Where Is The Line On Actionable Comms In Securities Cases?

By **Samuel Groner** (August 3, 2026)



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In a Law360 guest article published about a year ago, I analyzed recent case law about what types of statements are not made "in connection with the purchase or sale of any security" and therefore not covered by Section 10(b) of the Securities Exchange Act.

The article explained that some communications that are not expressly directed to investors, such as consumer-facing communications, may nevertheless be deemed by courts to be within the scope of the federal securities laws if they are the sorts of communications that investors, despite not being the intended audience, may rely on due to the nature or substance of the communication.

The article identified a number of forums in which such statements might be made, including advertisements, e-commerce websites, privacy statements, cybersecurity policies, customer brochures, statements on product packaging, and statements to Congress, government agencies or regulators.

Recent securities cases from the past year have raised similar issues, demonstrating the difficulty in drawing a clear line differentiating between statements that are made in connection with the purchase or sale of securities from those that are not.

Statements to FINRA

As noted, statements to Congress, government agencies or regulators, while not expressly directed to investors, may be deemed to be made in connection with the purchase or sale of any security.

Earlier this year, the U.S. Court of Appeals for the Eleventh Circuit faced a variation on this question: How about statements made to the Financial Industry Regulatory Authority, a self-regulatory organization?

In U.S. Securities and Exchange Commission v. Spartan Securities Group, the SEC brought an enforcement action alleging that information that the defendants submitted to FINRA was false or misleading in violation of Section 10(b) and SEC Rule 10b-5(b).[1]

The information in question was submitted to FINRA as part of a so-called Form 211 application. FINRA approval of a Form 211 application is necessary to permit an issuer's securities to be publicly quoted on the over-the-counter market.[2] There was also evidence in the record that it was possible for an investor to request and obtain the Form 211 application and review the information submitted to FINRA.[3]

At trial, the defendants argued that the challenged statements were not made in connection with the purchase or sale of a security because they were made to FINRA rather than to investors.[4]

On Jan. 20, the Eleventh Circuit rejected that defense, explaining that the "in connection with" requirement is interpreted flexibly, that "a direct or close relation between the fraud

and the securities transaction [i]s not required," and that "it is enough that the fraud 'touch' the sale in some manner ... or 'coincide' with it."[5]

Applying those criteria, the court held that there was enough evidence to support the conclusion that the challenged statements touched the purchase or sale of securities because obtaining FINRA clearance "'essentially open[s] the door' to over-the-counter public investing."[6]

In other words, the "in connection with" requirement was satisfied because the statements to FINRA were the but-for cause of investors being provided with the opportunity to invest in the company's securities; had a defendant not initiated and completed the Form 211 process, the issuer "wouldn't have been able to market the securities and 'the general public would not [have] be[en] able to invest' in them."[7]

While acknowledging that there "may be cases where the alleged deceit is too remote to 'touch' or 'coincide' with the purchase or sale of securities," the Eleventh Circuit held that the "in connection with" requirement was "broad enough to cover a situation where — as here — a defendant makes a false statement intentionally calculated to facilitate the purchase or sale of a security on a later date," even if the statement was not made directly to investors.[8]

Statements in Privacy Notices

In contrast, in In re: Block Inc. Securities Litigation, the U.S. District Court for the Southern District of New York explained on Sept. 9, 2025, that it was "not clear" that the plaintiffs in that case could satisfy the "in connection with" requirement with regard to statements in privacy notices.[9]

The plaintiffs had challenged statements in the company's privacy notices posted on its website that "we do a lot to keep your data safe" and "while we think we have strong defenses in place, no one can ever guarantee that hackers won't be able to break into our sites or steal your data."[10]

The court thought it was dubious whether statements of that nature were made in connection with the purchase or sale of any security, but ultimately did not need to reach the issue because the statements at issue were too generalized and nonspecific to be actionable.[11]

Statements That Do Not Precipitate Any Market Activity

SEC v. Jones, decided on June 27 by the U.S. District Court for the Northern District of Ohio, went one step further than the Block case and squarely held that the statements at issue there were not made in connection with the purchase or sale of a security.

The case arose in connection with statements made by Charles E. Jones, the former CEO of FirstEnergy Corp., about a bribery scandal involving former Speaker of the Ohio House of Representatives Larry Householder and H.B. 6, which Householder had introduced. The SEC brought an enforcement action against Jones alleging that he engaged in securities fraud by stating in a press release that "FirstEnergy acted ethically in this matter" and that the company acted "transparently."[12]

The court dismissed the case for failure to satisfy the "in connection with" requirement, among other failures, because there were "no allegations of any market activity or market

manipulation based on these statements and omissions."[13]

Of particular significance is the court's explanation that although Section 10(b) is construed flexibly, it "must not be construed so broadly as to convert every common-law fraud that happens to involve securities into a violation of [Section] 10(b)."[14] The court emphasized that just because a company's stock trades publicly does not make every statement or omission by the company actionable under Section 10(b).[15]

Takeaways

The differing conclusions about whether particular statements were made in connection with the purchase or sale of any security are more likely attributable to the individualized factual situations in which the statements were made than to any doctrinal differences of opinion between the various courts about what constitutes a close enough connection between the alleged fraud and a securities transaction to satisfy the statutory requirements.

Where a statement is intentionally calculated to facilitate the purchase or sale of a security on a later date and is a but-for cause of the securities transaction, it is likely that courts will hold that Section 10(b)'s "in connection with" requirement has been satisfied. In contrast, where a defendant is accused of making relatively generic statements in privacy notices about data safety or other statements unlikely to precipitate market activity, courts may determine that the necessary elements of a Section 10(b) claim, including its "in connection with" requirement, are lacking.

Nevertheless, until there is greater clarity in this area of the law, public companies may want to continue to err on the side of caution and assume that any statement that an investor might rely upon, even if investors were not the intended audience, may be challenged in court.

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[1] 164 F.4th 1231 (11th Cir. 2026).

[2] Id. at 1241.

[3] Id. at 1257.

[4] Id. at 1248.

[5] Id. at 1257.

[6] Id. at 1258.

[7] Id.

[8] Id. at 1258–59. It is possible that the defendants may raise similar issues at trial in another pending case, AMI – Government Employees Provident Fund Management Company v. Alphabet Inc., in which the U.S. District Court the Northern District of California certified the class in May 2026. In that case, the only challenged statement that survived a motion to dismiss was an answer to a question from the House Judiciary Committee.

[9] 2025 WL 2607890, at *8 n.9 (S.D.N.Y. Sept. 9, 2025).

[10] Id. at *8 n.9, *11.

[11] Id. at *8 n.9.

[12] 2026 WL 1850110, at *3 (N.D. Ohio June 27, 2026).

[13] Id. at *13

[14] Id. (quoting SEC v. Zandford, 535 U.S. 813, 820 (2002)).

[15] Id. at *14.