RECENT CASE LAW DEVELOPMENTS EXPAND THE SCOPE OF LIABILITY FOR SECURITIES TRANSACTIONS: AN ANALYSIS OF THE INTERPLAY BETWEEN EXPANSIONS OF PRIMARY LIABILITY UNDER STATUTORY SELLER AND SCHEME LIABILITY THEORIES AND PROPOSALS FOR CLARIFICATION OR REFORM

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ABSTRACT

In 2022 the Ninth and Eleventh Circuits opened up a Circuit split regarding the definition of a "seller" under § 12(a) of the Securities Act of 1933. These Circuits expanded the scope of defendants liable as "sellers" by rejecting a rule agreed upon by every other Circuit to have considered the question that held that in order to qualify as a seller the defendant must have had direct personal contact with the purchaser-plaintiff. This has implications both for industry actors who are now considered "sellers" in these two Circuits, as well as for purchasers seeking to file suit in deciding who to name.

This split came just a few years after the 2019 Supreme Court opinion in Lorenzo v. SEC *where it first countenanced a "scheme liability" theory of Rule 10b-5(a) and (c) securities fraud against a party who had disseminated, but not made, false or misleading statements. Finding scheme liability to be a primary liability theory, the Supreme Court thus expanded the scope of the defendant class under Rule 10b-5. This likewise has implications both for industry actors who can be sued only post-*Lorenzo *and for plaintiffs.*

Given that releasing the types of non-targeted publications into the markets which the Ninth and Eleventh Circuits have now said suffice to make someone a "seller" would also likely count as "dissemination" under 10b-5, these simultaneous developments create a legal landscape where a defendant can be liable both as part of a fraudulent scheme and as a seller, despite not having any discernible relationship with the plaintiff. Clarity of definitions and limiting principles in the scope of the defendant class for securities fraud cases under the two legal provisions at issue,10b-5 and § 12(a), are needed either from courts or regulators to preserve the predictable functioning of the financial markets, as well as the congressional intent behind the two separate laws.

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INTRODUCTION

In the wake of the 1929 stock market crash that led to the Great Depression, Congress enacted two principal pieces of legislation intended to prevent similar catastrophes from occurring in the future.[1] The first of these was the Securities Act of 1933 ("the '33 Act") which, at § 12(a), empowers purchasers who have been misled to bring an action against any offeror or seller of securities.[2]

The second was the Securities Exchange Act of 1934 ("the '34 Act"), which established the Securities and Exchange Commission ("SEC," "the Commission," or "the Agency") to regulate the U.S. capital markets.[3] Section 10(b) of the '34 Act includes a prohibition on the use of "any manipulative or deceptive device or contrivance" in the transacting of securities and gives the SEC rulemaking authority in the enforcement of the

[1] Cornell Law School, *Securities Law History*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/securities_law_history [https://perma.cc/CAY8-V74M] (last visited Apr. 12, 2025).
[2] 15 U.S.C. § 77l ("[a]ny person who . . . offers or sells a security in violation of [the '33 Act's registration requirements], or . . . by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication").
[3] 15 U.S.C. § 78d.

anti-fraud mechanisms of the securities laws.[4] Pursuant to this rulemaking authority, in 1942, the SEC created Rule 10b-5 ("10b-5" or "the Rule") forbidding "any person" from using "any device, scheme, or artifice," "any untrue statement," or "any act, practice, or course of business" to defraud investors "in connection with the purchase or sale of any security."[5]

Nearly a century after their respective passages, emerging communication technologies and legal theories put pressure on these provisions to adapt to modern times in order to continue protecting investors. These pressures have led to paradigm-shifting developments in recent years under both provisions. Specifically, the Ninth and Eleventh Circuits have rejected the notion that a "seller" under § 12(a) must have specifically targeted the purchaser in order to fall within the '33 Act's definition of the term, thus allowing posters of mass-viewed social media campaigns to be held liable as "sellers" of the securities they were marketing.[6] Meanwhile, departing from its older rulings on 10b-5, the Supreme Court now finds a cause of action against actors formerly considered only secondarily-liable as aiders and abettors (and therefore exempt from suit under 10b-5) by now considering them primarily-liable as participants in a scheme to defraud; this decision arose as an adoption of a relatively novel legal theory known as "scheme liability."[7]

These concurrent developments present an opportunity for plaintiffs to challenge parties only very tangentially related to a securities transaction as both "sellers" of the securities at issue and as parties to a "scheme" to defraud purchasers, despite the minimal or nonexistent relationship and contact between the plaintiff and the intended defendant. As an example, imagine the hypothetical case of a movie star taking to TikTok to read a promotion for a recently filed Ethereum ETF prospectus. He concludes the video (which is viewed hundreds of thousands of times) by reciting an email address where people can contact the company if they are interested in investing. Many people do, and some invest in the product. After the fund turns out to be fraudulent, he is sued by these investors. The recent developments mentioned above would force courts to consider if the movie star "sold" those securities, as well as if he was part of a "scheme" to defraud despite simply being a paid promoter for the fund, with no particular interest in how successfully it recruits investors.

Sections I and II of this Note discuss the origins of each of these new lines of case law, culminating in the Circuit split on the § 12(a) issue and the *Lorenzo* decision for the 10b-5 issue. Section III discusses how the new rulings affect each other and the more general landscape of securities case law. Section III also analyzes potential claims and defenses that can be made under this new regime. This Note concludes in section IV with several proposals as to how courts and the SEC can clarify the provisions at issue

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[4] 15 U.S.C. § 78j.

[5] 17 C.F.R. § 240.10b-5.

[6] *See generally* Wildes v. BitConnect Int'l PLC, 25 F.4th 1341 (11th Cir. 2022); Pino v. Cardone Cap., LLC, 55 F.4th 1253 (9th Cir. 2022).

[7] *See generally* Lorenzo v. SEC, 587 U.S. 71 (2019).

and preserve the congressional intent behind the statutes, particularly as interpreted in the 1988 case of *Pinter v. Dahl*.

I. DEVELOPMENT OF THE STATUTORY SELLER CIRCUIT SPLIT

The first major federal law governing the U.S. securities trade was the ’33 Act. This Act mandated the disclosure of all material information regarding the security to the potential purchasing investor.[8] Additionally, the ’33 Act established a number of liability provisions for actors who facilitated transactions with purchasers without providing the requisite statutorily sufficient disclosures.[9]

This section will begin with a more detailed overview of one of these liability provisions, § 12(a), before analyzing both how it is violated and the class of plaintiffs entitled to bring claims under the Act. This section will then explore in greater detail the long-standing difficulties in defining § 12(a)’s defendant class, culminating in *Pinter v. Dahl*, where the Supreme Court held that a “solicitor” qualifies as a “statutory seller.” Finally, this section will conclude with a discussion of the Circuit split that arose after *Pinter*.

A. *Overview of § 12(a) of the ’33 Act*

To ensure that investors have full information, § 12(a) empowers purchasers who have been misled by sellers to bring an action against anyone who offers or sells securities in violation of the registration requirements or by false or misleading statements.[10] Section 12(a) is divided into two subsections. Subsection (1) offers plaintiffs the private right of action described above against defendants who offer or sell securities that are neither registered according to statutory requirements nor exempted from such requirements.[11] Subsection (2) offers the right of action to plaintiffs against sellers who make false or misleading statements in a prospectus or oral communication.[12] While § 12(a)(1) is a strict liability provision,[13] the Supreme Court held in its 1995 opinion in *Gustafson v. Alloyd Co.* that an “oral communication” under § 12(a)(2) must relate to a prospectus, which it defined as a document describing a public offering of securities by an issuer[14]

[8] Cornell Law School, *Securities Law History*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/securities_law_history [https://perma.cc/CAY8-V74M] (last visited Apr. 12, 2025) (“The key theme of the federal securities law is disclosure”); *see also* James M. Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29, 34–35 (1959).
[9] *See* 15 U.S.C. §§ 77k, 77l, 77q.
[10] 15 U.S.C. § 77l (“[a]ny person who . . . offers or sells a security in violation of [the ’33 Act’s registration requirements], or . . . by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading”).
[11] 15 U.S.C. § 77l(a)(1).
[12] 15 U.S.C. § 77l(a)(2).
[13] Pinter v. Dahl, 486 U.S. 622, 638 (1988).
[14] An “issuer” is “every person who issues or proposes to issue any security.” 15 U.S.C. § 77b(a)(4). The Supreme Court accepted this definition without comment in 1936 and has

or controlling shareholder.[15] As such, liability under § 12(a)(2) is limited to acts relating to the sale of securities through public offerings, rather than private placements or aftermarket transactions, such as on a stock exchange.

B. The Plaintiff Class and Cause of Action Under § 12(a)

Section 12(a) of the '33 Act creates a private cause of action for all securities purchasers,[16] the elements of establishing which are (1) an offer or sale of a security; (2) in interstate commerce; (3) based on a written prospectus or related oral communication; (4) which includes an untrue statement or omission of material fact.[17] Notably, proving scienter, reliance, or loss causation is not required in the assertion of a § 12(a) claim.[18] However, there are two major caveats to this.

First, in *Pinter*, the Supreme Court limited liability under § 12(a) to "persons who pass title and persons who 'offer,' including those who 'solicit' offers."[19] This limitation arises from the Court's determination that the language of the '33 Act demonstrates congressional unwillingness to "impose liability on participants collateral to the offer or sale."[20] For the specific issue of reliance in cases brought against those who solicit offers, courts have held that a "plaintiff [must have] purchased the securities as a result of [solicitor-defendant's] solicitation."[21] Furthermore, courts have found an "absence-of-knowledge" element to § 12(a) claims which requires the plaintiff to show that they "did not know that the *specific* statement at issue in the prospectus or oral communication was false."[22] This means that a plaintiff attempting to sue a solicitor under § 12(a) must have trusted the statements made by the solicitor and must show a causal relationship between the solicitation and the purchase, even if § 12(a) does not require "reliance" per se.

Second, courts have thrown § 12(a) cases out on standing grounds in the absence of some showing of a causal relationship between the defendant's

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not cited to the statutory definition in any case since. Jones v. SEC, 298 U.S. 1, 10 (1936). In effect, the "issuer" is "generally the *company* that issues a security." SEC v. Davenport, No. 8:21-cv-01427-JLS-JDE2023, 2023 U.S. Dist. LEXIS 195364, at *10–*11 (C.D. Cal. Sept. 12, 2023) (quoting SMSW Enters., LLC v. Halberd Corp., No. 13-01412, 2015 WL 1457605, at *10 (C.D. Cal. Mar. 30, 2015) (emphasis added; internal quotation marks omitted)).

[15] Gustafson v. Alloyd Co., Inc., 513 U.S. 561, 567–68, 584 (1995). It is important to note that *Gustafson* referred to § 12(a)(2) as "§ 12(2)." Other authorities which will be discussed in this Note will do likewise and will also refer to § 12(a)(1) as "§ 12(1)." These name changes came about as a result of amendments passed into law by the Private Securities Litigation Reform Act of 1995. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 105, 109 Stat. 737, 757 (1995) (creating a subsection (b) within § 12).

[16] 15 U.S.C. § 77l ("any person . . . shall be liable . . . to the person purchasing [a] security from him").

[17] *E.g.*, Miller v. Thane Int'l, Inc., 519 F.3d 879, 885 (9th Cir. 2008).

[18] In fact, the statute places the burden of *disproving* loss causation on the defendant. *In re* Vivendi Universal, S.A., Sec. Litig., 605 F. Supp. 2d 586, 595 (S.D.N.Y. 2009).

[19] *Pinter*, 486 U.S. at 650.

[20] *Id.*

[21] Steed Fin. LDC v. Nomura Secs. Int'l, Inc., 2001 U.S. Dist. LEXIS 14761, at *22–*23 (S.D.N.Y. Sept. 19, 2001).

[22] Fed. Hous. Fin. Agency v. Nomura Holding Am., Inc., 873 F.3d 85, 122–23 (2d Cir. 2017).

actions and the plaintiff's injury.[23] For example, in *In re Barclays Bank PLC Sec. Litig.* a class of plaintiffs attempted to sue the issuer of securities they had purchased, as well as officers of the issuer and the issuer's underwriters. In their pleading under § 12(a)(2) the lead plaintiffs alleged that their purchase of the securities was "pursuant or traceable"[24] to the allegedly fraudulent offering materials, but not that they had "purchased the relevant shares directly from the defendant."[25] The district court determined that standing for a § 12(a) action requires (1) an injury to the plaintiff; that (2) is "fairly traceable" to defendant's actions; and which injury (3) can likely be remedied by the court action sought.[26] The court further determined that, for § 12(a) cases, a plaintiff is required to show that he or she "purchased the relevant shares directly from the defendant" in order to satisfy the "fairly traceable" element.[27]

Since merely showing a purchase of securities "pursuant or traceable" to a misleading statement was held insufficient, the court rejected the class' § 12(a)(2) claims.[28] Thus, even though the language of the '33 Act does not explicitly mention causation as an element of a claim, plaintiffs risk losing on standing if they cannot show that defendant's actions caused their injury.

