oxley Act of 2002 § 305(a), 15 U.S.C. § 78u (2012) (changing the standard for using officer and director bars in federal court actions from "substantial unfitness" to "unfitness"); *id.* § 308(a), 15 U.S.C. § 7246 (2012) (allowing the SEC to combine civil penalties with disgorgement funds).

182. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (codified in scattered titles of the U.S. Code)

183. *See* Liability for Aiding and Abetting Securities Violation Act of 2009, S. 1551, 111th Cong. (2009) (proposing a private civil right of action for aiding and abetting as part of Dodd-Frank); Alexander C. Krueger-Wyman, Note, *Making a Statement About Private Securities Litigation: The Merits and Implications of the Supreme Court*'s Janus Capital *Case*, 98 VA. L. REV. 1621, 1639 (2014) (discussing the bill).

184. Dodd-Frank § 929M, 15 U.S.C. § 77o (2012) (providing the SEC authority to pursue aiders and abettors of violations of the Securities Act); *see also id.* § 929O, 15 U.S.C. § 78t

expansion of SEC authority to combat fraud under the securities laws intimates Congress's intent not to have this authority narrowed by applying *Janus* to Section 17(a)(2).

Finally, the SEC's broad authority to obtain injunctions provides yet another factor suggesting that Congress intended for the SEC to have broader power than private litigants to pursue violations of the federal securities laws' antifraud provisions.[185] Unlike suits brought by private litigants, the purpose of an SEC injunctive proceeding "is to protect the public against harm, not punish the offender."[186] Also unlike private litigants seeking injunctive relief, the SEC typically is not required to demonstrate either irreparable injury or an inadequate remedy at law.[187] Further still, the SEC need not even prove that the defendant engaged in prohibited conduct to obtain an injunction; the SEC must establish merely that the defendant was "*about* to engage in any of the acts or practice which constitute or will constitute a violation" of the antifraud provisions.[188] Thus, not only does Section 17(a)(2) lack the language interpreted in *Janus* as narrowing the scope of primary-participant liability, the SEC's injunctive authority itself evidences that Congress does not desire for the pool of primary participants pursuable by the SEC to equal that available to private litigants.

IV. RESTORING BALANCE IN THE SEC'S ENFORCEMENT AUTHORITY

Given *Janus*'s applicability to Rule 10b-5(b) misrepresentation claims brought by the SEC,[189] the question arises: What next? Claims

(2012) (changing the aiding-and-abetting standard from "knowingly" to "knowingly or recklessly").

185. *See* Securities Act of 1933 § 20(b), 15 U.S.C. § 77t(b) (2012) (permitting the SEC to seek an injunction "[w]henever it shall appear to the Commission that any person is engaged in or about to engage in any of the acts or practice which constitute or will constitute a violation of any of the provisions of this chapter"); Exchange Act of 1934 § 21(d), 15 U.S.C. § 78u(d) (2012) (same).

186. SEC v. Coven, 581 F.2d 1020, 1027–28 (2d Cir. 1978).

187. *See, e.g.*, SEC v. Mgmt. Dynamics, Inc., 515 F.2d 801, 808 (2d Cir. 1975) ("Unlike private actions, which are rooted wholly in the equity jurisdiction of the federal court, SEC suits for injunctions are 'creatures of statutes.' '(P)roof of irreparable injury or the inadequacy of other remedies as in the usual suit for injunction' is not required." (alteration in original) (citation omitted)); *see also* SEC v. Marker, 427 F. Supp. 2d 583, 590 (M.D.N.C. 2006) ("[T]he Commission does not have to invoke the traditional equitable requirements for injunctive relief to obtain an injunction . . . .").

188. 15 U.S.C. § 77t(b) (emphasis added).

