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This month's edition of the Alert discusses two recent Supreme Court decisions: the ruling in *Janus Capital Group, Inc. v. First Derivative Traders* limiting the scope of liability for secondary actors under Section 10(b) and Rule 10b-5, and the ruling in *Erica P. John Fund, Inc. v. Halliburton Co.* holding that plaintiffs do not have to prove loss causation to trigger the fraud-on-the-market presumption at the class certification stage.

This month's Alert also discusses a Sixth Circuit opinion holding that courts need not conduct an allegation-by-allegation evaluation of scienter pleadings, and two Southern District of New York decisions, one curtailing the SEC's claims against Goldman Sachs banker Fabrice Tourre on *Morrison* grounds, and the other dismissing the Manulife shareholder class action. We also address: an Eastern District of Pennsylvania decision remanding a state pension fund suit on the grounds that the fund is an "arm of the state" for jurisdictional purposes; and a California Intermediate Court of Appeals decision holding that SLUSA does not preclude concurrent jurisdiction for all "covered class actions" under the Securities Act of 1933. Finally, this Alert discusses the SEC's final rules implementing the whistleblower provisions of the Dodd-Frank Act.

The Supreme Court Limits the Scope of Liability for Secondary Actors Under Section 10(b) and Rule 10b-5

In a 5-4 decision issued on June 13, 2011, the Supreme Court held that Janus Capital Management LLC ("JCM"), the investment adviser and administrator for Janus Investment Fund, could not be held liable under Section 10(b) and Rule 10b-5 for helping to create allegedly "false statements in mutual fund prospectuses filed by Janus Investment Fund." *Janus Capital Group, Inc. v. First Der. Traders*, 2011 WL 2297762, at *1 (U.S. June 13, 2011) (Thomas, J.). "Although JCM may have been significantly involved in preparing the prospectuses," the Court found that JCM "did not itself 'make' the statements at issue for Rule 10b-5 purposes." *Id*. at *2.

The majority decision found that "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." *Id*. at *5. The majority also ruled that "in the ordinary case," attribution is a requirement for secondary actor liability. *Id*.

Background

JCM "provides Janus Investment Fund with investment advisory services," as well as management and administrative services. *Id*. at *2. During the

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relevant time period, "all of the officers of Janus Investment Fund were also officers of JCM," but only one member of Janus Investment Fund's board of trustees was affiliated with JCM. *Id*. "[T]he two entities maintain[ed] legal independence" from one another. *Id*.

In 2003, plaintiffs brought suit against JCM and Janus Capital Group Inc. ("JCG"), the parent company of Janus Investment Fund, alleging that Janus Investment Fund's prospectuses contained misleading statements regarding the funds' policies with respect to market timing practices. The district court dismissed the complaint for failure to state a claim in 2007.

The Fourth Circuit reversed in 2009. The Fourth Circuit held that allegations that the defendants "participat[ed] in the writing and dissemination of the prospectuses" were sufficient to state a claim that "JCG and JCM … *made* the misleading statements contained in the documents." *In re Mut. Funds Inv. Litig.*, 566 F.3d 111, 121 (4th Cir. 2009). Given JCM's "publicly disclosed responsibilities" as Janus Investment Fund's investment adviser, the Fourth Circuit determined that investors would "infer that JCM played a role in preparing or approving the content of the Janus fund prospectuses." *Id*. at 127. However, the appellate court found that it would not necessarily be "apparent to the investing public that the investment adviser's parent company [JCG] … participate[d] in the drafting or approving of prospectuses issued by the individual [Janus] funds." *Id*. The Fourth Circuit held that while JCM could face primary liability under Rule 10b-5, JCG could only be held liable as a "control person" of JCM under § 20(a).

On June 28, 2010, the Supreme Court granted *certiorari* to determine whether JCM "can be held liable in a private action under Rule 10b-5 for false statements included in Janus Investment Fund's prospectuses." *Janus*, 2011 WL 2297762, at *4.

The Supreme Court Addresses What It Means to "Make" a Statement within the Meaning of Rule 10b-5

Rule 10b-5 provides that "it is 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." *Id*. (emphasis added). The Supreme Court explained at the outset that Rule 10b-5 must be read within "narrow dimensions" because "neither Rule 10b-5 nor § 10(b) expressly creates a private cause of action." *Id*.

Interpreting Rule 10b-5 within this "narrow scope," the Court held that the phrase "'[t]o make any … statement'" is "the approximate equivalent of 'to state.'" *Id*. at *5. Only a person or entity who has "ultimate authority over the statement, including its content and whether and how to communicate it" can be considered "the maker of a statement" for Rule 10b-5 purposes. *Id*. "Without control, a person or entity can merely suggest what to say, not 'make' a statement in its own right." *Id*.

The Court pointed to the relationship between a speechwriter and a speaker as an analogy for how this rule would apply. "Even when a speechwriter drafts a speech, the content is entirely within the control of the person who delivers it." *Id*. "[I]t is the speaker

who takes credit—or blame—for what is ultimately said." *Id*. Just as a speechwriter does not "make" a speech delivered by someone else, a person or entity who "prepares or publishes a statement on behalf of another is not its maker." *Id*.

The *Janus* Court expressly rejected the Government's contention that "'make' should be defined as 'create,'" explaining that "[a] broader reading of 'make' … would substantially undermine" the ruling in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.* 511 U.S. 164 (1994). *Janus*, 2011 WL 2297762, at *5-*6. Under *Central Bank*, "Rule 10b-5's private right of action does not include suits against aiders and abettors." *Id*. at *5. "If persons or entities without control over the content of a statement could be considered primary violators who 'made' the statement, then aiders and abettors would be almost nonexistent." *Id*.

The *Janus* Court also found support for its ruling in *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008). There, the Court "rejected a private Rule 10b-5 suit against companies involved in deceptive transactions, even when information about those transactions was later incorporated into false public statements." *Janus*, 2011 WL 2297762, at *6. "We see no reason to treat participating in the drafting of a false statement differently from engaging in deceptive transactions, when each is merely an undisclosed act preceding the decision of an independent entity to make a public statement." *Id*.