Based on the above, a slightly modified set of elements for a § 12(a) claim comes into focus. The original four (offer or sale, interstate commerce, prospectus or oral communication, and untrue statement or omission of material fact)[29] remain, but two more de facto elements are clear. First, cases interpreting *Pinter* have read some semblance of a reliance element into § 12(a) solicitor liability cases as a bulwark for preventing litigation against parties too tenuously related to the transaction in question.[30] Second, cases such as *In re Barclays* demonstrate that, as a threshold matter, if the plaintiff cannot to some extent show that the alleged loss or "injury" was caused by the defendant's actions, then the case is void for lack of standing.[31] Scienter remains uninvolved in § 12(a) claims except insofar as that § 12(a)(2) itself offers defendants a "reasonable care" affirmative defense if they can prove

[23] *See, e.g.*, *In re* Barclays Bank PLC Sec. Litig., No. 09 Civ. 1989 (PAC), 2011 U.S. Dist. LEXIS 2667, at *20–*22 (Jan. 25, 2011).
[24] *Id.* at *21 (internal quotations omitted) (citation omitted).
[25] *Id.*
[26] *Id.* at *20–*21 (citing Allen v. Wright, 468 U.S. 737, 751, (1984)).
[27] *Id.* at *21 (citing N.J. Carpenters Health Fund v. DLJ Mort. Cap., Inc., No. 08 Civ 5653, 2010 U.S. Dist. LEXIS 47512, at *12 (S.D.N.Y. Mar. 29, 2010)).
[28] *Id*. *In re Barclays* was overturned on appeal, but the appellate court did not disagree with—and in fact explicitly upheld ("In order to have standing under § 12(a)(2), however, plaintiffs must have purchased securities directly from the defendants")—the district court's finding of law. *In re Barclays* was overturned only insofar as that plaintiffs filed an amended complaint which the appellate court believed addressed the district court's reasons for initially rejecting the § 12(a)(2) claims, so the case was remanded. Freidus v. Barclays Bank PLC, 734 F.3d 132, 141–42 (2d Cir. 2013).
[29] Miller v. Thane Int'l, Inc., 519 F.3d 879, 885 (9th Cir. 2008).
[30] *See* Steed Fin. LDC v. Nomura Sec. Int'l, Inc., No. 00 Civ. 8058 (NRB), 2001 U.S. Dist. LEXIS 14761, at *21–*23 (S.D.N.Y Sept. 19, 2001); *but see* Pino v. Cardone Cap., LLC, 55 F.4th 1260 (9th Cir. 2022) ("To state a claim under § 12(a)(2), Pino need not have alleged that he specifically relied on any of the alleged misstatements").
[31] *In re Barclays*, 2011 U.S. Dist. LEXIS 2667, at *20–*22.

lack of knowledge that their statements were untrue or constituted omissions.[32]

C. The Defendant Class Under § 12(a)

Despite the relative clarity regarding which *acts* give rise to § 12(a) liability,[33] and that the statute establishes a private right of action for purchasers, courts have continuously struggled to agree on the limits of *who* can be held liable under § 12(a).[34] The original language of the '33 Act established liability under § 12(a) against "[a]ny person who . . . sells a security"[35] and defined "'sale', 'sell', 'offer to sell', or 'offer for sale'" to "include every contract of sale or disposition of, attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value."[36] No court has ever seriously asserted that the language of § 12(a) could not be read to include the party conveying title of a security to a purchasing party as a "seller" of the security.[37] But courts hearing § 12(a) cases have long debated how broadly the terms "offer" and "solicitation of an offer" can expand§ 12(a)'s defendant class.[38] Congress' 1954 amendment of the '33 Act—which split the original term "sells" into "offers or sells"[39]—did little to resolve the issue and decisions continued to fall generally into two camps: "strict privity" or "liberal."[40]

Of particular concern is the split at that time between the Seventh and Fifth Circuits. The Seventh Circuit established a strict privity standard for § 12(a) statutory sellers,[41] while the Fifth Circuit's more liberal approach

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[32] 15 U.S.C. § 77l(a)(2).
[33] *See* 15 U.S.C. §§ 77l(a)(1)–(2).
[34] *See* Joseph E. Reece, *Would Someone Please Tell Me the Definition of the Term "Seller": the Confusion Surrounding Section 12(2) of the Securities Act of 1933*, 14 DEL. J. CORP. L. 35, 42 (1989).
[35] Securities Act of 1933, Pub. L. No. 73-22, § 12, 48 Stat. 74, 84 (1933).
[36] Securities Act of 1933, Pub. L. No. 73-22, § 2(3), 48 Stat. 74, 74 (1933).
[37] Pinter v. Dahl, 486 U.S. 622, 642 (1988) ("it is settled that § 12(1) imposes liability on the owner who passed title, or other interest in the security, to the buyer for value").
[38] *See generally* W. Clark Goodwin, *The Effect of* Pinter v. Dahl *on Participant Liability Under Section 12 of the Securities Act of 1933*, 19 CUMB. L. REV. 191, 197–205 (1989).
[39] Allen Kent Davis, Pinter v. Dahl*: The Supreme Court's Attempt to Redefine The "Statutory Seller" Under Section 12 of the Securities Act of 1933* 4 BYU J. PUB. L. 97, 104 (1990). This particular amendment was made "in order to distinguish between 'offers and sales.'" Morris L. Forer, *A Comment on the Amendments to the Federal Securities Acts*, 103 U. PENN. L. REV. 1020, 1028 n.43 (1955). Such a distinction was deemed necessary in large part because the securities-registration requirements at § 5 of the '33 Act in effect already included it. *Id.* At the amending bill's introduction before the Senate on January 27, 1954, both its sponsor–Homer Capehart of Indiana–and SEC Chairman Ralph Demmler further explained that one of the its major purposes was to remove a distinction (included in the '33 Act's original language) between "disseminat[ing] information" and "solicit[ing] an offer to buy." 100 CONG. REC. 829, 832, 834 (1954). The difference between the two was considered "legalistic" and "without practical significance." 100 Cong. Rec. 829, 832 (1954).
[40] Stan D. Smith, *Securities—Section 12(1) Seller Liability Limited to Persons Who Pass Title or Solicit Securities Sales for Financial Gain.* Pinter v. Dahl*, 108 S. Ct. 2063 (1988)*, 11 U. ARK. LITTLE ROCK L. REV. 771, 773 (1988).
[41] Sanders v. John Nuveen & Co., 619 F.2d 1222, 1226 (7th Cir. 1980).

held defendants liable as statutory sellers if they had been a “substantial factor” in inducing the sale of the security.[42]

D. The Supreme Court Attempted to Clarify the Defendant Class in Pinter

The Circuit split described above was a defining feature of § 12(a) case law for 55 years after the initial passage of the ’33 Act.[43] In 1988 the Supreme Court made an effort to settle the matter by releasing its decision in the case of *Pinter v. Dahl*.[44]

1. Facts of the Case and Procedural History in Pinter v. Dahl

B.J. Pinter was a registered securities dealer from Texas who was active in the oil and gas industry; Maurice Dahl was a Californian real estate investor and broker who had unsuccessfully dabbled in oil and gas investing in the past.[45] Eventually, Dahl sought to try again at energy investing, and engaged an expert to identify promising investment opportunities for Dahl’s consideration.[46] This expert contacted Pinter and introduced him to Dahl.[47] Pinter evidently convinced Dahl of his ability to turn a profit through oil and gas investing, because Dahl gave him $20,000 on the condition that Pinter (through his company “Black Gold Oil Company”) would use the money to enter into lease agreements for fields upon which oil wells might potentially be erected.[48] The fields would be held by Pinter’s company, but Dahl would have the right of first refusal on the building of any wells on the properties.[49]

Dahl occasionally toured the properties Pinter had leased using Dahl’s money, and eventually invested around $310,000.[50] Dahl began reaching out to others (“friends, family, and business associates”)[51] to tell them about the fields he had leased through Pinter’s company and asking if they wanted to join the venture.[52] Many did, investing approximately $7,500 each using a

[42] Junker v. Crory, 650 F.2d 1349, 1360 (5th Cir 1981). Other Circuits tended to side with the Fifth in establishing tests more liberal than strict privity. The First Circuit opted for an expanded approach to § 12 liability when it found in *Cady v. Murphy* that “not only . . . principals, but also . . . brokers when selling securities owned by other persons” could be held liable for misrepresentation made in the selling of the security. Cady v. Murphy, 113 F.2d 988, 990 (1st Cir. 1940). The Third Circuit allowed an exception to the privity approach in the presence of a “special relationship.” Collins v. Signetics Corp., 605 F.2d 110, 112 (3d Cir. 1979). The Fourth, Eighth, and Ninth Circuits’ tests were the most similar to that of the Fifth, holding as a statutory seller any party that was either a “substantial factor” in the sale or that “directly and proximately” caused the injury. Lawler v. Gilliam, 569 F.2d 1283, 1288 (4th Cir. 1978); Stokes v. Lokken, 644 F.2d 779, 785 (8th Cir. 1981); SEC v. Seaboard Corp., 677 F.2d 1289, 1294 (9th Cir. 1982). For a succinct synopsis of this multi-Circuit split, *see* Beck v. Cantor, Fitzgerald & Co., 621 F. Supp. 1547, 1560–61 (N.D. Ill. 1985).

[43] *See* W. Clark Goodwin, *The Effect of* Pinter v. Dahl *on Participant Liability Under Section 12 of the Securities Act of 1933*, 19 CUMB. L. REV. 191, 200–03 (1989).

[44] Pinter v. Dahl, 486 U.S. 622, 625 (1988).

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.* at 625–26.

[51] *Id.* at 625.

[52] *Id.* at 626.

subscription-agreement form drafted by Pinter.[53] The form notified the signatory-investor that the interests being sold had not been registered as securities with the SEC.[54]

The fields proved worthless, and these interests sold were without value. Dahl and the others sued Pinter under § 12(1), claiming he had unlawfully sold them unregistered securities.[55] In a counterclaim, Pinter asserted both an *in pari delicto* defense and that Dahl himself was liable to the other investors under § 12(a) since he had solicited their subscriptions into the venture.[56]

The District Court found for Dahl and the investors, holding that Pinter had not sufficiently proven that the securities were exempt from registration under the private offering provisions.[57] The Fifth Circuit affirmed by first rejecting the *in pari delicto* defense and then by finding that Dahl was not a "seller" under that Circuit's construction of § 12(a).[58] Specifically, the court narrowed its prevailing "substantial factor" approach, excluding parties like Dahl and other "promoters" who gratuitously discuss investment opportunities with family members and other acquaintances; in such cases, the Circuit Court held, § 12(a) liability only attaches to parties "motivated by a desire to confer a direct or indirect benefit on someone other than the person he has advised to purchase."[59]

2. *The Supreme Court's Opinion in* Pinter v. Dahl

Writing for the Court, Justice Blackmun vacated the lower courts' decisions.[60] The Court defined two categories of possible defendants under § 12(a): the plaintiff can sue someone who either (1) passes title to ("sells") the security onto the plaintiff from himself or herself; or (2) on behalf of either their own interests or those of another (a) offers to sell the security to the plaintiff, or (b) *solicits* an offer from the plaintiff whereby the plaintiff would buy the security (all of which the Court included under the term "offers").[61] These two paths to liability came to be known as *Pinter*'s "prongs."[62]

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[53] *Id.*
[54] *Id.*
[55] *Id.* at 627.
[56] *Id.* at 628.
[57] *Id.* at 628–29.
[58] *Id.* at 629.
[59] *Id.* at 630 (1988) (quoting Dahl v. Pinter, 787 F.2d 985, 991 (5th Cir. 1986)).
[60] *Id.* at 655.
[61] *Id.* at 642, 647. *Pinter* was a case dealing with what was then referred to as "§ 12(1)," now § 12(a)(1); almost immediately after the decision was released, however, courts found its holding applied equally to cases arising under § 12(a)(2), and it has been postulated that the Supreme Court would accept such an application were it ever to hear the question. *See* Moore v. Kayport Package Express*,* 885 F.2d 531, 536; *see also* Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 49 (2d Cir. 1991); Allen Kent Davis, Pinter v. Dahl: *The Supreme Court's Attempt to Redefine The "Statutory Seller" Under Section 12 of the Securities Act of 1933*, 4 BYU J. Pub. L. 97, 110–11 (1990).
[62] *Pinter* itself did not use this term, but it has been popularly adopted by courts applying the decision ever since its release. *See, e.g.*, Griffin v. PaineWebber, Inc., No. 99 Civ. 2292 (VM), 2001 U.S. Dist. LEXIS 8937, at *5, *7 (S.D.N.Y. June 29, 2001).