189. *See supra* Part III.A.

brought under Section 17(a)(2) provide no alternative for prosecuting misrepresentations made in connection with the purchase of securities.[190] And pursuing such misrepresentations under a theory of scheme liability via Rule 10b-5(a) and 10b-5(c) presents its own difficulties.[191] Until recently, preserving the SEC's ability to equally prosecute fraudsters during both the offer and purchase of securities appeared to require either congressional action, such as what occurred following *Central Bank* and *Morrison*, or the SEC's exercise of its rulemaking authority. But in a recent agency adjudication the SEC interpreted its own regulations and the Securities Act in a manner that, if deferred to by courts, could alleviate this incongruence.

A. *The SEC's Take:* In re Matter of Flannery *and the SEC's Bid for Judicial Deference*

As could be expected, the SEC has not been silent on the issue, and for good reason. Extending *Janus* both to scheme liability claims under Rule 10b-5(a) and (c) and misrepresentation claims under Section 17(a)(2) would severely curtail the SEC's ability to pursue perpetrators of misrepresentations at *all* stages of securities dealings. The stance taken by the SEC in a recent adjudication, however, drastically limits the possibility that *Janus* will be stretched beyond Rule 10b-5(b).

In *In re Matter of Flannery*,[192] the SEC squarely addressed *Janus*'s application to Rule 10b-5(a) and (c) and Section 17(a)(2). In its opinion, the Commission noted that *Janus*'s silence regarding these provisions "creat[ed] confusion in the lower courts as to whether its limitations apply to those provisions, as well."[193] The SEC thus relied on its "experience and expertise in administering the securities laws" to set out its interpretation both of Rule 10b-5's various provisions and of Section 17(a).[194] It did so to "resolve the ambiguities in the meaning of Rule 10b-5 and Section 17(a) that have produced confusion in the courts and inconsistencies across jurisdictions."[195] The

190. *See supra* Part III.C.

191. *See supra* Part III.B.

192. *In re* Flannery, Securities Act Release No. 9689, Exchange Act Release No. 73,840, Investment Advisers Act Release No. 3981, Investment Company Act Release No. 31,374, 2014 WL 7145625 (Dec. 15, 2014).

193. *Id.* at *10.

194. *Id.* at *9.

195. *Id.*

SEC's allusion to ambiguity and its explicitness in bringing to bear its experience and expertise shows the SEC's intent in setting out its interpretations—a bid for judicial deference to its stance that *Janus* does not apply to SEC actions brought outside Rule 10b-5(b).

Under existing administrative-law doctrines, agencies receive deference for reasonable interpretations of ambiguities in their regulations and the statutes they administer.[196] In *In re Matter of Flannery*, the SEC interpreted both its own regulations—Rule 10b-5(a) and (c)—and a statute it is charged with administering—Section 17(a)(2) of the Securities Act. By doing so, courts considering *Janus*'s application outside of Rule 10b-5(b) must now assess whether the SEC's interpretations warrant deference.

1. *The SEC's Take on* Janus *and Section 17(a)(2).* The SEC's interpretation of Section 17(a)(2) might allow the SEC to avoid *Janus*'s ultimate authority rule when prosecuting fraud involving misrepresentations perpetrated in connection with the offer of securities. Under *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*,[197] federal courts must accept an agency's reasonable construction of an ambiguous statute "even if the agency's reading differs from what the court believes is the best statutory interpretation."[198]

In *In re Flannery*, the SEC concluded that "*Janus*'s limitation on primary liability under Rule 10b-5(b) does not apply to claims arising under Section 17(a)(2)."[199] It did so based on the same rationale employed by the many courts that similarly held *Janus* inapplicable to Section 17(a)(2). First, Section 17(a)(2) prohibits obtaining money or property "by means of" any untrue statement, not "making" a false statement.[200] This textual difference means Section 17(a)(2) "covers a

196. *See* Auer v. Robbins, 519 U.S. 452, 457 (1997) (declaring that because Congress had not directly spoken to the issue, the agency's interpretation was to be sustained if it was based on a permissible construction of the statute); Chevron U.S.A. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) (holding that if a court determines that Congress has not directly addressed the precise question at issue, the court must ask whether the agency's interpretation is a permissible construction of the statute); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945) (explaining that the administrative interpretation of a regulation is controlling unless plainly erroneous or inconsistent with the regulation).

