CONTEXT MAKES A DIFFERENCE: SEC LOSES CONTROVERSIAL CASE

In a lengthy enforcement proceeding, the SEC had issued an order against two former executives of certain fixed-income funds for allegedly making false statements to institutional investors during the subprime mortgage crisis. The Commission's decision was by a divided (3-2) vote and it overturned a decision by the Chief ALJ that no violation had occurred. The First Circuit sided with the ALJ and vacated the Commission's order. The authors describe the decisions at each level and note that the First Circuit's decision leaves unresolved some important securities law questions.

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On December 8, 2015, the Court of Appeals for the First Circuit delivered a high-profile loss to the Securities and Exchange Commission when it vacated an order issued by the Commission against John P. Flannery and James D. Hopkins, two former executives of State Street Global Advisors (the "Adviser"). They had allegedly violated the federal securities laws by making false and misleading statements about certain State Street-managed fixed-income funds during the 2007 subprime mortgage crisis.[1] The First Circuit's decision is particularly notable because it vacated a controversial Commission decision that itself had, by a 3-2 divided vote, overturned the decision by the SEC's Chief Administrative Law Judge that no violations had occurred and, in doing so, staked out questionable positions on a variety of securities law issues.[2]

After a careful review of the record, the First Circuit concluded that the statements attributed to Flannery were not "materially misleading,"[3] that the SEC's finding that Flannery had engaged in a fraudulent "practice" or "course of business" was not justified, and that the materiality of the statements attributed to Hopkins was "thin" and, even when combined with other evidence, was insufficient to establish *scienter*.[4] The Commission's decision was thus not "supported by substantial evidence," and its determination to overrule the decision of its own Chief ALJ was an "abuse[] [of] discretion."

The First Circuit decision represents a significant loss for the SEC, which has highlighted the prosecution of individuals as an integral component of the Commission's enforcement program.[5] But it has come under criticism for its increasingly aggressive enforcement posture, including the use of its in-house administrative tribunal to resolve contested enforcement matters.[6] However, the decision leaves unaddressed

[1] *Flannery v. SEC*, No. 15-1080, 2015 WL 8121647 (1st Cir. Dec. 8, 2015).

[2] *SEC Majority Argues for Negating Janus Decision with Broad Interpretation of Rule 10b-5*, SECURITIES DIARY (Dec. 19, 2014), http://securitiesdiary.com/2014/12/19/sec-majority-argues-for-negating-janus-decision-with-broad-interpretation-of-rule-10b-5/.

[3] *Flannery*, *supra* note 1, at *10.

[4] *Id.* at *8.

[5] *See, e.g.*, Mary Jo White, Chair, SEC, *Understanding Disqualifications, Exemptions and Waivers Under the Federal Securities Laws* (Mar. 12, 2015), http://www.sec.gov/news/speech/031215-spch-cmjw.html ("In my experience, in the enforcement arena, the most effective deterrent is strong enforcement against responsible individuals, especially senior executives. In the end, it is people, not institutions, who engage in unlawful conduct. . . . As our record at the SEC shows, a critical priority of our enforcement program is to hold responsible individuals accountable. . . . In fiscal year 2015 to date, we have charged individuals in more than 110 actions, or approximately 66 percent of our total actions.").

[6] *See, e.g.*, Jacob Gershman, *Former Official Says SEC Beset by "Crisis of Confidence" Over In-House Judges*, THE WALL

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several important interpretive issues under the federal securities laws, the resolution of which will have to await another day.

BACKGROUND

In 2002, the Adviser created the Limited Duration Bond Fund (the "LDBF"), a combination of two unregistered fixed-income funds that were invested in various fixed-income products.[7] The LDBF was offered and sold only to institutional investors and was heavily invested in asset-backed securities, including residential mortgage-backed securities. Since its inception, the LDBF had outperformed its benchmark index. Beginning in June 2007, however, as the subprime mortgage crisis unfolded, the LDBF experienced substantial under-performance.

Neither Hopkins nor Flannery managed the LDBF on a day-to-day basis.[8] Hopkins worked at the Adviser from 1998 until 2010 (when he was offered retirement as a result of the SEC proceeding).[9] From 2006 to 2007, he was a vice president and head of North American Product Engineering and was the senior product engineer responsible for fixed-income funds, including the LDBF. Among other duties, Hopkins was responsible for correcting inaccuracies in LDBF "fact sheets," two-page quarterly documents made available to clients and prospective clients that showed the LDBF's strategy and performance numbers. Until the SEC charges, Hopkins had worked in the securities industry for "35 years with an unblemished record."