The Court Holds That Attribution Is Generally a Requirement for Secondary Actor Liability under Rule 10b-5

In granting *certiorari*, the Court agreed to review the question of whether a service provider can face primary liability for "statements that were not directly and contemporaneously attributed to the service provider." Petition for Writ of Certiorari, *Janus Capital Grp., Inc., v. First Der. Traders*, 2009 WL 3614467, at *i* (U.S. Oct. 30, 2009) (No. 09-525). Prior to the Supreme Court's ruling, four circuits (the Second, Third, Fifth and Eleventh Circuits) had adopted a bright-line attribution rule for secondary actor liability, and the First Circuit had indicated its approval of that rule. The Fourth and Ninth Circuits, however, permitted secondary actor liability for statements that were not directly attributed to those actors at the time they were made.

The *Janus* Court adopted the bright-line attribution rule, explaining that "in 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 was attributed." *Janus*, 2011 WL 2297762, at *5.

Because the plaintiffs here failed to allege attribution, the Court determined that it need not consider the argument that JCM "made" the statements *indirectly*. "More may be required to find that a person or entity made a statement indirectly," the Court explained, "but attribution is necessary." *Id*. at *7, n. 11.

The Court Finds That the Complaint Fails to State a Claim under Rule 10b-5

Although JCM "may have assisted Janus Investment Fund with crafting … [its] prospectuses," the Court held that "JCM itself did not '*make*' those statements for purposes of Rule 10b-5." *Id*. at *7 (emphasis added). The Court noted that there was "no allegation that JCM in fact filed the prospectuses and falsely attributed them to Janus Investment Fund," nor was there "anything on the face of the prospectuses [that] indicate[d] that any statements therein came from JCM rather than Janus Investment Fund." *Id*. "[N]one of the statements in the prospectuses were attributed, explicitly or implicitly, to JCM." *Id*. at *7, n. 11.

As to arguments regarding the "'well-recognized and uniquely close relationship between a mutual fund and its investment adviser," the Court decided against "disregard[ing] the corporate form." *Id*. at *6. The Court

emphasized that "JCM and Janus Investment Fund remain legally separate entities" and all "corporate formalities were observed." *Id*. Moreover, "Congress also has established liability in § 20(a)" for situations involving a "relationship of influence." *Id*. Under these circumstances, "[a]ny reapportionment of liability in the securities industry … between investment advisers and mutual funds is properly the responsibility of Congress and not the courts." *Id*.

The Dissent Argues That the Majority's Interpretation of "Make" for Rule 10b-5 Purposes Is Unduly Narrow

Justice Stephen Breyer delivered a dissenting opinion, joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan. The dissent stated that "the majority has incorrectly interpreted the Rule's word 'make.'" *Id*. at *8. "Neither common English nor this Court's earlier cases limit the scope of that word to those with 'ultimate authority' over a statement's content." *Id*. "To the contrary, both language and case law indicate that, depending upon the circumstances, a management company, a board of trustees, [and] individual company officers … might 'make' statements contained in a firm's prospectus." *Id*. "Practical matters related to context, including control, participation, and relevant audience, help determine who 'makes' a statement and to whom that statement may be properly attributed." *Id*. at *9.

The dissent found that the majority's reliance on *Central Bank* was misplaced because that case involved *secondary* liability for aiding and abetting, while "the present case is about *primary* liability—about individuals who allegedly themselves 'make' materially false statements." *Id*. at *10. Responding to this criticism, the majority wrote that "there must be some distinction between those who are primarily liable … and those who are secondarily liable" for *Central Bank* to "have any meaning." *Id*. at *5, n. 6. "We draw a clean line between the two—the maker is the person or entity with ultimate authority over a statement and others are not." *Id*.

The dissent highlighted "[t]he possibility of guilty management and [an] innocent board." *Id*. at *13. "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?" *Id*. "Apparently under the majority's rule, in such circumstances *no one* could be found to have 'ma[d]e' a materially false statement." *Id*. Nothing in the language, history, or precedent of Section 10(b) or Rule 10b-5 suggests that Congress "intended a loophole of the kind that the majority's rule may well create." *Id*.

Turning to the complaint, the dissent found that "[t]he specific relationships alleged among [JCM], the Janus [Investment] Fund, and the prospectus statements warrant the conclusion that [JCM] did 'make' those statements." *Id*. at *14. "The relationship between [JCM] and the Fund could hardly have been closer," and JCM's "involvement in preparing and writing the relevant statements could hardly have been greater." *Id*. at *15. Moreover, "there is a serious suggestion that the board itself knew little or nothing about the falsity of what was said." *Id*. Given this backdrop, the dissent would "hold the allegations in the complaint … legally sufficient." *Id*.

The Supreme Court Holds That Plaintiffs Do Not Have to Prove Loss Causation to Trigger the Fraud-on-the-Market Presumption at the Class Certification Stage

On June 6, 2011, the Supreme Court unanimously held that securities fraud plaintiffs "need not" "prove loss causation in order to obtain class certification." *Erica P. John Fund, Inc. v. Halliburton Co.*, 2011 WL 2175208, at *3 (June 6, 2011) (Roberts, C.J.) ("*Halliburton*").

Background

The plaintiffs filed a putative securities fraud class action against Halliburton Co. and one of its executives alleging that "Halliburton made various misrepresentations designed to inflate its stock price" and "later made a number of corrective disclosures that caused its stock price to drop." *Id*. After defeating a motion to dismiss, the plaintiffs moved for class certification.

The district court declined to certify the class because the plaintiffs failed to meet the Fifth Circuit's "extremely high burden on plaintiffs seeking class certification in a securities fraud case." *Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co.*, 2008 WL 4791492, at *20 (N.D. Tex. Nov. 4, 2008). To "trigger the fraud-on-the-market presumption of class reliance," plaintiffs in the Fifth Circuit had to establish loss causation "at the class certification stage by a preponderance of all admissible evidence." *Id*. at *2 (*quoting Oscar Private Equity Invs. v. Allegiance Telecom, Inc*., 487 F.3d 261, 269 (5th Cir. 2007)). The district court defined loss causation as the "causal connection between the material misrepresentation and the [economic] loss" suffered by investors. *Id*. at *1.

Because the lead plaintiff "'failed to establish loss causation with respect to any' of its claims," the district court "concluded that it could not certify the class in this case." *Halliburton*, 2011 WL 2175208, at *4. The district court stated that "absent 'this stringent loss causation requirement,' it would have granted the [lead plaintiff's] certification request." *Id*. at *3.