197. Chevron U.S.A. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

198. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (citing *Chevron*, 467 U.S. at 843–44, 44 n.11.).

199. *Flannery*, 2014 WL 7145625, at *11 (citation omitted).

200. *Id.* (citing 15 U.S.C. § 77q(a)(2) (2012)).

broader range of activity than Rule 10b-5(b).”[201] Indeed, the SEC interpreted Section 17(a)(2)’s “by means of” requirement “to mean that a defendant may be held primarily liable if he *uses* a misstatement to obtain money or property even if he has not himself made a false statement in connection with the offer or sale of a security.”[202] Second, the SEC reasoned that since “make” is absent from Section 17(a)(2), “*Janus*’s limitation on primary liability under Rule 10b-5(b) does not apply to claims arising under Section 17(a)(2).”[203] Finally, extending *Janus* to Section 17(a)(2) would undermine the Securities Act’s remedial purposes and the SEC’s “long-held position that the securities laws ‘should be construed not technically and restrictively, but flexibly to effectuate [those] remedial purposes.’”[204]

Judicial deference to the SEC’s interpretation of Section 17(a)(2) will ensure that *Janus* does not constrain its ability to prosecute fraud involving misrepresentations perpetrated in connection with the offer of securities. Deferring to this interpretation will not, however, remedy the constraint *Janus* placed on the SEC’s ability to prosecute misrepresentations perpetrated in connection with the purchase of those securities on the secondary markets.

2. *The SEC’s Take on* Janus *and Scheme Liability Under Rule 10b-5(a) and (c).* In *Bowles v. Seminole Rock & Sand Co.*,[205] the Supreme Court held that an agency’s interpretation of its own rules “becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.”[206] In *In re Flannery*, the SEC interpreted Rule 10b-5(a) and (c), its own rules, and concluded that primary liability under those provisions “*also* encompasses the ‘making’ of a fraudulent misstatement to investors, as well as the drafting or devising of such a misstatement.”[207] This is because, according to the SEC, Rule 10b-5(a) and (c)’s combined prohibitions

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201. *Id.*

202. *Id.* (quoting SEC v. Tambone, 550 F.3d 106, 127–28 (1st Cir. 2008)).

203. *Id.*

204. *Id.* (alteration in original).

205. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).

206. *Id.* at 413–14; *see also* Auer v. Robbins, 519 U.S. 452, 461 (1997) (stating that an agency’s interpretation of its own regulation contained in an amicus brief is “controlling unless plainly erroneous or inconsistent with the regulation” (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989))).

207. *Flannery*, 2014 WL 7145625, at *12.

on employment of deceptive "device[s]," "scheme[s]," and "artifice[s] to defraud" and deceptive "act[s]" includes "making" a misstatement.[208] Thus, under the SEC's interpretation, a party could avoid primary liability for a misstatement under Rule 10b-5(b) if he did not "make" the statement as defined in *Janus* but nonetheless be primarily liable under subsections (a) and (c) for employing a deceptive "device," "scheme," or "artifice to defraud" and engaging in a deceptive "act."[209] This approach permits the SEC to avoid *Janus*'s constraints when prosecuting fraud involving misstatements or omissions in the purchase or sale of securities on the secondary markets.

Although a full-blown administrative-law analysis of this interpretation's chances of receiving deference is beyond the scope of this Note, one potential speed bump warrants mentioning: *Seminole Rock* deference may soon be dead. Justices Scalia and Thomas both recently expressed their desire to altogether jettison deference to agency interpretations of their own regulations.[210] Justice Alito and Chief Justice Roberts also believe that reconsideration of *Seminole Rock/Auer* deference may be appropriate when properly raised and argued.[211] As Chief Justice Roberts put it, the Court's recent decisions have assured that "[t]he bar is aware that there is some interest in reconsidering those cases."[212] Now "[w]ell-advised litigants pained by agency interpretations . . . will be teeing up the *Auer* question and, when it makes tactical sense, arguing that agency interpretations really are substantive rules" to which courts do not defer.[213] If

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208. *See id.* at *14 ("It would require a wholly arbitrary reading of those terms to construe them as *excluding* the making, drafting, or devising of a misstatement.").

