RECENT DEVELOPMENT

A MISSED OPPORTUNITY FOR "WALL STREET REFORM": SECONDARY LIABILITY FOR SECURITIES FRAUD AFTER THE DODD-FRANK ACT

In our complex society the accountant's certificate and the lawyer's opinion can be instruments for inflicting pecuniary loss more potent than the chisel or the crowbar.

—Judge Henry Friendly, *U.S. v. Benjamin*[1]

I. Introduction

On July 21, 2010, President Barack Obama signed into law the largest overhaul of the U.S. financial regulatory system in a generation in the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act" or the "Act").[2] The seminal piece of legislation sought to change the face of regulation in areas such as systemic risk management,[3] financial institution liquidation,[4] and consumer financial products,[5] in part by calling for 243 agency rulemakings.[6] It also created numerous regulatory bodies such as the Financial Stability Oversight Council[7] and the Consumer Financial Protection Bureau.[8] But amid the frenzy of regulatory reform, a more traditional aspect of financial oversight managed to emerge relatively unscathed: the scope of civil liability to private plaintiffs for securities fraud violations.

The previous regulatory overhaul of this magnitude, triggered by the Great Depression, combined the creation of administrative agencies like the

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[1] U.S. v. Benjamin, 328 F.2d 854, 863 (2d Cir. 1964) (discussing secondary actor liability for securities fraud).

[2] *See* President Barack Obama, Remarks by the President on 21st Century Financial Regulatory Reform (June 17, 2009), http://www.whitehouse.gov/the_press_office/Remarks-of-the-President-on-Regulatory-Reform/ (announcing the proposal of "a sweeping overhaul of the financial regulatory system, a transformation on a scale not seen since the reforms that followed the Great Depression").

[3] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 12 U.S.C. and 15 U.S.C.).

[4] *Id.* Tit. 2 (codified at 12 U.S.C. § 5381 (Supp. IV 2010)).

[5] *Id.* Tit. 10 (codified in scattered sections of 12 U.S.C.).

[6] Davis Polk & Wardwell LLP, Summary of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Enacted into Law on July 21, 2010, at i (2010), http://www.davispolk.com/files/Publication/efb94428-9911-4472-b5dd-006e9c6185bb/Presentation/PublicationAttachment/efd835f6-2014-4a48-832d-00aa2a4e3fdd/070910_Financial_Reform_Summary.pdf.

[7] *Id.* § 111 (codified at 12 U.S.C. § 5321 (Supp. IV 2010)).

[8] *Id.* § 1011 (codified at 12 U.S.C. § 549 (Supp. IV 2010)).

FDIC[9] and SEC[10] with the introduction of remedies under the federal securities laws that form the basis of modern securities litigation. Those statutes gave rise to a host of civil liabilities: the Securities Act of 1933 expressly provided rights of action for selling securities without registration or under misleading registration statements;[11] the Securities Exchange Act of 1934 (the "Exchange Act") provided express rights of action for participating in price manipulation, insider trading, and filing false documents;[12] and the Exchange Act created an implied right of action in a catch-all prohibition against securities fraud in § 10(b).[13] Public and private enforcement of these laws, particularly the general antifraud provisions, have since become an important part of the securities regulation regime.

With the Dodd-Frank Act, however, the 111th Congress shied from an expansion of civil securities fraud liability to match its regulatory expansion in its latest attempt to reform Wall Street. Originally, a substantial proportion[14] of securities fraud violations were litigated under a widely accepted theory of aiding and abetting civil liability; however, the Supreme Court eliminated that right of action in its 1994 decision in *Central Bank of Denver v. First Interstate Bank of Denver*.[15] The question of reinstating that secondary liability has come before Congress on multiple occasions in the years since *Central Bank*,[16] and in the recent session Congress again declined the opportunity to restore that liability through the Dodd-Frank Act. While the Act established some civil remedies, including a clarification of the SEC's ability to pursue aiders and abettors, Congress conspicuously declined to provide private litigants with a comparable right of action against those who aid and abet violations of federal securities laws.[17] This Note examines the issue of secondary liability in U.S. securities litigation and how Congress

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[9] Glass-Steagall Banking Act of 1933, Pub. L. No. 73-66, 48 Stat. 162 (1933) (codified as amended in scattered sections of 12 U.S.C.).

[10] Securities Exchange Act of 1934, Pub. L. No. 111-257, 48 Stat. 881 (1934) (codified as amended at 15 U.S.C. §§ 78a–78lll (2006 & Supp. IV 2010)).

[11] Securities Exchange Act of 1933, Pub. L. No. 111-229, 48 Stat. 74 §§ 11, 12 (codified as amended at 15 U.S.C. §§ 77a–77bbbb (2006 & Supp. IV 2010)).

[12] Securities Exchange Act of 1934 §§ 9, 16, 18 (codified at 15 U.S.C. §§ 77i, 77p, 77r (2006)).

[13] An implied right of action under § 10(b) and its implementation in SEC Rule 10b-5 was first acknowledged in *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946), and was recognized by the Supreme Court by 1983 in *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983). *See* Thomas Lee Hazen, Treatise on the Law of Securities Regulation § 12.3[2] (6th ed. 2009).

[14] *See* Robert A. Prentice, *Locating That "Indistinct" and "Virtually Nonexistent" Line Between Primary and Secondary Liability Under Section 10(b)*, 75 N.C. L. Rev. 691, 700 (1997) ("One of the larger branches of the Section 10(b)/Rule 10b-5 judicial oak [of civil liability] came to be represented by aiding and abetting liability.").

[15] 511 U.S. 164 (1994).

[16] *See, e.g.*, Brennan v. Midwestern United Life Ins. Co., 259 F. Supp. 673, 677–78 (N.D. Ind. 1966), *aff'd*, 417 F.2d 147, 154 (7th Cir. 1969).

[17] Instead, the Dodd-Frank Act mandated the Comptroller General to produce a report on the wisdom of reinstating secondary securities fraud liability. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 § 929Z (2010).

should proceed as we enter the post-Dodd-Frank era of financial regulation. Part II of this Note describes the historical development and current state of secondary liability jurisprudence under the U.S. securities laws. Part III addresses the legislative history behind attempts to reinstate aiding and abetting liability for securities fraud, including the most recent attempt to do so in the Dodd-Frank Act. Finally, Part IV argues for congressional action to establish a private right of action against aiders and abettors to securities fraud violations.

