MAKING A STATEMENT ABOUT PRIVATE SECURITIES LITIGATION: THE MERITS AND IMPLICATIONS OF THE SUPREME COURT'S *JANUS CAPITAL* CASE

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INTRODUCTION

IN recent years, both Congress and the Supreme Court have substantially limited the right of investors to sue securities issuers for fraud under Rule 10b–5.[1] This private right of action is nowhere expressly authorized but is widely recognized as within the scope of Rule 10b–5, and consequently of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act").[2] Out of concern for the costs of excessive litigation and abusive "strike-suits,"[3] Congress has refused to expand this right and the Supreme Court has interpreted its scope more and more narrowly with time. Most recently, the Court sparked controversy with its decision in *Janus Capital Group v. First Derivative Traders*, in which it held that, for pur-

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[1] See, e.g., Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (1998); Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737, 737–65 (1995); Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 165–66 (2008); Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 191 (1994).

[2] Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 & n.9 (1971). Rule 10b–5 was promulgated under the authority of § 10(b).

[3] "Strike-suits" are meritless suits that are designed to exploit defendants' incentives to avoid litigation costs and provoke a settlement. See Marvin Lowenthal, Note, Revitalizing Motive and Opportunity After *Tellabs*, 109 Mich. L. Rev. 625, 627 (2011).

poses of Rule 10b–5, the "maker" of a statement is the entity with "ultimate authority" over it.[4]

Janus settled a near-decade-long dispute over alleged misstatements in prospectuses issued by the Janus Investment Fund ("JIF"), a mutual fund created by asset management firm Janus Capital Group ("JCG").[5] JCG also created Janus Capital Management ("JCM"), an investment adviser, which was retained by JIF to govern the "management and administrative services necessary for" JIF's operation.[6] Although JCG created both JIF and JCM, the entities maintained legally separate identities with separate boards of directors and sets of investors.[7]

When the alleged fraud was discovered,[8] investors began to withdraw their investments from JIF.[9] As a result, JCM, which received its compensation as a percentage of assets under management in JIF, suffered significant losses in revenue.[10] Because JCG derived a large part of its income from JCM's management fees, this loss in JCM's revenue caused a sharp decline in JCG's share price. Shareholders in JCG thus lost approximately twenty-five percent of their investment value prior to the alleged fraud.[11] Plaintiffs First Derivative Traders ("Plaintiffs") represented a class of JCG shareholders who had suffered losses as a result of these events.[12] In their complaint, Plaintiffs alleged that JCG and JCM, as a result of their intimate involvement in the drafting process, had "caused" the pro-

[4] 131 S. Ct. 2296, 2302 (2011).

[5] The prospectuses, which outlined JIF's strategy and operations, contained statements alleging that JIF was not involved in and was taking measures to prevent market-timing, "a trading strategy that exploits time delay in mutual funds' daily valuation system." Id. at 2300 & n.1.

[6] Id. at 2299 (quoting Joint Appendix at 225a, *Janus*, 131 S. Ct. 2296 (No. 09-525)).

[7] Id.

[8] In September 2003, then-Attorney General of New York Eliot Spitzer filed a complaint against JCM, finding that it had "permitted excessive market timing activity in a number of its mutual funds." Press Release, N.Y. State Office of the Att'y Gen., Spitzer, Salazar Announce Market-timing Settlement with Janus Capital Management, LLC (Apr. 27, 2004), available at http://www.ag.ny.gov/press-release/spitzer-salazar-announce-market-timing-settlement-janus-capital-management-llc.

[9] *Janus*, 131 S. Ct. at 2300.

[10] Id.

[11] Id.

[12] Id.

spectuses "to be issued," and were liable for a violation of Rule 10b–5.[13]

At the district court level, the court dismissed Plaintiffs' complaint for failure to state a claim, holding that JCM could not be held primarily liable for misstatements in JIF's prospectuses.[14] The Fourth Circuit reversed, finding that the complaint adequately alleged "that JCG and JCM, by participating in the writing and dissemination of the prospectuses, *made* the misleading statements contained in the documents."[15] In response to a circuit split on the issue,[16] the Supreme Court granted certiorari to determine "whether . . . a mutual fund investment adviser[] can be held liable in a private action under . . . Rule 10b–5 for false statements included in its client mutual funds' prospectuses."[17] The Court reversed the Fourth Circuit's ruling and held that only the entity with "ultimate authority" over a statement can be its "maker" for purposes of determining Rule 10b–5 liability.[18]

In the short time since the case was decided, *Janus* already has had a profound impact on private securities litigation. The Court's ruling explicitly precludes the finding that legally separate entities from securities issuers can be primarily liable under Rule 10b–5, and implicitly carries far-reaching implications in other settings. In three Parts, this Note seeks to address both the merits of the case and its implications for the securities industry. First, Part I argues that *Janus* was correctly decided under both the plain language of the statute and Congress's intent in enacting Section 10(b) of the Exchange Act. Second, Part II addresses one of the most important issues following *Janus*—whether the limits that the case places on

[13] Id. Plaintiffs also alleged a violation under § 20(a), concerning controlling person liability, against JCG. In re Mut. Funds Inv. Litig., 487 F. Supp. 2d 618, 620 (D. Md. 2007), rev'd, 566 F.3d 111, 115 (4th Cir. 2009), rev'd sub nom. Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296 (2011).

[14] *In re Mut. Funds Inv. Litig.*, 487 F. Supp. 2d at 624 ("[A] mutual fund investment adviser that allegedly made misrepresentations to mutual fund shareholders cannot be liable under section 10(b) to its parent's shareholders who purchased no mutual fund shares."). Because the court found no primary violation, it also dismissed the controlling person claim, which is derivative of primary liability. Id.

[15] In re Mut. Funds Inv. Litig., 566 F.3d 111, 121 (4th Cir. 2009), rev'd sub nom. Janus Capital Grp., Inc. v. First Derivative Traders, 131 S. Ct. 2296 (2011).

[16] See Petition for a Writ of Certiorari at 10–14, *Janus*, 131 S. Ct. 2296 (No. 09-525).

[17] *Janus*, 131 S. Ct. at 2299.

[18] Id. at 2302.

private actions against legally separate entities apply to corporate insiders—and argues that the holding was intended to and does extend in this manner. Finally, Part III examines the consequences of *Janus* in the securities industry and argues that Congress should expand federal regulatory authority to compensate for what is currently a lack of remedy for investors.

I. *JANUS* WAS CORRECTLY DECIDED UNDER AN ACCURATE CONSTRUCTION OF THE LAW

Much of the recent criticism of *Janus* has focused on the consequences that the case could have on the securities industry.[19] As these critics suggest, the effect of the case is to limit drastically the private right of action available to investors under Rule 10b–5. Others have criticized the case as judicial activism disguised as textual construction.[20] Claiming that the *Janus* Court wished to restrict any private remedy under Rule 10b–5, they maintain that the decision was driven by policy objectives.[21] While the former group

[19] See, e.g., Barriers to Justice and Accountability: How the Supreme Court's Recent Ruling Will Affect Corporate Behavior: Hearing Before the S. Comm. on the Judiciary, 112th Cong. 2 (2011) [hereinafter Barriers to Justice] (statement of Senator Patrick Leahy, Chairman, S. Comm. on the Judiciary), available at http://www.gpo.gov/fdsys/pkg/CHRG-112shrg68273/pdf/CHRG-112shrg68273.pdf (arguing that the *Janus* decision "allows Wall Street companies to design new ways to evade accountability" for "fraudulent investment schemes and corporate misconduct"); Elizabeth Cosenza, Is the Third Time the Charm? *Janus* and the Proper Balance Between Primary and Secondary Actor Liability Under Section 10(b), 33 Cardozo L. Rev. 1019, 1075–82 (2012) (arguing for legislative action to remedy the problems caused by *Janus*); Norman S. Poser, The Supreme Court's *Janus Capital* Case, 44 Rev. of Sec. & Commodities Reg. 205, 209 (2011) ("The *Janus* Court failed to take account of a practical consequence of its decision."); Stephen M. Juris, *Janus Capital Group Inc. v. First Derivative Traders* and the Law of Unintended Consequences, Forbes, Sept. 21, 2011, 11:51 AM, http://www.forbes.com/sites/insider/2011/09/21/janus-capital-group-inc-v-first-derivative-traders-and-the-law-of-unintended-consequences/ (arguing that "broadly worded" opinions such as Justice Thomas's in *Janus* carry far-reaching and unintended consequences).

[20] See, e.g., James D. Redwood, To Make or to Mar: The Supreme Court Turns Away Another Securities Law Plaintiff, 14 U. Pa. J. Bus. L. 463, 485 (2012) (describing the Court's textual interpretation as "the wolf of policy dressed up as the sheep of language").

[21] See id. (stating that "in effectuating its policy preferences, the Court ignored the words actually used when Congress 'enacted the statute'"). But see Jonathan H. Adler, The Roberts Court and Business Revisited, The Volokh Conspiracy, June 29, 2011, 2:30 AM, http://volokh.com/2011/06/29/the-roberts-court-and-business-revisited/

raises legitimate and important concerns about the status of securities regulation and the latter may bring an interesting perspective to the conversation, such criticism ignores the fact that the Supreme Court was obligated to reach such a result by both the plain language of the statute and congressional intent. Regardless of the consequences, the Court must interpret the law as enacted by Congress.[22] Moreover, the ruling accords with Supreme Court precedent in allowing only a narrow right of action to private investors.

A. The Plain Language of Section 10(b) and Rule 10b–5 Supports the Court's Decision

"The broad remedial goals of the [securities laws] are insufficient justification for interpreting a specific provision 'more broadly than its language and the statutory scheme reasonably permit.' We must assume that Congress meant what it said."[23] Justice Thomas thus appropriately began his analysis by addressing the plain language of Section 10(b) and Rule 10b–5 before considering alternative factors.[24] Subsection (b) of Rule 10b–5, which was promulgated under Section 10(b) of the Exchange Act,[25] makes it

("[T]here is little evidence that the Court, or any of the justices, are motivated by a desire to help business . . . .").

[22] See Lewis v. City of Chi., 130 S. Ct. 2191, 2200 (2010) ("[I]t is not our task to assess the consequences of each approach and adopt the one that produces the least mischief. Our charge is to give effect to the law Congress enacted.").

[23] Pinter v. Dahl, 486 U.S. 622, 653 (1988) (quoting Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979)).

[24] *Janus*, 131 S. Ct. at 2301–02.

[25] 15 U.S.C. § 78j(b) (2006). Section 10(b) makes it unlawful for any person "[t]o use or employ . . . any manipulative or deceptive device or contrivance in contravention of" any rule promulgated by the Securities and Exchange Commission ("SEC"). In interpreting the plain text of the statute, the text of § 10(b) should predominantly govern: "The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is 'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'" Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213–14 (1976) (quoting Dixon v. United States, 381 U.S. 68, 74 (1965)). In his recent criticism of the *Janus* opinion, Professor Redwood suggests that Justice Thomas intentionally defied statutory construction principles by analyzing Rule 10b–5 before the statute, § 10(b), in order to effectuate his policy preferences. Redwood, supra note 20, at 485. Implicit in the majority's opinion, however, are important considerations regarding § 10(b) that have helped define the private right of action under Rule 10b–5. Prior cases by the Supreme Court have addressed this right, and have defined its scope as a subset of those remedies available under § 10(b). See, e.g., Central Bank of Denver, N.A. v.

unlawful for "any person, directly or indirectly, . . . [t]o make any untrue statement of a material fact" in connection with the purchase or sale of securities.[26]

Whether an entity "made" a statement is a consideration of enormous consequence, as it determines whether that actor was a primary or secondary actor with regard to the alleged violations. For purposes of Rule 10b–5, no secondary actors can be primarily liable unless "*all* of the requirements for primary liability" are met.[27] Consequently, JCM must have *made* the alleged misstatements to be subject to primary liability. Moreover, while there is a widely acknowledged, albeit narrow, private right of action under Rule 10b–5, the Court has ruled that it does not apply to aiding and abetting.[28] For Plaintiffs to bring a claim against JCM, they must therefore allege successfully that JCM was a primary actor with regard to the misstatements in question. Both the majority and dissenting opinions thus focused predominantly on and essentially differed over the definition of the term "to make" within the scope of Rule 10b–5.[29]

1. The Majority's Bright-Line Interpretation

Writing for the majority, Justice Thomas approached this issue by first considering the rules of textual construction set forth in the Oxford English Dictionary ("OED").[30] Under the OED, where the term "to make" is followed by the noun form of a verb, the statement is "approximately equivalent in sense" to simply stating the verb.[31] The phrase "[t]o make any . . . statement" in Rule 10b–5 would thus be the functional equivalent of "to state."[32] Whichever

First Interstate Bank of Denver, N.A., 511 U.S. 164, 177, 191 (1994) (delimiting the private right of action for rules promulgated under § 10(b) to those causes expressly recognized by the Exchange Act). Justice Thomas, who values brevity, likely did not feel the need to reevaluate these considerations.