For his part, Flannery was a former chief investment officer ("CIO").[10] He joined the Adviser in 1996 as a product engineer and stayed at the Adviser until 2007. In 2005, he became the Adviser's Fixed-Income CIO for the Americas. As CIO, Flannery had general supervisory oversight for the Adviser's fixed-income operations, but he was not involved in the LDBF's investment decisions or its daily management. Before joining the Adviser, Flannery had worked in the fixed-income area for about 16 years and had an "unblemished record in the industry, and a reputation for being very honest and having a great deal of integrity."

On September 30, 2010, the Commission issued an Order Instituting Proceedings in which the Division of Enforcement alleged that during the 2007 subprime mortgage crisis, Hopkins and Flannery "engaged in a course of business and made material misrepresentations and omissions that misled investors" about the LDBF. The Division charged them with engaging in a course of conduct that resulted in willful violations of Sections 17(a)(1), (2), and (3) of the Securities Act of 1933; Section 10(b) of the Securities Exchange Act of 1934; and Exchange Act Rule 10b-5.[11]

The charges against Hopkins and Flannery centered on three communications about the LDBF that Hopkins and Flannery either made or were involved with in 2007: a slide from a standard PowerPoint presentation that the Adviser used when presenting information about the LDBF to investors describing typical portfolios in the strategy that Hopkins had a hand in preparing (the "Typical Portfolio Slide");[12] and two letters, dated August 2 and August 14, 2007, regarding conditions in the housing-related securities market that Flannery either wrote or had seen before they were sent to investors.[13]

- ***The Typical Portfolio Slide.*** The Typical Portfolio Slide, which described the LDBF as "high quality,"

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STREET JOURNAL LAWBLOG (Dec. 2, 2015, 5:37 PM), http://blogs.wsj.com/law/2015/12/02/former-official-says-sec-beset-by-crisis-of-confidence-over-in-house-judges/ (explaining that former SEC commissioner Joseph Grundfest is among others "who worry that the SEC may be seen as seeking to exploit a home-court advantage by sending more of its serious cases to its own tribunal . . ." and stating that "[c]riticism of the internal tribunals picked up after The Wall Street Journal published an analysis . . . showing the agency won contested cases heard by its in-house judges at a far higher rate than ones it took to federal court").

[7] *Flannery*, *supra* note 1, at *2.

[8] *Id.* at **2-4.

[9] *Id.* at *2.

[10] *Id.* at *4.

[11] *Id.* at *1. The charges against Flannery and Hopkins were related to those brought against the Adviser, which the firm settled in 2010. *State Street Bank and Trust Company*, Securities Act Release No. 9,107 (Feb. 4, 2010). The SEC charged the Adviser with violating Section 17(a)(2) and Section 17(a)(3) of the Securities Act for allegedly misleading investors about the extent of the LDBF's subprime investments. Under the terms of the settlement, the Adviser agreed, without admitting or denying the allegations, to replace key senior personnel and portfolio managers, pay more than $300 million to investors who had lost money, and provide the SEC with information to help evaluate individuals' potential liability related to investor communications about the LDBF.

[12] *Flannery*, *supra* note 1, at *2.

[13] *Id.* at *5.

contained a sector allocation graph showing that the LDBF was 55% invested in ABS, 25% in commercial mortgage-backed securities, and 10% in mortgage-backed securities.[14] In 2007, however, the LDBF's actual investment in ABS reached 80% to nearly 100%. Hopkins used the Typical Portfolio Slide at an investor presentation in the spring of 2007 without updating the slide's sector breakdown and without disclosing the actual sector allocations. Although he had notes on the LDBF's actual investments, which he would use at presentations to respond to inquiries, Hopkins did not think the sector breakdowns were important to investors and could not recall any investor ever having asked him about them. No one who attended the spring 2007 presentation asked Hopkins what the actual sector breakdowns were.[15]

- ***The August 2 Letter.*** The August 2 Letter was sent to clients in at least 22 fixed-income funds and described the actions the Adviser had taken to respond to conditions in the subprime mortgage market, including the sale of significant portions of certain BBB- and AAA-rated securities held in its Limited Duration Bond Strategy.[16] The letter, which was signed by individual relationship managers and included fund-specific performance information, had been sent to the Adviser's legal department and others, including Flannery, for review. While Flannery made a number of edits to the letter, only some stayed in the final version, and Flannery had not been included in several e-mail exchanges related to the edits prior to the letter's distribution. The letter concluded by stating: "The actions we have taken to date in the Limited Duration Bond Strategy simultaneously reduced risk in other [Adviser] active fixed-income and active derivative-based strategies."

