SEC Puts Janus in its Place

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Interpretive positions adopted in a recent SEC opinion will, if accepted by the courts, greatly undermine the significance of the U.S. Supreme Court's 2011 opinion in *Janus Capital Group, Inc. v. First DerivativeTraders*. *Janus* held that an investment adviser to a mutual fund was not the "maker" of allegedly false statements in the fund's prospectus for purposes of liability in a private action for violations of SEC Rule 10b-5(b). The Court reasoned that because the fund, which filed the prospectus, had "ultimate authority" over the prospectus's content and dissemination, the adviser could not have "made" the statements at issue even if the adviser was "significantly involved" in preparing the prospectus. Nevertheless, **under the SEC's interpretations in *In the Matter of John P. Flannery and James D. Hopkins*, most, if not all, actions that could be brought under Rule 10b-5(b) *also* could be brought under Rule 10b-5(a) or (c)**. Moreover, the SEC expressed the view that *Janus* has no applicability to Rule 10b-5(a) or (c) because the terms of those subsections do not require that the alleged violator be the "maker" of any statement at issue. Under the SEC's analysis, therefore, avoiding the Supreme Court's holding in *Janus*–limiting Rule 10b-5(b) liability to "makers" as defined by the Court – could require nothing more than pleading a violation of one or both of those other subsections, rather than subsection (b). In the course of its nearly 60-page opinion in *Flannery*, the SEC expressed its views on a wide variety of interpretive questions. Two SEC Commissioners, Republicans Gallagher and Piwowar, dissented from the opinion, however, and several of the SEC's positions will doubtless stir controversy. We urge interested readers to grab a cup of coffee and spend some time absorbing the many contours of this deliberately crafted SEC opinion.

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