II. Secondary Liability Jurisprudence under the Federal Securities Laws

Prior to 1994, aiding and abetting liability was an important avenue through which fraud victims could obtain civil remedies for securities law violations. Courts began to acknowledge aiding and abetting liability for securities fraud shortly after the passing of the Securities and Exchange Acts, the first such case arising in 1939 under § 17(a) of the Securities Act.[18] Aiding and abetting liability under the § 10(b) catch-all antifraud provision of the Exchange Act followed in *Brennan v. Midwestern United Life Ins. Co.*,[19] and it had spread to all the circuits before the Supreme Court considered the *Central Bank* case.[20] Those courts explicitly borrowed the aiding and abetting theory of liability from the criminal and tort law traditions.[21] The federal district court in *SEC v. Timetrust* drew on an analogy to criminal law to permit an injunctive proceeding against aiders and abettors,[22] and *Brennan* cited the Restatement of Torts for the principle that persons can be liable "[f]or harm resulting to a third person from the tortious conduct of another."[23] Moreover, the circuits were in agreement not only over the existence of aiding and abetting liability but also regarding the specific elements

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[18] SEC v. Timetrust, Inc., 28 F. Supp. 34, 43 (N.D. Cal. 1939).

[19] 259 F. Supp. at 681.

[20] *See* Cleary v. Perfectune, Inc., 700 F.2d 774 (1st Cir. 1983); IIT v. Cornfeld, 619 F.2d 909 (2d Cir. 1980); Monsen v. Consol. Dressed Beef Co., 579 F.2d 793 (3d Cir. 1978); Schatz v. Rosenberg, 943 F.2d 485 (4th Cir. 1991); Akin v. Q-L Invs., 959 F.2d 521 (5th Cir. 1992); Moore v. Fenex, Inc., 809 F.2d 297 (6th Cir. 1987); DiLeo v. Ernst & Young, 901 F.2d 624 (7th Cir. 1990); K & S P'ship v. Cont'l Bank, N.A., 952 F.2d 971 (8th Cir. 1991); White v. Abrams, 495 F.2d 724 (9th Cir. 1974); Farlow v. Peat, Marwick, Mitchell & Co., 956 F.2d 982 (10th Cir. 1992); Rudolph v. Arthur Andersen & Co., 800 F.2d 1040 (11th Cir. 1986); Zoelsch v. Arthur Anderson & Co., 824 F.2d 27 (D.C. Cir. 1987).

[21] *See* 18 U.S.C. § 2(a) (2010) (codifying aiding and abetting criminal liability); Restatement of Torts § 876 (1939). One federal court even went so far as to refer to aiding and abetting liability as applied to securities violations as "a matter of common law." Metge v. Baehler, 762 F.2d 621, 624 (8th Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986).

[22] 28 F. Supp. at 43 (reasoning that "[p]ersons charged with aiding and abetting a criminal offense in violation of Sec. 17(a) may be joined as defendants, and no good reason appears why this same rule should not apply in an injunctive proceeding to restrain a violation of the same statute").

[23] *Brennan*, 259 F. Supp. at 680 (citing Restatement of Torts § 876 (1939)).

of establishing that liability.[24] The doctrine's long and largely unchallenged history in the lower federal courts led commentators in the 1980s to speculate that it "may be so well entrenched that the Supreme Court may be reluctant to overturn such settled precedent,"[25] a prediction that soon proved less than prescient.

The Supreme Court articulated the modern doctrine of secondary liability for securities fraud in *Central Bank.* Although the Supreme Court had never directly considered the question before 1994, in the 1970s the Court began to suggest a narrow view of the reach of the federal securities laws. What has been termed the "Contraction Era"[26] of securities fraud jurisprudence began in the Supreme Court with *Blue Chip Stamps v. Manor Drug Stores*, where Justice Rehnquist expressed the Court's concern that securities fraud had become a "judicial oak which has grown from little more than a legislative acorn."[27] The contraction of liability continued in *Ernst & Ernst v. Hochfelder*[28] and *Santa Fe Industries, Inc. v. Green*,[29] two cases that emphasized close adherence to statutory text to find that securities fraud liability under the Exchange Act § 10(b) extended to neither negligent conduct nor breaches of fiduciary duty, respectively.[30] This jurisprudential shift prompted widespread speculation among both the lower courts[31] and commentators[32] that the end of aiding and abetting liability under the securities laws was at hand, and courts proceeded cautiously with aiding and abetting

[24] Courts cited the same three-part test, requiring: (1) a primary securities fraud violation by a third party; (2) knowledge of that primary violation; and (3) provision of substantial assistance to the third party in the commission of the primary violation. *See, e.g.*, Rochez Bros., Inc. v. Rhoades, 527 F.2d 880, 886 (3d Cir. 1975); Rolf v. Blyth, Eastman Dillon & Co., 570 F.2d 38, 47–48 (2d Cir. 1978), *cert. denied*, 439 U.S. 1039 (1978).

[25] Ralph C. Ferrara & Diane Sanger, *Derivative Liability in Securities Law: Controlling Person Liability, Respondeat Superior, and Aiding and Abetting*, 40 WASH. & LEE L. REV. 1007, 1023 (1983).

[26] The Contraction Era was a period of transformation during which the broad construal of securities laws under the preceding "Expansion Era" was reversed by restricting new implied private actions and criticizing all implied private actions. Alan R. Bromberg & Lewis D. Lowenfels, *Aiding and Abetting Securities Fraud: A Critical Examination*, 52 ALB. L. REV. 637, 640–41 (1988) (internal citations omitted).

[27] 421 U.S. 723, 737 (1975).

[28] 425 U.S. 185 (1976).

[29] 430 U.S. 462 (1977).

[30] *See* Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 169 (1994).

[31] *See, e.g.*, Little v. Valley Nat'l Bank of Ariz., 650 F.2d 218, 220 n.3 (9th Cir. 1981) (finding that the "status of aiding and abetting as a basis for liability under the securities laws [was now] in some doubt."); Akin v. Q-L Investments, Inc., 959 F.2d 521, 525 (5th Cir. 1992) (finding it "now apparent" that there is "a powerful argument that . . . aider and abettor liability should not be enforceable by private parties pursuing an implied right of action.").