- ***The August 14 Letter.*** Flannery sent the August 14 Letter to LDBF investors in an attempt to explain what was taking place in the market. Flannery was normally not responsible for client communications and was discouraged from sending the letter, but proceeded regardless because he felt it was "the right thing to do." The letter, which was vetted by the president and CEO of the Adviser, as well as its in-house and outside legal counsel (among others), ended by stating: "While we will continue to liquidate assets for our clients when they demand it, we believe that many judicious investors will hold positions in anticipation of greater liquidity in the months to come."[17]

[14] *Id.* at *3.

[15] *Id.* at *8.

[16] *Id.* at *5.

THE DECISION OF THE SEC'S CHIEF ALJ

On October 28, 2011, after an 11-day hearing involving 19 witnesses, approximately 500 exhibits, and seven briefs totaling 442 pages of argument, the SEC's Chief ALJ dismissed the proceeding, finding that neither Hopkins nor Flannery was responsible for, or had ultimate authority over, the documents at issue and that these documents did not contain materially false or misleading statements or omissions.[18]

The Chief ALJ began her analysis by emphasizing that the LDBF's investors "were sophisticated, institutional investors, most of whom engaged investment consultants to provide investment advice," and noting that investment vehicles that remain private (like the LDBF) have "historically been understood not to present the same dangers to public markets as more widely available investment companies, like mutual funds."[19] Many courts, the Chief ALJ observed, have considered an investor's sophistication to be a factor in evaluating allegations of fraud, with respect to both materiality and *scienter*.[20]

The Chief ALJ then turned to the parties' contentions with respect to the impact of *Janus Capital Group, Inc. v. First Derivative Traders*,[21] which had been decided only a few months before and which resolved a circuit split on the meaning of the phrase "make a statement" for the purposes of Exchange Act Rule 10b-5. The Supreme Court held that a "maker" of a statement for the purposes of Rule 10b-5 is the "person or entity with ultimate authority over the statement, including its content and whether and how to communicate it," not one who merely "prepares or publishes a statement on behalf of another."[22] The Division contended that *Janus* applied only for the purposes of Rule 10b-5(b) and did not affect "scheme liability" or "course of conduct" claims under Rules 10b-5(a) and 10b-5(c), or Securities

[17] *Id.* at *6.

[18] *In the Matter of John P. Flannery and James D. Hopkins*, S.E.C. Release No. 438, 2011 WL 5130058 (Oct. 28, 2011).

[19] *Id.* at *32.

[20] *Id.* (citing cases).

[21] 131 S. Ct. 2296 (2011).

[22] *Id.* at 2302.

Act Sections 17(a)(1) and 17(a)(3), or "misstatement liability" under Section 17(a)(2).[23] The Chief ALJ disagreed, noting that the Division had made the same arguments about *Janus's* reach before the district court in *SEC v. Kelly*, a case that likewise turned on allegedly fraudulent misstatements and omissions, which the *Kelly* court rejected.[24] Because the case "involves allegations of materially false, or misleading statements or omissions," the Chief ALJ held, "the *Janus* test [is] the appropriate standard to apply in evaluating the [r]espondents' conduct."[25] Accordingly, with respect to allegations involving documentary evidence, the Chief ALJ held that the Division was required to establish that the respondents "had ultimate authority and control over such documents," which it failed to do.

With respect to the Typical Portfolio Slide, for instance, there was no dispute that Hopkins did not prepare the PowerPoint presentation and, though it was also undisputed that he was asked to make corrections, "this did not make him responsible for, or give him ultimate authority over, its contents or distribution."[26] Nor did the Typical Portfolio Slide contain material misrepresentations or omissions.[27] Among other reasons, the slide represented a typical portfolio composition of LDBF's portfolio at a particular time.[28] "Typical," the Chief ALJ stated, "is not actual." In addition, expert evidence established that "no sophisticated investor would rely on this single piece of information" but rather "would consider a total mix of information such as discussions with fund managers, responses to questions, and requests for information before making an investment decision."

