UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Rel. No. 9307 / March 30, 2012

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 66695 / March 30, 2012

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 3387 / March 30, 2012

INVESTMENT COMPANY ACT OF 1940
Rel. No. 30023 / March 30, 2012

Admin. Proc. File No. 14081

In the Matter of JOHN P. FLANNERY and JAMES D. HOPKINS	ORDER DENYING MOTIONS FOR SUMMARY AFFIRMANCE, GRANTING PETITION FOR REVIEW, AND SCHEDULING BRIEFS

On October 28, 2011, an administrative law judge issued an initial decision dismissing administrative proceedings against John P. Flannery, formerly Fixed Income Chief Investment Officer for the Americas at State Street Global Advisors (a division of State Street Bank and Trust Company ("State Street")), and James D. Hopkins, formerly Vice President and head of North American Product Engineering of State Street (collectively, "Respondents"). On November 21, 2011, the Commission's Division of Enforcement filed a petition for review of the law judge's decision. On December 9, 2011, and December 12, 2011, Flannery and Hopkins respectively moved for summary affirmance by the Commission of the law judge's decision. The Division opposes the Respondents' motions. We have determined to deny Respondents' motions, grant the Division's petition for review, and establish a briefing schedule for this review proceeding.

After eleven days of hearings, accompanied by the submission of approximately 500 exhibits, the law judge issued a fifty-eight page decision finding that the Respondents did not violate the antifraud provisions of the securities laws[1] because they did not make misleading or inadequate disclosure regarding the portfolio holdings of an unregistered collective trust fund, the Limited Duration Bond Fund ("Fund"), in certain letters to, and other communications with, Fund investors. In reaching her determination, the law judge concluded, in a case of first impression in administrative proceedings, that the construction of the words "to make" in Securities Exchange Act Rule 10b-5(b)[2] by the U.S. Supreme Court in *Janus Capital Group, Inc. v. First Derivative Traders – i.e.*, that to be liable for an untrue statement or misleading omission, a defendant must have "ultimate authority over the statement, including its content and whether and how to communicate it"[3] – also applies to fraud claims brought by the Division pursuant to Securities Act Section 17(a) and Rule 10b-5(a) and (c). According to the law judge, "the *Janus* test [is] the appropriate standard to apply in evaluating the extent of Respondents' conduct. Therefore, with respect to allegations involving documentary evidence, the Division must establish that Respondent[s] had ultimate authority and control over such documents." The law judge further concluded that Fund investors were sophisticated institutional investors and she considered that factor when evaluating the materiality element of the Division's allegations of fraud.

Flannery urges us to summarily affirm the law judge's decision because she found that the letters at issue contained no materially misleading misstatements or omissions, and Flannery did not act intentionally, recklessly, or negligently. Flannery further notes that the law judge found him to be credible and honest. Although Flannery contends that the law judge also correctly determined that, under *Janus*, he did not "make" the statements at issue in two letters, and that the law judge properly considered the sophistication of Fund investors, Flannery argues that the Commission need not consider these issues because of the other, independent grounds that support dismissal of the proceedings against him.

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[1] The Order Instituting Proceedings issued by the Commission on September 30, 2010, alleged that the Respondents violated Section 17(a) of the Securities Act of 1933 (15 U.S.C. § 77q(a)), Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)), and Exchange Act Rule 10b-5 (17 C.F.R. § 240.10b-5).

[2] Rule 10b-5(b) states that it shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, "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 light of the circumstances under which they were made, not misleading."

[3] 131 S. Ct. 2296, 2302 (2011).

Hopkins urges us to summarily affirm the law judge's decision because: the law judge's application of *Janus* is moot in light of her determination that none of the statements and omissions attributed to Hopkins were materially untrue or misleading; the law judge considered other factors in addition to investor sophistication and therefore investor sophistication was not solely dispositive of any issue; and the Division failed to prove that Hopkins had a culpable state of mind. Hopkins argues that, even if the law judge erred in applying *Janus* and considering the sophistication of Fund investors, summary affirmance is appropriate because the law judge rejected the Division's evidence on essential elements of the Division's case.

The Division opposes summary affirmance on the grounds that the law judge erred in applying *Janus* to this proceeding and failed to properly consider the Division's "scheme" and "course of conduct" claims against both Respondents. The Division also contends that the law judge improperly considered the sophistication of Fund investors in determining whether the alleged misrepresentations or omissions were material. The Division further claims that the law judge erred by making factual findings contrary to the record.