[26] 17 C.F.R. § 240.10b–5(b) (2012).

[27] *Cent. Bank*, 511 U.S. at 191.

[28] Id. at 180.

[29] *Janus*, 131 S. Ct. at 2302–05; id. at 2307–09 (Breyer, J., dissenting).

[30] Id. at 2302 (quoting 6 Oxford English Dictionary 66 (1933) (def. 59));.

[31] Id.; see also Webster's New International Dictionary 1485 (2d ed. 1934) (equating "'make a splash,' to splash, 'make a move,' to move, [and] 'make a complaint,' to complain" (emphasis omitted)).

[32] See id. at 2302.

entity can be said to "state" the prospectuses containing the alleged misrepresentations is thus the entity who made them for purposes of Rule 10b–5 liability.

From this proposition, Justice Thomas concludes that, under 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."[33] This bright-line approach to Rule 10b–5 is the rule for which *Janus* is commonly cited,[34] yet it does not seem to follow logically that it is only *authority* over a statement that determines its maker. When asking who stated something, one typically inquires who the speaker was, rather than who had authority over the statement. In this sense, the Court appears at first blush to confuse control with attribution. While the language of the rule seems to focus on control over the statement, the majority states in a footnote that "attribution is necessary" to establish that an entity "made" a given statement,[35] and its explanation makes clear that much more than "authority" over a statement is required. Indeed, the Court explicitly rejects the control-oriented approach advocated by Plaintiffs.[36] The Court's "ultimate authority" rule thus envisions a scenario with several speakers—or several entities to whom a statement may be attributed—and considers only the speaker with ultimate authority over the statement to be its "maker" for purposes of Rule 10b–5.

Before deciding how to construe the term, Justice Thomas was presented with two analogies proffered by the opposing parties. First, counsel for defendant JCM suggested that the role of an investment adviser to a mutual fund is akin to the relationship between the President and his speechwriter: "[W]hen the President delivers a speech, we say that he *made* the speech—but it would stretch ordinary usage too far to say that the President's *speechwriters* made the speech."[37] Under this analogy, while the invest-

[33] Id.

[34] See, e.g., Allstate Ins. Co. v. Countrywide Fin. Corp., 824 F. Supp. 2d 1164, 1186 (C.D. Cal. 2011)) (citing the Court's "ultimate authority" language as a new standard for Rule 10b–5 liability); SEC v. Carter, No. 10 C 6145, 2011 WL 5980966, at *2 (N.D. Ill. Nov. 28, 2011) (same); SEC v. Kelly, 817 F. Supp. 2d 340, 342 (S.D.N.Y. 2011)) (same).

[35] *Janus*, 131 S. Ct. at 2305 n.11.

[36] Id. at 2304.

[37] Brief for Petitioners at 41, *Janus*, 131 S. Ct. 2296 (No. 09-525).

ment advisers may prepare the prospectuses for the fund, only the fund delivers the prospectuses to its investors and only the fund makes the statements contained within those prospectuses. This interpretation accords with general principles of corporate law, as a prospectus is considered communication between the offeror of securities and potential investors.[38]

Justice Thomas characterizes Plaintiffs' claim as submitting an alternative view. Speaking again through analogy, he interprets Plaintiffs' argument as likening the relationship of mutual fund investment advisor and mutual fund to that between a playwright and an actor delivering the lines of the play.[39] Such a view, he reasons, completely ignores the unique characteristics of the corporate form.[40] A corporation may, under certain circumstances, attain separate legal status from its subsidiaries, allowing it to escape primary liability for violations by its subsidiaries.[41] As it was undisputed that JCM met the requirements necessary to establish this legal independence,[42] the Court needed only ask whether this was an appropriate instance to disregard the corporate form and pierce the corporate veil.[43]

[38] See 15 U.S.C. § 77b(a)(10) (2006) ("The term 'prospectus' means any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security . . . .").

[39] *Janus*, 131 S. Ct. at 2304; see also Brief for Respondent at 21, *Janus*, 131 S. Ct. 2296 (No. 09-525) ("The well-recognized and uniquely close relationship between a mutual fund and its investment adviser reinforces the plausibility of the complaint's allegations.").

[40] *Janus*, 131 S. Ct. at 2304; see also In re Optimal U.S. Litig., 10 CIV 4095 SAS, 2011 WL 4908745, at *6 (S.D.N.Y. Oct. 14, 2011) ("*Janus* emphasizes that the corporate form should be respected.").

[41] See United States v. Bestfoods, 524 U.S. 51, 61 (1998) ("It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." (internal quotation marks omitted)). For an understanding of the minimum independence requirements for affiliated persons to escape liability, see 15 U.S.C. § 80a–10 (establishing minimum independence requirements regarding affiliations or interest of directors, officers, or employees).

[42] *Janus*, 131 S. Ct. at 2304.

[43] "Piercing the corporate veil" refers to the rare instances in which courts will expose shareholders of a corporation, such as a parent company in this context, to personal or corporate liability and disregard the traditional limited liability that shareholders enjoy. See Stephen B. Presser, Piercing the Corporate Veil § 1:1 (2011).

2. The Dissent's "Practical" Interpretation

The dissent, led by Justice Breyer, disagreed with the majority's conclusion that "the maker is the person or entity with ultimate authority over a statement and others are not."[44] Taking instead a fact-specific approach to determining a statement's "maker," Justice Breyer reasoned that the Court's decision should be informed by "[p]ractical matters related to context, including control, participation, and relevant audience."[45] In doing so, the dissent essentially adopted the approach advocated by the United States in its amicus brief, which would impute primary liability to any entity that creates or causes the misrepresentations in question to exist.[46] Perhaps the most important difference from the majority's view is that Justice Breyer's interpretation allows for the possibility that more than one entity "made" the misstatements and can thus be primarily liable under Rule 10b–5.[47]

Justice Breyer bolstered his interpretation by discussing American norms in the realm of politics. It is not uncommon, he reasoned, for a cabinet member to "make" statements over which the President has ultimate authority, or even for a local political party branch to "make" a statement on behalf of the national party.[48] Professor James Redwood recently lent his support to this view, relating the situation to constructing a building.[49] Like a building, he argued, a statement can have many "makers," provided that the cause of the injury in question can be traced to the contributions of each maker.[50]

3. Analysis

We are thus left with two conflicting interpretations of the term "to make": Justice Thomas's bright-line approach under which

[44] *Janus*, 131 S. Ct. at 2302 n.6.
[45] Id. at 2307 (Breyer, J., dissenting).
[46] Brief for the United States as Amicus Curiae at 13–14, *Janus*, 131 S. Ct. 2296 (No. 09-525).
[47] *Janus*, 131 S. Ct. at 2307 (Breyer, J., dissenting) ("Nothing in the English language prevents one from saying that several different individuals, separately or together, 'make' a statement that each has a hand in producing.").
[48] Id.
[49] Redwood, supra note 20, at 496.
[50] Id.

only the entity with ultimate authority over a statement may be said to have "made" it; and Justice Breyer's fact-specific inquiry that allows a statement to be "made" by any actors sufficiently involved in creating it.[51] While each has its own advantages and disadvantages, several unique aspects of Rule 10b–5 liability and the mutual fund industry caution against taking a flexible, case-specific, and broader interpretation such as the one described by the dissent and suggest that the Court correctly adopted a stricter, bright-line rule.[52]

First, although the Court hinges its interpretation on the existence of control or "ultimate authority" over the statement,[53] it is not only the need for control that compels a bright-line approach. Both control and attribution are essential features to the view adopted by the majority. The Court states that attribution will often strongly suggest which entity had ultimate control over a given statement,[54] but the need for attribution alone within the context of Rule 10b–5 requires the narrower definition adopted by the majority. Under *Basic Inc. v. Levinson*[55] and its progeny, plaintiffs can establish a rebuttable presumption of reliance for purposes of alleging a Rule 10b–5 violation by proving only that the statements in question were public knowledge, that the securities were publicly traded in a qualified market, and that the transaction occurred "between the time the misrepresentations were made and the time the truth was revealed."[56] Given the ease with which a plaintiff can use

[51] A third "blended approach" has been adopted by some courts as well. See Anixter v. Home-Stake Prod. Co., 77 F.3d 1215, 1226–27 (10th Cir. 1996) (rejecting a rule that would impute liability on the basis of substantial participation, but stating that the court's rule was "far from a bright line"); see also Travis S. Souza, Note, Freedom to Defraud: *Stoneridge*, Primary Liability, and the Need to Properly Define Section 10(b), 57 Duke L.J. 1179, 1183–87 (2008) (describing the three options available to courts in determining primary liability under Rule 10b–5).

[52] See Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 739 (1975) ("[L]itigation under Rule 10b–5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general.").

[53] *Janus*, 131 S. Ct. at 2302 ("Without control, a person or entity can merely suggest what to say, not 'make' a statement in its own right.").

[54] Id. ("[I]n the ordinary case, attribution within a statement or implicit from surrounding circumstances is strong evidence that a statement was made by—and only by—the party to whom it is attributed.").

[55] 485 U.S. 224 (1988).

[56] Erica P. John Fund, Inc. v. Halliburton, 131 S. Ct. 2179, 2185 (2011) (quoting *Basic*, 485 U.S. at 248 n.27).

what is known as the "fraud-on-the-market" presumption[57] to establish a key element of Rule 10b–5 liability, an attribution requirement is necessary "to ensure that the misleading information 'is reflected in the market price of the security.'"[58]

Second, the majority was right to denounce a practical approach as a threat to the corporate form. Although the majority's opinion says little to elucidate why the observance of corporate formalities in this instance should insulate JCM from liability, strict adherence to the corporate form provides the modern business world with invaluable benefits, which have consistently been recognized by courts and scholars.[59] These benefits include, among others, limited liability for shareholders,[60] share liquidity and transferability for investors,[61] and protection against the "holdup" scenarios that occur in partnerships.[62]

Given the importance of preserving these benefits, it is unsurprising that courts have proven very reluctant to disregard the corporate form.[63] By arguing that JIF, and not JCM, was the entity

[57] Id. at 2185.

[58] In re Mut. Funds Inv. Litig., 566 F.3d 111, 121 (4th Cir. 2009) (quoting Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 159 (2008)).

[59] See, e.g., Glona v. Am. Guarantee & Liab. Ins. Co., 391 U.S. 73, 80 n.8 (1968) (Harlan, J., dissenting) ("[T]he benefits of doing business in corporate form may be denied, to the willful, the negligent, and the innocent alike, if the formalities of incorporation have not been properly complied with."); Margaret M. Blair, The Neglected Benefits of the Corporate Form: Entity Status and the Separation of Asset Ownership from Control, *in* Corporate Governance and Firm Organization: Microfoundations and Structural Forms 45–66 (Anna Grandori ed., 2004); Thomas K. Cheng, Form and Substance of the Doctrine of Piercing the Corporate Veil, 80 Miss. L.J. 497, 552–53 (2010) (touting substantive, cautionary, and evidentiary functions of observing corporate formalities).

[60] Nina A. Mendelson, A Control-Based Approach to Shareholder Liability for Corporate Torts, 102 Colum. L. Rev. 1203, 1208–09 (2002).

