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PERSPECTIVE

A new (old) enforcement tool for the SEC

By Marc J. Fagel

One year into her tenure as chair of the Securities and Exchange Commission, former criminal prosecutor Mary Jo White has been publicly touting the bold steps being taken by the agency to keep everyone from Wall Street banks to Silicon Valley start-ups on their best behavior: demanding admissions of wrongdoing as a condition of settlement in select cases; targeting both individual executives and corporate entities for ever-more-severe sanctions; filing charges under Section 20(b) of the Securities Exchange Act of 1934.

Yes, that last one seems a bit odd. It's not every day that the chair of the SEC gives a speech calling out a specific securities law provision, much less one so arcane that it is all but unknown to even long-time securities litigators, as she did last month. Section 20(b), which has been charged in only a handful of SEC enforcement actions over the past 80 years, makes it "unlawful for any person, directly or indirectly," to violate the federal securities laws "through or by means of any other person." In other words, you can't use someone else to commit your fraud for you.

The provision has been left largely untapped given the SEC's ability to reach a broad array of actors, both primarily and secondarily, under Section 10(b), the Exchange Act's general antifraud statute. That situation changed dramatically in 2011, when the U.S. Supreme Court's decision in *Janus Capital Group v. First Derivative Traders* severely curtailed the application of Section 10(b). Under *Janus*, only someone who actually "makes" a false statement — either the speaker or someone with "ultimate authority" over the statement — can be liable for fraud. In the public company context, that would typically be limited to the CFO and CEO who actually sign off on, or are quoted within, the company's public statements (or, depending on the statement at issue, perhaps other senior executives or board members).

So, after *Janus*, what about the employee who helps cook the books but has no "ultimate authority" over the company's public statements? Yes, the SEC (unlike private plaintiffs) has the ability to charge the employee secondarily for aiding and abetting the fraud of others. But what happens when there is no primary violator?

Consider a Silicon Valley sales executive, facing pressure to make the quarterly numbers, who uses improper means to create the appearance of significant sales — shipping products on terms that prevent revenue recognition or fabricating sales outright. The CFO, unaware of the misconduct, then



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SEC Chair Mary Jo White testifies on Capitol Hill in Washington, July 30, 2013.

reports fraudulently inflated financial results to the market. Under *Janus*, the sales executive might escape liability, as he was not the "maker" of the misrepresentations to the market. And since the CFO was unaware of the bogus sales, she committed no fraud, and there is thus no primary violation for the sales executive to have aided and abetted.

Section 20(b), in the eyes of the SEC, provides the perfect work-around. The sales executive in the above illustration could be sued for essentially using the hapless CFO to perpetrate his fraud on the market. For this reason, White described Section 20(b) as a "very powerful tool" that could establish primary liability against individuals who "have engaged in unlawful activity but attempted to insulate themselves from liability by avoiding direct communication with the defrauded investors."

Whether the SEC is reading the law correctly, however, is uncertain. As noted above, this statutory provision has rarely been used, and its parameters remain relatively untested. The SEC included Section 20(b) claims in a handful of settled cases, dating back many years, with no accompanying commentary. The Supreme Court itself, in *Janus*, referenced Section 20(b) as a potential alternative for the SEC but sidestepped any interpretation of the law, stating in a footnote that "we do not address whether Congress created liability for entities that act through innocent intermediaries" under the statute.

To the contrary, several decisions actually addressing the scope of Section 20(b) have declined to give it the broad reading the SEC is now advocating. In a 1974 case out of the 6th U.S. Circuit Court of Appeals, *SEC v. Coffey*, the court read 20(b) as a counterpart to Section 20(a), which provides for control person liability, interpreting Section 20(b) as requiring a showing of "knowing use of a controlled person by a controlling person." The consequence of finding otherwise, it reasoned, was that "every link in a chain of command would

be personally criminally and civilly liable for the violations of inferior corporate agents. This was not the congressional intent in enacting section 20(b)." Several subsequent cases have similarly held that Section 20(b) only applied where the defendant controlled the person whose actions constituted the securities law violation.

Under this reading, the SEC would still be unable to charge the sales executive in our above illustration with fraud, as it seems doubtful that he could be shown to have control over the actions of the CFO.

Other cases have at least suggested that no such control requirement exists under Section 20(b). Last year, in *Union Life Ins. Co. v. Acacia Life Ins.*, the Southern District of New York ultimately dismissed a 20(b) charge, but only because it found no unlawful act, not because there was an absence of control.

Notably, *Coffey* and other cases finding a control element within Section 20(b) predate *Janus*. It thus remains to be seen whether the courts, cognizant of the loophole created by *Janus*, will give a broader reading to Section 20(b) and find liability where the defendant neither aids a primary violator nor controls an innocent third party. Certainly, without the ability to fall back on other theories post-*Janus*, the SEC will be particularly incentivized to advocate for an interpretation of Section 20(b) that does not include any control requirement.

The larger question is the extent to which the SEC may use Section 20(b) to expand its reach in new directions. Beyond the public company scenario illustrated above, one can envision various types of cases, from insider trading to market manipulation, where a bad actor can enlist unknowing third parties to facilitate a fraud. Given the SEC's very public revival of this little-known statute, the agency undoubtedly views it as more than just a means of addressing a loophole created by *Janus*. In the months ahead, it will be interesting to see whether the SEC uses the statute to craft novel theories of liability — and whether the courts give the agency a wide berth to do so.



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