Commission Rule of Practice 411(e) governs our review of motions for summary affirmance.[4] In pertinent part, that rule provides that "[t]he Commission may grant summary affirmance if it finds that no issue raised in the initial decision warrants consideration by the Commission of further oral or written argument." The rule further provides that we "will decline to grant summary affirmance upon a reasonable showing that . . . the decision embodies an exercise of discretion or decision of law or policy that is important and that the Commission should review." We have previously noted that "[s]ummary affirmance is rare, given that generally we have an interest in articulating our views on important matters of public interest and the parties have a right to full consideration of those matters."[5] Summary affirmance is appropriate when it is clear that "submission of briefs by the parties will not benefit us in reaching a decision."[6]

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[4] 17 C.F.R. § 201.411(e).

[5] *Theodore W. Urban*, Order Denying Motion for Summary Affirmance, Securities Exchange Act Rel. No. 63456 (Dec. 7, 2010), 99 SEC Docket 35517, 35519 (*citing Richard Cannistraro*, 53 S.E.C. 388, 389 n.3 (1998)); *Salvatore F. Sodano,* Order Denying Motion for Summary Affirmance, Exchange Act Rel. No. 56961 (Dec. 13, 2007), 92 SEC Docket 469, 471; *see also Terry T. Steen*, 52 S.E.C. 1337, 1338 (1997) (denying summary affirmance and noting that such action is appropriate only where there are "compelling reasons").

[6] *Cannistraro*, 53 S.E.C. at 389 n.3.

Based on our own preliminary review of the record, and given the important matters of public interest this case presents, summary affirmance does not appear appropriate here. The proceeding raises important legal and policy issues by presenting us with a case of first impression regarding the applicability of the Supreme Court's holding in *Janus* to claims other than those brought pursuant to Exchange Act Rule 10b-5(b). The proceeding also raises the issue of whether investor sophistication is relevant to an analysis of liability under the antifraud provisions of the federal securities laws in a Commission enforcement proceeding. Additionally, we note that, as a general matter, Commission review of the findings and conclusions of an initial decision is conducted *de novo*,[7] and that an extensive record was developed below, encompassing eleven days of hearings, the submission of approximately 500 exhibits, and resulting in a lengthy decision by the law judge.

Under the circumstances, it appears appropriate to consider the record and the parties' arguments as part of the normal appellate process rather than the abbreviated process involved with a summary affirmance. We will therefore deny the Respondents' motions, though our denial should not be construed as suggesting any view as to the outcome of this case.

Pursuant to Commission Rule of Practice 411, the Division's petition for review of the administrative law judge's initial decision is granted. Pursuant to Rule of Practice 411(d), the Commission has determined on its own initiative to review what sanctions, if any, are appropriate in this matter.

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[7] *Gary M. Kornman*, Exchange Act Rel. No. 59403 (Feb. 13, 2009), 95 SEC Docket 14246, 14260 n.44, *petition denied*, 592 F.3d 173 (D.C. Cir. 2010); *see also* Rule of Practice 411(a), 17 C.F.R. § 201.411(a) ("The Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, an initial decision by a hearing officer and may make any findings or conclusions that in its judgment are proper and on the basis of the record.").

We note further that, although the Commission grants "considerable weight and deference" to credibility determinations of the law judges, we judge those determinations against the weight of the evidence. *Leslie A. Arouh*, Exchange Act Rel. No. 50889 (Dec. 20, 2004), 84 SEC Docket 1880, 1893 n.40; *see also Anthony Tricarico*, 51 S.E.C. 457, 460 (1993). "While we have held that a fact finder's 'explicit credibility' findings are to be accorded 'considerable weight,' we do not accept such findings 'blindly.' Rather, there are circumstances where, in the exercise of our review function, we must disregard explicit determinations of credibility." *Kenneth R. Ward*, 56 S.E.C. 236, 260 (2003) (finding testimonial and documentary evidence contradicted witness's testimony) (internal citations omitted), *aff'd*, 75 F. App'x. 320 (5th Cir. 2003).

Accordingly, IT IS ORDERED that the motions for summary affirmance by Flannery and Hopkins each be and it hereby is, denied; and it is further

ORDERED, pursuant to Rule of Practice 450(a)[8] that a brief in support of the petition for review shall be filed by April 30, 2012. A brief in opposition shall be filed by May 30, 2012, and any reply brief shall be filed by June 13, 2012. Pursuant to rule of Practice 180(c),[9] failure to file a brief in support of the petition may result in dismissal of this review proceeding as to that petitioner.

By the Commission.

Elizabeth M. Murphy
Secretary

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[8] 17 C.F.R. § 201.450(a).

[9] 17 C.F.R. § 201.180(c).