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Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

**Re: File No. 4-617
Release No. 34-63174
Study on Extraterritorial Private Rights of Action**

Dear Ms. Murphy:

The National Association of Shareholder and Consumer Attorneys (“NASCAT”) submits this comment to the Securities Exchange Commission pursuant to Section 929Y of the Dodd-Frank Wall Street Reform and Consumer Protection Act. NASCAT is a nonprofit membership organization founded in 1988. NASCAT’s member law firms represent investors (both institutions and individuals) in securities fraud and shareholder derivative cases throughout the United States. NASCAT and its members are devoted to representing victims of corporate abuse, fraudulent schemes, and so-called “white collar” criminal activity in cases that have the potential for advancing the state of the law, educating the public, modifying corporate behavior, and improving access to justice and compensation for the wrongs inflicted upon victims.

In *Morrison v. National Australia Bank*,¹ the Supreme Court reversed decades of appeals court precedent and limited application of the federal securities anti-fraud provisions to cases involving securities listed on a national (*i.e.*, domestic) exchange or otherwise purchased in the

¹ 130 S. Ct. 2869 (2010).

United States. In Section 929P(b) of the Dodd-Frank Act, Congress legislatively reversed *Morrison* with respect to actions brought by the SEC, reinstating in such actions the “conduct” and “effects” tests that had been previously been formulated by several Courts of Appeals, holding the federal securities laws applicable where (a) conduct occurred within the United States that constitutes a significant step in the furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors, or (b) conduct occurring outside the United States had a foreseeable substantial effect within the United States.² In Section 929Y, Congress called for the SEC to solicit public comment and thereafter conduct a study on the question whether the “conduct” or “effects” tests should similarly be reinstated in private actions.³

The SEC in turn promulgated six issues to be addressed in public comments with respect to the reinstatement of the “conduct” or “effects” tests in private actions. We will address each of the six issues in turn, showing that they all lead to the conclusion that both the “conduct” and “effects” tests should be reinstated in private as well as SEC actions, in accordance with the standards set forth in the Solicitor General’s brief to the Supreme Court as *amicus curiae* in the *Morrison* case.⁴ The *Morrison* rule, as it stands, underserves the purposes of the United States securities laws and ignores the reality of the expanding global market.

² Section 929P(b) of H.R. 4173, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010); *see, e.g.*, 15 U.S.C. § 78aa(b).

It has been questioned whether Section 929(P) successfully restores the SEC’s right to bring actions for transnational securities fraud, as that section speaks of the courts’ “subject matter jurisdiction” to hear such claims, whereas the Supreme Court in *Morrison*, after affirming that such subject matter jurisdiction existed, held that Section 10(b) of the Exchange Act nevertheless did not reach transnational frauds involving securities not listed on United States exchanges or otherwise purchased in the United States. *See* 130 S. Ct. at 2876-77, 2888.

³ Section 929Y of H.R. 4173, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

⁴ Brief for United States as Amicus Curiae Supporting Respondents, *Morrison v. National Australia Bank*, No. 08-1191, 2010 WL 719337, at *13-30 (Feb. 26, 2010).

I. Both Institutional and Individual Investors Should Have the Ability to Assert a Private Right of Action in Cases of Transnational Securities Fraud (Within the Parameters of the “Conduct” or “Effects” Tests)

All investors, not just institutional investors, should have a private right of action under the antifraud provisions of the Exchange Act in transnational securities fraud cases. In enacting the Exchange Act, Congress’s focus was on protecting *all* investors from securities fraud and maintaining the integrity of the securities markets.⁵ The confidence that investors generally have in the securities markets is at serious risk if individual investors are without a remedy. In addition, holding corporate wrongdoers accountable to only certain shareholders would undermine one of the other primary purposes of the securities laws, deterring securities fraud. Indeed, it would be extraordinary, and even unprecedented, to extend the protection of the (securities) law to only certain financial interests – that gesture alone could potentially undermine investor confidence in the markets.

For example, most institutional investors do not invest in shares trading at less than \$5 per share.⁶ Thus, any limitation of the cause of action to institutions will create a license to

⁵ See, e.g., *Morrison*, 130 S. Ct. at 2894-95 (Stevens, J., joined by Ginsburg, J., concurring) (“it is the ‘public interest’ and ‘the interests of investors’ that are the objects of the [Exchange Act]’s solicitude”), citing *Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 125 (2d Cir. 1998) (“The antifraud provisions are designed to remedy deceptive and manipulative conduct with the potential to harm the public interest or the interests of investors.”) (citing H.R. Rep. No. 1838, 73d Cong., 2d Sess., 32-33 (1934) (“H.R. 1383”), reprinted in 1 Alan R. Bromberg & Lewis D. Lowenfels, *Bromberg and Lowenfels on Securities Fraud & Commodities Fraud* § 2.2(331) (2d ed. 1997)) and *Basic, Inc. v. Levinson*, 485 U.S. 224, 230 (1988) (“The 1934 Act was designed to protect investors against manipulation of stock prices.”) (citing S. Rep. No. 792, 73d Cong. 2d Sess., 105 (1934) (“S. Rep. 792”)) and *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195 (1976) (“The 1934 Act was intended principally to protect investors against manipulation of stock prices through regulation of transactions upon securities exchanges and in over-the-counter markets...” (citing S. Rep. 792 at 1-5). See also *U.S. v. O’Hagan*, 521 U.S. 642, 658 (1997) (“an animating purpose of the Exchange Act [is] to ensure honest securities markets and thereby promote investor confidence”); *Basic*, 485 U.S. at 230 (“Underlying the adoption of extensive disclosure requirements [in the 1934 Act] was a legislative philosophy: ‘There cannot be honest markets without honest publicity. Manipulation and dishonest practices of the marketplace thrive upon mystery and secrecy.’”) (citing H.R. Rep. No. 1383 at 11).