Justice Blackmun opened the relevant portion of the Court's opinion[63] by pointing out that the language of the '33 Act "defines the class of defendants . . . as those who offer or sell" securities, but that neither the statute itself, nor its "sparse" legislative history, nor the courts had yet convincingly "delineate[d] who may be regarded as a statutory seller."[64]

To clarify this issue, the Court first accepted the undisputed principle that, in a buyer-seller relationship, the party which passes title is the "seller."[65] Noting the inclusion of such terms as "offer to sell," "offer for sale," "offer," and "solicitation of an offer to buy" within the definition at § 2(3), the Court then vastly expanded the defendant class under § 12(a) to include not only title-passers but also solicitors and anyone within "the entire selling process, including the seller/agent transaction."[66] But the Court was of the opinion that the second clause of § 12(a)—establishing liability only against those "from" whom the plaintiff "purchas[ed] such security"[67]—served as a limiting principle to the vast defendant class implied by § 2(3).[68] Determining the bounds of the defendant class established by § 12(a) (according to the definitions found in § 2(3)) and the limitation established by the second clause of § 12(a) ("[t]he purchase requirement") was where the Court believed the disagreement inherent to the Circuit split lay.[69]

However, rather than adopting either the "strict privity" or the "liberal" positions espoused by the Circuits, the Court rejected all existing lower court tests to define "statutory seller" and created its own.[70] In its decision, the Court extensively analyzed the Seventh Circuit's[71] strict privity approach and the substantial factor test of the Fifth Circuit, from which the case was appealed.

The Court first set its sights on the strict privity approach.[72] It summarized this approach as follows:

> "Several courts and commentators have stated that the purchase requirement necessarily restricts § 12 primary liability to the owner of the security. . . . Thus, an offeror, as defined by § 2(3), may incur § 12 liability only if the offeror also 'sells' the security to the plaintiff, in the sense of transferring title for value."[73]

But the Court considered this reading of § 12(a) unnecessarily restrictive, determining that the purchase requirement served only to limit § 12(a) liability to cases in which there had actually been a sale of a security; as long

[63] Pinter v. Dahl, 486 U.S. 622, 641 (1988). The Court's consideration of the § 12(a) question begins at part III of the decision.
[64] *Id.* at 641–42.
[65] *Id.* at 643.
[66] *Id.* at 646.
[67] 15 U.S.C. § 77l(a)(2).
[68] *Pinter*, 486 U.S. at 643.
[69] *Id.* at 644.
[70] *Id.* at 644–45, 647, 652–54.
[71] *Id.* at 644, 648. Although the Court in its opinion never referred to the Seventh Circuit by name.
[72] *Id.* at 644.
[73] *Id.*

as that threshold condition was met, anything within the range of sales-related activities discussed above (including solicitation) was sufficient to establish liability.[74]

This approach, the Court believed, was in line with both congressional intent and existing case law.[75] The Court noted that "purchase" is a "correlative" term to both the words "sell" and "offer," and that in the '33 Act's original definitions Congress had included solicitation as a type of offer.[76] The 1954 amendments were "intended to preserve existing law," which the Court held to mean that Congress had not intended to remove solicitation from the class of activities that constituted a statutory sale.[77] The Court noted that § 12(a) had frequently been used against agents of security title-holders (such as brokers) since the passage of the '33 Act.[78] If Congress had intended to limit § 12(a) liability only to title-passers it could have done so during the 1954 amendment process.[79] The Court included one caveat, however: agreeing with the Fifth Circuit, it held that § 12(a) liability cannot attach to a party "whose motivation is solely to benefit the buyer;" liability instead inheres to persons who act in "[their] own financial interests or those of the securities owner."[80]

Next, the Court dispatched with the more liberal interpretations espoused by some[81] Circuits, particularly homing in on the "substantial factor" test used by the Circuit Court from which the case had been appealed.[82] While the Court had found the Seventh Circuit's strict privity approach too narrow, it also found the Fifth Circuit's substantial factor approach overly broad. Under this approach, according to the Court, "a nontransferor § 12(1) seller is defined as one 'whose participation in the buy-sell transaction is a substantial factor in causing the transaction to take place.'"[83] This was an overextension of § 12(a) liability because it enabled plaintiffs to assert that "mere participa[nts] . . . collateral to the offer or sale" were (statutory) *sellers* in the transaction.[84] This, the Court held, would drastically expand the defendant class under § 12(a) beyond the congressionally intended bounds of title-passers, offerors to sell, and solicitors of offers to buy.[85]

Based on these holdings, the Court determined that the record was unclear as to whether Dahl could be considered a statutory seller, so it remanded the case for further proceedings.[86] *Pinter v. Dahl* shifted the landscape of § 12(a) statutory seller liability. The Court made it clear that

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[74] *Id.* at 644–45.
[75] *Id.* at 645–46.
[76] *Id.* at 645.
[77] *Id.*
[78] *Id.* at 646.
[79] *Id.*
[80] *Id.* at 647.
[81] *See, e.g.*, Junker v. Crory, 650 F.2d 1349, 1360 (5th Cir 1981).
[82] *Pinter*, 486 U.S. at 652.
[83] *Id.* at 649 (quoting Pharo v. Smith, 621 F.2d 656, 667 (5th Cir. 1980)).
[84] *Id.* at 650.
[85] *Id.* at 624, 643 n.21 ("a buyer cannot recover against his seller's seller") (citation omitted).
[86] *Id.* at 654–55.

§ 12 liability attached only to the two groups who became known as *Pinter's* "prongs:" (1) title-passers; and (2) offerors (defined by the statute to include solicitors of offers to buy), if and only if they were motivated by a desire to financially benefit themselves or the owner of the security, rather than merely a gratuitous desire to recommend investment opportunities to potential buyers.[87]

E. Pinter Led to an Orthodoxy of Interpretation Until the 2022 Circuit Split

After the *Pinter* decision, courts faced a corollary question arising from *Pinter*'s second prong (offeror/solicitor liability): whether plaintiffs could assert § 12(a) claims against parties who had solicited offers to buy in general, or if plaintiffs were limited in their legal actions to suits against parties who had solicited offers to buy from them in particular.[88] Courts uniformly held that in order to hold someone liable as a "solicitor"—and therefore an "offeror"—the plaintiff was required to make "[a]n allegation of direct and active participation in the solicitation of the immediate sale . . . where the section [sic] 12(2) defendant is not a direct seller."[89] Thus, after *Pinter* in order for a solicitor to count as a seller under § 12(a) they were required to have had an explicit promotional relationship with the eventual purchaser and to have intended to induce the party's purchase.

From 1988 until 2022 this orthodoxy in interpreting *Pinter's* second prong held fast: due to Congress' desire not to hold "collateral" parties liable for unlawful sales, for a party to be liable to a purchaser as a solicitor, that party must have specifically targeted the purchasing plaintiff with its solicitations. In 2022, however, the Ninth and Eleventh Circuits cast this line of reasoning into doubt in the cases of *Wildes v. BitConnect Int'l PLC* and *Pino v. Cardone Cap., LLC*, where they decided that statements made on social media could count as "solicitations" sufficient to assert § 12(a) liability, despite not being targeted at any particular individual.[90]

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[87]*See id.* at 647.

[88] *See* Craftmatic Sec. Litig. v. Kraftsow, 890 F.2d 628, 635–36 (3d Cir. 1989) (discussing a number of post-*Pinter* cases from several Circuits which considered what sorts of activities do and do not establish solicitor liability).

[89] *In re* Westinghouse Sec. Litig., 90 F.3d 696, 717 n.19 (3d Cir. 1996); *see also* Shaw v. Dig. Equip. Corp., 82 F.3d 1194, 1214–16 (1st Cir. 1996) (finding no "direct[] involve[ment] in the actual solicitation" when defendant's only role in plaintiff's purchase was to prepare a registration statement and prospectus in advance of a firm commitment underwriting by which plaintiff dealt with and purchased securities from the underwriter defendant sold them to); Shain v. Duff & Phelps Credit Rating Co., 915 F. Supp. 575, 583 (S.D.N.Y. 1995) (no direct contact when the only contacts between plaintiff and defendant were through intermediary brokers); Rosenzweig v. Azurix Corp., 332 F.3d 854, 871 (5th Cir. 2003) (holding that direct contact means direct communication); Maher v. Durango Metals, Inc.,144 F.3d 1302, 1307 (10th Cir. 1998); Steed Fin. LDC v. Nomura Secs. Int'l, Inc., No. 00 Civ. 8058 (NRB), 2001 U.S. Dist. LEXIS 14761, at *22–*23 (S.D.N.Y. Sept. 20, 2001) ("actively solicited"). As can be seen the "direct and active" standard proved fairly difficult for plaintiffs to meet and served to greatly limit the defendant class under § 12.

[90] Wildes v. BitConnect Int'l PLC, 25 F.4th 1341 (11th Cir. 2022); Pino v. Cardone Cap., LLC, 55 F.4th 1253 (9th Cir. 2022); *see also* Virginia Milstead et al., *Circuits Split Over Whether Social Media Posts May Give Rise to Section 12 Seller Liability*, THOMSON REUTERS (Mar. 6, 2023, 10:16 AM), /.https://www.reuters.com/legal/legalindustry/Circuits-

In each of these cases the plaintiff sued the defendant over alleged § 12(a) violations arising from generic social media posts that were not targeted at any individual. In *Wildes*, which was decided under § 12(a)(1), the defendants posted "thousands of YouTube videos extolling [the security] . . . [which] were viewed millions of times."[91] Similarly, in *Pino*, where the Ninth Circuit extended the Eleventh's *Wildes* opinion to § 12(a)(2),[92] the defendant posted offering materials in the form of Instagram and YouTube videos.[93] In both cases the plaintiffs invested in securities after viewing the promotional videos.[94] The securities offered in *Wildes* turned out to be a Ponzi scheme,[95] while those offered in *Pino* fell short of the promoted rates of return and the videos did not include meaningful warnings about the risks of investment.[96]

In *Wildes*, the Eleventh Circuit explicitly rejected the notion that "solicitation" requires "direct and active" contact with the purchaser.[97] In fact, it determined that the language of the '33 Act shows that such a requirement is wrong: the statute does not mention "direct" solicitation, but it does establish liability "for using 'any means' of 'communication in interstate commerce,'" and at the time of its passage it defined such communications as including even very impersonal media such as radio and television.[98] The court also noted that *Pinter* itself makes no mention of a personalness requirement for a solicitation.[99] As such, the court held that social media advertisements of securities can constitute "solicitations" of offers to buy—despite not being targeted at any individual in particular—and that they therefore suffice to give rise to § 12(a) statutory seller liability.[100] Months later, the Ninth Circuit agreed with the *Wildes* decision when it held that "nothing in the Act indicates that mass communications, directed to multiple potential purchasers at once, fall outside the Act's protections."[101]

With these decisions, the Ninth and Eleventh Circuits opened a circuit split questioning or eliminating the limits to statutory seller liability under *Pinter*'s second prong. Left undefined or unchallenged, such decisions

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split-over-whether-social-media-posts-may-give-rise-section-12-seller-2023-03-06/ [https://perma.cc/9U9L-E5VP].

[91] *Wildes*, 25 F.4th at 1344.

[92] Recall that courts and commentators have unanimously held that "seller" under both subsections carries the same meaning. Davis, *supra* note 61; *see also* Moore v. Kayport Package Express, 885 F.2d 531, 536 (9th Cir. 1989); Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 49 (2d Cir. 1991).

[93] *See Pino*, 55 F.4th at 1256.

[94] *See Wildes*, 25 F.4th at 1345 ("signed up for BitConnect directly through the promoters' referral links"); *Pino*, 55 F.4th at 1256–57.

[95] *See Wildes*, 25 F.4th at 1343.

[96] *See Pino*, 55 F.4th at 1256.

[97] *See Wildes*, 25 F.4th 1341 at 1345.

[98] *See id.* (emphasis omitted).

[99] *Id.* at 1346.

[100] *Id.*

[101] *See Pino*, 55 F.4th at 1258.

threaten to return § 12(a) case law to a pre-*Pinter* "substantial factor"-esque approach.[102]

This defendant class-expanding line of cases initiated by *Wildes* and *Pino* came just a few years after the Supreme Court expanded the securities defendant class in another context.

II. DEVELOPMENT OF THE SCHEME LIABILITY THEORY AND THE SUPREME COURT'S DECISION IN *LORENZO*

About a year after the passage of the '33 Act, Congress passed the '34 Act. Unlike the '33 Act, which only governed matters pertaining to securities offerings by issuers or controlling shareholders, the '34 Act "sweeps more broadly:"[103] it governs all transacting of securities on secondary markets, such as stock exchanges, and created the SEC to regulate the entire U.S. securities market.[104]

This section will begin with an introduction to § 10(b) of the '34 Act, as well as of the SEC's Rule 10b-5. This section will then define the plaintiff class and violations of 10b-5 before explaining how the scheme liability theory arose as a way to broaden the Rule's defendant class. Next there will be a synopsis of the Supreme Court's decision in *Lorenzo* where it first granted victory to a plaintiff under a scheme liability theory. This section will conclude by explaining how *Lorenzo* affects the scope of the defendant class under 10b-5.

