

## Supreme Court Decisions

12.23.19



(Article from *Securities Law Alert, Year in Review 2019*)

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### Defendants Can Face Primary Liability Under Rules 10b-5(a) and (c) for Disseminating False or Misleading Information With Intent to Defraud

On March 27, 2019, the Supreme Court held that “dissemination of false or misleading statements with intent to defraud can fall within the scope of subsections (a) and (c) of Rule 10b-5, . . . even if the disseminator did not ‘make’ the statements” within the meaning of the Supreme Court’s decision in *Janus Capital Group v. First Derivative Traders*, 564 U.S. 135 (2011), “and consequently falls outside subsection (b) of” Rule 10b-5. [Lorenzo v. SEC, 139 S. Ct. 1094 \(2019\) \(Breyer, J.\)](#).<sup>[1]</sup>

SEC Rule 10b-5 proscribes three types of securities fraud: subsection (a) makes it unlawful “[t]o employ any device, scheme or artifice to defraud”; subsection (b) prohibits “mak[ing] any untrue statement of a material fact”; and subsection (c) prohibits “engag[ing] in any act, practice, or course of business which operates or would operate as a fraud or deceit.” The Court rejected the argument that the three subsections of Rule 10b-5 “should be read as governing different, mutually exclusive, spheres of conduct.” The Court explained that both the Supreme Court and the SEC “have long recognized considerable overlap among the subsections of the Rule and related provisions of the securities laws.”

The Court also found meritless the contention that subsection (b) “*exclusively* regulates conduct involving false or misleading statements.” The Court reasoned that adopting this interpretation “would mean those who disseminate false statements with the intent to cheat investors might escape liability under the Rule altogether.” The Court observed that “using false representations to induce the purchase of securities would seem a paradigmatic example of securities fraud.”

The Court explained that *Janus* did not require a different result as it concerned only subsection (b) of Rule 10b-5, and did not address Rule 10b-5’s “application to the dissemination of false or misleading information.” The Court stated that “*Janus* would remain relevant (and preclude liability) where an individual neither *makes* nor *disseminates* false information—provided, of course, that the individual is not involved in some other form of fraud.”

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[1] The *Janus* Court held that for purposes of Rule 10b-5, “the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it.” Please [click here](#) to read our discussion of the Supreme Court’s decision in *Janus*.

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