209. *See id.* at *13 ("Accepting that a drafter is not primarily liable for 'making' a misstatement under Rule 10b-5*(b)*, our position is that the drafter would be primarily liable under subsections *(a)* and *(c)* for employing a deceptive 'device' and engaging in a deceptive 'act'.").

210. *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1213 (2015) (Thomas J., concurring) ("I write separately because [these cases at hand] call into question the legitimacy of our precedents requiring deference to administrative interpretations of regulations."); *id.* at 1211–13 (Scalia J., concurring) (describing that in interpreting regulations, "courts [should] decide—with no deference to the agency—whether [the agency's] interpretation is correct").

211. Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1338 (2013).

212. *Id.* at 1339.

213. Brian Wolfman & Bradley Girard, *Opinion Analysis: The Court Slays the D.C. Circuit's* Paralyzed Veterans *Doctrine, Leaving Bigger Issues for Another Day*, SCOTUSBLOG (Mar. 10, 2015, 9:22 AM), http://www.scotusblog.com/2015/03/opinion-analysis-the-court-slays-the-d-c-circuits-paralyzed-veterans-doctrine-leaving-bigger-issues-for-another-day [http://perma.cc/G5CJ-632V].

Seminole Rock/*Auer* deference is extinguished, the SEC's interpretation of Rule 10b-5(a) and (c) as unaffected by *Janus* may not carry the day. If it does not, the SEC would be back to having a curtailed ability to pursue misstatements and omissions during the purchase of securities on the secondary markets. This possibility calls for exploration of alternative routes to alleviating *Janus* constraints.

B. Restoring Balance via the SEC's Rulemaking Authority Under Section 10(b)

Given the current congressional environment of partisan gridlock,[214] the most plausible means of restoring balance in the SEC's authority to prosecute misrepresentations at the varying stages of securities dealings is through the SEC's rulemaking authority. Given that *Janus*'s applicability to SEC enforcement actions stems from the presence of "make" in Rule 10b-5(b) regardless of the plaintiff's identity, the SEC could reverse *Janus*'s detrimental effects on pursuing primary participants by amending its own rule.[215] Importantly, *Janus* did not constrain the scope of Section 10(b)—and thus the SEC's ability to promulgate rules under that Section—since the opinion interpreted the text of Rule 10b-5 itself and not the statutory language of Section 10(b).[216] In deciding to bring its misrepresentation enforcement powers into equilibrium through exercising this rulemaking authority, the SEC has two options. The Commission can simply amend the current Rule 10b-5(b) and discard "make" in favor of a preferable term. Or it can leave intact the current narrow Rule 10b-5(b) and create a new Rule 10b-5(b) to explicitly apply only to SEC enforcement actions.

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214. *See* Gillian E. Metzger, *Appointments, Innovation, and the Judicial-Political Divide*, 64 DUKE L.J. 1607, 1630–33 (2015) ("Political scientists have documented significantly increased political polarization in Congress. The ideological gap between the two parties is growing, with increasingly consistent party divides across a wide range of policy issues."). Such polarization makes "periods of divided government especially prone to conflict and stalemate." *Id.* at 1632 (citation omitted).

215. The SEC has used its rulemaking authority in the past to essentially overrule a line of cases interpreting Rule 10b-5. In 2000, the SEC promulgated Rule 10b5-1 to clarify whether insider trading prohibited by Rule 10b-5 required knowing possession of material nonpublic information, or using such information to trade. The SEC settled on the former interpretation in Rule 10b5-1, overruling the Ninth and Eleventh Circuits' approach requiring use of the information. *See* JAMES D. COX & MELVIN ARON EISENBERG, BUSINESS ORGANIZATIONS CASES AND MATERIALS 948–49 (11th ed. 2014).