A. Overview of § 10(b) of the '34 Act and SEC Rule 10b-5

Section 10(b) of the '34 Act forbids "any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors."[105] Pursuant to this provision, in 1942 the SEC enacted Rule 10b-5,[106] which states in its entirety, that:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality

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[102] *See* American Bar Association Business Law Section, *Case Law Developments 2022*, 78 BUS. LAW. 927, 960–61 nn.282–84 and accompanying text (citing Pinter v. Dahl, 486 U.S. 622, 643–44 (1988) (expressing concern that the holding in *Wildes* could lead to suits being brought against parties falling without the group of defendants contemplated by the Supreme Court in *Pinter* when it said that the bounds of solicitor liability were—according to the language of the statute—"a securities vendor's agent who solicited the purchase [who] would commonly be said, and would be thought by the buyer, to be among those 'from' whom the buyer 'purchased'")).

[103] Slack Techs., LLC v. Pirani, 598 U.S. 759, 763 (2023).

[104] Cornell Law School, *Securities Exchange Act of 1934*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/securities_exchange_act_of_1934 [https://perma.cc/YG2T-RCNW] (last visited Nov. 21, 2023).

[105] 15 U.S.C. § 78j(b).

[106] *See* Exchange Act Release No. 3230, 1942 SEC LEXIS 485 (May 21, 1942). The Rule was drafted and passed hastily and without any debate among the Commissioners; in fact, the only one of them who spoke at all at its passing was Sumner Pike, who half-humorously remarked "Well, we are against fraud, aren't we?." Larry D. Soderquist and Theresa A. Gabaldon, SEC. REGUL. 447–48 (Robert C. Clark et al. eds., 9th ed. West Acad. 2018); *see also* William L. Cary & W. McNeil Kennedy, *Summation*, 22 BUS. LAW. 908, 922 (1967) (statement of Milton Freeman).

> of interstate commerce, or of the mails or of any facility of any national securities exchange,
> (a) To employ any device, scheme, or artifice to defraud,
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
> in connection with the purchase or sale of any security.[107]

The language of the Rule, as seen above, is so broad that courts permit its use even in actions arising from violations which are otherwise governed by the '33 Act.[108] Due at least in part to the Rule's expansiveness, 10b-5 has become the primary enforcement mechanism of securities laws in the United States.[109] Section 12(a)(2) is widely seen as having been particularly subsumed, with one author referring to it as "little more than a weak stepsister to . . . section 10(b)."[110]

With the massive scope of liability-creating acts under 10b-5 not much debated due to the Rule's nearly all-encompassing language, a new theory has arisen in recent years which expands the bounds of the defendant class suable under 10b-5 claims. The theory is called "scheme liability," and was first countenanced by the Supreme Court in its 2019 decision in *Lorenzo v. SEC*.[111] In that decision, the Court parsed the second section of 10b-5 (10b-5(b), establishing liability against those who "make" false or misleading statements) out from the first and final sections of the Rule (10b-5(a) and 10b-5(c)).[112] The Court determined that 10b-5(a) and 10b-5(c) establish liability—independently of 10b-5(b)—against those who "disseminate" rather than "make" false or misleading statements.[113]

B. The Plaintiff Class and Cause of Action under Rule 10b-5

While Rule 10(b)-5 itself does not define its plaintiff class, the Supreme Court answered questions about that class' scope in the 1975 case of *Blue Chip Stamps v. Manor Drug Stores*, where it adopted the so-called

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[107] 17 C.F.R. § 240.10b-5.
[108] *See, e.g.*, Musick, Peeler & Garrett v. Employers Ins. of Wausau, 508 U.S. 286, 288–89 (1993) (discussing an action brought under both § 12 of the '33 Act and Rule 10b-5—among others—against the issuer of a public offering).
[109] *See* Arnold S. Jacobs, *What Is a Misleading Statement or Omission Under Rule 10b-5?*, 42 FORDHAM L. REV. 243, 243 (1973).
[110] Patricia O'Hara, *Erosion of the Privity Requirement in Section 12(2) of the Securities Act of 1933: The Expanded Meaning*, 31 UCLA L. REV. 921, 922 (1984).
[111] *See* Lorenzo v. SEC, 587 U.S. 71, 80 (2019).
[112] *See id.* at 71–74 (2019). In separating 10b-5(b) "maker" liability from 10b-5(a) and (c) "scheme" liability, the Court relied heavily on its decision in *Janus Capital Group, Inc. v. First Derivative Traders*, where it defined who counts as a "maker" of a statement. *See* discussion *infra* Section II.D.2 (explaining the relationship between *Lorenzo* and *Janus*).
[113] *See Lorenzo*, 587 U.S. at 71–74.

"*Birnbaum*" or "purchaser-seller" rule.[114] Under this rule, originally crafted by the Second Circuit in the 1952 case of *Birnbaum v. Newport Steel Corp.*, the private right of action established by § 10(b) of the '34 Act and Rule 10b-5 is "limited to actual purchasers and sellers of securities."[115] The Court in *Blue Chip Stamps* adopted the *Birnbaum* rule after determining that neither the '34 Act, nor its legislative history, nor anything in the drafting history of 10b-5 gives any meaningful indication as to whether Congress or the SEC even "considered the problem of private suits" when the Act and Rule were written.[116] Despite this, an implied private right of action had arisen in numerous courts as a "judicial oak . . . grown from little more than a legislative acorn."[117] In light of this situation, the Supreme Court was willing to join with other courts in allowing private actions.[118]

Thirty years after the Court announced a private cause of action under 10b-5 it enumerated the elements of such a claim. In *Dura Pharms., Inc. v. Broudo* it held that a plaintiff must show: (1) a material misrepresentation or omission; (2) scienter; (3) connection with the purchase or sale of a security; (4) reliance;[119] (5) economic loss; and (6) loss causation.[120]

These elements of a 10b-5 claim are similar to the elements of a § 12(a) claim discussed above.[121] A § 12(a) claim requires (1) an offer or sale of a security; (2) in interstate commerce; (3) based on a written prospectus or related oral communication; (4) which includes an untrue statement or omission of material fact.[122] And, although not officially recognized as elements of the claim, some showing of reliance and loss causation have both been read by courts into the list of requisite allegations.[123] Thus, claims under both § 12(a) and 10b-5 require (1) a material misrepresentation or omission (including in a prospectus or related oral communication); (2) in connection with the purchase or sale of a security; (3) in interstate commerce;[124] (4) upon which the plaintiff relied in making the purchase; (5) which led to loss; (6) caused by the defendant's actions.

This leaves only 10b-5's scienter element as the outlier. The system established as a result of 10b-5 requiring an intent element but § 12(a) not doing so is a well-thought-out one. Whereas § 12(a) liability for malfeasance

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[114] Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 731 (1975) ("we are of the opinion that *Birnbaum* was rightly decided").
[115] *See id.* at 730.
[116] *See id.* at 729.
[117] *Id.* at 737.
[118] *Id.* at 730 (*citing* J. I. Case Co. v. Borak, 377 U.S. 426, 432 (1964)) (concluding that lower courts were right to find a private cause of action as "a necessary supplement to Commission action") (internal quotation marks omitted). The Court also noted *Birnbaum*'s "longstanding acceptance by the courts, coupled with Congress' failure to reject [its] reasonable interpretation of the wording of § 10 (b) [sic]." *Id.* at 733.
[119] Although the SEC is exempt from this requirement. *See Lorenzo*, 587 U.S. at 84.
[120] Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 341–42 (2005).
[121] *See* discussion *supra* Section I.B.
[122] *See* Miller v. Thane Int'l Inc., 519 F.3d 879, 885 (9th Cir. 2008).
[123] *See* discussion *supra* Section I.B.
[124] Which the Court in *Broudo* did not mention but which the Rule itself specifically states. 17 C.F.R. § 240.10b-5.

or nonfeasance at the fragile[125] offering stage is easier to prove but more limited in the circumstances under which it affords plaintiffs a cause of action, 10b-5 has an almost-unlimited scope in terms of the sorts of acts or omissions it holds defendants liable for, but because intent is an element of its claim it is more difficult to prove.[126]

But scienter under the securities laws is a famously malleable standard, notably lower than its criminal "mens rea" counterpart: numerous longstanding legal principles regarding the scienter standard greatly diminish the culpable state of mind required to make a successful allegation of securities fraud. For example: neither knowledge nor intent is required to establish scienter, it can be established based on recklessness;[127] it can be proven based on an inference stemming from "motive and opportunity"[128] or based on circumstantial evidence;[129] and it is analyzed by a preponderance standard, rather than a "clear and convincing" burden of proof.[130] At the very least, claimants are bound by the enhanced pleading requirements added to the '34 Act by the Private Securities Litigation Reform Act of 1995, which requires that a "strong inference" of scienter be shown and that false statements be alleged "with particularity."[131] "Because scheme liability 'does not require an allegation that the defendant made a statement,'"[132] however, this particularity requirement is undercut in scheme liability cases.

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[125] *See* James M. Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 28, at 34–35 (1959), (discussing the drafters' implementation of a "novel" waiting period during the registration process in order to give the SEC and the financial industry time to digest and assess the offering materials).

[126] Perhaps the most succinct way of framing the entire issue of this Note, in fact, is as an inverse deformation of this juxtaposition: an analysis of developing trends in the law which one need not squint too tightly to see could lead to plaintiffs making use of both the ease of a § 12(a) claim and the general scope of a 10b-5 claim—without much fear of being hampered by the restraints included in either—due to the very nature of the defendant class (which is removed enough from the sale at issue to be a "seller" only in the statutory sense, but whose acts in attaining that status would also make them "scheme" participants).

[127] *See* Tellabs, Inc. v. Makor Issues & Rts., Ltd., 551 U.S. 308, 337 n.3 (2007) (noting that every Circuit Court to decide the issue has found recklessness sufficient to establish scienter, but that the Circuits "differ on the degree of recklessness required").

[128] *See In re* Hain Celestial Grp. Inc., No. 2:16-CV-04581 (JS) (LGD), 2022 U.S. Dist. LEXIS 202774, at *74 (E.D.N.Y. Nov. 4., 2022) (citing Setzer v. Omega Healthcare Invs., Inc., 968 F.3d 204, 212 (2d Cir. 2020)). This is, however, also largely Circuit-specific; although the Second Circuit—which enjoys outsized importance in securities jurisprudence—does allow a strong inference through allegations of motive and opportunity. James R. Carroll et al., Scienter Defenses in Securities Fraud Actions, PRACTICAL GUIDANCE, https://www.skadden.com/-/media/files/publications/2022/11/scienter_defenses_in_securities_fraud_actions.pdf [https://perma.cc/W4NK-Y2A3] (discussing the approaches on this issue used by the First, Second, Fifth, and Eleventh Circuits; citing ECA & Local 134 IBEW Joint Pension Trust of Chi., 553 F.3d 187, 198–99 (2d. Cir. 2009)).

[129] *See In re Hain Celestial*, 2022 U.S. Dist. LEXIS 202774, at *74.

[130] *See* Herman & Maclean v. Huddleston, 459 U.S. 375, 388–91 (1983).

[131] Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 21D(b)(2), 109 Stat. 737, 747 (1995) (codified at 15 U.S.C. § 78u-4(b)(2)(A)).

[132] Menaldi v. Och-Ziff Cap. Mgmt. Grp. LLC, 164 F. Supp. 3d 568, 577 (S.D.N.Y. 2016). (quoting *In re* Alstom SA Sec. Litig., 406 F. Supp. 2d 433, 474 (S.D.N.Y. 2005)), *cited with approval in* SEC v. Rio Tinto PLC, 41 F.4th 47, 52 (2d Cir. 2022).

Meanwhile, the Supreme Court has set a fact-dependent standard for what qualifies as a "strong inference" of scienter.[133]

C. *The Scheme Liability Theory*

Scheme liability is a relatively recent legal theory arising under subsections (a) and (c) of 10b-5.[134] The theory proposes that actors tangentially involved in a securities transaction can be held liable as primary violators under 10b-5(a) and (c) (the "scheme liability provisions") because those subsections are worded more generally than 10b-5(b) and proscribe no particular conduct such as "making" a statement.[135]

The theory arose essentially as a way to circumvent older rulings (whose paradigmatic cases were *Central Bank, N. A. v. First Interstate Bank, N. A.* and *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*) that "there is no private aiding and abetting liability under § 10(b)."[136] By asserting that disseminators were not mere aiders and abettors, but rather that dissemination is itself a *primary* violation, plaintiffs believed they could expand the right of action given them by 10b-5 to parties the Court had previously held to be shielded from such liability.[137]

D. *The Court Adopts Scheme Liability in Lorenzo v. SEC*

The Supreme Court first approved of a scheme liability theory in *Lorenzo v. SEC*.[138] The Supreme Court did not assert that scheme liability can be alleged only when a defendant has violated *both* of the scheme liability provisions; 10b-5(a) and 10b-5(c) have separate requirements, with "considerable overlap" between them.[139] It just so happened that Lorenzo's conduct had violated both provisions.