The Fifth Circuit affirmed the district court's decision. *Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co*., 597 F.3d 330, 336 (5th Cir. 2010) ("*Halliburton II*"). No other circuit required plaintiffs to prove loss causation at the class certification stage. *Compare Halliburton II* with *In re Salomon Analyst Metromedia Litig*., 544 F.3d 474, 483 (2d. Cir. 2008) (stating that "plaintiffs do not bear the burden of showing an impact on price" at the class certification stage); *Schleicher v. Wendt*, 618 F.3d 679, 687 (7th Cir. 2010) (holding that "[i]t gets the cart before the horse to insist that [a loss causation determination] be made before any class can be certified"); *In re DVI, Inc. Sec. Litig*., 2011 WL 1125926, at *7 (3d Cir. Mar. 29, 2011) (finding that plaintiffs need not "establish loss causation as a prerequisite to invoking the presumption of reliance in the first instance") (decided after *certiorari* was granted).

The Supreme Court granted *certiorari* "to resolve [this] conflict among the Circuits as to whether

securities fraud plaintiffs must prove loss causation in order to obtain class certification." *Halliburton*, 2011 WL 2175208, at *4.

The Supreme Court Rejects the Fifth Circuit's Approach as Inconsistent with *Basic*

The Supreme Court held that the Fifth Circuit's approach "is not justified by *Basic* [*v. Levinson*, 485 U.S. 224 (1998)] or its logic." *Halliburton*, 2011 WL 2175208, at *6. The Court explained that "we have never before mentioned loss causation as a precondition for invoking *Basic*'s rebuttable presumption of reliance." *Id*. "The term 'loss causation' does not even appear in our *Basic* opinion," because "[l]oss causation addresses a matter different from whether an investor relied on a misrepresentation, presumptively or otherwise, when buying or selling a stock." *Id*.

"Under *Basic*'s fraud-on-the-market doctrine, an investor presumptively relies on a defendant's misrepresentation if that 'information is reflected in [the] market price' of the stock at the time of the relevant transaction." *Id*. Loss causation, on the other hand, "requires a plaintiff to show that a misrepresentation that affected the integrity of the market price *also* caused a subsequent economic loss." *Id*.

The Supreme Court explained that the two requirements are distinct and independent: "Loss causation has no logical connection to the facts necessary to establish the efficient market predicate to the fraud-on-the-market theory." *Id*. "The fact that a subsequent loss may have been caused by factors other than the revelation of a misrepresentation has nothing to do with whether an investor relied on the misrepresentation in the first place, either directly or presumptively through the fraud-on-the-market theory." *Id*.

Notably, the Court declined to address questions of "how and when [the *Basic* presumption] may be rebutted." *Id*. at *8. The Court specifically "express[ed] no views on the merits" of Halliburton's contention that "a plaintiff must prove price impact [at the class certification stage] only after *Basic*'s presumption has been successfully rebutted by the defendant." *Id*. at *7, n. *.

The Supreme Court Finds No Basis for Halliburton's "Price Impact" Argument

Although Halliburton "concede[d] that securities fraud plaintiffs should not be required to prove loss causation in order to invoke *Basic*'s presumption of reliance or otherwise achieve class certification," Halliburton argued that the Fifth Circuit's requirement was "merely 'shorthand'" for "price impact." *Id*. at *7. "'Price impact' simply refers to the effect of a misrepresentation on a stock price." *Id*. Halliburton contended that "[i]f the price is unaffected by the fraud, the price does not reflect the fraud." *Id*.

The Supreme Court rejected Halliburton's attempt to transform the Fifth Circuit's requirement from "loss causation" to "price impact" as a "wishful interpretation of the [Fifth Circuit's] opinion." *Id*. "Whatever Halliburton thinks the [Fifth Circuit] meant to say, what it said was loss causation." *Id*. "We take the [Fifth Circuit] at its word," and "[b]ased on those words, the decision below cannot stand." *Id*.

The Sixth Circuit Holds That Assessing Scienter Allegations Individually Is No Longer Necessary In Light of the Supreme Court's Decisions in *Tellabs* and *Matrixx*

On May 25, 2011, the Sixth Circuit reversed the dismissal of a securities fraud class action against the chief executive officer and the chief financial officer of Dana Corporation, finding that the plaintiffs had adequately pleaded scienter. *See Frank v. Dana Corp.*, 2011 WL 2020717 (6th Cir. May 25, 2011) (Martin, C.J.). Notably, the Sixth Circuit reached its decision after conducting only a "holistic" review of the scienter allegations. The appellate court held that "conducting an individual review of myriad [scienter] allegations is an unnecessary inefficiency" that "risks losing the forest for the trees." *Id.* at *5.

The Sixth Circuit Relies on *Tellabs* and *Matrixx* to Conclude That Only a Holistic Review of Scienter Allegations Is Necessary

The Sixth Circuit acknowledged that "[i]n the past, we have conducted our scienter analysis in section 10(b) cases by sorting through each allegation individually before concluding with a collective approach." *Id.* However, the appellate court found that this allegation-by-allegation approach is not consistent with the Supreme Court's holding in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007). There, the Court held that "[t]he inquiry … is whether all of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard." *Id.* at 322-23. In view of the *Tellabs* ruling, the Sixth Circuit concluded that "the only appropriate approach … [is] to review scienter pleadings based on the collective view of the facts, not the facts individually." *Frank*, 2011 WL 2020717, at *5.

The Sixth Circuit also pointed to the Supreme Court's recent decision in *Matrixx v. Siracusano*, 131 S. Ct. 1309 (2011), as a "post-*Tellabs* example of how to consider scienter pleadings 'holistically' in section 10(b) cases." *Frank*, 2011 WL 2020717, at *5. In *Matrixx*, "Justice Sotomayor expertly addressed the allegations collectively, did so quickly, and importantly, did not parse out the allegations for individual analysis." *Id.* (To read our discussion of the *Matrixx* decision in the April edition of the Alert, please click here.)

The Sixth Circuit Finds that the Plaintiffs' Allegations, Viewed Holistically, Support an Inference of Scienter

In a one page-long analysis, the Sixth Circuit noted that the defendants, "the top two executives of an auto parts manufacturer," had allegedly "reported gangbuster earnings during a period of time when the entire auto industry was spiraling toward bankruptcy." *Id.* The court stated that the defendants had allegedly "made positive public statements, and asserted the veracity of their financials to government authorities all while one of their key product lines was operating at fifty percent of earnings, multiple factories failed to meet their budgets, and the price of steel rose seventy-five to 120 percent." *Id.* Given this backdrop, the Sixth Circuit found it "difficult to grasp the thought that [the defendants] really had no idea that [the company] was on the road to bankruptcy." *Id.*

The *Frank* court held that "the inference that [the defendants] recklessly disregarded the falsity of their extremely optimistic statements is at least as compelling … as their excuse of failed accounting systems." *Id.* at *6. "[W]hen viewing the factors

holistically," the Sixth Circuit "conclude[d] that [the] [p]laintiffs have adequately pleaded a strong inference of scienter." *Id.* at *5.