[32] *See* Daniel R. Fischel, *Secondary Liability under Section 10(b) of the Securities Act of 1934*, 69 CAL. L. REV. 80, 82 (1981) (cited in *Central Bank*, 511 U.S. at 169, which noted Professor Fischel's opinion that "secondary liability [was] no longer viable"). *See generally* David S. Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, In Pari Delicto, Indemnification, and Contribution*, 120 U. PA. L. REV. 597, 620–46 (1972).

liability while awaiting the impending Supreme Court decision.[33] The Supreme Court specifically reserved the issue on two occasions[34] before the axe fell in *Central Bank*.

In *Central Bank*, bondholders accused a bank of aiding and abetting a bond issuer in securities fraud by agreeing to delay its review of the appraisal of land underlying the value of the bonds until the bond issue had completed.[35] The Court deemed it unnecessary to look beyond the "uncontroversial conclusion" that "the text of the 1934 [Exchange] Act does not itself reach those who aid and abet a § 10(b) violation" and held that a disciplined reading of the statutory text does not permit the application of aiding and abetting liability to actions brought by private litigants.[36] However, the Court was quick to note that this holding did not foreclose the possibility of securities fraud liability for secondary actors in the securities markets, such as lawyers, accountants, and investment bankers, and the securities laws can reach any actor who meets the requirements for primary liability, regardless of the nature of the actor's relationship to the harmed investor.[37]

Operating in the shadow of *Central Bank*, modern litigation against secondary actors is premised on distinguishing claims of primary liability from foreclosed claims of aiding and abetting liability.[38] The Circuit Courts of Appeals have adopted various approaches to post-*Central Bank* attempts at invoking primary liability,[39] ranging from the most narrow "bright-line" approach, which focuses on defendants who "actually make a false or mislead-

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[33] *See, e.g.*, Robin v. Arthur Young & Co., 915 F.2d 1120, 1123 (7th Cir. 1990) (Noting that the Supreme Court had reserved decision on aiding and abetting liability in two prior cases before maintaining that "[o]ur recognition of aider and abettor liability is rooted in 20+ years' precedent . . . and we stand by this decision until the Supreme Court tells us otherwise.").

[34] *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 192 n.7 (1976) (stating that the Court "need not consider whether civil liability for aiding and abetting is appropriate"); Herman & MacLean v. Huddleston, 459 U.S. 375, 379 n.5 (1983) (noting that "[w]hile several courts of appeals have permitted aider and abettor liability, [the Court] specifically reserved this issue in [*Ernst*]").

[35] 511 U.S. at 167–68.

[36] *Id.* at 177–78.

[37] *Id.* at 191.

> The absence of § 10(b) aiding and abetting liability does not mean that secondary actors in the securities markets are always free from liability . . . . Any person or entity . . . may be liable as a primary violator under 10b-5, assuming *all* of the requirements for primary liability under Rule 10b-5 are met.

Id.

[38] *See* Prentice, *supra* note 14, at 712 ("In the long run, the ultimate impact of *Central Bank* will depend upon how broad the lower courts determine the scope of primary liability . . . to be."); Robert J. Grubb II, *Attorneys, Accountants, and Bankers, Oh My! Primary Liability for Secondary Actors in the Wake of* Stoneridge, 62 Vand. L. Rev. 275, 287 (2009) ("[After *Central Bank*,] plaintiffs must now demonstrate a primary violation . . . to survive a motion to dismiss.").

[39] *See* Wright v. Ernst & Young, LLP, 152 F.3d 169, 174 (2d Cir. 1998) ("In the wake of *Central Bank*, federal courts have differed over the threshold required for a secondary actor's conduct to implicate primary liability.").

ing statement,"[40] to standards of "substantial participation"[41] or "scheme liability,"[42] which have greater potential to implicate secondary actors.[43] In two recent decisions, *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*[44] and *Janus Capital Group, Inc. v. First Derivative Traders*,[45] the Supreme Court rejected the more relaxed standards and opted instead to establish a very narrow scope for secondary actor liability. In *Stoneridge*, the Court declined to apply the theory of scheme liability and found that vendors who had participated in sham transactions to help a company falsify its financial reports were not liable for securities fraud.[46] In *Janus*, the Court concluded that an investment adviser who drafted misleading statements that appeared in an investment fund's prospectuses was not liable for "making" those misstatements despite the "significant influence" exercised by the investment adviser over the fund's activities and the close relationship between the two.[47] Taking a narrow approach to the scope of primary liability, the Court held that the adviser could not be found liable because it did not have "ultimate authority" over the content of the fund's statements and therefore could not "make" misstatements as required by 10b-5.[48] Between *Stoneridge* and *Janus*, the Court has established extensive protection for secondary ac-

[40] *See* Shapiro v. Cantor, 123 F.3d 717, 720–21 (2d Cir. 1997); *see also Wright*, 152 F.3d at 174; Ziemba v. Cascade Int'l, Inc., 256 F.3d 1194 (11th Cir. 2001); SEC v. Tambone, 597 F.3d 436 (1st Cir. 2010) (discussing what it means to "make a statement"); Anixter v. Home-Stake Production Co., 77 F.3d 1215 (10th Cir. 1996).

[41] The Ninth Circuit found that a defendant need not actually make a statement, but must merely exhibit "substantial participation or intricate involvement" in the preparation of misleading statements to be primarily liable, even if the defendant's conduct did not directly lead to the actual making of the statements. Howard v. Everex Systems, Inc., 228 F.3d 1057, 1061 n.5 (9th Cir. 2000) (citing *In re* Software Toolworks Inc. Sec. Litig., 50 F.3d 615 (9th Cir. 1994)).

[42] The Ninth Circuit found defendants reachable under a theory of "scheme liability," but the Fifth and Eighth Circuits declined to do the same. Such a theory employs an expansive interpretation of SEC Rule 10b-5 language making it unlawful "to employ any device, *scheme*, or artifice to defraud" to cover secondary actors within the scope of primary liability (emphasis added). *Compare* Simpson v. AOL Time Warner, Inc., 452 F.3d 1040 (9th Cir. 2006) *with In re* Charter Commc'ns, Inc. Sec. Litig., 443 F.3d 987 (8th Cir. 2006) *and* Regents of Univ. of Cal. v. Credit Suisse First Boston (USA), Inc., 482 F.3d 372 (5th Cir. 2007).