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[133] *Tellabs*, 551 U.S. at 324 ("The inference that the defendant acted with scienter need not be irrefutable. . . . Yet the inference of scienter must be more than merely 'reasonable' or 'permissible'—it must be cogent and compelling . . . . A complaint will survive, we hold, only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged.").
[134] 17 C.F.R. § 240.10b-5(b). Recall that these provisions specifically make it unlawful to "employ any device, scheme, or artifice to defraud" or to "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person."
[135] *See* Robert C. Micheletto et al., *When Secondary is Primary: Scheme Liability Under Rule 10b-5(a) and (c)*, JONES DAY, https://www.jonesday.com/-/media/files/publications/2007/07/when-secondary-is-primary-scheme-liability-under-r/files/secondary-is-primary/fileattachment/secondary-is-primary.pdf (last visited May 7, 2025). Put differently, 10b-5(b) requires that a defendant made a statement, while the scheme liability provisions include no such requirement. In fact, these provisions are silent as to which sorts of conduct violate them. Recall how broadly- and vaguely-worded the scheme liability provisions are. *See* 17 C.F.R. § 240.10b-5; *see also* Musick, Peeler & Garrett v. Employers Ins. of Wausau, 508 U.S. 286, 288–89 (1993) (indicating that violations of the '33 Act can also violate 10b-5).
[136] Cent. Bank, N.A. v. First Interstate Bank, N.A., 511 U.S. 164, 191 (1994); *see also* Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc., 552 U.S. 148, 158 (2008) ("[t]he § 10(b) implied private right of action does not extend to aiders and abettors").
[137] *See generally* Brief for Respondent at 31–34, Lorenzo v. SEC, 587 U.S. 71 (2019).
[138] *See generally* Lorenzo v. SEC, 587 U.S. 71 (2019).
[139] *See id.* at 81("It should go without saying that at least some conduct amounts to 'employ[ing]' a 'device, scheme, or artifice to defraud' under subsection (a) as well as 'engag[ing] in a[n] act . . . which operates . . . as a fraud' under subsection (c)") (quoting 17 C.F.R. § 240.10b-5).

1. Facts of the Case and Procedural History in Lorenzo

Francis Lorenzo was the director of investment banking at a registered broker-dealer in New York City.[140] At the time of the events giving rise to the case (approximately June through October of 2009) Lorenzo had only one client: a company that—according to a contemporaneous filing—claimed to have $14 million in assets, $10 million of which were intellectual property in a technology the company was developing.[141] Lorenzo doubted the valuation, believing the technology "didn't really work," but shortly after the aforementioned filing the company asked him to broker the sale of $15 million worth of securities.[142] Just months after Lorenzo's firm was hired, the client publicly (and privately to Lorenzo) admitted that its assets were worthless and amended its holdings calculation to a mere $370,552.[143]

Despite this amendment, Lorenzo's boss at the firm drafted, sent to him, and ordered Lorenzo to disseminate two emails touting the investment opportunity in the company.[144] Neither email disclosed the downward-amended valuation; both still claimed the company had $10 million in assets.[145] Lorenzo signed the emails, sent them to investors, and listed himself as the contact for follow-up regarding the investment opportunity.[146]

In 2013 the SEC brought charges against Lorenzo and two others[147] under 10b-5, claiming he had intended to defraud investors by sending the false and misleading emails.[148] Lorenzo countered that he could not have violated 10b-5 because he did not "make" the statements included in the emails; his boss drafted, approved, and ordered the dissemination of the emails—Lorenzo merely signed and sent them.[149] The SEC responded that Lorenzo did not need to be the "maker" of the statements because, under scheme liability, "knowingly disseminating false information to prospective investors" is a primary violation of 10b-5(a) and (c).[150]

The case was initially tried as an administrative law proceeding before an ALJ and then the Commission, both of which found against Lorenzo.[151] Lorenzo appealed to the Court of Appeals for the D.C. Circuit which likewise found for the Commission;[152] the Supreme Court granted certiorari.

140 *Id.* at 75.
141 *Id.*
142 *Id.*
143 *Id.*
144 *Id.*
145 *See id.*
146 *Id.* at 75–76.
147 The firm and Francis Lorenzo's boss, both of whom settled with the SEC. *See generally* Gregg C. Lorenzo, Ord. Making Findings, Securities Act Release No. 9480, Exchange Act Release No. 70904, 2013 SEC LEXIS 3687 (Nov. 20, 2013).
148 *See Lorenzo*, 587 U.S. at 76.
149 *Id.*
150 *Id.* at 77.
151 Pet. Writ Cert. at 8–11, Lorenzo v. SEC, 587 U.S. at 76 (No. 17-1077); *see also* Francis V. Lorenzo, Exchange Act Release No. 74836, 2015 SEC LEXIS 1650 (Apr. 29, 2015).
152 Lorenzo v. SEC, 872 F.3d 578, 588–89 (D.C. Cir. 2017), *aff'd*, 587 U.S. 71 (2019) ("in the circumstances of this case . . . [Lorenzo] can be found to have infringed Section 10(b), Rules 10b-5(a) and (c) . . . regardless of whether he was the 'maker' of the false statements for purposes of Rule 10b-5(b).").

2. The Court's Opinion in Lorenzo

The Supreme Court agreed to hear the case somewhat as a companion[153] to the 2011 case of *Janus Capital Group, Inc. v. First Derivative Traders*.[154] In *Janus* the Court examined the definition of a "maker" under 10b-5(b) and 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."[155] The question in *Lorenzo* was whether a party who disseminated false or misleading statements can be liable under 10b-5(a) and (c), even if *Janus* says they cannot be liable under 10b-5(b) because they did not "make" the statements at issue.[156]

The Court based its decision first on the statutory language of 10b-5 and on the almost identically worded § 17(a)(1) of the '33 Act, which the Commission cited in its enforcement action against Lorenzo.[157] The Court considered language such as "*any* device, scheme, or artifice"[158] to be "sufficiently broad to include within [its] scope the dissemination of false or misleading information with the intent to defraud."[159] The Court used dictionary definitions of the words in the statutes to buttress this finding, notably saying that a "scheme" is a "project, plan, or program of something to be done."[160] Based on this, the Court concluded that Lorenzo's actions fell well within the broad scope of liability-establishing conduct encompassed by the language at issue.[161]

The Court next considered the point that Lorenzo's misdeeds had only to do with misstatements, which are already governed by 10b-5(b), but which he was not subject to because he was not the "maker" of such misstatements.[162] The Court rejected the notion that "each of [10b-5's] provisions should be read as governing different, mutually exclusive, spheres of conduct," finding instead that "this Court and the Commission have long recognized considerable overlap among the subsections of the Rule and related provisions of the securities laws."[163]

Finally, in Part III of the decision, the Court considered and dispensed with two ancillary arguments asserted by Lorenzo in his defense. First, the Court stated explicitly that *Lorenzo* in no way overturned *Janus*, where the Court held that 10b-5(b) did not cover the drafter of a statement when that statement was ultimately controlled by another entity but did not discuss 10b-5's application in cases of dissemination.[164] Next, the Court determined

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[153] *Lorenzo,* 587 U.S. at 74 (explaining that the case addresses a question left unanswered by the *Janus* decision).
[154] *See generally* Janus Cap. Grp., Inc. v. First Derivative Traders, 564 U.S. 135 (2011).
[155] *Id.* at 142.
[156] *See Lorenzo*, 587 U.S. at 74.
[157] *See id.* at 77–78.
[158] *Id.* at 78; *see also* 17 C.F.R. § 240.10b-5 (emphasis added).
[159] *Lorenzo,* 587 U.S. at 78.
[160] *Id.* (cleaned up) (quoting Aaron v. SEC, 446 U. S. 680 at 696, n. 13 (1980) (quoting Webster's International Dictionary 713, 2234, 157 (2d ed. 1934)).
[161] *Id.* at 78–79.
[162] *Id.* at 79.
[163] *Id.* at 80.
[164] *See id.* at 82.

that *Lorenzo* did not "weaken what is otherwise a clear distinction between primary and secondary (i.e., aiding and abetting) liability."[165] It came to this conclusion by specifically invoking and distinguishing *Central Bank* and *Stoneridge*. The former did not apply here because it had held that 10b-5 does not permit action against "secondary violators," which Lorenzo would have been under a *Janus*/10b-5(b) theory.[166] But since the SEC brought its action under a 10b-5(a) and (c) Lorenzo was *primarily* liable for his actions in disseminating the statements.[167] *Stoneridge* did not apply because, although the plaintiff in *Lorenzo* was the SEC (which does not need to show reliance),[168] the Court found that the statements Lorenzo disseminated were intended to "induce reliance" by recipient prospective investors.[169] *Stoneridge* had indicated that scheme liability theories are inapposite when reliance cannot be shown.[170] And in either case, the Court did not think it unusual that the same conduct (disseminating) could establish primary liability under one area of law (10b-5(a) and (c)) but only secondary liability under another (10b-5(b)).[171]

E. Effects of the Lorenzo *Decision on 10b-5 Jurisprudence*

In sum, the Supreme Court held in *Lorenzo* 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 and consequently falls outside subsection (b) of the Rule."[172] But the Court failed to offer guidance, either on the definition of "dissemination" or as to factors it looked to in *Lorenzo* to determine that the scheme liability theory presented should prevail upon a showing of such "dissemination" (i.e.: what is "dissemination," what is a "scheme,"[173] and why does dissemination count as a scheme?).

The closest thing to an answer to these questions was a passing and fact-dependent comment. The Court said that "the petitioner in this case sent false statements directly to investors, invited them to follow up with questions,

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[165] *Id.*

[166] *Id.* at 84 ("Take *Central Bank*, where we held that Rule 10b-5's private right of action does not permit suits against secondary violators") (citing Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 177 (1994)).

[167] *See id.* at 83–84 (distinguishing *Cent. Bank*, 511 U.S. at 176–77). In *Central Bank* the Court held appellant indenture trustee for bond issuances not liable to appellee purchaser of such bonds after non-party bond issuer's default because Congress would have included "aiding and abetting" language in the statute if it had intended to create such liability; noting also that this holding extends to all "secondary actors in the securities markets" including "a lawyer, accountant, or bank." 511 U.S. at 176–77.

[168] *See Lorenzo*, 587 U.S. at 84 ("the Commission, unlike private parties, need not show reliance in its enforcement actions").

[169] *See id.*

[170] *See id.* (citing Stoneridge Inv. Partners, LLC v. Sci-Atlanta, 552 U.S. 148, 159 (2008)). *Stoneridge* had held that defendants in a securities fraud suit are not liable when plaintiff "cannot show reliance upon any of respondents' actions except in an indirect chain that we find too remote for liability." *Stoneridge*, 552 U.S. at 159.

[171] *Lorenzo*, 587 U.S. at 83.

[172] *Id.* at 78.

[173] It seems axiomatic that the Court did not really mean to define "scheme" as any "plan," but the *Lorenzo* decision does not explain what the differentiator(s) would be.

and did so in his capacity as vice president of an investment banking company."[174] Other than this, much of the Court's logic in finding dissemination to be violative of the scheme liability provisions had simply to do with the broad wording of the Rule.[175] But the Court itself undercut this logic without further explanation by giving an example of dissemination which it said *would not* count as scheme liability: it said liability for "actors tangentially involved in dissemination" would not be viable but made little indication either as to why this is so or as to what constitutes "tangential involvement."[176] Instead, it said only that liability in such cases would be "inappropriate."[177] This means that practitioners, plaintiffs, and defendants alike are kept in the dark as to whether an intended defendant's conduct truly constitutes "dissemination," as well as if it constitutes the sort of dissemination which rises to the level of 10b-5 scheme liability.

III. ANALYSIS OF THE INTERPLAY BETWEEN THESE DEVELOPMENTS AND ITS EFFECTS ON COMPLAINTS AND DEFENSES

The coincidental nascence of these two developments has broad implications for plaintiffs and defendants alike in securities offering cases. As mentioned above, Rule 10b-5 governs and prohibits a vast array of fraudulent activities, included in which is the more niche range of prohibitions set forth by § 12(a). But the defendant classes of both 10b-5 and § 12(a) have been the subject of debate and tinkering by the courts. With the 2019 expansion of potential defendants under 10b-5 (to include those who until *Lorenzo* would have been exempt from suit since the Rule does not permit claims against secondarily liable actors) coupled with the 2022 loosening of the definition of a "seller" under § 12(a) in the Ninth and Eleventh Circuits, plaintiffs now have a drastically expanded menu of potential defendants from whom to choose when considering a lawsuit.