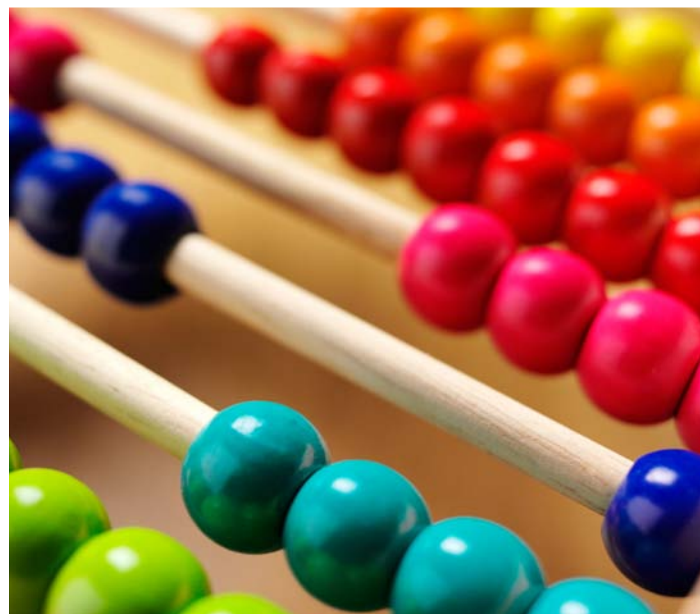
The Southern District of New York Curtails the SEC's Claims Against Banker on *Morrison* Grounds

On June 10, 2011, the Southern District of New York dismissed in part an action brought by the Securities & Exchange Commission ("SEC") against Goldman Sachs & Co. executive Fabrice Tourre. *See SEC v. Goldman Sachs & Co.*, 2011 WL 2305988 (S.D.N.Y. June 10, 2011). The *Goldman Sachs* court applied the Supreme Court's ruling in *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010) to limit the extraterritorial reach of Sections 10(b) and 17(a) in the fact-specific context of complex international transactions involving non-exchange traded securities.

Background

In April 2010, the SEC brought suit against Goldman Sachs and Tourre in connection with ABACUS 2007-ACI, a synthetic collateralized debt obligation linked to the performance of residential mortgage-backed securities. The SEC alleged that the ABACUS marketing materials failed to disclose that Paulson & Co, a large hedge fund, played a significant role in the portfolio selection process while holding a short position on the portfolio.

Goldman Sachs settled the SEC's action for $550 million without admitting or denying liability. Tourre, on the other hand, moved for judgment on the pleadings on the grounds that the complaint "did not allege a securities transaction [that] took place in the United States" within the meaning of *Morrison*. *Goldman Sachs*, 2011 WL 2305988, at *1. Because the SEC brought suit prior to the *Morrison* ruling, the SEC successfully sought leave to amend its complaint to allege additional details regarding the domestic aspects of the Abacus transactions.



The SEC's amended complaint asserted both primary and aiding and abetting liability claims under Section 10(b), as well as claims under Section 17(a) of the Securities Act of 1933. The claims involved three separate Abacus securities transactions: (1) two note purchases by IKB, a German commercial bank, for approximately $150 million; (2) an assumption of $909 million in credit risk by ABN AMRO Bank, a European financial institution; and (3) security-based swap agreements and $42 million in note purchases by ACA Capital, the U.S.-based parent company of ACA Management LLC.

The Court Dismisses the SEC's Section 10(b) Claims Involving the IKB Transaction

With respect to the IKB transaction, the SEC pointed to the fact that New York-based Tourre "had primary

responsibility for preparing and/or reviewing" the allegedly "false and misleading ABACUS marketing materials that were transmitted to IKB." *Id*. at *8. The SEC "also cite[d] a series of email communications from Tourre … to IKB, encouraging them to purchase the ABACUS securities." *Id*. The court found that "[t]he shortcoming of all of this [alleged] U.S. based conduct is precisely that—it is just conduct." *Id*. at *9. "*Morrison* was clear that domestic conduct is not the test for determining Section 10(b) liability." *Id*.

Rather, the test is whether "the SEC adequately alleges facts that demonstrate that any of the ABACUS securities transactions constitute a 'purchase or sale … made in the United States.'" *Id*. at *8. Finding "little guidance in *Morrison*" on how to make this assessment, the court turned to "the statutory definitions of 'purchase' and 'sale'" set forth in the Securities Exchange Act of 1934. *Id*.

The court found that for purposes of the Exchange Act, the term "purchase" has been interpreted to mean the incurring of "'an *irrevocable* liability to take and pay for the stock.'" *Id*. (*quoting Plumbers' Union Local No. 12 Pension Fund v. Swiss Reins. Co.*, 753. F. Supp. 2d 166, 177 (S.D.N.Y. 2010)). Although the SEC alleged only a "sale" and not a "purchase," the court found that "the notion of 'irrevocable liability' … is at the core of both a 'sale' and a 'purchase.'" *Id*.

The SEC "[t]acitly conced[ed] that none of the U.S.-based conduct it describe[d] allege[d] that any party [to the IKB transaction] incurred 'irrevocable liability' in the United States." *Id*. at *9. Nonetheless, the SEC argued that the court "must consider 'the entire selling process'" for purposes of a *Morrison* analysis. *Id*. The court rejected this contention, finding that "the SEC's 'entire selling process' argument is an invitation for this [c]ourt to disregard *Morrison* and return to the 'conduct' and 'effects' tests." *Id*.

In an effort to "show [that] the IKB note purchases were [in fact] foreign transactions," Tourre cited the trade confirmations for the IKB note purchases, which listed London-based Goldman Sachs International as the seller, and an IKB affiliate based on the island of Jersey, a British Crown Dependency, as the purchaser. *Id*. The SEC responded by arguing that "U.S. companies should not be allowed to skirt U.S. federal securities laws by using foreign affiliates to complete securities transactions." *Id*.