[43] The SEC has also proposed a "creator" standard, under which a secondary actor would be primarily liable whenever it "creates" a misrepresentation, even if the misrepresentation is not publicly attributed to the secondary actor and the investment community is otherwise unaware of its role. *See* Brief of the SEC as Amicus Curiae, Klein v. Boyd, Fed. Sec. L. Rep. 90, 165 (3d Cir. 1998) (Nos. 97-1143; 97-1261), *available at* http://www.sec.gov/pdf/klein.pdf.

[44] 552 U.S. 148 (2008).

[45] 131 S.Ct. 2296 (2011).

[46] 552 U.S. at 157 (analogizing the issue of scheme liability to making a defendant "liable without any showing that the plaintiff relied upon the aider and abettor's statements or actions.") (quoting Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 177 (1994)).

[47] For example, the parent company (Janus Capital Group) of the investment adviser (Janus Capital Management) was the creator of the investment fund (Janus Investment Fund), and every officer of the fund was a vice president of the investment adviser. *Janus*, 131 S.Ct. at 2312 (Breyer, J., dissenting).

[48] *Id.* at 2302–06.

tors and largely closed the door to private actions against them in the post-*Central Bank* era.[49]

III. The Legislative History of Aiding and Abetting Liability Up to and Including the Dodd-Frank Act

Despite what appeared to be consensus in the lower federal courts that aiding and abetting liability applied in private securities fraud actions,[50] over the years Congress has specifically considered and rejected amendments to the federal securities laws that would expressly provide private rights of action against aiders and abettors. Such proposals appeared in unenacted bills in 1956, 1957, and 1959, as well as an unenacted proposal in the Private Securities Litigation Reform Act of 1995 ("PSLRA").[51] Defendants have argued that the legislative history indicates a congressional determination against extending secondary liability for securities violations.[52] Most recently before the Dodd-Frank Act, Congress considered amending § 20 of the Exchange Act in 2009 to provide that "any person that knowingly or recklessly provides substantial assistance to another person in violation of this title . . . shall be deemed in violation" to the same extent as a primary violator,[53] partly in response to recent cases of securities fraud such as the highly-publicized Bernie Madoff Ponzi scheme.[54] But to date, Congress has declined every opportunity to expressly endorse aiding and abetting liability in private securities actions.

Meanwhile, Congress maintained the authority of the SEC to invoke civil aiding and abetting liability under the Exchange Act in the PSLRA.[55] This balance of authority in favor of public proceedings over private litigation was reaffirmed by the 111th Congress's actions and inactions in the Dodd-Frank Act.

In the Dodd-Frank Act, Congress was once again presented with an opportunity to react to the Supreme Court's decisive line of jurisprudence in

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[49] For example the Ninth Circuit did a drastic about-face in In re *Peregrine Systems, Inc. Sec. Litig.*, 310 F. App'x. 149, 151–52 (9th Cir. 2009), a decision the court explicitly held off on until after the *Stoneridge* decision. The Ninth Circuit effectively adopted the bright-line approach in dismissing a claim against secondary actors who, while involved in securities fraud, did "nothing [to make] it necessary or inevitable" for the primary actor to defraud its investors. *Id.*

[50] *See* discussion *supra*, footnotes 19–26 and accompanying text.

[51] *See Abandonment of the Private Right of Action for Aiding and Abetting Securities Fraud: Hearing Before the Subcomm. on Securities of the S. Comm. on Banking, Housing, and Urban Affairs*, 103d Cong. 13–14 (1994) [hereinafter *1994 Hearing*].

[52] *See Brennan*, 259 F. Supp. at 677–78; *see also* Bromberg & Lowenfels, *supra* note 26 at 653–55.

[53] S. 1551, 111th Cong. (2009).

[54] *See Evaluating S. 1551: The Liability for Aiding and Abetting Securities Violations Act of 2009: Hearing Before the Subcomm. on Crime and Drugs*, 111th Cong. 164 (2009) (statement of Sen. Leahy, Chairman, S. Comm. on the Judiciary) [hereinafter *Hearing on S. 1551*].

[55] Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.).

Central Bank and *Stoneridge*. The legislative history behind the Act indicates that Congress carefully considered but rejected the possibility of extending civil liability to aiders and abettors in private actions. The Senate Committee on Banking, Housing, and Urban Affairs heard testimony on the need to "address the glaring hole in the fabric of investor protection created by the [*Central Bank*] and *Stoneridge* cases."[56] In particular, the Senate inquired into how a private right of action would affect the participation by secondary actors such as accountants and credit ratings agencies in securities fraud[57] and whether Congress should once again adopt a "gatekeeper" theory, using a potent threat of civil liability to provide secondary actors with incentives to protect investors[58] (discussed further below).[59] The discussion largely continued the debate with respect to the aiding and abetting liability bill introduced in 2009.

Ultimately, Congress declined to respond directly to the Court's holdings, opting instead to perpetuate the disparity between the SEC's and private litigants' remedies against aiders and abettors. The Dodd-Frank Act expanded SEC authority, first by extending express aiding and abetting liability beyond the Exchange Act (provided in PSLRA) to the Securities Act of 1933,[60] the Investment Company Act of 1940,[61] and the Investment Advisers Act of 1940.[62] The Act also went further to clarify that the SEC's aiding and abetting authority extended to "reckless" as well as "knowing" conduct, settling some confusion among the courts.[63] But in view of the debate over the issue in the legislative history and during the consideration of the preceding bill in 2009, the Dodd-Frank Act conspicuously declined to provide a private right of action against aiders and abettors of federal securities laws. Congress has thus, for the time being, effectively accepted the protections extended to secondary actors by the Court in *Central Bank* and *Stoneridge*.

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[56] *Enhancing Investor Protection and the Regulation of Securities Market: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 111th Cong. 137 (2009) (statement of Damon A. Silvers, Associate General Counsel, AFL-CIO).

[57] *See, e.g.*, *id.* at 41–42 (statement of John C. Coffee, Jr., Professor of Law, Columbia University Law School).