216. *See* Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296, 2302 (2011) ("*For purposes of Rule 10b–5*, the maker of a statement is the person or entity with ultimate authority over the statement . . . ." (emphasis added)).

1. *Reversing* Janus*'s Effects by Amending Rule 10b-5(b)*. The more interesting route for the SEC to take is to amend the current Rule 10b-5(b), resulting in a newly phrased single rule applicable to both the SEC and private litigants. Given Rule 10b-5(b)'s roots, the SEC could amend Rule 10b-5(b)'s language to track that of the broader Section 17(a)(2), from which Rule 10b-5(b) was substantially derived.[217] This response would accord with the assertion that, given Rule 10b-5(b)'s creation, the Court in *Janus* so interpreted Rule 10b-5(b) to provoke the SEC into acting to bring its enforcement authority under Rule 10b-5 up to par with that of its parent, Section 17(a).[218]

Simply amending the current Rule 10b-5(b) carries with it the primary benefit of preserving private enforcement as a "necessary supplement to the securities fraud deterrence efforts of the SEC."[219] That is, a Rule 10b-5(b) that captures the same scope of primary participants regardless of the plaintiff's identity allows the threat of private litigation to serve as an added deterrent to those considering engaging in fraudulent conduct. Amending the current Rule 10b-5(b) to track the language of Section 17(a)(2) would therefore relieve the SEC of *Janus*'s constraints on pursuing primary violators while supplementing this broader enforcement authority with the deterrence provided by the specter of private litigation. Indeed, that the SEC's amicus brief in *Janus* argued for a broad interpretation of "make" hints at the SEC is content with a single rule applicable to both itself and private plaintiffs.[220] Even before *Janus* the SEC recommended to Congress that aiding-and-abetting liability be established in private claims following *Central Bank*,[221] which would have permitted both the SEC and private plaintiffs to pursue such actors.

217. *See supra* notes 131–32 and accompanying text.

218. *See supra* Part III.A.

219. Rose, *supra* note 99, at 1301. For an argument that private enforcement results in detrimental overdeterrence, see generally *id.*

220. *See* Brief for the U.S. as Amicus Curiae Supporting Respondent at 12–17, *Janus*, 131 S. Ct. 2296 (2011) (No. 09-525), 2010 WL 4339892 (explaining the agency's view that a person makes a statement if "the statement is written or spoken by him, or if he provides the false or misleading information that another person then puts into the statement, or if he allows the statement to be attributed to him" (citation omitted)); *see also Janus*, 131 S. Ct. at 2303 & n.8 (explaining that the SEC definition would permit private plaintiffs to sue a person who provides false information).

221. *Private Right of Action Hearing*, *supra* note 118, at 13–14 (statement of Arthur Levitt, Chairman, Securities and Exchange Commission).

But taking this path to reversing *Janus*'s adverse effects also eschews the notion that Congress prefers that the SEC enjoy broader enforcement authority than do private litigants even when the actions are brought under identical provisions.[222] In this regard, the SEC might alternatively preserve the current Rule 10b-5(b) interpreted in *Janus* but also promulgate a new Rule 10b-5(b) that explicitly applies only to the SEC.