[61] Julian Velasco, The Fundamental Rights of the Shareholder, 40 U.C. Davis L. Rev. 407, 414 (2006) ("One of the key characteristics of corporations is the free transferability of shares: shareholders can sell shares at will.").

[62] In general partnerships, any partner can "hold up" the entire partnership by threatening dissolution. Unif. P'ship Act § 29 (1914); Margaret M. Blair, Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century, 51 UCLA L. Rev. 387, 402, 420–21 (2003).

[63] Douglas G. Smith, A Federalism-Based Rationale for Limited Liability, 60 Ala. L. Rev. 649, 678 (2009) (quoting Foxmeyer Corp. v. Gen. Elec. Capital Corp. (In re Foxmeyer Corp.), 290 B.R. 229, 237 (Bankr. D. Del. 2003)) ("Courts require proof that is 'greater than merely a preponderance of the evidence standard'—if not 'clear and convincing' evidence—before they will disregard the corporate form.").

that "made" the misstatements, Plaintiffs were requesting that the Court eliminate the greatest advantage of the corporate form[64] by denying JCM the benefit of limited liability. Generally, courts will only oblige such a request "when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime."[65] Absent a finding that JCM exploited the corporate form to protect itself from charges of fraud, the Court thus appropriately declined to extend liability to JCM under its bright-line approach.

Third, the securities industry demands bright-line rules such as the one adopted by the majority. For purposes of determining Rule 10b–5 liability, there must be a concrete distinction between those who can be primarily liable and those who cannot. As the Court stated in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, this is "an area that demands certainty and predictability."[66] Fact-specific inquiries, such as the one advocated by the dissent, offer "'little predictive value' to those who provide services to participants in the securities business."[67] The Court has not only been reluctant to adopt such an approach in determining liability under the securities laws—it has refused to accept it as a valid basis for finding liability.[68] Indeed, under this view, there is no apparent limit to who could be liable for having "made" a misstatement.[69]

Despite these important considerations, the Court may still eschew a bright-line rule in favor of a more flexible approach when doing so is warranted by statute. If, for instance, the Court were to find Rule 10b–5 ambiguous on its face, it may look to other sources for purposes of interpreting congressional intent.[70]

[64] See Mendelson, supra note 60.

[65] United States v. Milwaukee Refrigerator Transit Co., 142 F. 247, 255 (C.C.E.D. Wis. 1905); see also Stephen B. Presser, Piercing the Corporate Veil 1–11 (2011).

[66] 511 U.S. 164, 188 (1994) (quoting Pinter v. Dahl, 486 U.S. 622, 652 (1988)).

[67] Id. (quoting *Pinter*, 486 U.S. at 652).

[68] Id. ("'[S]uch a shifting and highly fact-oriented disposition of the issue of who may [be liable for] a damages claim for violation of Rule 10b–5' is not a 'satisfactory basis for a rule of liability imposed on the conduct of business transactions.'" (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 755 (1975))).

[69] SEC v. Tambone, 597 F.3d 436, 452 (1st Cir. 2010) (Boudin, J., concurring).

[70] Blum v. Stenson, 465 U.S. 886, 896–97 (1984).

B. The Court's Decision Accords with Legislative Intent

Ordinarily, legislative history accompanying the enactment and development of a statute is most effective in determining legislative intent when it is not clear from the plain language of the statute.[71] These resources are less helpful when interpreting the scope of the private right of action under Rule 10b–5, however, as this right is implied and merely a product of judicial creation[72] that has been implicitly authorized by Congress.[73] Determination of legislative intent must therefore encompass scrutiny of both the cases that have identified this right as a function of Section 10(b) and the legislative history that has acknowledged it.

1. The Private Right of Action Under Rule 10b–5 is Narrow

The most obvious characteristic of the 10b–5 private right of action is that it was intended to be and has been applied narrowly. As the Supreme Court stated in one of the earlier cases in which it acknowledged the right, this right is "a private cause of action which has been judicially found to exist, and which will have to be judicially delimited" in part because "the inexorable broadening of the class of plaintiff who may sue in this area of the law will ultimately result in more harm than good."[74] The Court was immediately aware of the dangers of expanding this right beyond its extremely narrow scope.[75]

In the two most pivotal cases on the matter preceding *Janus*, the Court limited the scope of this right even further. First, in *Central Bank*, the Court addressed the potential for aiding-and-abetting liability in private actions under Rule 10b–5.[76] Holding that Congress did not intend to apply such liability under Section 10(b), the Court

[71] Id.

[72] This right was first identified by the Supreme Court in *Superintendent of Insurance of State of New York v. Bankers Life & Casualty Co.*, 404 U.S. 6, 13 n.9 (1971).

[73] See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 165–66 (2008) (stating that Congress ratified an implied private right of action under Rule 10b–5 in enacting § 104 of the Private Securities Litigation Reform Act of 1995 ("PSLRA")).

[74] Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 747–49 (1975).

[75] See, e.g., Marine Bank v. Weaver, 455 U.S. 551, 556 (1982) ("Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud.").

[76] *Cent. Bank*, 511 U.S. at 166–67.

found conclusive the fact that Congress did not provide for such liability in the text of the statute.[77] Following *Central Bank*, secondary actors cannot be found liable in private suits under Rule 10b–5 unless "*all* of the requirements for primary liability . . . are met."[78] *Central Bank* thus took the next step in restricting the availability of a private cause of action in rules promulgated under Section 10(b). Although other courts had cautioned against the right of action's expansion, the *Central Bank* Court actively limited its scope by reading the text of Section 10(b) as exclusive.[79]

Second, in *Stoneridge Investment Partners v. Scientific-Atlanta*, the Court made two important statements regarding the scope of the private right of action for rules promulgated under Section 10(b). The Court began its analysis by recognizing that this right, albeit a judicially constructed cause of action, had been implicitly ratified by Congress in its passing of the Private Securities Litigation Reform Act of 1995 ("PSLRA").[80] After apparently endorsing this cause of action, the Court then made a rather weighty pronouncement: "Though it remains the law, the § 10(b) private right should not be extended beyond its present boundaries."[81] In *Stoneridge*, the Court therefore determined that the private right of action under Section 10(b) (and consequently under Rule 10b–5) had reached its limits when Congress enacted the PSLRA in 1995.

Both *Central Bank* and *Stoneridge* suggest strongly that, in the eyes of the Supreme Court, Congress did not intend the private cause of action to be expanded any further by the time that *Janus* was decided. In *Janus*, the Court was presented with a circuit split over whether to expand this right by including "participation" in what it means to "make" a statement for purposes of Rule 10b–5.[82]

[77] Id. at 177; see also id. at 191 ("Because the text of § 10(b) does not prohibit aiding and abetting, we hold that a private plaintiff may not maintain an aiding and abetting suit under § 10(b).").

[78] Id. at 191.

[79] In acknowledging the implied private right of action, the Court stated that the primary basis for interpreting its scope should be the express causes of action granted under the Securities Act of 1933 and the Exchange Act: "[h]ad the 73d Congress enacted a private § 10(b) right of action, it likely would have designed it in a manner similar to the other private rights of action in the securities Acts." Id. at 178.

[80] Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 165–66. (2008).

[81] Id. at 165.

[82] Petition for a Writ of Certiorari at 10–14, *Janus*, 131 S. Ct. 2296 (No. 09-525).

The doctrine of stare decisis thus clearly compels the result reached in *Janus*, as any application of the private right of action beyond what had already been accepted by the Court prior to the adoption of the PSLRA must be seen as an expansion of the right in contravention of *Central Bank* and *Stoneridge*.[83]

Given that this private right of action is not expressly provided for, but is a product of judicial creation, compliance with direct precedent should provide persuasive evidence that the Court did not interpret its scope too narrowly in *Janus*. Moreover, stare decisis carries a special importance when dealing with statutory interpretation—courts should not overturn precedent when interpreting a statute without "compelling justification."[84] Absent the warnings in *Central Bank* and *Stoneridge* against expanding this right, however, the Court should still have found that Congress did not intend to extend Section 10(b) to encompass actors such as JCM.

2. JCM Should Not be Primarily Liable under the Clear Intent of the Congress

In determining primary liability in private actions under Rule 10b–5, Congress would be most likely to adopt a strict, bright-line

[83] While *Central Bank* and *Stoneridge* are the most salient examples of the Court's unwillingness to expand this right, they come from a long list of Supreme Court cases that have delimited this right. See Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 313 (2007) (interpreting the PSLRA "[a]s a check against abusive litigation by private parties"); Dura Pharm. v. Broudo, 544 U.S. 336, 345–46 (2005) (raising the burden of proving loss causation and economic loss in private securities actions); Santa Fe Indus. v. Green, 430 U.S. 462, 477 (1977) ("Congress did not expressly provide a private cause of action for violations of § 10(b). . . . [A] private cause of action under the antifraud provisions of the Securities Exchange Act should not be implied where it is 'unnecessary to ensure the fulfillment of Congress' purposes' in adopting the Act." (quoting Piper v. Chris-Craft Indus., 430 U.S. 1, 41 (1977))); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 214 (1976) (refusing to extend the right to encompass acts not explicitly covered by the statute); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 735 (1975) (disallowing a private right of action under § 10(b) absent an actual sale or purchase of securities).

[84] 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 280 (2009) (5-4 decision) (Souter, J., dissenting) ("And '[c]onsiderations of *stare decisis* have special force' over an issue of statutory interpretation, which is unlike constitutional interpretation owing to the capacity of Congress to alter any reading we adopt simply by amending the statute. Once we have construed a statute, stability is the rule, and 'we will not depart from [it] without some compelling justification.'" (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989), and Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 202 (1991)) (alterations in original)).

approach of the fashion applied by the majority in *Janus*. There are generally three options for determining whether an actor may be primarily liable for purposes of Rule 10b–5.[85] First, a court can take a "bright-line" approach: "Under the first approach, to have actually made a false or misleading statement, that statement must be attributable to the actor, by the public, at the time of dissemination."[86] This approach provides the important benefits of certainty and predictability, and has been adopted by several courts.[87]

Second, other courts have adopted a "substantial participation" approach. Under this view, "substantial participation or intricate involvement in the preparation of fraudulent statements is grounds for primary liability even though that participation might not lead to the actor's actual making of the statements."[88] This method differs from that advocated by the United States in *Janus* in that it acknowledges that the actor did not *make* the statements even though it still allows the actor to be primarily liable. Finally, a few courts have adopted a blend of the two approaches and placed more emphasis on reliance than on actual attribution or participation.[89] Although they varied slightly, the approaches suggested by the majority and dissent in *Janus* resembled closely the bright-line approach and the substantial participation approach, respectively. By selecting a bright-line approach, Justice Thomas adopted the option most likely to be accepted by Congress.

As an initial matter, the substantial participation approach advocated by Justice Breyer does not make sense within the framework of the other securities laws promulgated under the authority of the Exchange Act. As counsel for JCM pointed out in their brief:

> In other sections of the Exchange Act, Congress demonstrated that it knew perfectly well how to reach persons who "cause" a

[85] See Souza, supra note 51, at 1183–87.

[86] Id. at 1183.

[87] See Wright v. Ernst & Young LLP, 152 F.3d 169, 175 (2d Cir. 1998); see also Ziemba v. Cascade Int'l, Inc., 256 F.3d 1194, 1205 (11th Cir. 2001) (adopting the Second Circuit's bright-line test in *Wright*).

[88] Howard v. Everex Sys., Inc., 228 F.3d 1057, 1061 n.5 (9th Cir. 2000); see also In re Software Toolworks Inc. Sec. Litig., 50 F.3d 615, 628 n.3 (9th Cir. 1994) (finding that playing a "significant role in drafting and editing" an SEC letter containing material misrepresentations "is sufficient to sustain a primary cause of action under section 10(b)").

[89] See supra note 51.