[58] *See id.* at 74 (statement of John C. Coffee, Jr.). *See also Enhancing Investor Protection and the Regulation of Securities Markets—Part II: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 111th Cong. 84 (2009) (statement of Fred J. Joseph, President, North American Securities Administrators Association).

[59] *See infra* text accompanying notes 66–72.

[60] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 § 929M(a) (2010) (codified at 15 U.S.C. § 77o(b) (2006 & Supp. IV 2010)).

[61] *Id.* § 929M(b) (codified at 15 U.S.C. § 80a-48(b) (2006 & Supp. IV 2010)).

[62] *Id.* § 929N (codified at 15 U.S.C. § 80b-9(f) (2006 & Supp. IV 2010)).

[63] *Compare* Geman v. S.E.C., 334 F.3d 1183, 1195 (10th Cir. 2003) (finding that reckless inaction supported a finding that defendant aided and abetted securities violation), *and* Ponce v. S.E.C., 345 F.3d 722, 729 (9th Cir. 2003) ("In the Ninth Circuit, scienter may be established by demonstrating that the defendant acted recklessly."), *with* S.E.C. v. Cedric Kushner Promotions, Inc., 417 F.Supp.2d 326, 334–35 (S.D.N.Y. 2006) (rejecting the contention by the S.E.C. that "recklessness is sufficient for the required mental state" and finding instead that "knowing misconduct must now be shown.").

At the same time, Congress issued a mandate under the Dodd-Frank Act to the U.S. Government Accountability Office to report on the wisdom of authorizing aiding and abetting liability in private actions, suggesting that it is reserving the question for further consideration.[64] The possibility of an authorizing statute appearing in the near future is therefore very much a live issue, and reflection on the arguments in favor of and opposed to such a provision is highly relevant to the state of U.S. securities regulation going forward.

IV. Congress Ought to Provide a Private Right of Action against Aiders and Abettors

The current disparity between public and private authority to pursue aiders and abettors, as affirmed by the Supreme Court in *Central Bank* and by Congress in its failure to act in the Dodd-Frank Act, has proven to be an ineffective regime for stopping securities fraud, as recently highlighted by the failure of the system to detect massive Ponzi schemes conducted for years by Bernie Madoff and Allen Stanford.[65] Congress ought to expand private investors' enforcement authority against secondary actors by authorizing aiding and abetting liability in private actions for securities fraud. This Part presents a number of arguments in favor of a system of robust secondary liability: (1) it would enhance detection and deterrence of securities fraud, as public enforcement has proven to be insufficient; (2) it would more adequately provide compensation to securities fraud victims; and (3) it would serve to promote the policy of truthful disclosure established by the securities laws. This Part also addresses arguments made by opponents of expanded liability: (1) the contention that aiding and abetting liability is unnecessary for deterrence or compensation; (2) the worry that the added threat of liability will overdeter securities markets actors; and (3) the fear of frivolous "strike suits" brought by the plaintiffs' bar.

As discussed above, subjecting aiders and abettors to liability for securities fraud violations is nothing new. The lower federal courts had recognized aiding and abetting liability under the federal securities laws for decades before the *Central Bank* decision.[66] One of the primary justifications for extending secondary liability is the "gatekeeper" theory of securities fraud detection and deterrence. Gatekeepers are those "reputational intermediaries," such as auditors, credit rating agencies, investment bankers, and lawyers, who evaluate and endorse the statements of primary actors in the securities markets.[67] Employed to protect the interests of dispersed inves-

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[64] Dodd-Frank Act § 929Z.

[65] *See Hearing on S. 1551*, *supra* note 54, at 108 (testimony of Professor John C. Coffee, Jr., Adolf A. Berle Professor of Law, Columbia University Law School).

[66] *See supra* text accompanying notes 18–25.

[67] *See* definition of "gatekeeper" as formulated in John C. Coffee, Jr., *Understanding Enron: "It's About the Gatekeepers, Stupid,"* 57 Bus. Law 1403, 1405 (2002).

tors, these professionals are meant to serve as a market-based solution to a collective action problem in the prevention of fraud.[68] In the past, Congress has recognized that gatekeepers are uniquely placed to detect and block fraudulent transactions and explicitly adopted a strategy of imposing civil liability on gatekeepers such as accountants and appraisers to deter the filing of false securities registration statements.[69] Given their ability to prevent fraud and weak incentive to participate in it, deterring gatekeepers is a logical way to regulate the conduct of primary actors.[70] This reasoning favors an expansion of secondary actor liability by authorizing private actions against aiders and abettors. Recent experience has moved most commentators to agree that in situations of underdeterrence, gatekeepers can fail to prevent (or perhaps even become complicit in) large-scale securities fraud.[71] There is substantial evidence to refute the traditional understanding that gatekeepers' desire to protect their "reputational capital" sufficiently incentivizes them to protect investors from securities fraud, and civil liability is an important way to make up the difference.[72] Congressional acquiescence to the limitations on secondary liability after *Central Bank* would essentially forego the most efficient method for policing securities fraud.

Furthermore, beyond incentivizing secondary actors to act as effective gatekeepers, aiding and abetting liability would also deter secondary actors from acting as guiltless conduits for disseminating fraudulent statements on behalf of primary actors. The current securities fraud regime establishes a stark disparity between the exposure to liability of primary actors and secondary actors. Despite language in *Central Bank* suggesting that the Court there did not intend to insulate secondary actors from liability, *Stoneridge* and *Janus* have severely narrowed the scope of primary liability for secondary actors.[73] In *Janus*, the Court conceded that plaintiffs had "persuasively argue[d] that investment advisers exercise significant influence over their

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[68] *See* Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 U. Pa. L. Rev. 2173, 2182 (2010); John C. Coffee, Jr., *Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms*, 84 B.U. L. Rev. 301, 302 (2004).

[69] For example, when Congress authorized a right of action against "every accountant, engineer, or appraiser" involved in the production or certification of false registration statements under the Securities Act § 11. 15 U.S.C. § 77k(a)(1)(4).

[70] *See Hearing on S.1551*, *supra* note 65, at 106.