2. *Reversing* Janus*'s Effects by Adopting a New Rule 10b-5(b) Applicable Only to SEC Enforcement Actions.* Promulgating a new Rule 10b-5(b) exclusive to the SEC would not only honor Congress's apparent desire to constrain the scope of private securities actions while broadening the SEC's enforcement authority, but also pander to the Supreme Court's concerns over implied private rights of action and its desire to ensure such actions remain narrowly construed.[223] Moreover, this two-rule approach would alleviate the tension following cases brought by private plaintiffs that produce disagreement as to their applicability to SEC enforcement actions. The Supreme Court and lower courts could freely construe the current Rule 10b-5(b), applicable to private actions, narrowly while interpreting the new Rule 10b-5(b), applicable to SEC actions, "not technically and restrictively, but flexibly to effectuate its remedial purposes."[224]

C. Restoring Balance via Congressional Action

Congressional action provides an alternative—but also less likely—means of restoring balance in the SEC's enforcement authority with regards to misrepresentations under the securities antifraud provisions. Indeed, it would not be the first time Congress has acted to rebalance the SEC's enforcement authority following the Supreme Court's textual interpretation of the Exchange Act's antifraud provisions. For example, following the Court's abrogation of aiding-and-abetting liability in *Central Bank*, Congress quickly

222. *See supra* Part III.D.

223. *See, e.g.*, *Janus*, 131 S. Ct. at 2302 ("[C]oncerns with the judicial creation of a private cause of action caution against its expansion." (quoting Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 165 (2008))); *see also id.* ("[W]e are mindful that we must give 'narrow dimensions . . . to a right of action Congress did not authorize when it first enacted the statute and did not expand when it revisited the law.'" (alterations in original) (quoting *Stoneridge*, 552 U.S. at 167)).

224. SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 195 (1963).

affirmed the SEC's ability to pursue such actors.[225] On that occasion Congress acted with good reason because application of *Central Bank*'s holding to the SEC would bar the Commission from obtaining injunctive relief against aiders and abettors.[226] Such a result would be a "strange anomaly" in that "the Commission's enforcement powers would, under the express language of the Act, be broader in actions brought in an administrative proceeding . . . than if the same action were initiated in the district court" seeking injunctive relief.[227] But the PSLRA, "by expressly authorizing SEC judicial enforcement of the antifraud provision against aiders and abettors, avoids the anomal[y]."[228]

The post-*Janus* imbalance in the SEC's authority to pursue as primary participants those who materially misrepresent information in connection with the offer of securities versus those who do so in connection with the purchase of securities on the secondary markets parallels the anomalous result of applying *Central Bank* to the SEC. It likewise could be avoided by congressional action reversing *Janus*'s narrow holding as applied to the SEC. Given the substantial institutional constraints on congressional action, and the current bitterly partisan state of Congress in general, times do not appear conducive to such remedial action.[229] Thus, judicial deference to the SEC's interpretation of scheme liability under Rule 10b-5(a) and (c) or the SEC utilizing its rulemaking authority are the more plausible solutions to *Janus*'s incongruence quandary.

CONCLUSION

Despite the ultimate authority rule being molded to allay concerns present only in private actions and to mesh seamlessly with precedent not applicable to the SEC, "make" does not disappear from Rule 10b-5(b) when the SEC is the plaintiff. To that end, *Janus*'s ultimate authority rule, whether intended or as a result of collateral damage, constrains the scope of actors the SEC can prosecute as

225. *See* Private Securities Litigation Reform Act of 1995 § 104, 15 U.S.C. § 78t(e) (2012) (reestablishing aiding-and-abetting liability).

226. *See* Cox, *supra* note 41, at 537 (discussing the effects of applying *Central Bank* to the SEC).

227. *Id.* at 537, 539.

228. *Id.* at 539.

229. *See* Metzger, *supra* note 214, at 1630–33 (considering how the combination of divided government and political polarization render government "especially prone to conflict and stalemate" (citation omitted)).

primary participants under that provision. The Supreme Court's puzzling methodology is plausibly explained as an attempt to prompt the SEC or Congress into bringing Rule 10b-5(b) and Section 17(a)(2) into equilibrium with one another. After all, Rule 10b-5 is derived substantially from Section 17(a) and was meant to serve the same purpose. The SEC has taken notice, and perhaps the courts will defer to its interpretation of scheme liability under Rule 10b-5(a) and (c) as reaching the claims foreclosed by *Janus*. If not, either the SEC or Congress may need to take additional action to resolve this incongruence.