> statement to be made. Section 18, for instance, "creates a private cause of action against persons, such as accountants, who '*make or cause to be made*' materially misleading statements in reports or other documents filed with the Commission." Section 18 is stated in the disjunctive—"make *or* cause to be made"—which destroys the government's suggestion that one "makes" a statement merely by "causing" it to be made. And thus if *Central Bank*'s focus on the statutory language "is to have any real meaning, a defendant must *actually make* a false or misleading statement in order to be held liable under Section 10(b). Anything short of such conduct is merely aiding and abetting."[90]

It is a general canon of statutory construction that acts of Congress "should not be read as a series of unrelated and isolated provisions."[91] Instead, words or phrases used in one provision are generally given the same effect and interpretation throughout the act.[92] To adopt Justice Breyer's interpretation of "make" would thus be to read Section 18's clause as redundant, which the Court is to avoid doing in construing the statute.[93]

Moreover, Congress has provided alternative, privately enforceable liability measures for secondary actors who "control" primary violators of the securities laws.[94] There are also ample provisions deterring secondary actors from aiding and abetting.[95] The avail-

[90] Brief for Petitioners at 38–39, *Janus*, 131 S. Ct. 2296 (No. 09-525) (citations omitted); see also Brief of *Amicus Curiae* Sec. Indus. and Fin. Mkts. Ass'n Supporting Petitioners at 16, *Janus*, 131 S. Ct. 2296 (No. 09-525) ("The Fourth Circuit's decision would gut § 18(a).").

[91] Gustafson v. Alloyd Co., 513 U.S. 561, 570 (1995).

[92] See Dep't of Revenue of Or. v. ACF Indus., 510 U.S. 332, 342 (1994) ("[I]dentical words used in different parts of the same act are intended to have the same meaning . . . ." (quoting Sorenson v. Sec'y of the Treasury, 475 U.S. 851, 860 (1986)))

[93] *Gustafson*, 513 U.S. at 574.

[94] See, e.g., 15 U.S.C. § 77k(a) (2006) (listing all potential defendants for misrepresentations on registration statements under the Securities Act); see also 15 U.S.C.A. § 78i(a)–(c), (f) (West 2012) (creating private civil liability for "[a]ny person who willfully participates in" manipulating security prices); 15 U.S.C. § 78r(a) (2006) (providing liability for misleading statements in investor materials to "any person . . . who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement"); id. § 78t(a) (providing for controlling person liability).

[95] See id. § 78t(e) (enabling the SEC to prosecute aiders and abettors); id. § 78ff (subjecting secondary actors to criminal penalties for making false and misleading statements).

ability of such alternative measures is a clear indication by Congress of its intent to limit primary liability for secondary actors under Section 10(b).[96]

Next, and importantly, Congress has repeatedly declined to extend liability to those actors who, like JCM, provide "substantial assistance" to violators of the securities laws. In the past two decades, Congress has enacted sweeping changes to the securities industry through several acts, including the PSLRA, the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley"), and finally the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). In each of these Acts, Congress refused to extend liability in private causes of action under Rule 10b–5 beyond primary actors, implicitly ratifying the Supreme Court's delimitation of this right in *Central Bank* and *Stoneridge*.

First, in response to *Central Bank*, the Securities and Exchange Commission ("SEC") lobbied Congress to extend a private right of action for cases of aiding and abetting under Rule 10b–5.[97] Congress declined this request and instead enacted Section 104 of the PSLRA, in which it authorized the SEC to prosecute aiders and abettors but withheld that right from private litigants.[98] It was this significant refusal to the SEC that led the Supreme Court in *Stoneridge* to determine that the PSLRA was both an acknowledgment of and a ceiling on the private right of action under Rule 10b–5.[99] Years later, in passing Sarbanes-Oxley, Congress rejected proposals that purported "to give the victims of fraud the right to sue those who aid issuers in misleading and defrauding the public."[100]

[96] See Musick, Peeler & Garrett v. Emp'rs Ins. of Wausau, 508 U.S. 286, 296 (1993) (discussing how §§ 77o and 78t(a) impose derivative liability "in marked contrast to the implied § 10 remedy").

[97] 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., and Urban Affairs, 103d Cong. 13–14 (1994) (statement of Arthur Levitt, Chairman, Securities and Exchange Commission).

[98] See 15 U.S.C. § 78t(e).

[99] Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 158 (2008).

[100] H.R. Rep. No. 107-414, at 53–54 (2002); see also H.R. 3763—The Corporate and Auditing Accountability, Responsibility and Transparency Act of 2002: Hearings Before the H. Comm. on Fin. Servs., 107th Cong. 486 (2002) (testimony of Professor Donald C. Langevoort, Georgetown University Law Center) ("[W]hen a person adds substantial value to a fraudulent course of conduct – in other words, contributes in a

Finally, in "the most sweeping overhaul of the financial system since the New Deal,"[101] Congress once again considered a bill to extend primary liability to secondary actors such as JCM.[102] Congress rejected this bill in favor of Section 929Z, which directed the Comptroller General to "conduct a study on the impact of authorizing a private right of action against any person who aids or abets another person in violation of the securities laws" that "shall include . . . a review of the role of secondary actors in companies [sic] issuance of securities."[103] Simultaneously, Congress expanded the authority of the SEC to prosecute such actors while providing no such right to private litigants.[104]

Congress has thus repeatedly refused to extend primary liability in private Rule 10b–5 actions when the actor has only substantially participated[105] in or helped to create[106] the statements at issue. "When Congress amends one statutory provision but not another, it is presumed to have acted intentionally. Furthermore, as the Court has explained, 'negative implications raised by disparate provisions are strongest' when the provisions were 'considered simultaneously when the language raising the implication was in-

substantive way to its success – then liability is necessary and appropriate to achieve both deterrence and compensation.").

[101] Annalyn Censky, Obama on New Law: 'No More Taxpayer Bailouts', CNNMoney.com, July 21, 2010, 12:46 PM, http://money.cnn.com/2010/07/21/news/economy/obama_signs_wall_street_reform_bill/index.htm.

[102] This bill, supported by then-Pennsylvania Senator Arlen Specter, was aimed at "amend[ing] section 20 of the [Exchange Act] to allow for a private civil action against a person that provides substantial assistance in violation of such Act." Liability for Aiding and Abetting Securities Violations Act of 2009, S. 1551, 111th Cong. (2009); see also 156 Cong. Rec. S3618–19 (daily ed. May 12, 2010) (statement of Sen. Arlen Specter) (describing Senator Specter's proposal to extend liability to secondary actors who "knowingly provide substantial assistance" to primary violators).

[103] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929Z, 124 Stat. 1376, 1871 (2010).

[104] See id. § 929O, 124 Stat. at 1862 (amending § 20(e) of the Exchange Act to lower the aiding-and-abetting standard of knowledge to "recklessness").

[105] See *Janus*, 131 S. Ct. at 2307 (Breyer, J., dissenting) (suggesting that participation, along with control, context, and relevant audience, should determine whether an actor can be primarily liable under Rule 10b–5).

[106] Brief for the United States as *Amicus Curiae* Supporting Respondent at 14, *Janus*, 131 S. Ct. 2296 (No. 09-525) (quoting Webster's New International Dictionary 1485 (2d ed. 1958)) (suggesting that "make" should be defined as "[t]o cause to exist, appear, or occur").

serted.'"[107] As the extension of primary liability to actors such as JCM has been sought and denied on several occasions while other changes have been made to Rule 10b–5, it can be reasonably inferred that Congress did not intend to encompass entities such as JCM within the scope of the Rule.

In fact, much of the recent legislation in this area has been directed toward limiting private Rule 10b–5 liability in favor of SEC enforcement. The PSLRA, the first sweeping reform of private securities litigation, was enacted primarily in order to curb abusive litigation by private litigants.[108] Similarly, the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") sought to close a remaining loophole after the PSLRA, again emphasizing Congress's intent to limit the amount of private securities litigation.[109] Far from wishing to expand the private right of action under Rule 10b–5 to encompass actors such as JCM, it is clear that, by the time *Janus* was decided, Congress's intent had for years been to limit the availability of private securities litigation and to narrow the scope of the private right under Rule 10b–5.

C. Janus *Was Correctly Decided Under the Current Securities Laws*

As illustrated above, the *Janus* decision, while widely criticized for its potential ramifications on the securities industry, was a necessary result compelled by prior case law and Congress's intent not to provide private litigants with a cause of action against entities such as JCM. Regardless of what the Court or anyone else may think is best for the securities industry, the Court is required to resolve cases by interpreting the law as it stands on that day.[110] *Janus*,

[107] Gross v. FBL Fin. Servs., 129 S. Ct. 2343, 2349 (2009) (citation omitted) (quoting Lindh v. Murphy, 521 U.S. 320, 330).

[108] See H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.) ("The private securities litigation system is too important to the integrity of American capital markets to allow this system to be undermined by those who seek to line their own pockets by bringing abusive and meritless suits."); S. Rep. No. 104-98, at 4 (1995) (identifying as one of the three purposes of the PSLRA "to encourage . . . defendants to fight abusive claims").

[109] Pub. L. No. 105-353, 112 Stat. 3227 (1998).

[110] See Lewis v. City of Chi., 130 S. Ct. 2191, 2200 (2010) ("It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended."); Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979) ("The ultimate question is one of congressional intent, not one of whether this

as the latest in a series of Supreme Court cases that have restricted the private cause of action under Rule 10b–5, may indeed have far-reaching consequences. Although courts have already begun to interpret this "broadly worded" opinion,[111] few have yet to appreciate the full scope of its implications.

II. THE BROAD RULING IN *JANUS* APPLIES TO CORPORATE INSIDERS

Apart from its obvious impact on the ability of private litigants to sue legally separate entities under Rule 10b–5, there are several areas in which the ruling in *Janus* could have significant and far-reaching implications.[112] Perhaps the most troubling of these consequences regards the liability of corporate insiders such as officers and management. In the wake of *Janus*, several district courts have split on the issue of whether the Court's holding limits the liability of these actors. While some courts have found *Janus* inapplicable in this setting, others have held that it insulates any corporate officer who does not have "ultimate authority" over a given statement from liability to investors. Because there is no language in *Janus* that limits its holding to mutual fund investment advisers, this Part argues that the ruling in *Janus* was intended to and does extend to corporate insiders.

A. Cases Addressing the Impact of Janus *on Corporate Insiders*

Less than a year after *Janus* was decided, four courts had already addressed this issue directly, with varying results. The first of these cases, *In re Merck,* decided merely two months after *Janus*, con-

Court thinks that it can improve upon the statutory scheme that Congress enacted into law.").

[111] See Juris, supra note 19.