[71] *See* Assaf Hamdani, *Gatekeeper Liability*, 77 S. Cal. L. Rev. 53, 55 (2003) (citing *Hearing on S. 1551*, *supra* note 54, at 108 (testimony of John C. Coffee, Jr.)).

[72] *See generally* Frank Partnoy, *Barbarians at the Gatekeepers?: A Proposal for a Modified Strict Liability Regime*, 79 Wash. U. L. Q. 491 (2001).

[73] *Compare* Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 191 (1994) (emphasizing that its holding did "not mean that secondary actors in the securities markets are always free from liability . . . . Any person or entity . . . who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies may be liable as a primary violator under 10b-5"), *with* Janus Capital Group, Inc. v. First Derivative Traders, 131 S.Ct. 2296, 2302 (2011) (narrowly construing the "making" of a misstatement as to exclude "[o]ne who prepares or publishes a statement on behalf of another" from any liability).

client funds," but as secondary actors they could not be held liable because they lacked "ultimate authority" over the final statements.[74] As contemplated by Justice Breyer in his dissent in *Janus*, this regime shields guilty parties from liability in cases where a secondary actor is in a position to use a primary actor as an "innocent intermediary for its misstatements."[75] For example, the management of a company may write fraudulent statements, deceive both the board of the company and the public, and be shielded from private liability because it is a secondary actor, with the "ultimate authority" to issue those statements resting in the board.[76] The disparity between primary and secondary actor liability invites gaming of the system. As Justice Thomas suggests in his majority opinion in *Janus*, Congress ought to consider reapportioning the liability between primary and secondary actors to avoid these results.[77]

In addition to deterring fraudulent actors, aiding and abetting liability is also necessary to provide adequate compensation to injured investors.[78] In the absence of aiding and abetting liability, fraud victims are largely limited to recover losses from the primary actor, typically a public company that issued the securities and the fraudulent statements. But recent anecdotal history, notably in the cases of Enron and WorldCom, suggests that primary actors often become bankrupt by the time a fraud is discovered and a lawsuit undertaken.[79] Contributions from secondary participants under a theory of private aiding and abetting liability is important in many cases to provide victims with some form of redress (even if liability is capped, as discussed below).[80] In addition, the inability of defrauded investors to recover the majority of their losses is likely to erode public confidence in the markets and negatively affect both market integrity and investment activity.[81]

Furthermore, as a general matter, expanding securities fraud liability to include aiders and abettors would serve the policy aims of the federal securities laws. The usual policy justification for the securities regulation regime is to promote truthful disclosure of investment information with the goal of encouraging accurate pricing, efficiency, and faith in the integrity of the se-

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[74] *Janus*, 131 S.Ct. at 2304.

[75] *Id.* at 2310 (Breyer, J., dissenting).

[76] *Id.* (Breyer, J., dissenting).

[77] *See id.* at 2304 ("Any reapportionment of liability in the securities industry in light of the close relationship between investment advisers and mutual funds is properly the responsibility of Congress and not the courts.").

[78] *But see Hearing on S. 1551*, *supra* note 54, at 120 (statement of Robert J. Giuffra, Jr., Former Chief Counsel, U.S. Senate Banking Committee).

[79] *See id.* at 104 (statement of John C. Coffee, Jr.). For example, in the Enron case, the SEC and Department of Justice were able to recover only a little more than one percent of the total claimed losses of $40 billion for harmed investors. Brief for Former SEC Commissioners as Amicus Curiae Supporting Petitioners, Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., 522 U.S. 148 (2008) (No. 06-43).

[80] *See* text accompanying notes 105–06.

[81] Brief for the Former SEC Commissioners, *supra* note 79, at 9 ("The continuation of fraudulent scheme liability will not harm American competitiveness; in fact, investor faith in the safety and integrity of our markets *is* their strength.").

curities markets.[82] However, the expansion of federal securities fraud liability has diverged from the pursuit of these goals. In particular, commentators point to the rise of insider trading liability under Rule 10b-5 as a shift in the focus of the antifraud provision to principles of unjust enrichment rather than efficient markets.[83] Meanwhile, what was once the more conventional use of Rule 10b-5 to deter deceptive and distortive misstatements has been sharply limited,[84] a trend starkly illustrated by the Supreme Court's decisions in *Central Bank*, *Stoneridge*, and *Janus*. In contrast to insider trading liability, aiding and abetting liability would aim directly at improving the current securities-related disclosure regime. Secondary actors often exercise a significant amount of influence over the content of the information disseminated by primary actors.[85] The imposition of aiding and abetting liability would strengthen the incentives of all actors involved in the preparation of investment-related statements to ensure that those statements fully and truthfully disclose all material issues to investors. Thus, to the extent that Congress continues to support its original policy of truthful disclosure, it ought to consider the authorization of aiding and abetting liability as an extension of securities fraud liability that, unlike insider trading liability, directly addresses the robustness of the disclosure regime.

While the SEC currently has the authority to pursue aiders and abettors, these proceedings have failed to adequately compensate victims or deter securities fraud. Opponents of aiding and abetting liability maintain that, while the goals of effective deterrence of securities fraud and adequate compensation of victims may be served by civil litigation against secondary actors, that authority is best reserved to the SEC. Allowing private litigants to reach aiders and abettors, the argument goes, would subject secondary actors to vexatious litigation and "strike suits," which are brought for the sole purpose of coercing deep-pocketed defendants to settle.[86] A public enforcement agency, on the other hand, would be more sensitive to the public interest and

[82] *See generally* Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669 (1984).

[83] *See* James J. Park, *Rule 10b-5 and the Rise of the Unjust Enrichment Principle*, 60 DUKE L.J. 345, 349 (2010) ("[F]ar from being an ancillary concern, the unjust enrichment principle has increasingly defined the scope of Rule 10b-5."); Saikrishna Prakash, *Our Dysfunctional Insider Trading Regime*, 99 COLUM. L. REV. 1491, 1500 (1999) ("[M]any securities market participants view insider trading as the wholly unjust enrichment of those privy to significant confidential information.").

[84] *See* Park, *supra* note 83, at 394 ("Ironically, the once-controversial use of Rule 10b-5 to prohibit insider trading is now rarely questioned, whereas the conventional use of Rule 10b-5 to deter deceptive misstatements that distort stock market prices is more and more limited . . .").