The court determined that it "need not address the SEC's argument" on this issue. *Id*. Because the SEC did "not sufficiently allege [that] the IKB note purchases were domestic transactions, … the [c]ourt ma[de] no finding regarding whether trade confirmations are sufficient to establish the territorial location of a 'purchase' or 'sale.'" *Id*.

The Court Dismisses the SEC's Section 10(b) Claims Involving the ABN Transaction

With respect to the ABN transaction, the SEC contended that Tourre "directly and indirectly marketed ABACUS to ABN." *Id*. at *11. The court held that "Tourre's alleged [New York-based] marketing efforts are insufficient to make him liable under Section 10(b)." *Id*. Moreover, the court found that the SEC failed to "allege that any party to the ABN CDS transaction incurred 'irrevocable liability' in the United States." *Id*.

The Court Permits the SEC to Proceed with Section 10(b) Claims Involving the ACA Capital Transaction

With respect to the ACA Capital transaction, Tourre did "not argue—at least at this stage—[that] the ACA Capital ABACUS securities purchase and swap agreement are [foreign] securities transactions under *Morrison*." *Id*. at *12, n. 18. Because the court found that the SEC "adequately plead[ed] all of the elements of a Section 10(b) and Rule 10b-5 violation with respect to the ACA transactions," the court denied Tourre's motion to dismiss those claims. *Id*. at *12.

The Court Dismisses in Part the SEC's Section 17(a) Claims Involving the IKB and ABN Transactions

The court stated at the outset that "*Morrison* applies to Section 17(a) of the Securities Act." *Id.* at *14. The court noted that the Southern District of New York has previously held that "the Securities Act does not apply to 'sales that occur outside the United States.'" *Id.* (*citing In re RBS Grp. PLC Sec. Litig.*, 2011 WL 167749, at *9 (S.D.N.Y. Jan. 11, 2011)). (To read our discussion of the *RBS* decision in the January edition of the Alert, please click here.)

The court explained that the *Morrison* analysis for Section 17(a) claims is two-pronged, because the statute addresses both the "sale" of securities as well as the "offer" of securities. The court dismissed the SEC's Section 17(a) "sale" prong claims involving the IKB and ABN transactions for the same reasons the court dismissed the SEC's Section 10(b) and Rule 10b-5 claims as to those transactions. However, the court found that the SEC adequately alleged that "Tourre, acting in and from New York City, *offered* ABACUS notes to IKB and solicited ABN's participation in an ABACUS CDS via direct and indirect communications." *Id.* at *15 (emphasis added). "In view of these allegations," the court denied Tourre's motion to dismiss the Section 17(a) "offer" prong claims involving the IKB and ABN transactions. *Id.*

With respect to the ACA Capital transaction, Tourre did "not argue that *Morrison* bars the Section 17(a) 'offer' and 'sale' claims." *Id.* at *16. The court accordingly denied Tourre's motion to dismiss those claims.

The Southern District of New York Dismisses the Manulife Shareholder Class Action

On May 23, 2011, the Southern District of New York dismissed a putative class action brought by shareholders of Manulife Financial Corporation. *See In re Manulife Financial Corp. Sec. Litig.*, 2011 WL 1990883 (S.D.N.Y. May 23, 2011) (Keenan, J.). The court held that the plaintiffs failed to allege actionable misstatements, raise an inference of scienter, or plead loss causation.

Background

According to the complaint, the defendants "defrauded investors when they concealed risks to the value of Manulife stock by 'touting the [c]ompany's … prudent risk management and the diversified nature of its investments, and by stating that Manulife was well-positioned to weather equity market declines." *Id.* at *3. "[T]hese statements [allegedly] artificially inflated the value of Manulife stock, … so that when 'the truth was revealed to the market,' the price of Manulife common stock dropped." *Id.*

The plaintiffs' allegations primarily "concern[ed] the financial impact of Manulife's segregated fund and variable annuity products on the value of Manulife common stock." *Id.* at *2. These "Guaranteed Products" are "hybrids of mutual fund investments and insurance contracts," offering purchasers guaranteed minimum payments as well as the "potential to benefit from equity market growth." *Id.* "Manulife profits so

long as the long-term value of the funds exceeds the guaranteed payment obligations, but may incur losses when the value of the funds are insufficient to cover the guarantees." *Id*.

The Court Finds That the Complaint Alleges No Actionable Misstatements

The complaint's allegations of material misrepresentations or omissions "fall into two categories." *Id*. at *12. The first "involves Manulife's public statements about its actions to reduce risk posed by its Guaranteed Product obligations." *Id*. The second "consists of statements relating to the adequacy of Manulife's capital reserves backing its Guaranteed Product obligations." *Id*.

With respect to the first category, the court held that the "alleged misstatements are not actionable because they allege only 'fraud-by-hindsight.'" *Id*. at *13. "[A]llegations that Manulife misled the public about the effectiveness of its risk management policies and the risk of a greater than 10% decline in equity prices fail to include any explanation about why these statements were misleading when made." *Id*. Moreover, "[t]he fact that some concerns about Manulife's disclosure of its equity market exposure were raised in newspaper articles does not make up for this deficiency." *Id*.

As to the second category, the plaintiffs did not claim that "any defendants falsified capital adequacy statistics released to the public." *Id*. at *14. Rather, the complaint alleges that "'statements to the effect that Manulife was 'well capitalized' misled investors about the risk posed by Manulife's Guaranteed Products to Manulife's overall capital levels." *Id*. Contrary to the plaintiffs' assertions, the court found that "Manulife clearly disclosed the risks of an equity market downturn to its investors." *Id*. The court determined that the plaintiffs "fail[ed] to exclude the most reasonable interpretation of Manulife's capital adequacy statements: that Manulife believed its

regulatory capital to be adequate given the range of probable equity market declines and the long duration of its Guaranteed Product obligations." *Id*.

With respect to "allegations that Manulife misrepresented its intent to raise additional capital through the dilutive issuance of common stock," the court found that the statements at issue were not "'unequivocal' assurances that Manulife would not raise capital through a dilutive equity offering." *Id*. at *15. "[C]ircumstances changed and Manulife raised capital through a … dilutive equity offering." *Id*. The court concluded that "these later developments do not suggest fraud, particularly given the extreme volatility in equity markets at the time." *Id*.