The major differences between the pleading elements necessary to assert claims under 10b-5 and § 12(a) are blurry at best. The permissive standard for scienter,[178] as well as the *de facto* consideration by courts of reliance and loss causation in § 12(a) claims,[179] mean that the same set of facts could simultaneously support claims under both 10b-5 and § 12(a).[180] This is not a bad thing when litigating against a party directly involved in the fraudulent transaction, but the further removed from the transaction courts expand the

[174] *Lorenzo,* 587 U.S. at 79.
[175] *Id.* at 78; *see also* 17 C.F.R § 240.10b-5.
[176] *Lorenzo*, 587 U.S. at 79.
[177] *Id.*
[178] Which, recall, is diminished in the state of mind of the defendant it requires that plaintiffs show, especially as compared to other iterations of a required showing of intent or wrongful state of mind. *See* discussion *supra* Section II.B.
[179] *See* discussion *supra* Section I.B.
[180] *See, e.g.*, Musick, Peeler & Garrett v. Employers Emps. Ins. of Wausau, 508 U.S. at 288–89; *see also* Pinter v. Dahl, 486 U.S. 622, 627 n.4 (1988).

defendant class the more questionable it becomes that parties should be so severely punished.[181]

The Ninth and Eleventh Circuits, in their 2022 holdings in *Wildes* and *Pino*, made such an expansion under § 12(a) of the '33 Act by holding social media advertisers liable as "sellers" of securities, thereby rejecting in the process the majority view among the Circuits that in order to qualify as a seller one must have "direct and active" contact with the purchaser.[182] This decision to reject the prevailing "direct and active" approach was reached without a limiting principle: neither the Ninth Circuit in *Pino* nor the Eleventh Circuit in its earlier *Wildes* decision which served as the basis for *Pino* explained what would *not* establish a statutory seller relationship under the '33 Act.

The Supreme Court similarly expanded the scope of the defendant class under 10b-5 when it adopted a scheme liability theory in *Lorenzo*. [183] Under this theory, someone who does not make material misstatements or omissions can still be liable when there *are* such misstatements or omissions by virtue of having disseminated them into the markets. But the Court came to this conclusion without explaining what dissemination is or what makes it a "scheme."

What these contemporaneous expansions of the defendant class mean is that, until limits are specified, parties cannot be sure what sorts of contact with potential purchasers will lead to their classification as statutory sellers; and if they are acting on behalf of the issuing party, they cannot be sure that they will not be further liable under 10b-5's scheme liability provisions.

This matters because the Supreme Court in *Pinter* already warned against (and attempted to counteract) overexpansive private enforcement of the securities laws.[184] Under the post-*Pinter* definition of "seller," the line between appropriate and overexpansive enforcement was quite clear: the seller—even if on behalf of the party in current ownership of the security—had to make "direct and active" contact with the purchaser in order to induce the sale; without this relationship the parties were too incidental to each other to give rise to liability. The Ninth and Eleventh Circuits have blurred these lines so much, however, that not only can someone who had neither knowledge of the purchaser nor specific intent to induce their purchase be a "seller," but under the Supreme Court's ruling in *Lorenzo* they can be held liable under 10b-5 as part of a scheme to defraud, as well.

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[181] The onus largely falls on the courts to establish guardrails against overexpansion of the defendant class, just as it has been the courts fueling the expansion. *See infra* Section IV. If courts are overly permissive, and since the same facts which establish a statutory seller relationship can relatively easily also establish participation in a scheme to defraud, there is no reason for plaintiffs to abandon either one of these claims. This is especially true given the different remedies available under § 12(a) and 10b-5. *See* Junker v. Crory, 650 F.2d 1349, 1362 (5th Cir. 1981); Garrison v. Ringgold, No. 19-cv-0244 GPC-MSB, 2020 U.S. Dist. LEXIS 263048, at *13–*14 (S.D. Cal. Nov. 9, 2020).

[182] *See generally* Wildes v. BitConnect Int'l PLC, 25 F.4th 1341, 1345–1346 (11th Cir. 2022); Pino v. Cardone Cap., LLC, 55 F.4th 1253, 1260 (9th Cir. 2022).

[183] *See generally Lorenzo*, 587 U.S. at 71.

[184] *Pinter,* 486 U.S. at 650.

There are reasons for plaintiffs to assert aggressively that this situation ought to be allowed, even under *Pinter*. First, social media is an exceptionally modern[185] phenomenon which perhaps the *Pinter* Court did not foresee the rise of when it limited § 12(a) liability to direct sellers (title-passers), offerors to sell, and solicitors of offers to buy.[186] To the credit of the Eleventh Circuit in *Wildes*, the '33 Act does explicitly mention means of communication in interstate commerce like radio and television;[187] the *Pinter* decision refers to neither of these, apparently not considering the impersonal nature of TV and radio, even as it limited liability to a series of personal relationships. But there is an argument to be made that social media—although a similar method of remote, mass communication—is more personal than either of the older media mentioned by the '33 Act. A poster on social media has a level of control (through such methods as targeted ads,[188] private accounts, blocked accounts, and control over who may be a "follower") over who sees their posts that is unavailable to broadcasters of radio and television. Furthermore, social media posters can very often see either specifically who has viewed their posts[189] or, at the very least, an accurate counting of how many people have viewed them.[190] Radio and television broadcasters are limited to estimations,[191] such as Nielsen ratings, in ascertaining the reach of their broadcasts. Given these differences,

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[185] Courts have recently had ample opportunities to consider social media and securities in high-profile cases involving celebrity endorsements of cryptocoins and companies. *See generally* Press Release, U.S. Securities and Exchange Commission, SEC Charges Kim Kardashian for Unlawfully Touting Crypto Security (Oct. 3, 2022) (on file at https://www.sec.gov/news/press-release/2022-183 [https://perma.cc/T5VN-7E5R]); Elizabeth Napolitano, *Shaquille O'Neal Served FTX Complaint During Broadcast of NBA Playoff Game*, MONEYWATCH (May 25, 2023, 12:47 PM), https://www.cbsnews.com/news/shaq-served-in-ftx-lawsuit-after-he-allegedly-hid-for-months/ [https://perma.cc/439V-JRNC]. These cases have led to the recommendations that paid promoters using social media to market securities (1) disclose the amount of their payment, not just that they were paid; and (2) agree to promote issuing companies rather than individual securities. Felix Salmon, *Why Kim Kardashian Got Fined and Matt Damon Didn't*, AXIOS (Oct. 4, 2022), https://www.axios.com/2022/10/04/kim-kardashian-crypto-fine-matt-damon [https://perma.cc/4DGH-NUZP]. This has also led to social media companies themselves limiting the conditions under which crypto advertisements can be posted to their platforms. *Understanding Crypto Rules on Social Media and How to Win Business Organically*, FIN. MAGNATES (Dec. 4, 2022, 9:14 AM), https://www.financemagnates.com/thought-leadership/understanding-crypto-rules-on-social-media-and-how-to-win-business-organically/ [https://perma.cc/8ZH6-B8MH].

[186] *Pinter,* 486 U.S. at 644–47.

[187] *Wildes*, 25 F.4th at 1345 (citing 15 U.S.C. § 77b(a)(1)).

[188] Nik Froelich, *The Truth in User Privacy and Targeted Ads*, FORBES (Feb. 24, 2022, 8:30 AM), https://www.forbes.com/councils/forbestechcouncil/2022/02/24/the-truth-in-user-privacy-and-targeted-ads/ [https://perma.cc/7J72-ECSY].

[189]*How to Tell Who's Seen Your Instagram Story*, INSTAGRAM, https://help.instagram.com/202055156863605/?cms_platform=iphone-app&helpref=platform_switcher (last visited Jan. 18, 2024) [https://perma.cc/4RW2-HNYU].

[190] About View Counts, X HELP CENTER, https://help.twitter.com/en/using-x/view-counts [https://perma.cc/P47X-2MRZ] (last visited Jan. 18, 2024).

[191] *See Audio Measurement*, NIELSEN, https://www.nielsen.com/solutions/audience-measurement/audio/ [https://perma.cc/8RRS-7WDQ] (last visited Apr. 12, 2025); *Need to Know: What is Panel Data and Why Does it Matter?*, NIELSEN, https://www.nielsen.com/insights/2023/what-is-panel-data-and-why-does-it-matter/ [https://perma.cc/H99R-2QQQ] (last visited Apr. 12, 2025).

future plaintiffs asserting statutory seller cases against social media posters might argue that social media really is more similar to "direct and active" communication than not.

Secondly, the Supreme Court in *Pinter* determined that "Congress' intent [was] that § 12(1) civil liability be *in terrorem*."[192] A legal dictionary from around the time of the release of *Pinter* defines "in terrorem" as "[i]n terror or warning; by way of threat."[193] As such, § 12(a) of the '33 Act was written on the notion that the mere threat of its enforcement would convince sellers and offerors of securities to pause and ensure compliance with its provisions, lest suits be filed against them. Given this, it seems logical that the potential punishments for violation of § 12(a) were meant to be not only uncomfortable, but frightening. Section 12 itself is punishable by rescission of sale or rescissory damages;[194] but given its *in terrorem* purpose it would make sense for courts to expand upon this in cases where the law and facts allow. Rule 10b-5 could present just such a circumstance, given that penalties for its violation can include out-of-pocket and consequential damages.[195] Therefore, plaintiffs could assert that § 12 and 10b-5 should be used together against disseminators/offerors because the dual penalty structure this would create serves well the *in terrorem* nature of § 12.

Finally, recall that—for § 12(a)(2) cases at least—the statute itself offers a reasonable care defense for defendants who, in good faith, did not know that the prospectus or related statements were false or misleading.[196] Section 12(b) of the '33 Act also allows defendants to mitigate the damages assessed against them.[197] Plaintiffs bringing cases against parties included in the expanded defendant class could argue that there is no error in the rulings of the Ninth and Eleventh Circuits because these statutory provisions already exist as backstops for just adjudications against defendants.

Nevertheless, neither the undetermined status of social media in securities promotion nor the *in terrorem* nature of § 12(a) nor the case-specific defenses offered by the statute itself categorically overcome the Supreme Court's clear announcement in *Pinter* that Congress did intend there to be limits to the defendant class in securities fraud cases. As the Court said, "Congress did not intend that [§ 12(a)] impose liability on participants collateral to the offer or sale."[198] This was not a mere platitude: the Court cited to a number of specific examples showing that Congress knows how to draft statutory language so as to expand the scope of liability under private

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[192] *Pinter*, 486 U.S. at 646.
[193] *In terrorem*, BLACK'S LAW DICTIONARY (6th ed. 1990).
[194] *See, e.g.*, Junker v. Crory, 650 F.2d 1349, 1362 (5th Cir. 1981); *see also Pinter,* 486 U.S. at 627 n.4.
[195] *See, e.g.*, Garrison v. Ringgold, No. 19-cv-0244 GPC-MSB, 2020 U.S. Dist. LEXIS 263048, at *13–*14 (S.D. Cal. Nov. 9, 2020); *see also Pinter*, 486 U.S. at 627 n.4.
[196] 15 U.S.C. § 77l(a)(2) (defense available for defendants who can "sustain the burden of proof that [they] did not know, and in the exercise of reasonable care could not have known, of [the] untruth or omission").
[197] 15 U.S.C. § 77l(b) (explaining defenses against "loss causation.").
[198] *Pinter*, 486 U.S. at 650.

rights of action, none of which strategies it employed in § 12(a).[199] But the Ninth and Eleventh Circuits—by not limiting their 2022 opinions to the unique circumstances of social media or in any other way expounding upon the scope of their holdings—imply a defendant class with no apparent delineation between "liable" and "collateral" and thereby fail to adhere to the Supreme Court's admonition in *Pinter*.

IV. PROPOSALS FOR CLARIFICATION REGARDING THE NEW RULINGS

A number of concrete steps can be taken to reconcile this issue and clarify the defendant class in both statutory seller and scheme liability cases. This section will begin by recommending steps Circuit Courts can take to ameliorate the confusion surrounding these developments and discussing one sort of case which could be a vehicle for such action. Secondly, this section will discuss action the SEC could take to solve the problems or assist courts in doing so.