[112] One important consequence that is beyond the scope of this Note concerns the ability of the SEC to prosecute entities such as JCM. Although *Janus* discussed only the private cause of action under Rule 10b–5 and addressed specifically subsection (b) of the Rule, one district court has already ruled that the decision precludes the SEC from charging secondary actors with so-called "scheme liability" under subsections (a) and (c). SEC v. Kelly, 817 F. Supp. 2d 340, 343 (S.D.N.Y. 2011) ("[W]here the primary purpose and effect of a purported scheme is to make a public misrepresentation or omission, courts have routinely rejected the SEC's attempt to bypass the elements necessary to impose 'misstatement' liability under subsection (b) by labeling the alleged misconduct a 'scheme' rather than a 'misstatement.'").

cerned the liability of a corporate officer of defendant Merck & Company ("Merck") for misstatements regarding Merck's faulty medication, Vioxx.[113] Based on the ruling in *Janus*, the officer, an executive vice president of Merck, argued that he could not have "made" the misstatements in question because he lacked ultimate authority over them.[114]

Quickly dismissing the officer's argument as taking *Janus* "out of context,"[115] the court allowed the 10(b) claim to proceed and held that *Janus* only applied where statements were made "on behalf of some separate and independent entity."[116] The court then emphasized the importance of the agency relationship shared between corporation and officer to bolster its conclusion that *Janus* did not affect this relationship:

> *Janus* does not alter the well-established rule that "a corporation can act only through its employees and agents." It certainly cannot be read to restrict liability for Rule 10b–5 claims against corporate officers to instances in which a plaintiff can plead, and ultimately prove, that those officers—as opposed to the corporation itself—had "ultimate authority" over the statement.[117]

Without giving much thought to the language actually used in *Janus*, the court simply treated the officer's argument as absurd.[118]

Only a month later, however, a district court in Ohio gave this absurd argument the consideration it deserved. In *Hawaii Ironworkers Annuity Trust Fund v. Cole*, the court allowed for a much broader interpretation of *Janus*, stating that the only relevant inquiry was "whether the defendants had ultimate authority over the false statements in question."[119] Notably, the court recognized that *Janus* turned not on the issue of whether the defendant was a legally separate entity from the primary actor, but rather on the Su-

[113] In re Merck & Co., Inc. Sec., Derivative & "ERISA" Litig., MDL No. 1658 (SRC), 2011 WL 3444199, at *22 (D.N.J. Aug. 8, 2011).
[114] Id. at *24.
[115] Id. at *25.
[116] Id.
[117] Id. (citations omitted).
[118] Id.
[119] No. 3:10CV371, 2011 WL 3862206, at *4 (N.D. Ohio Sept. 1, 2011).

preme Court's very narrow interpretation of the term "to make."[120] This interpretation, the court reasoned, was not a statement on the legal independence of separate entities but a dividing line between primary and secondary liability: "The Court . . . intended its analysis to elucidate the contours of primary and secondary liability under Rule 10b–5(b). . . . [N]othing in the Court's decision in *Janus* limits the key holding—the definition of the phrase 'to make . . . a statement' under Rule 10b–5(b)—to legally separate entities."[121]

While the court clearly disagreed with the rationale in *Merck*, it concurred with the result.[122] The difference, it argued, is a matter of degree.[123] In *Merck*, the defendant was an executive vice president of the corporation who regularly made statements authorized by and on behalf of the corporation.[124] "[T]he defendant was the speaker, the corporation was the speechwriter, and 'it is the speaker who takes credit—or blame—for what is ultimately said.'"[125] By contrast, the defendants in *Hawaii Ironworkers* did not have ultimate authority over the statements in question because they were simply delivering information that they were required to prepare by upper management.[126]

A third case, *In re Coinstar Securities Litigation*, which concerned misstatements made by the Chief Executive Officer ("CEO") and Chief Financial Officer ("CFO") of the DVD rental business Redbox, supports the *Hawaii Ironworkers* interpretation.[127] Refusing to hold the General Counsel ("GC"), Chief Operating Officer ("COO"), and Treasurer liable for these statements, the court reasoned that the *Janus* rule applies in determining liability of individuals for misstatements made by their codefendants: "While the Supreme Court in *Janus* considered whether a business entity could be held liable for a prospectus issued by a separate entity, its analysis applies equally to whether [the individual officers]

[120] Id. at *2.
[121] Id. at *3.
[122] Id. at *4 n.3.
[123] Id. at *3 ("The degree of separation between entities naturally will inform the analysis of where ultimate authority lies.").
[124] *In re Merck*, 2011 WL 3444199, at *25.
[125] *Hawaii Ironworkers*, 2011 WL 3862206, at *4 n.3 (quoting *Janus*, 131 S. Ct. at 2302).
[126] Id. at *5.
[127] No. C11-133 MJP, 2011 WL 4712206, at *1, *10 (W.D. Wash. Oct. 6, 2011).

may be held liable for the misstatements of their co-defendants."[128] By distinguishing between upper management (CEO and CFO) and lower management (GC, COO, and Treasurer),[129] the court followed *Hawaii Ironworkers*'s approach of delineating corporate officer liability for purposes of Rule 10b–5 based on his or her *authority* over a statement.

Finally, in *SEC v. Carter*,[130] the court dealt with facts similar to those in *Merck*. Assessing the potential liability of a President and CEO, the court again looked to *Janus* to determine whether the officer "made" the alleged misstatements, which were contained in press releases.[131] Although the court found against the CEO and cited the ruling in *Merck*, its reasoning more closely resembled the analysis that drove the court's decision in *Hawaii Ironworkers*: "Because the amended complaint states that defendant, in his capacity as CEO, approved the releases before they were made available to the public, plaintiff has sufficiently alleged that defendant had ultimate authority for the statements and 'made' them for purposes of *Janus*."[132] Indeed, the court cited "indicia of 'ultimate authority'" in determining whether the CEO should be liable for the alleged misstatements.[133] Applying the now-common speechwriter analogy, the court argued that the CEO was acting as the speaker by approving the press releases, while the attorneys and director who drafted the releases were analogous to the speechwriters.[134]

While only the court in *Hawaii Ironworkers* explicitly held that *Janus* may insulate corporate insiders from liability under Rule 10b–5, both *Coinstar* and *Carter* support the proposition that the "ultimate authority" rule from *Janus* applies to officers and man-

[128] Id. at *10.
[129] Id. at *10–11. The term "lower management" as applied in this Note refers to those officers with less authority over the alleged misstatements.
[130] No. 10 C 6145, 2011 WL 5980966 (N.D. Ill. Nov. 28, 2011).
[131] Id. at *1–2.
[132] Id. at *2.
[133] Id. at *3.
[134] Id. at *2 ("Like a 'speaker,' defendant may not have authored the contents of the press releases but was made aware of them and knew that he would be held accountable. Thus, the allegation that defendant, as the company's CEO, approved the press releases is sufficient to make defendant the 'speaker.' The corporate attorney and the director are, in contrast, the 'speechwriters,' who wrote the releases (allegedly at defendant's instigation), but would not be blamed for their contents.").

agement. Moreover, in *Merck*, the court distinguished *Janus* due primarily to the broad implications for corporate law that could result from doing otherwise.[135]

B. Janus *Insulates Corporate Insiders from Primary Liability Absent Ultimate Authority*

No higher court has yet to rule on this issue, but any court would be likely to adopt a variation of one of the two approaches represented by these few district court decisions. A court could determine either that *Janus* does not apply to corporate insiders, or that *all actors*, including corporate insiders, are subject to the "ultimate authority" rule of *Janus*. While the former approach may lead to outcomes with which more people are comfortable, the latter follows a more accurate interpretation of the case.

First, as the court in *Hawaii Ironworkers* acknowledged, there is nothing in the Court's language in *Janus* that limits its holding to legally separate entities such as JCM.[136] The Supreme Court, in defining the scope of the private cause of action under Rule 10b–5, spoke only to the definition of the term "to make." It was this definition that determined the Court's holding,[137] not whether JCM was a legally separate entity from the fund. Though JCM's status as a legally separate entity undoubtedly influenced the Court's decision of whether it "made" the statements *within the Court's framework*, it did not inform its analysis. That is to say, it was not the observance of corporate formalities by JCM in particular that led the Court to adopt its "ultimate authority" rule for JCM—it was the importance of the corporate form that persuaded the Court to adopt the rule for *all actors*. The Court never stated that the entity must be legally independent.

What the Court did say is that only those with "ultimate authority" can be said to "make" a statement for purposes of Rule 10b–5.[138] The argument against the extension of this rule to corporate insiders that is presented in *Merck*—that such an application would

[135] *In re Merck*, 2011 WL 3444199, at *25.

[136] 2011 WL 3862206, at *3.

[137] See *Janus*, 131 S. Ct. at 2301 ("To be liable, . . . JCM must have 'made' the material misstatements in the prospectuses."); supra Section I.A.

[138] *Janus*, 131 S. Ct. at 2302.

"alter the well-established rule that 'a corporation can act only through its employees and agents'"[139]—fails to acknowledge the varying degrees of authority within the agency framework between a corporation and its officers. Whereas a CEO may have the final say in whether to release a public statement, the GC who wrote every word of the statement may have simply been preparing a statement under the direction of his superiors. The GC cannot be liable because he was simply drafting the statement to be released by someone else. Were the GC granted the authority by the corporation (that is, the board of directors or the CEO operating on behalf of the board) to release the statement at his own discretion, the GC may be said to have "made" the statement because he is then acting as an agent of the corporation.

Janus thus does not alter the traditional agency relationship between a corporation and its officers, but it absolutely clarifies the extent of liability for officers based on their designated role in creating the misstatements. Whether an officer has ultimate authority over a statement now depends on whether the corporation has delegated ultimate authority to the officer for this particular statement.[140] In a significant line of the case, the Court states that "[o]ne who prepares or publishes a statement on behalf of another is not its maker."[141] If a corporate officer prepares a statement, even in its entirety, on behalf of a corporation, the officer cannot be primarily liable under Rule 10b–5 after *Janus* unless the officer has been given ultimate authority over that statement.

The Court did not intend *Janus* to be read narrowly. It took a strong stance against the availability of a private cause of action under Rule 10b–5, one that was clearly received by the dissent even if it was lost on the court in *Merck*. It intended both to restrict the private right of action under Rule 10b–5[142] and to produce clar-

[139] *In re Merck*, 2011 WL 3444199, at *25 (quoting Suez Equity Investors, L.P. v. Toronto-Dominion Bank, 250 F.3d 87, 101 (2d Cir. 2001)).

[140] Because a CEO generally acts as the agent of the corporation, the CEO will more often have this grant of authority and can more often be liable under Rule 10b–5. In this hypothetical, where the GC has been given authority, the GC, and not the CEO, is the agent, and only the GC can be primarily liable.

[141] *Janus*, 131 S. Ct. at 2302.

[142] See id. at 2303 ("Our holding also accords with the narrow scope that we must give the implied right of action.").

ity on the issue of who can be held liable in such actions.[143] That the Court was aware of its decision's potential impact on corporate insiders is evident from both the dissent's opinion and the discussion during oral argument.

In dissent, Justice Breyer made clear his view that the majority's rule could be extended to corporate insiders by asking the very loaded question: "What is to happen when guilty management writes a prospectus (for the board) containing materially false statements and fools both board and public into believing they are true?"[144] Justice Breyer envisioned a situation where a corporate officer who drafted a statement in its entirety could not be held primarily liable under Rule 10b–5 due to the new "ultimate authority" rule from *Janus*. The majority was thus alerted to this potential application of its rule, and it would have addressed the issue had it wished to restrict its holding to legally separate entities.

Similarly, during oral argument, the Court repeatedly voiced its concern over this issue. For instance, Justice Breyer posed a hypothetical to JCM's counsel concerning the impact that a victory for the defense could have on liability for corporate executives.[145] Justice Kennedy then returned to the hypothetical shortly thereafter, allowing JCM's counsel to emphasize the importance of an entity's scope of authority granted by its agency relationship with the corporation in determining liability.[146] Later, during oral argument for the United States (as amicus curiae), counsel for the government discussed the matter with the Court. Analogizing the situation in *Janus* to cases involving corporate employees, counsel argued that the relationship of management to corporation should not vary depending on whether the relationship is by contract (such as be-

[143] Id. at 2305 n.11 (discussing the lack of clarity that would result if the Court were to accept Plaintiffs' argument that the term "indirectly" in Rule 10b–5 should broaden its meaning).

[144] Id. at 2310 (Breyer, J., dissenting).

[145] See Transcript of Oral Argument at 19–21, *Janus*, 131 S. Ct. 2296 (No. 09-525) ("[W]hat happens if the president of the oil company, knowing that the statement is false, says: We have discovered 42 trillion barrels of oil in Yucatan. He writes it on a piece of paper; he gives it to the board of trustees; they think it's true and they issue it. Joe Smith buys stock and later loses money. Can Joe Smith sue the president of Yucatan, of the oil company, for having made an untrue statement of material fact?"). Justice Breyer repeated this question to counsel for Plaintiffs, again highlighting this issue to the Court. Id. at 39–40.

[146] Id. at 24–25.

tween mutual fund and investment adviser like JCM) or by internal arrangement of the corporation (that is, officers and management).[147]

The Court thus gave adequate consideration to this question prior to its ruling. Its failure to address corporate officers and management in stating its rule was not due to a lack of attention, nor should it be deemed accidental. One can therefore reasonably infer both that the Court was aware of the consequences of its "broadly worded" opinion[148] and that it intentionally omitted any restriction for corporate insiders. Although a higher court has yet to rule on this issue, courts are not free to ignore the potential ramifications of a broadly worded Supreme Court opinion.[149] Instead, courts must apply the Supreme Court's analysis to the facts of each case regardless of whether they like the results.[150]

Despite the early variation in approach, courts are likely to begin adopting the analysis in *Hawaii Ironworkers*.[151] This broader interpretation of the Court's rule suggests two primary implications of *Janus*. First, the "ultimate authority" rule from *Janus* applies not only to legally separate entities but to corporate officers and management as well. Second, whether a corporate officer can be primarily liable under Rule 10b–5 is a matter of *degree*—an officer can be primarily liable only where he or she has been granted "ultimate authority" over the statement as an agent of the corporation.