The Court Rules That the Plaintiffs Failed to Raise an Inference of Scienter

The court held that the plaintiffs "failed to show that [the defendants] intended to deceive the public by taking on exposure to the equity markets." *Id*. at *16. "[I]n light of all the allegations," the court found that "it is more plausible … that the [d]efendants believed the Guaranteed Products would be profitable over the long term and that in the short term, Manulife's other revenue streams and accumulated capital would keep the [c]ompany afloat." *Id*.

As to the plaintiffs' claim that the "proximity in time" between the defendants' "denials [of plans to issue additional stock] and the share issuance provides strong circumstantial evidence of conscious misbehavior and recklessness," the court found that "this argument takes no account of the massive economic and political changes taking place … in the fall of 2008." *Id.*

The court noted that "[t]he only allegation raising an inference of scienter" was an investigation by the Ontario Securities Commission ("OSC"). *Id.* However, the court explained that the mere fact that a regulator is examining a public corporation's behavior "cannot be sufficient to allege scienter," particularly where, as here, the regulator has since completed its investigation and closed the matter without action. *Id.*

The Court Holds That the Plaintiffs Failed to Establish Loss Causation

"[T]o plead loss causation, one must sufficiently plead the existence of a 'causal link between the alleged misconduct and the economic harm ultimately suffered by the plaintiff.'" *Id.* at *12. Here, the plaintiffs' "theory of loss causation is that public misstatements or material omissions of information artificially inflated the price of Manulife common stock, so that when the deceptive scheme was revealed and the price declined, members of the Class sustained economic injury." *Id.* at *16. The plaintiffs asserted that the price decline was "due *solely* to the revelation of a fraudulent scheme" and not "any other salient factors, such as changed market conditions." *Id.* (emphasis added).

The court found that the "first deficiency" in the plaintiffs' loss causation pleading was the failure to identify any corrective disclosure "to explain the decline in price of Manulife's common stock" between April and early October of 2008. *Id.* at *17. Although the plaintiffs pointed to statements that allegedly "artificially inflated" Manulife's stock price on October 14, 2008, the plaintiffs "ma[d]e no attempt to show that any corrective disclosure caused [a subsequent price] drop" between October 14, 2008 and December 1, 2008. *Id.* The only alleged "corrective disclosures" identified by the plaintiffs were "unspecified rumors about Manulife's need to raise additional capital" that were "allegedly leaked to the market" on December 1, 2008. *Id.* The court held that "the bare allegation that rumors were circulating in the market is not a 'well-pleaded' factual allegation" and "fails to provide the [d]efendants with proper notice." *Id.*

The court dismissed the plaintiffs' Section 10(b) claims, and also dismissed the plaintiffs' Section 20(a) control person liability claims for "fail[ure] to state a valid claim against Manulife." *Id.* at *19. These dismissals were without prejudice and with leave to replead.

The Eastern District of Pennsylvania Remands a State Pension Fund Suit, Finding that the Fund Is an "Arm of the State" for Jurisdictional Purposes

On May 20, 2011, the Eastern District of Pennsylvania remanded an action brought by the Commonwealth of Pennsylvania Public School Employees' Retirement System ("PSERS") and the Pennsylvania Municipal Retirement Board ("PMRB") to "recover damages they allege resulted from Citigroup's undisclosed exposure to mortgage-backed securities." *Commonwealth of Pennsylvania Public School Employees' Retirement Sys. v. Citigroup, Inc.*, 2011 WL 1937737, at *1 (E.D. Pa. May 20, 2011) (Schiller, J.). The court held that remand was warranted because the defendants "failed to demonstrate that PSERS is not an arm of the state" for jurisdictional purposes. *Id.* at *2. Since "PSERS's status as an alter ego of the state

bars the [c]ourt from exercising diversity jurisdiction," the court found that it "need not consider whether PMRB is also an arm of the state." *Id.* at *2, n. 1.

Background

Plaintiffs PSERS and PMRB both invested in Citigroup securities between 2004 and 2009. At the time they made these investments, PSERS and PMRB were allegedly "unaware of Citigroup's exposure to mortgage-related assets, including subprime and residential mortgage-backed securities." *Id.* at *1. "[A]fter Citigroup's [alleged] exposure to mortgage-backed securities [allegedly] nearly destroyed the company," PSERS and PMRB brought suit in the Philadelphia County Court of Common Pleas. *Id.* The plaintiffs asserted claims under the Securities Act of 1933 and the Pennsylvania Securities Act, as well as claims for negligence, unjust enrichment and fraud.

The defendants filed a notice of removal on the grounds that "neither [p]laintiff is an arm of the state for jurisdictional purposes." *Id.* The plaintiffs responded with a motion to remand, contending that "they are state entities not amenable to diversity jurisdiction." *Id.* at *2.

The Court Finds That PSERS Is an "Arm of the State" for Jurisdictional Purposes

At the outset of its analysis, the court explained that "[a] state's 'arm or alter ego' is not a 'citizen' within the meaning of [the federal diversity jurisdiction statute, 28 U.S.C.] § 1332." *Id.* To determine whether a state agency is a state's alter ego, courts in the Third Circuit examine: "(1) whether the state would be liable for a judgment against the agency; (2) the agency's status under state law; and (3) the agency's autonomy. *Id.* (*citing Fitchik v. N.J. Transit Rail Operations, Inc.*, 873 F.2d 655, 659 (3d Cir. 1989)). "In cases involving state agency plaintiffs, courts look[] … to whether any recovery by the entity [would] inure[] to the state's benefit." *Id.* .

Applying the first *Fitchik* factor, the court rejected the defendants' argument that "Pennsylvania 'has no financial interest in the assets of plaintiffs' funds and no interest whatsoever in any potential recovery.'" *Id.* The court noted that "Pennsylvania guarantees the maintenance of PSERS's reserve fund and its payment of interest charges, annuities and other benefits" and "must appropriate funds from Pennsylvania's General Fund if PSERS's annual earnings do not exceed" a set percentage. *Id.* Moreover, "Pennsylvania has [also] undertaken to pay many of the PSERS's debts through its commitment to keep PSERS solvent." *Id.* The court ruled that "Pennsylvania's statutory obligation to the [PSERS] system weighs in favor of remand." *Id.* at *3.