A. Circuit Court Action

The most immediate action that should be taken to resolve these issues would come at the Circuit Court level. For starters, the Ninth and Eleventh Circuits can clarify whether *Wildes* and *Pino* are meant as categorical rejections of the notion that a "solicitor" must have directly targeted the plaintiff, or if those rulings were an exception to the prevailing "direct and active" approach made in light of the unique middle-ground between personal and impersonal communication represented by social media. The Ninth and Eleventh Circuits should be wary of opening floodgates of tangential liability against parties not foreseen by the *Pinter* decision; the *Wildes* and *Pino* decisions should be put into the context of a construction of § 12(a) liability which has as its default a requirement for a direct and active relationship between seller and buyer, but which allows for exceptions in extenuating circumstances. This is a standard which all Circuits hearing such cases should adopt, as it adheres to *Pinter*'s desire not to hold "collateral"[200] parties liable, but at the same time accounts for the post-*Pinter* advent of social media and the quasi-personalized communications it facilitates.[201]

If, however, the Ninth and Eleventh Circuits do consider *Wildes* and *Pino* to be categorical rejections of the "direct and active" approach, these Circuits should inform practitioners and parties alike of what—if anything—they view as the bounds of a legitimate § 12(a) defendant class. This is absolutely necessary, both to respect the directive of the Supreme Court in

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[199] *Id.* (citing *Touche Ross & Co. v. Redington*, 442 U.S. 560, 572 (1979) (citing inter alia *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 734 (1975) (noting the language at 15 U.S.C. § 78p(b), which allows any security holder to sue derivatively on behalf of the issuer any "beneficial owner, director, or officer" of the issuer who engages in insider trading of the issuer's securities, despite the derivative plaintiff being neither a purchaser nor a seller in the challenged transaction))).

[200] *Id.*

[201] *See* discussion *supra* Section III (discussing social media in comparison to older forms of mass media such as radio and television); *supra* notes 185, 189–90.

Pinter[202] and to forfend the filing of frivolous lawsuits against defendants truly unrelated to their plaintiffs.

As for scheme liability, future districts and Circuits confronted with post-*Lorenzo* cases should strongly consider adopting concrete, workable factors of the sort of dissemination which suffices to establish scheme liability. This could come by answering two questions: (1) what is "dissemination" under *Lorenzo*; and (2) what about it proves a "scheme?" The Supreme Court's passing comment in *Lorenzo* can serve as a basis for answers to these questions. In that statement, the Court found Lorenzo liable because he "sent false statements directly to investors, invited them to follow up with questions, and did so in his capacity as vice president of an investment banking company."[203]

With this framework, courts could establish a four-part test for violative dissemination under *Lorenzo*. As a threshold, (1) "dissemination" would be constituted by the act of sending materials to recipients.[204] Whether this "dissemination" demonstrates a "scheme" could, in turn, be shown by (2) evidence that the statements disseminated were false or misleading; (3) evidence of the disseminator's ongoing connection with the offering that is the subject of the statements, including via the statements' listing of the disseminator—rather than the maker—as a recipient's point of contact for follow-up inquiries or offers to buy; and (4) the disseminator's position of high rank within the organization on whose behalf the maker[205] of the statements acted, rather than a contractual advertising relationship. These four would all be strong candidates for factors that courts would do well to bring out of the bounds of *Lorenzo's* facts and declare indicia of violative dissemination.

One recent example of a case whose type would make a prime vehicle for answering the questions posed by *Wildes*, *Pino*, and *Lorenzo*[206] was *In re FirstEnergy Corp. Securities Litigation*. The case involved a suit between a

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[202] *Pinter,* 486 U.S. at 650.
[203] Lorenzo v. SEC, 587 U.S. 71, 79 (2019).
[204] Reasonable courts, similarly to the debate over the "direct and active" requirement for § 12(a) liability, might disagree as to whether "dissemination" *requires* directly sending false or misleading information to recipients, or if merely releasing them into the markets suffices. Unlike for the issue of considering someone with no relation to a purchaser to be a "seller," it might well make sense to construe "dissemination" more liberally and not require that defendants "directly" send information to plaintiffs, although this would certainly suffice. Under this construction, perhaps the *Lorenzo* opinion could be read as asserting that the defendant must be "directly" responsible for the false or misleading materials being released into the markets, whether such release came in the form of direct contact with the recipient or otherwise.
[205] Pertinent to (4), although beyond the scope of this Note, it is worth at least mentioning that Circuits happen to already be split on the issue of whether a "maker" can be considered part of a scheme without any further involvement. *Compare* Alphabet Secs. Litig., R.I. v. Alphabet, Inc., 1 F.4th 687 (9th Cir. 2021) *and* SEC v. Earle, No. 3:22-cv-01914-H-MDD, 2023 U.S. Dist. LEXIS 63705 (S.D. Cal. Apr. 20, 2023) *with* SEC v. Rio Tinto PLC, 41 F.4th 47 (2nd Cir. 2022). Thus, while Lorenzo was undoubtedly a disseminator, the status of players such as his boss—who was the "maker" of the statements Lorenzo disseminated (according to *Janus*' definition)—under a scheme liability theory is uncertain.
[206] Need a defendant have "direct and active" contact with a purchaser in order to qualify as a "seller" under *Pinter's* second prong and § 12? What is "dissemination" under *Lorenzo* and what about it proves a "scheme?"

shareholder class[207] and an Ohio electrical utility.[208] The class alleged both scheme and misstatement liability under all subdivisions of 10b-5, as well as solicitor liability claims under § 12(a)(2).[209] Of particular interest was the court's consideration of motions to dismiss filed by one defendant, Jones, who was CEO of FirstEnergy during the relevant period. The court rejected Jones' 10b-5(b) motion to dismiss because of certain statements he made[210] and certified in SEC filings;[211] it rejected his scheme liability motion to dismiss because of the same SEC filings, as well as meetings and contacts he had with other members of the alleged scheme during the relevant period;[212] and it rejected his statutory seller motion to dismiss because he had both signed the statements and "actively and intentionally" communicated with investors.[213]

In permitting the proceedings to advance against Jones, the district court made a number of statements directly relevant to the recent case law developments at issue in this Note. First, as to the question of what proves a "scheme" under 10b-5—and why "dissemination" suffices—the district court noted Jones' direct interpersonal connections with other members of the scheme as the factor that brought his conduct out of the purview of 10b-5(b) alone and into the concurrent jurisdiction of the scheme liability provisions.[214] These connections, combined with Jones' position as CEO of FirstEnergy, would satisfy proposed factors (3) and (4) above. The court also explicitly named the scheme, saying that "[t]he scheme as alleged by Plaintiffs was 'to corrupt legislators and regulators' in order to 'generate billions of dollars in illicit proceeds for the Company.'"[215] Thus the district court in this case seems to assert that an *unlawful* plan constitutes a "scheme;" the illegality requirement was notably absent from the *Lorenzo* decision's discussion of what qualifies as a "scheme," and fits comfortably into factor (2) above.

The district court found that dissemination had occurred within the context of two rebuttable presumptions under 10b-5's reliance element: the

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[207] *In re* First Energy Corp. Sec. Litig., No. 2:20-cv-3785, 2023 U.S. Dist. LEXIS 56035, at *76 (S.D. Ohio Mar. 30, 2023).
[208] *Id.* at *2–*3. The District Court opinion certifying the class has been granted appeal by the Sixth Circuit. *In re* First Energy Corp. Sec. Litig., No. 2:20-cv-3785, 2023 U.S. Dist. LEXIS 56035 (S.D. Ohio Mar. 30, 2023), *app. granted*, *sub nom. In re* First Energy Corp., 2023 U.S. App. LEXIS 30672, at *7–*8 (6th Cir. Nov. 16, 2023) (Nos. 23-0303/0304/0305/0306/0307). There has not yet been an appeal filed or granted for the substantive decision discussed in this Note.
[209] *In re First Energy Corp.*, U.S. Dist. LEXIS 56035 at *7, *18; *In re* First Energy Corp. Sec. Litig., Nos. 2:20-cv-3785; 2:20-cv-4287, 2022 U.S. Dist. LEXIS 39308, at *13–*14, *100 (S.D. Ohio Mar. 7, 2022).
[210] Such as on investor calls where he "misrepresented the nature of FirstEnergy's pursuit of legislative or regulatory solutions." *In re First Energy Corp.*, U.S. Dist. LEXIS 39308, at *30.
[211] *Id.* at *30–*31.
[212] *Id.* at *40–*41.
[213] *Id.* at *100–*101.
[214] *Id.* at *40–*41.
[215] *Id.* at *34–*35 (citing an electronic filing).

"fraud on the market" presumption and the *Affiliated Ute* presumption.[216] Specifically, it found "dissemination" because defendants' false and misleading statements had been relied on by purchasers, meaning that those statements were necessarily widely distributed. Because of this, the facts of *In re FirstEnergy* would satisfy factor (1) above.

The applicability of the district court's discussion of the § 12(a) issue is less clear, since the court does not detail how Jones "actively and intentionally"[217] solicited investors' purchases. It is not clear if Jones used social media, for example. What is clear, however, is that other forms of impersonal contact with investors, such as signing registration statements,[218] were not found to be sufficient to establish solicitor liability under § 12(a)(2).[219]

Thus, the opinion in *In re FirstEnergy* takes some helpful steps towards clearing up the questions surrounding Rule 10b-5 and § 12(a). Regarding 10b-5, the district court seems to have come to the Supreme Court's aid in solidifying the definition of violative dissemination: personally releasing misleading statements into the market on behalf of or in concert with other individuals with whom the disseminator has a direct relationship and who are—along with him—all parts of a group undertaking some unlawful action. Regarding § 12(a), the district court effectively opted for the classic "direct and active" approach to solicitor liability, cutting against the trend from the Ninth and Eleventh Circuits.

If a case such as *In re FirstEnergy* were ever heard on appeal, the panel deciding the matter should hold similarly to the *In re FirstEnergy* court. For the 10b-5 issue, the district court did right in attempting to define a "scheme" and the sort of dissemination which constitutes a violation of 10b-5's scheme liability provisions. Circuit Courts should continue similarly in order to clarify the implications of the Supreme Court's opinion in *Lorenzo*, which unfortunately did not tackle these issues head-on. For the § 12(a) issue, the Circuits should maintain the "direct and active" approach in order to follow the Court's guidance in *Pinter*, seeking to limit the class of possible defendants. Some expansion of what qualifies as "direct and active" might be appropriate to account for new forms of mass communications such as social media, but the fundamental requirement should not be thrown out entirely.

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[216] First, the "fraud-on-the-market theory" is that "the market factored [the disseminated misleading] material information into its pricing of FirstEnergy securities, and Plaintiffs purchased securities under that inflated pricing." Second, *Affiliated Ute* is a presumption that if material facts were omitted from the markets and "a reasonable investor might have considered them important in the making of this decision [to purchase or sell]" then plaintiffs need not show reliance on any particular materials disseminated by defendant; the lack of material information in the public record, which deficiency the defendant unlawfully caused, suffices. *Id.* at *71–*74 (citing *Basic Inc. v. Levinson*, 485 U.S. 224 (1988); *Affiliated Ute Citizens of Utah v.* United States., 406 U.S. 128 (1972)); *see also* discussion *supra* Section II.B (discussing elements of a 10b-5 claim).

[217] *In re* First Energy Corp., 2022 U.S. Dist. LEXIS 39308, at *101.

[218] *Id.* at *100.

[219] *Id.*

The added benefit of more Circuits hearing cases akin to *In re FirstEnergy*, as such cases present themselves, is that more Circuits weighing in to the debates surrounding these issues increases the chances of the Supreme Court granting certiorari on them. Alternatively, although perhaps less likely, as more Circuits release decisions on these matters a consensus might emerge, thus negating the need for Supreme Court action. Either of these outcomes would be beneficial to parties and counsel who seek to understand the nature of the litigation they are or might someday be involved in.

B. SEC Guidance

Finally, the SEC could take actions pertaining to these issues. First, it could go so far as to amend 10b-5 to attempt to solve the questions arising under the scheme liability theories approved by the Court in *Lorenzo*. For example, the Agency could insert a "Provided" clause after the current text of the rule in which it defines or clarifies the definition of the word "scheme" in 10b-5(a). Such addition could very closely mirror what could be released as an interpretation (below)—to the effect that probably only one or the other is necessary—but an amendment to the Rule, with force-of-law, might signal more strongly to industry and courts how fervently the SEC stands by its interpretation. The Agency's decision to amend the Rule in this or similar ways, as an agency rulemaking authorized by the '34 Act, would be subject to judicial review under the standard announced by the Supreme Court in *Loper Bright Enterprises v. Raimondo*. This precedent effectively directs lower courts to review agency findings of law (which the SEC's 10b-5 interpretation of § 10(b) is) de novo, but offers *Skidmore* respect as an analytical tool available to courts in conducting that review.[220]

Alternatively,[221] the SEC could release specialized guidance meant to address and alleviate the confusion surrounding these issues. This would help practitioners holistically understand the legal developments behind these issues and give the courts guidance on how to approach these cases. This would be a departure from form for the SEC: the Agency has not promulgated an "interpretive release" since 2019,[222] or an "interpretive rule"

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[220] Loper Bright Enters. v. Raimondo, 603 U.S. 369, 395, 402 (2024) ("the role of the reviewing court under the APA is, as always, to independently interpret the statute[;]" "the court will go about its task with the agency's 'body of experience and informed judgment,' among other information, at its disposal") (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

[221] And potentially preferably to the new Trump administration and the SEC under Chairman Paul Atkins; the administration has indicated it will not rely on SEC rulemaking to the extent its predecessor administration did. *See, e.g.*, Brad Goldberg et al., *The Changing Tides of the SEC Under the Second Trump Administration*, HARV. L. SCH. F. CORP. GOVERNANCE (Mar. 3, 2025), https://corpgov.law.harvard.edu/2025/03/03/the-changing-tides-of-the-sec-under-the-second-trump-administration/.