This interpretation accords with the Court's emphasis on preserving the corporate form. The corporate entity is designed both

[147] Id. at 59.

[148] See Juris, supra note 19.

[149] See Alto Eldorado Partners v. City of Santa Fe, 644 F. Supp. 2d 1313, 1334 (D.N.M. 2009) ("A district court must be careful in drawing overly fine distinctions in Supreme Court cases or in characterizing something the Supreme Court has said as dicta."); see also Nelson v. Quarterman, 472 F.3d 287, 344 (5th Cir. 2006) (Jones, C.J., dissenting) ("This court may not overlook the potentially broad language in [the Supreme Court's opinion].").

[150] See Hart v. Massanari, 266 F.3d 1155, 1171 (9th Cir. 2001).

[151] Other cases have dealt in passing with *Janus* without directly discussing its impact on corporate insiders. Some of these cases have already applied its rule implicitly to officers and management. See, e.g., Curry v. Hansen Med., Inc., No. 5:09-cv-05094-JF (HRL), 2011 WL 3741238, at *3–4, 6 (N.D. Cal. Aug. 25, 2011) (acknowledging that the "ultimate authority" rule from *Janus* controls in determining whether a CEO and COO made fraudulent misrepresentations).

to ensure limited liability for legally separate entities and to establish a hierarchy of both control and liability within the corporation.[152] The management hierarchy within corporations is intended, among other things, to allocate responsibility among officers.[153] Responsibility almost always leads to the expectation of greater potential for liability.[154] By matching the prospect of liability with an officer's authority, the *Hawaii Ironworkers* approach respects the corporate hierarchy and preserves the importance of the corporate form acknowledged in *Janus*.

C. Implications of the "Ultimate Authority" Rule for Corporate Insiders

Though it was wrong to base its decision on such a concern, the court in *Merck* identified a frightening potential consequence of *Janus*. The case's application to corporate insiders, it argues, "would absolve corporate officers of primary liability for all Rule 10b–5 claims, because ultimately, the statements are within the control of the corporation which employs them."[155] This statement is not entirely true. As explained above, corporate officers *can* be primarily liable for misstatements made on behalf of the corporation *if* they are authorized as agents of the corporation to make those statements.

Nevertheless, the court is right in its general view that *Janus* will limit significantly the potential for liability for the majority of cor-

[152] See Margaret M. Blair & Lynn A. Stout, A Team Production Theory of Corporate Law, 85 Va. L. Rev. 247, 290–92 (1999) (quoting Robert C. Clark, Agency Costs Versus Fiduciary Duties, *in* Principals and Agents: The Structure of Business 56 (John W. Pratt & Richard J. Zeckhauser eds., 1985)) (discussing the roles of directors as the ultimate decision makers of the corporation and certain officers, such as the President and Treasurer, as the general agents of the corporation); Steven R. Salbu, True Codes Versus Voluntary Codes of Ethics in International Markets: Towards the Preservation of Colloquy in Emerging Global Communities, 15 U. Pa. J. Int'l Bus. L. 327, 333 n.25 (1994) ("Even when corporations elicit substantial input from employees at all organizational levels . . . the ultimate authority rests at the top of the hierarchy.").

[153] See generally Jennifer Arlen & Reinier Kraakman, Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes, 72 N.Y.U. L. Rev. 687, 689–91 (1997) (discussing the corporate liability structure for a corporation's agents).

[154] See Charles M. Yablon, Poison Pills and Litigation Uncertainty, 1989 Duke L.J. 54, 89 (discussing the need for corporate management to balance the desire to control against the risk of liability for breach of fiduciary duty that comes with such control).

[155] *In re Merck*, 2011 WL 3444199, at *25.

porate officers and management. As the Ninth Circuit noted, *Janus* "sets the pleading bar even higher in private securities fraud actions seeking to hold defendants primarily liable for the misstatements of others."[156] Coupled with a growing fear of fraud on investors, any new limit on an already narrow remedy for investors will necessarily come with increased scrutiny and skepticism.[157] It is therefore appropriate to ask, yet again, whether investors have an adequate remedy for securities fraud.

III. *JANUS* LEAVES INVESTORS WITHOUT AN ADEQUATE REMEDY

As explained above, *Janus* will have consequences beyond the scope of mutual funds. It is helpful in examining the scope of a private remedy, however, to highlight these concerns within the mutual fund industry where the effects will be most glaring. This Part will thus discuss first the problems posed by this decision within the mutual fund industry before extrapolating to facts outside those reviewed in *Janus*. It will then discuss the merits of alternative remedies and evaluate arguments for and against expanding private liability against secondary actors. Finally, this Part will conclude by suggesting that Congress should account for investors' lack of remedy by increasing the scope of federal enforcement and the SEC's ability to compensate defrauded investors.

A. The Facts in Janus *Illustrate the Lack of Remedy for Investors in Mutual Funds*

As one can surmise from this discussion, the investors in JCG (Plaintiffs) received no remedy for the losses they incurred as a result of the alleged misstatements in the JIF prospectuses.[158] This re-

[156] Reese v. BP Exploration (Alaska), Inc., 643 F.3d 681, 693 n.8 (9th Cir. 2011).

[157] See, e.g., Poser, supra note 19, at 2 ("[T]he Court's adoption of its new 'ultimate authority' rule arguably narrows the scope of such liability to an unprecedented degree."); Redwood, supra note 20, at 512–13; Enzo Incandela, Note, Recourse Under § 10(b) on Life Support: The Displacement of Liability and Private Securities Fraud Action After *Janus v. First Derivative*, 43 Loy. U. Chi. L.J. 935, 939 ("[T]he Court's decision in *Janus* has eviscerated this implied right so unmercifully that it will be difficult, if not impossible, for investors to seek redress for securities fraud through private litigation.").

[158] The JIF shareholders, by contrast, received $100 million from JCM ($50 million in disgorgement and $50 million in civil penalties). See Order Approving the Modified Plan of Distribution at 1, Exchange Act Release No. 57721, 93 S.E.C. Docket 258

sult is obviously a product of the Court's refusal to afford securities plaintiffs a broader private right of action, but it poses an interesting problem for investors. For instance, JCM did not make the statements in the prospectuses because it lacked ultimate authority over them. The entity that had ultimate authority over these statements was the JIF board, which signed off on and issued the prospectuses. Plaintiffs, however, could not recover from JIF for two reasons.

First, JIF, like all mutual funds structured in this way, was simply a shell corporation[159] with "no assets separate and apart from those they hold for shareholders."[160] If a court were to find JIF liable to Plaintiffs, who were investors in JCG, JIF would have to pay Plaintiffs out of its investment assets, which belong entirely to the investors in JIF.[161] This is particularly troublesome given that the JIF shareholders were injured by the same misstatements, making it both unlikely that there would be sufficient assets left from which to recover and inequitable to do so if there were.[162]

Second, due to the extent of involvement by investment advisers such as JCM in the preparation of statements by mutual funds, the entity with "ultimate authority" over these statements will often be completely unaware of their falsity. Under this scenario, the entity with ultimate authority, usually the board of directors for the mutual fund (JIF here), will very likely not be liable. A necessary element for establishing liability under Rule 10b–5 is scienter, the re-

(April 25, 2008). JCM also agreed, however, to lower its fees over the next five years by a total of $125 million, even though their fees were already below average. See Riva D. Atlas, Janus Agrees to Lower Fees in $225 Million Settlement, N.Y. Times, Apr. 28, 2004, at C5.

[159] A "shell corporation" is "a company that is incorporated, but has no significant assets or operations." Nautilus Ins. Co. v. Reuter, 537 F.3d 733, 737 (7th Cir. 2008) (quoting Shell (corporation) Wikipedia Entry, http://en.wikipedia.org/wiki/Shell_(corporation) (last visited June 26, 2008)). This is how the majority of funds are set up: "Virtually all funds do not have employees. Instead, their operations are conducted by affiliated organizations and independent contractors." Matthew P. Fink, The Rise of Mutual Funds: An Insider's View 13 (2d ed. 2011).

[160] In re Mut. Funds Inv. Litig., 384 F. Supp. 2d 845, 852 n.3 (D. Md. 2005).

[161] *Janus*, 131 S. Ct. at 2299.

[162] Upon discovering fraud allegations, most investors, as they did with JIF, would withdraw their investment, depleting the fund of its assets. Those who remained in the fund would also be injured by the fraud, making it inequitable for them to pay.

quired state of mind for securities fraud.[163] Scienter generally requires a showing of specific intent to defraud,[164] although courts have also allowed deliberate or gross recklessness to suffice in certain circumstances.[165] Negligence, however, is not enough.[166] If Plaintiffs cannot prove that the directors of JIF were at least reckless in releasing the prospectuses, Plaintiffs will not be able to recover from them. It was this fear that led Justice Breyer in dissent to warn: "The possibility of guilty management and innocent board is the 13th stroke of the new rule's clock."[167] Several critics have echoed this concern since the case's disposition, calling the rule a "roadmap for fraud" or a "license to lie."[168] Although these criticisms are exaggerated, the nature of the mutual fund industry does present a unique problem to determining fraud liability. When the entity that has ultimate authority over misstatements is a business trust or shell entity with no assets with which to compensate harmed investors, there is little remedy available to them.[169]

B. Amending the Securities Laws

Congress must enact changes in the securities laws if it wants to limit the holding in *Janus*—enacting changes to the structure of the mutual fund industry would be inadequate. Even if Congress im-

[163] See Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976). The PSLRA strengthened this requirement by raising the standard for pleading scienter: "[T]he complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2)(A) (2010).

[164] *Ernst & Ernst*, 425 U.S. at 194 n.12.

[165] See Matrixx Initiatives, Inc. v. Siracusano, 131 S. Ct. 1309, 1323–24 (2011) ("We have not decided whether recklessness suffices to fulfill the scienter requirement. Because Matrixx does not challenge the Court of Appeals' holding that the scienter requirement may be satisfied by a showing of 'deliberate recklessness,' we assume, without deciding, that the standard applied by the Court of Appeals is sufficient to establish scienter." (internal citations omitted)); see also Rolf v. Blyth, Eastman Dillon & Co., 570 F.2d 38, 46 (1978) (holding reckless behavior to constitute willful fraud); William H. Kuehnle, On Scienter, Knowledge, and Recklessness Under the Federal Securities Laws, 34 Hous. L. Rev. 121, 179 (1997) ("For the scienter element, most courts have concluded that recklessness is sufficient.").

[166] See Merck & Co. v. Reynolds, 130 S. Ct. 1784, 1796 (2010) (holding negligence insufficient to establish scienter); *Ernst & Ernst*, 425 U.S. at 199 (same).

[167] *Janus*, 131 S. Ct. at 2310 (Breyer, J., dissenting).

[168] Barriers to Justice, supra note 19.

[169] See Editorial, So No One's Responsible, N.Y. Times, June 15, 2011, at A26.

posed a fiduciary duty or regulatory standard to unite investment and management in mutual funds,[170] the same tasks would simply be performed by corporate officers. As discussed in Part II, corporate insiders are subject to the "ultimate authority" rule of *Janus*. To escape liability, a corporation need only apply the same tactics and withhold the ultimate authority over statements from these officers.[171] The Court's holding was thus so broad that only a newly created cause of action could establish private liability for actors like JCM. Though Congress has repeatedly declined to expand private liability, the time is now ripe for some manner of reform for several reasons.