[85] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, SEC. FRAUD LIAB. OF SECONDARY ACTORS 11–16 (2011) (discussing the role of secondary actors such as accountants, attorneys, investment banks, credit rating agencies, and securities analysts in providing information to investors).

[86] *See, e.g.*, *Hearing on S. 1551*, *supra* note 54, at 5 (statement of Robert J. Giuffra, Jr., Former Chief Counsel, U.S. Senate Banking Committee).

have fewer incentives to be excessively litigious.[87] However, there is substantial evidence that the current system of emphasizing public enforcement against aiders and abettors while denying private remedies has failed at victim compensation and deterrence.

Public proceedings have often failed to make victims whole as effectively as private actions have. In a number of cases, SEC actions for damages have recovered a substantially smaller amount in comparison to related private actions.[88] Private actions constitute an important component of the securities enforcement regime. Public agencies like the SEC struggle to police a rapidly growing and evolving securities industry with limited resources. Providing private litigants with the ability to pursue aiders and abettors would enable those "private attorneys general" to aid the effort to enforce compliance with federal securities fraud laws.[89] Furthermore, issues of limited resources aside, the SEC falls short of the ideal public enforcer envisioned by adherents to the current regulatory scheme due to the agency's numerous institutional shortcomings. In particular, the agency's hindsight bias, its focus on the most recent and easily available information, and its susceptibility to political will tend to make it complacent in bull markets and reactionary in response to bear markets and headline-grabbing scandals.[90] On the other hand, private litigants, who are motivated by personal recovery rather than institutional mission, can better resist these biases and act as reliably vigilant lookouts for fraudulent behavior regardless of the state of the market or the publicity surrounding a particular case. Members of the SEC themselves have called for Congress to establish a private cause of action for aiding and abetting securities fraud. In a hearing during Congress's consideration of the PSLRA, Arthur Levitt, the SEC Chairman at the time, advocated for legislation "to restore aiding and abetting liability in private actions" after *Central Bank* because such legislation is "necessary in order

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[87] *See generally* Rose, *supra* note 68, at 2200–01 (describing the "idealized public enforcer" with the ability to exercise "self-restraint" as opposed to the private litigant as an "aggressive enforcer.").

[88] For example, in the WorldCom case, the SEC recovered only $750 million for investors while a private action recovered $6.2 billion, see Brief for Council of Inst. Investors as Amici Curiae Supporting Petitioners, Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., 522 U.S. 148 (2008) (No. 06-43) (citing CORNERSTONE RES., SECURITIES CLASS ACTION SETTLEMENTS: 2006 REVIEW AND ANALYSIS (2007)), and in the *Cendant* case, the SEC recovered nothing for investors while private actions recovered $3.2 billion, *see In re* Cendant Corp. Litig., 264 F.3d 201, 217 (3d Cir. 2001).

[89] *See The Securities Litigation Uniform Standards Act of 1997: Hearing on S. 1260 Before the Subcomm. on Securities of the S. Comm. on Banking, Housing, and Urban Affairs*, 105th Cong. 5–6 (1997) (statement of Arthur Levitt, SEC Chairman, and Isaac C. Hunt, SEC Comm'r) ("The Commission has always relied, and continues to rely, on private actions . . . to support the agency's efforts to combat fraud . . . because of the phenomenal growth of the securities industry during a time when the Commission's staff and budget levels have remained relatively constant.").

[90] *See* Stephen J. Choi & A.C. Pritchard, *Behavioral Economics and the SEC*, 56 STAN. L. REV. 1, 25–27 (2003); A.C. Pritchard, *The SEC at 70: Time for Retirement?*, 80 NOTRE DAME L. REV. 1073, 1078–83 (2005).

to preserve the benefits of private actions as a source of deterrence and a vehicle for compensating private investors."[91]

Opponents of authorizing aiding and abetting liability point to problems of "overdeterrence" in securities fraud liability, arguing that the threat of liability and the resulting uncertainty would result in a chilling effect on investment and the allocative efficiency of the economy.[92] Recent history suggests that, in today's financial regulatory environment, the problem with the securities regime is not overdeterrence but underdeterrence of primary and secondary actors alike, and this problem of underdeterrence has contributed to grave economic harm.[93] In 2001–2002, the high-profile collapses of Enron and WorldCom on the heels of the tech bubble burst highlighted an era of accounting irregularities that required widespread financial restatements.[94] In 2007–2008, the reckless and perhaps knowing failure of credit rating agencies to accurately assess the risk behind mortgage-backed securities and related instruments contributed to the housing trouble that sparked the recent financial collapse.[95] If Congress were to reject proposals to reinstate aiding and abetting liability in the face of this legacy of gatekeeper failure out of fear of overdeterrence, Congress would improperly refrain from an otherwise attractive way to discourage fraudulent activity. On the one hand, as discussed above,[96] targeting gatekeepers, who have little incentive to participate in fraud and significant control over fraudulent activity in some cases, through aiding and abetting liability is an effective way to deter fraud. On the other hand, fears of overdeterrence can and should be allayed through other, more appropriate measures, such as revised pleading standards and damages rules (discussed further below).[97] Furthermore, the facts in recent cases dismiss fears that aiding and abetting liability may overreach its purpose by going beyond the monitoring of traditional gatekeepers and

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[91] *See 1994 Hearing*, *supra* note 51, at 46 (statement of Arthur Levitt, SEC Chairman).

[92] *Cf.* Rose, *supra* note 68, at 2183–84 (explaining the "indirect" costs of enforcing antifraud provisions).

[93] *See Hearing on S. 1551*, *supra* note 54, at 2 (statement of John C. Coffee).

[94] *See* George Benston, *The Quality of Corporate Financial Statements and Their Auditors Before and After Enron*, 497 CATO INSTITUTE, POLICY ANALYSIS, Nov. 2003, at 1.