As to the second *Fitchik* factor, the court disagreed with the defendants' "assert[ion] that state law generally treats PSERS as an independent entity." *Id.* While the PSERS is run by an independent administrative board and has "some authority to hire its staff," it is "not separately incorporated" and the Pennsylvania Office of General Counsel must serve as the PSERS's legal advisor. *Id.* State law dictates the composition of PSERS's board, and establishes the state treasurer as the custodian of the PSERS's funds. In view of "PSERS's lack of independent corporate existence" and "the role state officials play in the [PSERS's] operations," the

court determined that "the [d]efendants' arguments … do not carry the day with respect to the second *Fitchik* factor." *Id*.

In connection with the third *Fitchik* factor, the court found that the "PSERS is … subject to a great degree of state influence and control." *Id*. at *4. The court noted that "[t]en members of PSERS's fifteen-member board are state officials or appointed by the state governor," "[t]he system's funding is contingent on the approval of the state General Assembly," and "a state statute specifically limits PSERS's discretion to make certain investments." *Id*.

Based on "Pennsylvania's financial interest in the outcome of this case, PSERS's status under state law, and the system's lack of autonomy," the court held that removal was warranted. *Id*.

A California Intermediate Court of Appeals Holds That SLUSA Does Not Preclude Concurrent State Court Jurisdiction for All "Covered Class Actions" under the 1933 Act

On May 18, 2011, a California Intermediate Court of Appeals reversed the dismissal of a class action suit alleging 1933 Act claims brought in Los Angeles Superior Court. *See Luther v. Countrywide Fin. Corp.*, 2011 WL 1879242 (Cal. Ct. App. May 18, 2011) (Armstrong, J.). The case "present[ed] a single issue of statutory interpretation." *Id*. at *1. Does the federal Securities Act of 1933 ("1933 Act"), as amended by the Securities Litigation Uniform Standards Act ("SLUSA"), establish an exception to concurrent state and federal court jurisdiction for *all* "covered class actions" asserting 1933 Act claims? *Id*. (emphasis added). The court held that the SLUSA exception to concurrent jurisdiction does not encompass *all* "covered class actions" as that term is defined under the statute. *Id*. (emphasis added).

Background

The plaintiffs alleged 1933 Act claims in connection with mortgage-backed securities that "were subject to the rules and regulations promulgated under the 1933 Act, but were not listed on a national exchange." *Id*. No state law causes of action were brought. At issue were "allegations of false and misleading registration statements and prospectus supplements." *Id*.

The defendants "demurred on the ground that the state court had no jurisdiction under the 1933 Act, as amended by SLUSA." *Id*. Under 15 U.S.C. § 77v, state and federal courts have concurrent jurisdiction over 1933 Act claims, except with regards to "covered class actions"—a term defined elsewhere in the statute at 15 U.S.C. § 77p(f). The defendants contended that "[S]ection 77v creates an exception to concurrent jurisdiction [over 1933 Act claims] for all covered class actions" that fall within the definition set forth in Section 77p(f). *Id*.

The trial court sustained the defendants' demurrers, and dismissed the case. The plaintiffs appealed.

The Appellate Court Holds That Section 77v Does Not Create an Exception to Concurrent State Court Jurisdiction for All "Covered Class Actions" Brought under the 1933 Act

The appellate court rejected the defendants' interpretation of Section 77v's exception to concurrent state and federal court jurisdiction for 1933 Act cases. "We 'do not read statutes in little bites,'" the appellate court explained, "and [we] cannot endorse such a limited reading of [S]ection 77v." *Id*. The appellate

court found that Section 77v neither "say[s] that there is an exception to concurrent jurisdiction for all covered class actions" nor "create[s] its exception by referring to the definition of covered class action in [S]ection 77p(f)(2)." *Id*.

The court closely examined Section 77p in its entirety to "see what it provides 'with respect to covered class actions'" and concluded that none of the provisions of Section 77p applied to the instant action. *Id*. at *2. Subsection (a) establishes that the remedies set forth in the statute are non-exclusive, and subsection (b) precludes certain state law class actions in both federal and state court. *Id*. Because this case was not based on state law, it was not a precluded class action. Subsection (c), which addresses the removal of "covered class actions" involving a "covered security," also did not apply here. *Id*. Subsection (d) provides that notwithstanding subsections (b) and (c), "certain covered class actions which bring state law claims may be maintained in state or federal court." *Id*. at *3. Finally, subsection (e) "preserves the jurisdiction of a state securities agency to bring enforcement actions," and subsection (f) defines various terms, including "covered class action" and "covered security." *Id*.

"Nothing … in [S]ection 77p describes this case," the appellate court concluded, and "thus, nothing in [S]ection 77p puts this case into the exception to the rule of concurrent jurisdiction." *Id*. The court explained that "the fact that the case is not precluded and can be maintained, but cannot be removed to federal court if it is filed in state court, tells us that the state court has jurisdiction to hear the action." *Id*.

The Court Declines to Follow the Southern District of New York's Reasoning in *Knox v. Agria*

The defendants cited the Southern District of New York's decision in *Knox v. Agria Corp.*, 613 F. Supp. 2d 419 (S.D.N.Y. 2009) (Pauley, J.), to support their argument that Section 77v provides an exception to concurrent state court jurisdiction for all "covered class actions." *Luther*, 2011 WL 1879242, at *3-*4. In *Knox*, the Southern District of New York found that "the definitional provision of [Section 77p] [is] the only subsection that can breathe meaning into the SLUSA jurisdictional exception" of Section 77v. *Knox*, 613 F. Supp. 2d at 424. The *Knox* court concluded that Section 77v "exempts [all] covered class actions … from concurrent jurisdiction [and] federal courts alone have jurisdiction to hear them." *Id*. at 425. The court explained that this "reading is consistent with Congress's general remedial intent in passing SLUSA … to make 'federal court the exclusive venue for class actions alleging fraud in the sale of certain covered securities.'" *Id*.

The California Intermediate Court of Appeals rejected the *Knox* court's analysis. *Luther*, 2011 WL 1879242, at *3. The appellate court reasoned that "Section 77v … refers to *all of [S]ection 77p, not just the definitional provision*." *Id*. at *4 (emphasis added). Moreover, the appellate court found unpersuasive the *Knox* court's "view [that] no other rule is consistent with … the legislative intent." *Id*. The California Intermediate Court of Appeals explained that Congress's legislative intent "to prevent certain class actions does not tell us that this class action, or all securities class actions must be brought in federal court." *Id*. at *5.