The Division's case against Flannery suffered from similar infirmities. Flannery did not "make" the statements in the August 2 Letter, the Chief ALJ held, because he did not "author any of the drafts," "his name [did] not appear on the letter, very few of his edits appear[ed] in the final product, he did not sign it, he did not have final approval authority, nor did he control the letter's distribution."[29] The statements contained in the August 2 Letter were not materially misleading in any event.[30] The Division claimed that the August 2 Letter was misleading because it focused on prior risk reductions but failed to disclose the intent to use the proceeds to fund redemption requests, including those from clients advised by the Adviser's internal advisory groups, redemptions that, in fact, would increase the risks to remaining LDBF shareholders. However, expert testimony established that the sales did reduce the LDBF's portfolio, market and credit risk, there was no dispute that approximately $200 million in cash and cash equivalents remained in the fund even after the sales and redemptions, and there was no evidence that Flannery had made any attempt to obfuscate or mislead.[31]

As for the August 14 Letter, while Flannery did have responsibility for and ultimate authority over its contents, according to the Chief ALJ, it was not misleading either.[32] Not only did Flannery believe in the truthfulness of the "judicious investor" language, which language the Chief ALJ believed was reasonable, but Flannery reasonably relied on the review of others at the Adviser, including its in-house and outside legal counsel, who concluded that the language was appropriate.[33]

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[23] *Flannery, supra note 18*, at *34.

[24] *SEC v. Kelly*, 817 F. Supp. 2d 340 (S.D.N.Y. 2011). In rejecting the Division's attempt to distinguish *Janus*, the *Kelly* court ruled that scheme liability under subsections (a) and (c) of Exchange Act Rule 10b-5 was not available where "the primary purpose and effect of a purported scheme is to make a public misrepresentation or omission." *Id.* at 343. In such circumstances, the court held, permitting primary liability "when the defendant did not 'make' the misstatement would render the rule announced in *Janus* meaningless." *Id.* at 344. The *Kelly* court also agreed with defendants that *Janus* precluded primary liability under Securities Act Section 17(a), notwithstanding differences in the language of Section 17(a) and Rule 10b-5. *Id.* at 345. Given the similarities between Section 17(a) and Rule 10b-5 in terms of the misconduct that both statutes were intended to address, the district court reasoned, "it would be inconsistent for *Janus* to require that a defendant made the misleading statement to be liable under subsection (b) of Rule 10b-5, but not under subsection (2) of Section 17(a)." *Id.*

[25] *Flannery, supra* note 18, at *35.

[26] *Id.* at *37.

[27] *Id.* at **38-39.

[28] *Id.* at *38.

[29] *Id.* at *44.

[30] *Id.* at *45.

[31] *Id.* at **44-45.

[32] *Id.* at *45.

[33] *Id.* at *47.

THE DECISION OF THE COMMISSION

Less than a month after the Chief ALJ's decision was released, the Division appealed to the Commission.[34] In a 3-2 decision issued three years later, the Commission reversed the Chief ALJ, finding Hopkins liable under Securities Act Section 17(a)(1), Exchange Act Section 10(b), and Exchange Act Rule 10b-5, and Flannery liable under Section 17(a)(3).[35] Key to the Commission's decision was its views on the relevance of investor sophistication and the impact of *Janus*.

Materiality, the Commission held, is to be viewed on an objective basis, measured by what a "reasonable investor" would consider important in making an investment decision.[36] As such, investor sophistication has no bearing on evaluating the materiality of misrepresentations or omissions.[37] Further, the fact that allegedly missing information is otherwise available to investors does not alter the result.[38] According to the Commission, simply because information enters the public domain, that alone does not relieve the speaker of any "duty to disclose information necessary to make his statements not misleading."