[222] *SEC Interpretive Releases Archive: 2019*, U.S. SECURITIES AND EXCHANGE COMMISSION, https://www.sec.gov/rules/interp/interparchive/interparch2019.shtml (last visited Apr. 3, 2024); *see generally* Securities and Exchange Commission, *Rulemaking Activity*, Interpretation Regarding Standard of Conduct for Investment Advisors, 84 Fed. Reg. 33669 (Jul. 12, 2019) (codified at 17 C.F.R. part 276). https://www.sec.gov/rules-

since 2020.[223]And while a "Staff Legal Bulletin" was released in February, 2025, the prior publication of such a document was in 2021.[224] Nevertheless, given both the SEC's authority to oversee the country's securities markets and the widespread confusion among courts pertaining to both of the principal statutes by which the SEC has such authority, an understanding of its position on these matters would likely be welcomed by industry and many courts.

The SEC could release guidance explaining indicia which, if identified during an investigation, will likely lead it to file scheme liability complaints. This would not be binding in private actions, but would put issuers and sellers on notice as to what the Agency—which has the most expertise in the securities field and wrote the Rule—believes is and is not violative of the scheme liability provisions. Moreover, the Agency could draft such guidance to inform purchasers of actions available to them if their sellers engage in wrongful conduct. While the SEC in recent years has rarely released such guidance *sua sponte*,[225] it could do so here because the guidance would interpret one of the SEC's own Rules, and would benefit from *Auer* deference.[226]

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regulations/rulemaking-activity?search=&rulemaking_status=178891&division_office=All&year=All (last visited Apr. 3, 2024).

[223]*Rulemaking Activity*, U.S. SECURITIES AND EXCHANGE COMMISSION, https://www.sec.gov/rules/rulemakingactivity?aId=&search=&rulemaking_status=178891&division_office=All&year=All (last visited Apr. 3, 2024). *See generally* Commission Guidance on Management's Discussion and Analysis of Financial Condition and Results of Operations, 85 Fed. Reg. 10568 (Feb. 25, 2020). https://www.sec.gov/rules/rulemaking-activity?aId=&search=&rulemaking_status=178891&division_office=All&year=All (last visited Apr. 3, 2024).

[224]*Staff Legal Bulletins*, U.S. SECURITIES AND EXCHANGE COMMISSION, https://www.sec.gov/regulation/staff-interpretations/legal-bulletins [https://perma.cc/C7HK-B2ZK] (last visited Feb. 25, 2025).

[225] *See id.*; Commission Interpretation Regarding Standard of Conduct for Investment Advisers, 84 Fed. Reg. 33669 (Jul. 12, 2019); *see also* Commission Guidance on Management's Discussion and Analysis of Financial Condition and Results of Operations, 85 Fed. Reg. 10568 (Feb. 25, 2020) (to be codified at 17 C.F.R. pt. 211(A), 231, 214).

[226] *Auer* deference is credence lent by the courts to agencies engaged in the act of interpreting an ambiguity which has arisen under one of that agency's own rules. Christopher J. Walker, *What* Kisor *Means for the Future of* Auer *Deference: The New Five-Step* Kisor *Deference Doctrine*, YALE J. REGUL. (June 26, 2019), https://www.yalejreg.com/nc/what-kisor-means-for-the-future-of-auer-deference-the-new-five-step-kisor-deference-doctrine/ [https://perma.cc/FG96-YLLZLL5F-AMTV65MP-XJTZ].(June 26, 2019). Five limits to this standard of deference were clarified in the 2019 case of *Kisor v. Wilkie*. U.S. 558, 563 (2019) ("we reinforce [*Auer's*] limits"). These are: (1) the rule remains ambiguous to courts, even after applying tools of interpretation; (2) the agency's proposed interpretation is reasonable; and the agency's interpretation of its rule should be "controlling," which is established by (3) the agency issuing the interpretation officially, rather than through *ad hoc* channels; (4) the agency basing its interpretation on its "substantive expertise;" and (5) the agency persuasively presenting its argument as a correct interpretation of the rule at issue, rather than merely as a way to enhance its own enforcement activity and litigation posture. *See Kisor* , 588 U.S. at 558–562 (case syllabus summarizing the five limits to *Auer* deference). Nonetheless, the SEC's interpretation of the Rule would likely prevail under *Auer* if challenged in court so long as what it includes in its interpretation of the Rule is neither "plainly erroneous or inconsistent with the regulation" nor violative of *Kisor*'s limits. *Kisor*, 588 U.S. at 603–04 (quoting Kisor v. Shulkin, 869

For the § 12(a) issue, the SEC should explain permitted and forbidden uses of social media in securities offerings. Such an explanation could come as a non-binding interpretation. One source has commented on perceived similarities between social media communications regarding securities and "general solicitation" or "gun-jumping" under SEC Rule 506 (17 CFR § 230.506),[227] so addressing concerns such as those could be a starting point for the SEC's analysis. In fact, the SEC has released interpretive guidance through the Federal Register which is facially germane to the subject, although it came in the form of the now-outdated 2000 Interpretation and Solicitation of Comment known as "Use of Electronic Media."[228] Since then, the most recent other internet-related guidance actions that the SEC has taken include a 2020 package of rule reforms intended to modernize the regulations governing investment advisor marketing, and a 2024 package of amendments governing investment advisers operating exclusively through the internet.[229]

Despite its age, one section within Use of Electronic Media shows promise as a launching-pad for SEC clarification on the issue. In § II.D.7, entitled "Internet Discussion Forums," the SEC noted that there were "web sites [sic] contain[ing] 'bulletin boards,' cyberspace message centers where comments concerning issuers, securities or industries can be posted and saved for viewing over an extended period of time."[230] This seems analogous to modern social media: web platforms where users can make posts—albeit no longer limited to comments—which can be saved to the platform and viewed essentially ad infinitum. The SEC concluded § II.D.7 by admitting that it needed more information on the issue of Internet Discussion Forums and by asking for interested parties to submit comments.[231]

F.3d 1360, 1367 (2017)). Not being "plainly erroneous or inconsistent with the regulation" is the principal condition set forth by *Auer* itself. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)). The future status of the *Auer*-*Kisor* doctrine given the undercurrents of administrative law demonstrated in the *Loper Bright* decision is unclear; there is no currently-docketed challenge to the doctrine, but four Justices concurring in *Kisor* described it as a "stay of execution" for *Auer*. *Kisor*, 588 U.S. at 592 (Gorsuch, J., joined by Thomas, Kavanaugh, and Alito, J., concurring).

[227] *See* Jay G. Baris & Bradley Berman, *The Guide to Social Media and the Securities Laws,* MORRISON & FOERSTER (Aug. 2017), https://www.jdsupra.com/legalnews/the-guide-to-social-media-and-the-85652/ [https://perma.cc/7TRR-DMS5]. Both "general solicitation" and "gun-jumping" refer to unlawfully advertising securities before they have been properly registered with the Commission*. See* Latham & Watkins Capital Markets Practice Group, *"You Talkin' to Me?" FAQs About the SEC's New General Solicitation, Regulation D and Bad Actor Rules,* (July. 25, 2013) https://www.lw.com/admin/upload/SiteAttachments/you%20talkin%20to%20me%20general-solicitation-reg-d-faq.pdf[https://perma.cc/27KC-6QZ4]; LEGAL INFORMATION INSTITUTE, *gun jumping*, https://www.law.cornell.edu/wex/gun_jumping [https://perma.cc/55J7-C5AH] (last accessed May. 6, 2025).

[228] Use of Electronic Media, 65 Fed. Reg. 25,843 (May 4, 2000) (codified at 17 C.F.R. parts 231, 241, 271).

[229] Press Release, U.S. Securities and Exchange Commission, SEC Adopts Modernized Marketing Rule for Investment Advisers (Dec. 22, 2020) (on file at https://www.sec.gov/news/press-release/2020-334 [https://perma.cc/ETB2-X9XH]).

[230] Use of Electronic Media, 65 Fed. Reg. at 25,855.

[231] *Id.*

In truth, the Commission was not completely lost in the wilderness, even in 2000, when Use of Electronic Media was published. Then, probably the leading authority on Internet Discussion Forums in securities transactions with which the SEC would have been familiar was its own 1996 No-Action Letter to Real Goods Trading Corporation ("RGTC"). In this letter, the SEC Divisions of Corporation Finance and Investment Management agreed not to recommend an enforcement action against a company which sought permission to publish contact information for parties interested in trading in its securities, which (to increase liquidity and avoid regulatory fees) it wanted to post to an electronic bulletin board without selling through broker-dealers or registering as an exchange, broker-dealer, or investment adviser.[232] The Divisions determined that this course of business would not violate the securities laws, subject to six conditions.[233] Given the similarities between social media and older "bulletin boards," as well as the significant and presumably permanent role social media now plays in securities transactions as a mode of advertising, the SEC could begin clarifying its position on the use of social media by picking up where it left off in 1996 and 2000.[234]

V. CONCLUSION

For many years Circuit Courts agreed that in order to be a statutory seller of a security, an offeror or solicitor had to have directly communicated with the purchaser. In 2022, however, two Circuit Courts—one under each subdivision of § 12(a) of the '33 Act—rejected this approach and held that parties whose only contact with purchaser-plaintiffs had been social media posts could be liable as statutory sellers. Only a few years prior to this split, the Supreme Court similarly expanded a securities law defendant class, in that instance under Rule 10b-5 of the '34 Act. The Court did so by finding that "dissemination" of false or misleading statements is a primary violation of 10b-5's "scheme liability" provisions, rather than a secondary violation.

What this means for issuers of securities and investors is that there is now a broadened defendant class, every member of which can be held liable

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[232] Harv. L. Rev., *RECENT AGENCY ACTION, Securities Law--SEC Allows Internet-Based Trading of Securities--Real Goods Trading Corp., SEC No-Action Letter, [Current Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,226, at 77,131 (June 24, 1996)*, 110 HARV. L. REV. 959, 960–61 (1997).

[233] The conditions were (1) notices explaining the system would be on-screen or available to users; (2) RGTC would retain '34 Act § 12 registrant status, or would make public disclosures in compliance with '34 Act § 13(a); (3) RGTC would keep records of transactions occurring via the system; (4) RGTC would advertise compliantly; (5) neither RGTC nor its affiliates would use the bulletin board to buy or sell securities non-compliantly; and (6) RGTC and its affiliates would comply with certain compensation-based restrictions, as listed in the letter. Real Goods Trading Corporation, SEC Staff No-Action Letter, [1996–1997 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,226 (June 24, 1996).

[234] What to say in such guidance would ultimately be up to the SEC, but at first glance a current security owner who posts their contact information online hoping someone will attempt to initiate a sale from them seems like a "solicitor of an offer to buy." An issuer doing likewise could likely be treated the same way; the only material difference between the scenarios is that, in the latter, the issuer is releasing a new security into the market whereas the former would be an aftermarket transaction.

as both a "seller" and a member of a "scheme" for release of misinformation into the marketplace. As a pro-investor matter of enforcement there are reasons to support this dual liability. First, social media is a modern phenomenon and its place in statutes written almost a century ago is as yet untested. Second, the Court has noted that § 12(a) is meant as an *in terrorem* diversion away from fraudulent activity, and increased liability—even if from another statute—serves this purpose well.

But limits to the scope of the defendant class are not clear under either the new rulings from the Ninth and Eleventh Circuits in the § 12(a) issue or from the Supreme Court in the 10b-5 issue. This presents a potential conflict with the Court's holding in *Pinter*, where, relying on its understanding of the congressional intent behind the securities laws, it determined that "collateral" participants to a transaction in securities could not be held liable for damages arising from that reaction.

These matters could be advanced towards resolution by Circuit Courts working to clarify the issues by further explaining the role of social media in securities offerings and making conscious efforts to define "dissemination" and the factors that define a "scheme." Future cases similar in their claims to those presented by *In re FirstEnergy* in the Southern District of Ohio would make ideal vehicles for these legal developments. To assist courts in these technical considerations and give direction to practitioners while the courts are working, the SEC could amend 10b-5 so that the definitional issues left open by the Supreme Court in *Lorenzo* are resolved by rule. Otherwise, the Agency could release interpretive guidance in regards to conduct which will prompt *it* to bring scheme liability enforcement actions, and do likewise regarding the use of social media in securities transactions.