First, Congress recently passed the Dodd-Frank Act, in which it directed the Comptroller General of the Government Accountability Office ("GAO") to conduct a study on the need for a private right of action in this situation.[172] This study, which was released in July 2011, discussed *Janus* and the impact of the case on the scope of Rule 10b–5.[173] Had the GAO offered compelling reasons for establishing an express private right of action in this study, it may have triggered congressional support for a potential amendment to the securities laws. Instead, the GAO produced an impartial summary of recent legislation and case law relating to Rule 10b–5 liability, finishing with the rather unhelpful conclusion: "Debate continues over whether a private cause of action for aiding and abetting securities fraud should be created, centering on whether this would enhance deterrence of securities fraud, promote equita-

[170] The feature of the mutual fund industry that makes any remedy to investors so elusive is the common practice of separating management from investment, as in *Janus*. See, e.g., Eugene F. Fama & Michael C. Jenson, Separation of Ownership and Control, 26 J.L. & Econ. 301, 317 (1983) (discussing this feature of "financial mutuals"). Some critics have suggested that this feature is destructive to the future of mutual funds and have advocated mutual funds that "run themselves." Among the loudest of these advocates is Jack Bogle, the famous founder of Vanguard. See John C. Bogle, Don't Count On It!: Reflections on Investment Illusions, Capitalism, "Mutual" Funds, Indexing, Entrepreneurship, Idealism, and Heroes 232–33 (2011).

[171] Again, assuming the board had ultimate authority and lacked the requisite state of mind to establish a Rule 10b–5 claim, no one could be found primarily liable in this scenario.

[172] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929Z, 124 Stat. 1376, 1871 (2010).

[173] U.S. Gov't Accountability Office, GAO-11-664, Securities Fraud Liability of Secondary Actors 25–26 (2011).

ble compensation of injured investors, and affect the U.S. economy and corporate governance."[174] As a result, the compromise embodied in the provision ordering this study produced little more than marginal awareness of the issue.

Second, while Congress's refusal to address this issue in Dodd-Frank may diminish any enthusiasm to revisit it now,[175] Congress has generally been more successful at passing similar reform following economic turmoil like that experienced in the 2008 financial crisis.[176] For example, Sarbanes-Oxley was passed largely in response to corporate scandals perpetrated by companies such as Enron and WorldCom.[177] Similarly, Dodd-Frank rode the coattails of the recent recession and resulting demand for greater regulation on Wall Street to enact sweeping financial reform.[178] Even the decision in *Central Bank* spurred legislative action. Responding to the case's prohibition against bringing aiding-and-abetting claims under Section 10(b) of the Exchange Act, Congress amended Section 20 to enable the SEC to prosecute aiders and abettors.[179] In response to the financial crisis of 2008 and specifically to *Janus*, Congress may find substantially more support for expanding securities fraud liability for actors such as JCM.

Finally, the private cause of action under Rule 10b–5 is, after *Janus*, more limited than ever before. Opponents of expanding liabil-

[174] Id. at 45.

[175] See Shuenn (Patrick) Ho, Recent Development, A Missed Opportunity for "Wall Street Reform": Secondary Liability for Securities Fraud After the Dodd-Frank Act, 49 Harv. J. on Legis. 175, 182 (2012) ("[T]he Dodd-Frank Act conspicuously declined to provide a private right of action against aiders and abettors of federal securities laws.").

[176] See Lawrence A. Cunningham & David Zaring, The Three or Four Approaches to Financial Regulation: A Cautionary Analysis Against Exuberance in Crisis Response, 78 Geo. Wash. L. Rev. 39, 39 (2009) ("First the financial markets collapsed, and second came massive government intervention designed to address the collapse. The third part of any financial crisis is reform.").

[177] Roberta Romano, The Sarbanes-Oxley Act and the Making of Quack Corporate Governance, 114 Yale L.J. 1521, 1523 (2005).

[178] Saule T. Omarova, Wall Street as Community of Fate: Toward Financial Industry Self-Regulation, 159 U. Pa. L. Rev. 411, 414–15, 416 & n.14 (2011).

[179] Ediberto Román, Statutory Interpretation in Securities Jurisprudence: A Failure of Textualism, 75 Neb. L. Rev. 377, 422 (1996). These amendments to § 20 added § 20(e), which was recently amended in Dodd-Frank, "to cover any person who 'knowingly or recklessly'—rather than simply 'knowingly'—provides substantial assistance to another person in violation of the Securities Exchange Act or its rules." Andrew F. Tuch, Multiple Gatekeepers, 96 Va. L. Rev. 1583, 1642 (2010).

ity may be more inclined to reconsider now that this right is so narrow. Few would argue that investors should have no remedy for fraud, and it is likely that many were more comfortable with the scope of Rule 10b–5 liability prior to *Janus*. If proponents of greater fraud liability wish to expand this cause of action, they may be able to capitalize on these timing factors to gain greater support for their proposal.

C. Cost-Benefit Analysis of an Expanded Private Right of Action

Whether expanding this private right of action is beneficial for society, however, is another question. Investors in mutual funds are clearly left with little remedy for losses suffered due to fraud caused in large part by investment advisers. Moreover, as illustrated above,[180] this problem is likely to occur with corporate investors as well—corporations can escape private fraud liability simply by establishing a management division to draft statements that are later released by senior management who lack knowledge of their contents. Such a scenario supports the enactment of an alternative source of liability to fix this loophole. The troublesome point in this debate, however (at least for proponents of increased liability), is that Congress *has* provided for alternative sources of liability. It is necessary to consider the efficacy of these provisions in determining whether to expand the scope of the private cause of action under Rule 10b–5, as well as the costs and benefits of any expansion.

1. Arguments in Favor of Expanding Private Liability Under Rule 10b–5

There are several persuasive arguments in favor of passing new legislation to expand the private cause of action under Rule 10b–5.[181] First, greater liability for fraud obviously has a greater deterrent effect on fraudulent behavior. "Proponents of creating a private

[180] See supra Part II & Section III.A.

[181] Such legislation may come in the form of amending § 20(e) to add an express private right of action against secondary actors who aid and abet securities fraud. See H.R. 5042, 111th Cong. (2010); S. 1551, 111th Cong. (2009). The new right would likely mirror the authority of the SEC to prosecute those who knowingly or recklessly aid and abet primary actors in securities fraud.

right of action for aiding and abetting securities fraud argue that such action is a necessary supplement to SEC enforcement and provides an additional deterrent to fraud."[182] Some feel that SEC enforcement alone is inadequate because the SEC may lack the incentive to pursue claims due to budgetary or political pressures.[183] In contrast, others have argued that the SEC may be too aggressive in its regulation without a private right of action.[184] As a result, proponents of an expanded private right of action argue that government enforcement alone is an ineffective deterrent for fraud.

Second, a private right of action would compensate investors for their losses resulting from the fraudulent acts. This is perhaps the strongest argument in favor of a private right of action.[185] While SEC enforcement may effectively deter the vast majority of securities fraud, it is unlikely ever to eliminate fraud entirely. In those instances in which investors suffer losses due to fraud, the SEC may levy penalties on the perpetrators, but without an alternative manner of recourse investors will be left without a remedy for their losses.[186] A private cause of action thus ensures that when fraud does occur, investors are compensated, at least in part, for their losses.[187]

[182] U.S. Gov't Accountability Office, supra note 173, at 38–39.

[183] See, e.g., Michael J. Kaufman & John M. Wunderlich, Regressing: The Troubling Dispositive Role of Event Studies in Securities Fraud Litigation, 15 Stan. J.L. Bus. & Fin. 183, 252 & n.425 (2009).

[184] Robert Allen, Securities Litigation as a Coordination Problem, 11 U. Pa. J. Bus. L. 475, 508 (2009).

[185] See Amanda M. Rose, Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b–5, 108 Colum. L. Rev. 1301, 1310 (2008) (discussing the "corrective justice" function of the private right of action).

[186] Christopher R. Leslie, Den of Inequity: The Case for Equitable Doctrines in Rule 10b–5 Cases, 81 Calif. L. Rev. 1587, 1629–30 (1993).

[187] This argument relies on the assumption that securities class action lawsuits can be effective in compensating injured victims; some critics have doubted this premise due to the fluctuations in market prices attributable to the fraud. See, e.g., Jill E. Fisch, Confronting the Circularity Problem in Private Securities Litigation, 2009 Wis. L. Rev. 333, 348 (arguing that informed investors will be undercompensated and uninformed investors overcompensated because of their differing reliance interests). The efficacy of securities class actions is beyond the scope of this Note. It should be noted, however, that these criticisms are likely to be less persuasive when applied to secondary actors, which would not compensate investors out of the corporation's funds.

Finally, the availability of a private right of action may lead to higher investor confidence.[188] Even if an investor never needs to exercise this right, the simple knowledge that he or she may sue to collect damages in the case of fraud may encourage the investor to trust the market and invest with confidence. While deterrence and compensation are typically the primary arguments advanced in favor of an expanded private right of action, this tertiary point should not be undervalued. Investor confidence is one of the most important goals of securities regulation. There is no substitute for "the general conviction investors have . . . that the regulatory system provides adequate investor protection and ensures capital market integrity, above and beyond investors' ability to make informed decisions."[189] Without this confidence, investors may stop trusting the securities markets and these markets could collapse. The mere existence of a private cause of action thus spurs investment and helps protect the market from a crash of consumer confidence.

2. Arguments Against Expanding Private Liability Under Rule 10b–5

In contrast, there are compelling arguments against expanding the private cause of action under Rule 10b–5. For instance, as the Supreme Court has reasoned, the securities industry is "an area that demands certainty and predictability."[190] Regardless of its consequences, the "ultimate authority" rule from *Janus* allows for more certainty and predictability than the fact-based approach advocated by the minority in *Janus*. In fact, it would be difficult to draft a rule that both expands liability for secondary actors in Rule 10b–5 cases and provides sufficient clarity for securities issuers

[188] See Rose, supra note 185, at 1359–60; Joel Seligman, Commentary, The Merits Do Matter: A Comment on Professor Grundfest's "Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority," 108 Harv. L. Rev. 438, 455 (1994).

[189] Troy A. Paredes, Blinded by the Light: Information Overload and its Consequences for Securities Regulation, 81 Wash. U. L.Q. 417, 468 (2003); see id. at 467–69 (discussing the importance of investor confidence in the market).

[190] Pinter v. Dahl, 486 U.S. 622, 652 (1988). The need for clarity in this industry is widely acknowledged, particularly given the availability in today's business world of alternative markets. See 143 Cong. Rec. 21328, 21357 (1997) (statement of Sen. Dodd) ("[I]f our markets are to remain ahead of those in London, Frankfurt, Tokyo or Hong Kong, we must create uniformity and certainty.").

without expanding liability to encompass a host of secondary actors such as attorneys or accountants.[191]

Moreover, increased liability, which would undeniably lead to increased securities litigation, could impose a number of substantial costs on society. In general, greater liability in this industry leads to significant costs that are inevitably borne by the investors.[192] Expected costs include not only the threat of liability but also attorneys' fees, costs of discovery, and other costs of litigation. As a result, these costs also discourage companies from investing in the United States—with greater liability in securities laws, "[o]verseas firms with no other exposure to our securities laws could be deterred from doing business here."[193] The costs of securities litigation are so significant, in fact, that they have been the driving force behind the majority of congressional reform in the industry. The PSLRA, for example, was intended to reduce the amount of litigation due to fear of the impact of abusive litigation on companies' incentives.[194] The need to minimize these costs is particularly strong today, following the economic crisis and with

[191] A common criticism of *Janus* has concerned the Court's implicit holding that there can be only one "maker" of any statement. See, e.g., Redwood, supra note 20, at 496–97 (criticizing the Court's "either-or" approach and arguing that, like a building, a statement could have many "makers"). This criticism is misplaced. Such an "either-or" approach as the Court adopted successfully informs issuers of securities who may be liable under Rule 10b–5 and provides the certainty and predictability that is necessary to avoid the substantial costs of increased liability and abusive litigation. See infra notes 192–95 and accompanying text.

[192] See, e.g., SEC v. Tambone, 597 F.3d 436, 452–53 (1st Cir. 2010) (Boudin, J., concurring) ("No one sophisticated about markets believes that multiplying liability is free of cost. And the cost, initially borne by those who raise capital or provide audit or other services to companies, gets passed along to the public."); see also Paul G. Mahoney, Precaution Costs and the Law of Fraud in Impersonal Markets, 78 Va. L. Rev. 623, 655 (1992) ("[T]he costs of overenforcing Rule 10b–5 against verbal means of communication are indeed significant.").