[95] *See* Timothy E. Lynch, *Deeply and Persistently Conflicted: Credit Rating Agencies in the Current Regulatory Environment*, 59 CASE. W. L. REV. 227, 230–34 (2009). While no fraud has yet been found with respect to credit rating agency behavior in connection with the credit crisis, the SEC has threatened investigations and potential fraud actions. *See* Marcy Gordon, *SEC Threatens Credit Rating Agencies with Fraud Charges*, HUFFINGTON POST, Aug. 31, 2010, http://www.huffingtonpost.com/2010/08/31/sec-threatens-credit-rating-agencies-fraud_n_701135.html. The SEC has also identified repeated failures by credit rating agencies to properly follow their rating methodologies and manage conflicts of interests. *See* SECURITIES EXCHANGE COMMISSION, 2011 SUMMARY REPORT OF COMMISSION STAFF'S EXAMINATIONS OF EACH NATIONALLY RECOGNIZED STATISTICAL RATING ORGANIZATION (2011), *available at* http://www.sec.gov/news/studies/2011/2011_nrsro_section15e_examinations_summary_report.pdf.

[96] *See* text accompanying notes 66–72.

[97] *See* discussion *infra*, text accompanying notes 105–06.

possibly affecting companies' business transactions.[98] *Stoneridge*[99] and *Simpson*[100] illustrate situations where vendors and other third-party business partners assisted a company in defrauding its investors through ostensibly arms-length sham transactions. Considering the little incentive that the third-party business partners had to provide this assistance in the first place,[101] sharing in civil liability would have substantially deterred a party with the ability to prevent these fraudulent transactions from participating. In In re *Refco Securities Litigation*, a federal district judge who was forced to dismiss claims against a law firm that participated in sham loan transactions engineered to defraud investors expressed regret at the direction of post-*Central Bank* doctrine.[102] Judge Gerald Lynch felt that post-*Central Bank* doctrine "may be ripe for legislative re-examination" and questioned the wisdom of a bright line between principals and accomplices when some accomplices, like "the Godfather order[ing] a hit . . . are deeply and indispensably implicated in wrongful conduct."[103] The fact patterns in these cases reveal, first, that a company's business partners can be just as complicit in securities fraud as a traditional gatekeeper can be, and second, that these parties may also be appropriate targets for secondary liability since they are in a position to prevent securities fraud and they can be easily deterred from participating.

Finally, there is little evidence to support the fear that authorizing a private right of action against aiders and abettors would open the floodgates to exploitative litigation. Fears of rampant frivolous litigation are largely unsubstantiated in the modern framework of securities litigation. First of all, the long history[104] of aiding and abetting liability prior to the *Central Bank* decision in 1994 refutes claims that the sky will fall if Congress reintroduces similar liability seventeen years later. But more importantly, the logical way to address the worry that a predatory plaintiffs' bar will use the expanded liability to force settlements with secondary actors is not to eliminate the cause of action entirely but to heighten pleading requirements for securities fraud claims. Congress has already taken this course of action in the PSLRA of 1995, requiring a plaintiff to "plead with particularity facts giving a strong inference that the defendant acted with the required state of mind" in claims of securities violations. This PSLRA provision, among others, has "amply protected—indeed, insulated—secondary participants" in the secur-

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[98] *See* William A. Gregory & Sherri Johnson, *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*: *The Evisceration of Investor Protection*, 34 S. Ill. U. L.J. 251, 271–72 (2010).

[99] Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., 522 U.S. 148, 153–55 (2008).

[100] Simpson v. AOL Time Warner, Inc., 452 F.3d 1040, 1043–45 (9th Cir. 2006).

[101] The vendors in *Stoneridge* reported the transactions as a wash in their own financial statements. 552 U.S. at 155.

[102] 609 F. Supp.2d 304, 318–19 (S.D.N.Y. 2009).

[103] *Id.*

[104] *See* notes 18–25 and accompanying text.

ities markets.[105] If the relative culpability of primary and secondary actors is a concern, even stricter pleading requirements can be imposed on claims of aiding and abetting. Another way to mitigate the risk of burdensome litigation against secondary actors is to cap liability for aiders and abettors or otherwise change rules for calculating damages, as some commentators have suggested.[106] The crucial point is that pleading requirements and damages rules can address opponents' worries without entirely foreclosing private aiding and abetting liability as an important securities fraud enforcement tool.

V. Conclusion

The Dodd-Frank Act reaffirmed the current regime of secondary actor liability for securities fraud by strengthening SEC authority but conspicuously declining to provide private litigants with a cause of action against aiders and abettors. Congress thereby acquiesced once again to the Supreme Court's reversal of a long history of private aiding and abetting liability in the lower courts in its *Central Bank*, *Stoneridge*, and *Janus* decisions. However, the current disparity between public and private authority against secondary actors for complicity in securities fraud is an unsustainable and ineffective regime for securities fraud enforcement. The reliance on the SEC to enforce the securities fraud provisions is misplaced. Empowering private litigants to pursue aiders and abettors can provide an efficient method for deterrence and may be essential for adequately compensating fraud victims. Private plaintiffs can police both traditional gatekeepers of the securities markets and other parties well-positioned to deter primary actors from defrauding their investors, and recovering against secondary actors can make victims whole in those all-too-common situations where primary violators have gone bankrupt. Recent experience has proven "overdeterrence" due to expanded liability to be a largely unfounded fear, as the prevailing problem is one of underdeterrence. Worries about "strike suits" and an aggressive plaintiffs' bar are best addressed through changes to pleading requirements and liability caps, not by completely shielding aiders and abettors from private liability. Furthermore, reinstating a private cause of action against aiders and abettors is consistent with the securities laws' policy of promoting truthful disclosure and does more to advance that policy than other extensions of securities fraud liability, such as insider trading liability. Congress should not miss another opportunity to reform Wall Street by continuing to yield to the current regime, which substantially protects secondary actors who aid in defrauding investors from paying civil damages to their victims.

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[105] *See Hearing on S. 1551*, *supra* note 54, at 7–8 (statement of John C. Coffee, Jr.).

[106] *See, e.g.*, *id.* at 5–6 (statement of John C. Coffee, Jr.) (proposing a ceiling on damages for secondary actor defendants); Daniel C. Langevoort, *Reading* Stoneridge *Carefully: A Duty-Based Approach to Reliance and Third-Party Liability Under Rule 10b-5*, 158 U. Pa. L. Rev. 2125, 2167–70 (2010) (proposing a damages rule that considers whether a defendant "acted with actual knowledge of the fraud *and* bore primary responsibility for its commission").

Rather, Congress ought to authorize a private cause of action against aiders and abettors for securities fraud.

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