Highlights of the SEC's Final Rules Implementing the Whistleblower Provisions of the Dodd-Frank Act

On May 25, 2011, the SEC adopted final rules implementing the whistleblower provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act. *See* Pub. L. No. 111-203, §§ 748, 922, 124 Stat. 1376, 1739-46, 1841-49 (2010). The Dodd-Frank Act added a new Section 21F to the Exchange Act, which "directs that the [SEC] pay awards, subject to certain limitations and conditions, to whistleblowers who voluntarily provide the [SEC] with original information about a violation of the securities laws that leads to the successful enforcement of an action brought by the [SEC] that results in monetary sanctions exceeding $1,000,000." Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, 17 C.F.R. §§ 240, 249 (the "Adopting Release") at 3.

In November 2010, the SEC published proposed rules and invited public comment. (To read our discussion of these proposed rules in the November edition of the Alert, please click here.) After receiving more than 240 comment letters and well in excess of a thousand form letters, the SEC "made a number of revisions and refinements to the proposed rules." *Id*. at 4. Several of these changes are discussed below.

Impact on Internal Compliance Programs

Perhaps the most significant debate on the proposed rules focused on the "impact of the whistleblower program on companies' internal compliance processes." *Id*. at 5. The final rules do not include a requirement that whistleblowers first report any possible violation internally before bringing it to the SEC's attention (as many commenters had requested). However, the SEC did include in the final rules a number of changes "to further incentivize whistleblowers to utilize their companies' internal compliance and reporting systems when appropriate." *Id*.

First, the final rules provide that the SEC will consider a whistleblower's cooperation with a company's internal compliance program when determining the ultimate amount of the award, which is discretionary. The SEC can increase an award if it finds that the whistleblower cooperated with "internal compliance and reporting systems," or decrease an award if a whistleblower "interfer[ed]" with those systems. *Id*. at 5.

Second, the final rules establish that whistleblowers will still be eligible for an award if they provide information regarding possible violations to their employer before or at the same time that they report to the SEC, and their employer then provides information relating to that same alleged misconduct to the SEC. "[A]ll the information provided by the [employer] to the [SEC] will be attributed to the whistleblower, which means that the whistleblower will get credit—and potentially a greater reward—for any additional information generated by the [employer] in its investigation." *Id*. at 6.

Third, under the final rules, a whistleblower who reports to the SEC within 120 days of reporting through internal compliance channels will still be treated as if he or she had reported to the SEC on the date he or she first reported internally. *Id*.

Changes to the Definition of Whistleblower

While the proposed rules defined a whistleblower as an individual who provided information to the SEC regarding a *potential* violation of the securities laws, the final rules use the term "possible violation." *Id*. at 13. Under the "possible violation" standard, information provided by a whistleblower "should indicate a facially plausible relationship to some securities law violation." *Id*. The SEC found it "unnecessary" to establish "a higher standard requiring a 'probable' or 'likely' violation." *Id*. Moreover, the final rules do not require "that the information relate to a 'material' violation of the securities laws." *Id*. at 14.

The final rules establish that a whistleblower must be an individual or a group of individuals. An organization or other entity cannot have whistle-blower status.

Eligibility for Anti-Retaliation Protections

To qualify for the anti-retaliation protections of the final rules, a whistleblower must "possess[] a reasonable belief that the information he is providing relates to a possible securities law violation." *Id*. at 15 (internal citations omitted). This "reasonable belief" must be "one that a similarly situated employee might reasonably possess." *Id*. at 16. A whistleblower is entitled to protection from retaliation "irrespective of whether [he] is ultimately entitled to an award." *Id*. at 18.

The final rules clarify that "employers may not require employees to waive or limit their anti-retaliation rights," and confirm that the SEC has enforcement authority with respect to violations of these protections. *Id*. at 18-20.

What Constitutes a "Voluntary" Submission

In order to be eligible to receive an award, a whistleblower must provide information to the SEC voluntarily. Under the final rules, a submission is not "voluntary" if it is made in response to a request or demand from certain government and self-regulatory entities, including the SEC. *Id*. at 30. Notably, the SEC opted "not to adopt a rule that would treat a request to an employer as directed as well to all employees whose documents or information fall within the scope of the request." *Id*. at 35. "[O]nly a request that is directed to the individual involved (or his or her representative) will preclude that individual from subsequently making a 'voluntary' submission." *Id*. at 36.

Aggregation of Smaller Actions to Qualify for the $1,000,000 Threshold

While the proposed rules provided that a whistleblower would only be eligible for an award when he provided information that "significantly contributed" to a *single* SEC action resulting in monetary sanctions of a million dollars or more, the final rules provide that the SEC may "aggregate [the monetary sanctions resulting from] two or more smaller actions that arise from the same nucleus of operative facts." *Id*. at 7, 36. This "same-nucleus-of-operative-facts test is … satisfied where two proceedings, although brought separately, share such a close factual basis that the proceedings might logically have been brought together in one proceeding." *Id*. at 110.

Exclusions from Eligibility for Whistleblower Awards

Instead of creating "expansive new exclusions for broad categories of company personnel (*e.g.*, any supervisor …)," the SEC attempted in the final rules to "adopt more tailored exclusions for 'core' persons and processes related to internal compliance mechanisms." *Id*.

The categories of individuals excluded from whistleblower eligibility in the final rules include:

- Officers, directors, trustees or partners of an entity, when those individuals learn of information about the misconduct in question from another person or in connection with the company's processes for identifying potential illegal conduct;

- Employees whose main job functions involve compliance or internal audit, or persons who are employed by a firm hired to (a) perform audit or compliance functions or (b) investigate possible violations of the law.

- Employees of public accounting firms performing an engagement required by the securities laws, when the information relates to a violation by the client or the client's officers, directors or employees.

The final rules contain two important limitations to these exclusions:

- These individuals are still eligible for a Dodd-Frank award if they have a reasonable belief that disclosure to the SEC is necessary to prevent the company from engaging in conduct that could cause substantial injury to investors, or if they have a reasonable belief that the company is acting in a way that would interfere with an investigation of the misconduct.

- These individuals are eligible to report information as a whistleblower if 120 days have passed since they escalated the information to their company's audit committee, legal/compliance officer, or supervisor, or if 120 days have passed since they received the information and the circumstances indicate that the audit committee, legal/compliance officer, or supervisor was already aware of the information.

Although we have attempted to present a few highlights of the final rules above, the SEC's Adopting Release provides more than three hundred pages of discussion on the complexities and nuances of the final rules. Please contact one of our securities litigation partners should you require further details on any aspect of the final rules.

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