[193] Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 164 (2008); see also H.R. Rep. No. 104-50, pt. 1, at 20 (1995) ("Fear of litigation keeps companies out of the capital markets.").

[194] See supra note 108 and accompanying text; see also Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 189 (1994) (stating that excessive litigation could cause companies to "find it prudent and necessary, as a business judgment, to abandon substantial defenses and to pay settlements in order to avoid the expense and risk of going to trial").

declining investor confidence both inside and outside the United States.[195]

The costs of increased liability cannot be viewed in isolation—one must also account for the alternative measures of liability already imposed upon actors such as JCM by Congress. To determine whether the benefits of an expanded private right of action would outweigh its costs, it is necessary to consider the deterrent and remedial measures already in place on both the federal and the private side.

First, Congress provides federal regulation agencies with much greater authority to sanction secondary actors such as investment advisers. Both the SEC and the Department of Justice ("DOJ") have the power to regulate aiding and abetting in securities fraud.[196] The SEC has civil authority to issue "injunctions, disgorgement orders, civil penalties, and orders barring or suspending individuals from serving as officers or directors of securities issuers or participating in the securities industry."[197] The SEC may also refer violations to the DOJ, which has authority to levy criminal sanctions on secondary actors such as investment advisors.[198] As these penalties

[195] See Barriers to Justice, supra note 19, at 59 (statement of Robert Alt, Senior Legal Fellow and Deputy Director, Center for Legal and Judicial Studies at The Heritage Foundation) (citing John C. Coffee, Jr., Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation, 106 Colum. L. Rev. 1534, 1535–36 (2006)) (testifying that additional liability would add substantial legal costs and uncertainty to sluggish United States markets and criticizing securities class actions as a poor enforcement mechanism).

[196] In the PSLRA, Congress gave express authority to the SEC to sanction aiders and abettors by adding § 20(e) to the Exchange Act. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 104, 109 Stat. 737, 757. This right was expanded in the Dodd-Frank Act, in which Congress lowered the pleading standard to "recklessly" for aiding and abetting. Pub. L. No. 111-203, §929O, 124 Stat. 1376, 1862 (2010). The DOJ has criminal authority to punish these offenses. 18 U.S.C. § 2(a) (2006).

[197] U.S. Gov't Accountability Office, supra note 173, at 26 (citing 15 U.S.C. § 78u (2006) (investigations and actions by SEC); 15 U.S.C. § 78ff(a) (2006) (penalties for willful violations); id. § 78u(d)(1) (injunctions); id. § 78u(d)(2) (barring service as officer or director); id. § 78u-1 (civil penalties for insider trading); id. § 78u-2 (civil remedies in administrative proceedings); id. § 78u-3 (cease-and-desist proceedings)).

[198] 18 U.S.C. § 2(a) (2006) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.").

may reach up to $25 million[199] in fines and up to twenty years imprisonment, federal regulation thus creates a powerful deterrent effect.

Where federal regulation is perhaps most deficient is in its ability to compensate investors for losses attributable to fraud. While the SEC may distribute disgorged funds of violators to investors, its regulatory power is not targeted toward compensating defrauded investors. In Sarbanes-Oxley, however, Congress amended this authority to allow the SEC to combine disgorgement proceeds with any civil penalties in order to establish a "Fair Fund"—a fund designed to compensate investors harmed by the securities fraud.[200] As a result, federal regulation allows for at least the *ability* to provide substantial compensation to defrauded investors.

Second, Congress has enacted several privately enforceable provisions that encompass secondary actors such as investment advisers. Perhaps the most important of these provisions is Section 20(a), which gives investors the authority to sue those who "control" primary actors in the fraud.[201] Although whether sufficient "control" was exerted to satisfy this provision is a fact-specific inquiry,[202] this "controlling person" liability has been widely litigated due to the breadth of its coverage.[203] In fact, Section 20(a) liability is so commonly sought that the *Janus* Court found its existence to be a compelling justification to deny a broader alternative in expanding Rule 10b–5.[204] Similarly, Section 11 of the Securities Act of 1933 provides another option for private investors. Section 11, which applies to issuers, underwriters, and other entities who *participated in* the drafting of the registration statement,[205] creates liability for including any untrue statements of material fact in the registration statement.[206] Section 11 provides an express private

[199] This figure represents the maximum sanction for corporations—for individuals the maximum is $5 million. 15 U.S.C. § 78ff(a).

[200] Id. § 7246. As mentioned earlier, supra note 158, JCM actually paid $100 million into a Fair Fund, the proceeds of which benefitted investors in JIF.

[201] 15 U.S.C. § 78t(a).

[202] Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1441 (9th Cir. 1987).

[203] Lewis D. Lowenfels & Alan R. Bromberg, Controlling Person Liability Under Section 20(a) of the Securities Exchange Act and Section 15 of the Securities Act, 53 Bus. Law. 1, 6 (1997).

[204] *Janus*, 131 S. Ct. at 2304.

[205] 15 U.S.C. § 77k(a)(4).

[206] Id. § 77k(a).

right of action to "any person acquiring such security."[207] Other provisions of the Securities Acts governing securities fraud are also privately enforceable.[208]

Finally, many state statutes allow for private action against secondary actors in securities fraud violations.[209] These laws differ in their scope and in their pleading standard, but almost all of them reach secondary actors such as JCM. Since the enactment of SLUSA, however, the application of these laws has been severely limited.[210] SLUSA stipulates that any class action with more than fifty members must be brought in federal court.[211] As most major securities fraud suits involve more than fifty victims, state laws now provide little additional relief to the majority of defrauded investors.[212]

3. Congress Should Not Expand the Private Right of Action for Rule 10b–5

As the aforementioned considerations illustrate, there are valid arguments on both sides of this debate. Proponents of an expanded private right of action have legitimate concerns regarding the abil-

[207] Id.

[208] See id. § 78i(a)–(c), (f) (creating private civil liability for "[a]ny person who willfully participates in" manipulating security prices); id. § 78r(a) (providing liability for misleading statements in investor materials to "any person . . . who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement").

[209] These statutes are collectively referred to as "blue sky laws." See, e.g., Paul G. Mahoney, Mandatory Disclosure as a Solution to Agency Problems, 62 U. Chi. L. Rev. 1047, 1075–76 (1995). Forty-nine out of fifty states provide for a private right of action against aiders and abettors in violation of blue sky laws. Securities Litigation Uniform Standards Act of 1997: Hearing on S.1260 Before the Subcomm. on Sec., S. Comm. on Banking, Hous., and Urban Affairs, 105th Cong. 47 (1997) (prepared statement of Arthur Levitt, Jr., Chairman & Isaac C. Hunt, Jr., Comm'r, U.S. Securities and Exchange Commission).

[210] Russell Kamerman, Securities Class Action Abuse: Protecting Small Plaintiffs' Big Money, 29 Cardozo L. Rev. 853, 864–65 (2007).

[211] 15 U.S.C. § 78bb(f)(5)(B)(ii). There is, however, an exception known as the "Delaware carve-out" exception, which allows actions to proceed where the class action is primarily based on laws of the state in which the securities issuer is incorporated. See Madden v. Cowen & Co., 576 F.3d 957, 969–70 (9th Cir. 2009).

[212] See Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, Introductory Statement, § 16, 112 Stat. 3227–28 (limiting the conduct of securities class actions under state law by making all class actions with more than fifty persons removable to federal court).

ity of federal and state regulatory laws to compensate investors for losses. Most of the emphasis of this regulation focuses on deterring fraudulent acts, rather than on compensating victims. Nevertheless, there are substantive reasons for Congress's reluctance to expand this right—increased liability comes with substantial costs, and in the securities industry these costs will inevitably be passed on to investors. Moreover, while the SEC has repeatedly requested that Congress expand this cause of action,[213] the SEC has the regulatory power to compensate defrauded investors, at least in part, through Fair Funds.

Congress is thus left with two options for addressing investors' lack of remedy. It can either expand the scope of Rule 10b–5 and risk triggering an onslaught of litigation of the kind that both the PSLRA and SLUSA were designed to prevent, or it can continue to limit this right and look for alternative measures of providing a remedy for fraud. Given the substantial costs of increased litigation, particularly on a struggling economy fighting to regain the confidence of both domestic and foreign markets, Congress should be extremely wary of expanding any private cause of action. History has proven that it is incredibly difficult to rein in abusive litigation in the securities industry. Even with a ceiling on secondary actor liability,[214] companies would still face the pressures to settle unmeritorious claims to avoid the costs of litigation.

Congress has repeatedly exhibited its intent to entrust the SEC with the authority to regulate securities fraud. In recent years, it has expanded this authority by giving the SEC the power to distribute to defrauded investors any amounts received by civil penalties and disgorgement proceedings (into "Fair Funds").[215] There are two problems with the application of these Fair Funds. First, the SEC is subject to budgetary restrictions and political pressures,[216] which may inhibit its ability to pursue all violations to the fullest extent. Second, the SEC is often unable to recover more than a

[213] See supra notes 97, 100, 102 and accompanying text.

[214] A cap on secondary actor liability has been suggested as a possible compromise in this debate. See Evaluating S. 1551: The Liability for Aiding and Abetting Securities Violations Act of 2009: Hearing Before the Subcomm. on Crime and Drugs of the U.S. S. Comm. on the Judiciary, 111th Cong. 111–12 (2009) (testimony of John C. Coffee, Jr., Adolf A. Berle Professor of Law, Columbia University Law School).

[215] 15 U.S.C. § 7246.

[216] See Kaufman & Wunderlich, supra note 183.

fraction of total losses in large securities fraud cases. As a result, the Fair Funds often produce insufficient funding to compensate defrauded investors in full.

Throughout its recent history of reforming securities fraud litigation, Congress has emphasized two common themes. First, private litigation comes with substantial costs, which should be limited. Second, the primary vehicle of regulation is to be the SEC—not the individual investor. It follows logically that if Congress is to enact changes to expand liability for securities fraud, any new enforcement authority should rest with the SEC and not with investors. By expanding both the scope of SEC enforcement authority and the SEC's budget, Congress can overcome the two primary obstacles standing in the way of more effective federal regulation.

Such new authority would mark a significant change in SEC enforcement, which is primarily a regulatory agency with less focus on investor compensation. In making such a change, Congress must consider several important elements. First, the SEC will need sufficient resources to administer an effective compensatory fund. The SEC would likely require funding well beyond what it was given to establish Fair Funds in order to avoid the same budgetary restrictions. Second, the SEC may need to restructure its civil penalty formula, as it will be the primary tool for generating compensatory funds. This formula must therefore provide a mechanism for establishing civil penalties that reflect the extent of losses suffered by investors. Finally, Congress must give consideration to the SEC compensatory process itself. The SEC requires both a system for identifying deserving injured investors so as to prevent compensation for meritless claims, as well as a method of allocation in the likely scenario where the need for compensation exceeds the penalties collected.

By taking these measures, Congress can cure the remedial deficiency left by *Janus* through its chosen vehicle for enforcement. In order to improve compensation of defrauded investors while avoiding the threat of increased litigation costs, Congress should expand the scope of the SEC's enforcement authority while continuing to restrict the private cause of action.

CONCLUSION

The landscape of securities litigation has changed dramatically based on the impact of the private right of action under Rule 10b–5. As more courts interpret the broad scope of the Supreme Court's holding in *Janus* , this issue will once again be the defining feature of private securities litigation. Although *Janus* advances Congress's laudable goal of restricting private securities litigation and its accompanying costs, the ruling also provides corporations with the opportunity to escape liability through manipulation of corporate structuring.

While there are various options for overcoming this consequence on both the private and regulatory side, Congress has repeatedly exhibited its preference for entrusting the Securities and Exchange Commission, and not the individual investor, with the authority to police securities fraud. To address what is after *Janus* a lack of remedy for many individual investors, Congress should provide the Commission with sufficient regulatory tools to close the remedial gap.