The Commission took a similarly critical view of the Chief ALJ's analysis of *Janus*. Based on the text of the statutes at issue and the broad remedial objectives the statutes were meant to serve, the Commission reasoned it would unduly limit the reach of the securities laws to require that a person be a "maker" of a statement before liability could be imposed under Exchange Act Rules 10b-5(a) and 10b-5(c), and Securities Act Section 17(a).[39] Rather, in the Commission's opinion, Rules 10b-5(a) and 10b-5(c) encompass not only the making of a fraudulent misstatement, but also "the drafting or devising of such a misstatement."[40] Likewise, Sections 17(a)(1) and 17(a)(2) apply to anyone who uses or employs a misstatement, whether or not they themselves were the "maker" of the statement.[41] Section 17(a)(3) encompasses misstatements, but only to the extent that they can be deemed fraudulent transactions, practices, or courses of business.[42]

Accordingly, it was irrelevant that Hopkins was not the "maker" of the Typical Portfolio Slide.[43] That slide was misleading, the Commission found, because although it showed the LDBF's "typical" sector breakdown, it "did not even come close to truthfully representing the LDBF's 'typical' portfolio during the relevant time period."[44] Nor did it matter that the Adviser provided information about its actual LDBF portfolio upon request, that such information was available from a variety of sources, that Hopkins brought sector breakdown information with him during presentations, or that most investors never even asked about portfolio composition.[45] "It would send an extraordinarily dangerous message," the Commission stated, "to say that Hopkins was free to make any misstatements about LDBF he wished in his presentations, so long as he could later claim that investors could have obtained accurate information about the fund if they had only known to ask."

That Flannery was not the "maker" of the statements in the August 2 Letter was irrelevant as well. That letter, particularly when considered together with the August 14 Letter (which Flannery concededly did make), evidenced a larger "effort to convince investors to remain in the poorly performing LDBF" by "misleadingly downplay[ing] LDBF's risk and encourag[ing] investors to hold onto their shares, even though [the Adviser's] own funds and internal advisory group clients were fleeing the fund."[46]

The Commission therefore imposed cease-and-desist orders against Flannery and Hopkins, suspended them from association with any investment adviser or company for a period of one year, and ordered Flannery and Hopkins to pay civil monetary penalties of $6,500 and $65,000, respectively.[47] Flannery and Hopkins each appealed the SEC's decision to the U.S. Court of Appeals for the First Circuit.

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[34] *In re John P. Flannery & James D. Hopkins*, S.E.C. Release No. 3981, 2014 WL 7145625 (Dec. 15, 2014).

[35] *Id.* at *42.

[36] *Id.* at *21.

[37] *Id.* at *22.

[38] *Id.* at *21.

[39] *Id.* at *13.

[40] *Id.* at *18.

[41] *Id.* at *11.

[42] *Id.* at *18.

[43] *Id.* at *24.

[44] *Id.* at *19.

[45] *Id.* at *21.

[46] *Id.* at *29.

[47] *Id.* at *42.

THE DECISION OF THE COURT OF APPEALS FOR THE FIRST CIRCUIT

The First Circuit began its analysis with a discussion of the appropriate standard of review.[48] "The SEC's factual findings control if supported by substantial evidence," the First Circuit noted, so long as its orders and conclusions are not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[49]

The First Circuit also addressed the appropriate standard of review for a Commission decision that is different from the prior Chief ALJ's decision. "When the Commission and the [Chief] ALJ reach different conclusions," the court continued, "the [Chief] ALJ's findings and written decision are simply part of the record that the reviewing court must consider in determining whether the [SEC's] decision is supported by substantial evidence."[50] In that instance, however, because the evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from those reached by the Commission, "our review is slightly less deferential than it would be otherwise." Applying that standard, the First Circuit concluded that there was not substantial evidence to support the Commission's decision either as to materiality or as to *scienter*, and vacated the SEC's ruling.[51]

With regard to Hopkins, the court held that even assuming that the Typical Portfolio Slide was misleading, the SEC's evidence of materiality was "marginal."[52] Because materiality turns on "how a reasonable investor would react," the court noted, "context makes a difference."[53] Although the SEC's decision identified a witness who attended the spring 2007 presentation and believed that the Adviser did not adequately inform him of the risks in the portfolio, myriad other facts suggested that the information in the Typical Portfolio Slide was not material at all. These facts included: (i) that the slide itself was labeled "Typical," (ii) that it was only one slide of at least 20, (iii) that the purpose of Hopkins' presentation was to explain why the LDBF had under-performed in the first quarter of 2007 and to discuss the specific index investment that contributed to under-performance, and (iv) that expert evidence established that such PowerPoint presentations were merely meant to be "starting points," after which investor due diligence is performed. Indeed, not only were clients given specific information upon request, but information about the LDBF's actual percentage of sector investment was available through fact sheets and annual audited financial statements before the presentation took place. Those facts weighed heavily against any conclusion that the Typical Portfolio Slide had "significantly altered the 'total mix' of information made available."[54]

That "thin materiality showing," the First Circuit continued, could not "support a finding of *scienter*." Hopkins himself testified that he did not believe that the sector breakdown was important to investors and was never asked to provide that breakdown information, either at the spring 2007 presentation or otherwise. Further, the fact that Hopkins had notes of the actual sector breakdowns with him at the time the presentation was made was not evidence of *scienter*, given the fact that the slide was labeled "Typical" and the other evidence weighing against materiality.

The SEC's case against Flannery fared no better. In its opinion, the SEC asserted that the August 2 Letter was misleading because the bond sales increased the fund's credit risk and liquidity risk, rather than reducing them.[55] But the evidence, the First Circuit concluded, did not support those assertions because, among other reasons, the SEC did not dispute the truth of the statements in the August 2 Letter that the LDBF maintained an average AA-credit rating, and lay and expert opinions at trial established that the bond sales did in fact reduce the fund's risk.[56] To the extent the Commission claimed that the fund's liquidity risk increased after the bond sales, the First Circuit noted, it was incumbent upon the Commission to show that that risk would have been lower if no bond sales had occurred at all, which it did not do. More importantly, counsel for the Commission conceded at oral argument that there was no particular sentence in the August 2 Letter that was inaccurate and there was no evidence that

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[48] *Flannery*, *supra* note 1, at *6.

[49] *Id.* (quoting *Cody v. SEC*, 639 F.3d 251, 257 (1st Cir. 2012)).

[50] *Id.* at *7.

[51] *Id.* at *10-11.

[52] *Id.* at *1.

[53] *Id.* at *8.

[54] *Id.* (citing *TSC Indus., Inc. v. Northway, Inc.*, 96 S. Ct. 2126 (1976)).

[55] *Flannery*, 2014 WL 7145625, at *29.

[56] *Flannery*, *supra* note 1, at *9.

the Adviser did not "seek to reduce risk across the affected portfolios," just as it said it would.[57]

Because the First Circuit found that the August 2 Letter was not misleading, it found it unnecessary to review the August 14 Letter since Securities Act Section 17(a)(3), under which the Commission found Flannery liable, does not proscribe a "single act of making or drafting a material misstatement to investors."[58] In other words, even if the August 14 Letter were misleading, that would not be enough evidence to find that Flannery had engaged in a fraudulent "practice" or "course of business" under Section 17(a)(3).

CONCLUSIONS AND UNRESOLVED MATTERS

Flannery notably reaffirms the "total mix" standard for determining materiality and the burden of proof required to prove *scienter*. In doing so, the First Circuit indirectly took aim at the SEC's allegations which took presentations and statements without regard for context. This case therefore should serve as a reminder that, as the First Circuit stated, "context makes a difference."[59]

The case also demonstrates the limitations of the idea that the outcome of every SEC case will support individual liability. As the First Circuit made clear, the SEC overstepped its authority in overturning the decision of the SEC's Chief ALJ, who determined — after a very lengthy proceeding involving live testimony and an opportunity to gauge the witnesses' credibility — that Hopkins and Flannery were honest men who answered without hesitation or equivocation, and with candor and did not break the law. Even if an entity has liability, it is not always the case that any individual bears corresponding individual responsibility.

At the same time, however, the First Circuit left important legal issues under the federal securities laws unaddressed. For instance, although the First Circuit implicitly undermined the SEC's theory that institutional investors rely only on written documents provided to them, not on information freely available to them in due diligence, it declined to determine whether "the level of sophistication of the LDBF investors would have made any misrepresentation material."[60]

Likewise, although presented with an opportunity to speak on the reach of *Janus*, the court side-stepped that issue as well, confining its opinion to whether the statements at issue were misleading.[61] Given the Commission's forceful rejection of the notion that *Janus* has any application beyond Exchange Act Rule 10b-5(b), until addressed by the federal courts, future cases alleging violations by individuals who participate in the preparation of allegedly misleading statements are likely to follow, even if such individuals do not "make" the statements themselves. ■

[57] *Id.* at *10.

[58] *Id.* at *11.

[59] *Id.* at *8.

[60] *Id.* at *8, n.9.

[61] *Id.* at *7.