⁶ See, e.g., Bezinga staff, *Way To Trade: Jim Cramer States Citigroup \$12 By 2012*, <http://www.benzinga.com/options/11/01/762229/way-to-trade-jim-cramer-states-citigroup-12-by-2012-c>, January 7, 2011 (“Many institutional investors cannot trade common stocks that are below \$5 because of margin requirements and bylaws built into their firms.”); Mike Armstrong, *Reverse stock split didn’t make Unisys No. 1 local stock*,

defraud investors in low priced stocks. This license could also extend to small and mid cap stocks, where the respective losses of institutional investors might be too small to compel them to seek legal redress against corporate wrongdoer, even on a classwide basis. In such instances, it may be left to the individual shareholder – whose losses are greater, on a percentage basis, than those incurred by institutional investors – to recoup the damages incurred by the class.⁷

In reality, only investors with large losses – whether institutional or individual – will actually manage litigations in transnational fraud cases. It will not make financial sense for an individual or institutional investor with small losses (in terms of the amount and/or in the context of the investor’s overall holdings) to challenge a transnational fraud in an individual action.⁸ In class actions, the PSLRA ensures that only the investor with the largest financial stake in the litigation is selected as lead plaintiff.⁹ While Congressional intent was to increase the likelihood

<http://www.philly.com/philly/blogs/phillyinc/?month=&main=Inq+Phillyinc&year=&cat=Investing%2C+Markets&page=2>, January 8, 2010 (“[M]any institutional investors cannot own stocks at prices below \$5.”); Kathleen Pender, *Companies That Are Delisted By Nasdaq Face Some Tough Hurdles / Stocks trading below \$5 a share raise red flags / Tricks like reverse stock splits can keep share price above \$1*, http://articles.sfgate.com/2000-11-10/business/17666371_1_nasdaq-delisting-nasdaq-s-criteria-nasdaq-s-national-market-system/3, Nov. 10, 2000 (“Most institutional investors cannot buy stocks trading below \$5, because the market value of their publicly traded shares is so low that if the institutions had to sell, the stock price would plummet.”) (citing Thomas Weisel Partners market strategist Mat Johnson).

⁷ See, e.g., *Henning v. Orient Paper, Inc.*, No. 10-cv-5887 (C.D. Cal.) (individual investors appointed as lead plaintiff to prosecute federal securities claims on behalf of the class against small-cap Chinese company).

⁸ See, e.g., *In re: Marsh McLennan Cos., Inc., Sec. Litig.*, No. 04-Civ.-8144, 2009 U.S. Dist. LEXIS 120953, at *37 (S.D.N.Y. Dec. 23, 2009) (“Class members have limited interest in individually controlling the prosecution or defense of separate actions given the prohibitive cost of instituting individual actions for securities fraud.”); *In re: Merrill Lynch Tyco Research Sec. Litig.*, 249 F.R.D. 124, 142 (S.D.N.Y. 2008) (“Due to the dispersed, and relatively small, losses among a large pool of investors, the class action mechanism and its associated percentage-of-recovery fee award solve the collective action problem otherwise encountered by which it would not be worthwhile for individual investors to take the time and effort to initiate the action.”) Although these cases, and countless others like them, discussed this concept in the context of domestic securities class actions, it applies with equal if not greater force to transnational cases, in which the costs of litigation could be substantially higher due to geography alone.

⁹ The impact of, and intent behind, the PSLRA has been summarized as follows:

The Reform Act establishes a presumption that the class member ‘most capable of adequately representing the interests of class members’ is the shareholder with the largest financial stake in the recovery sought by the class. 15 U.S.C. §78u-4(a)(3)(B)(i) & (iii)(I). The plaintiff with the largest stake in a given securities class action will almost invariably be a large institutional investor, and the PSLRA’s legislative history expressly states that Congress anticipated and intended that such investors would serve as lead plaintiffs. See S. Rep. No. 104-98,

that institutional investors would serve as lead plaintiffs, Congress did not mandate that outcome, choosing instead to allow individual investors to seek lead plaintiff status when their losses are large. Because the securities laws, including the PSLRA, do not foreclose the possibility that an individual investor with large losses could adequately serve as a lead plaintiff, no regulation should be promulgated that would bar individual investors from doing so.

II. Restoring Private Plaintiffs' Right to Pursue Transnational Securities Fraud Claims Under the Exchange Act in Certain Limited Contexts Will Not Adversely Impact Comity or Undermine International Relations

International comity (*i.e.*, the doctrine by which a court that otherwise has jurisdiction over a matter will defer to a foreign court whose country may have a greater interest in the matter – which is implicated only when there is a true conflict between American law and the law of a foreign jurisdiction) and international relations will not be disturbed by allowing private investors to pursue securities fraud claims in the limited situations involving transnational fraud discussed below – *i.e.*, when significant conduct occurs *in the United States* or has substantial effects on investors *in the United States*. In addition, to the extent any such concerns could somehow be implicated in some rare context, there are more nuanced ways of addressing them than the draconian denial of an opportunity for injured investors to recover their losses and hold the corporate violators accountable for their wrongful conduct.

(a) International Comity Is Not Implicated When a Material Component of the Fraud Occurred in the U.S. or Had a Substantial Effect on Investors in the U.S.

As an initial matter, as amended by Section 929P, the anti-fraud provisions of the Exchange Act prohibit fraud in the sale of securities when significant conduct occurs in the

at 11 (1995), reprinted in 1995 U.S.C.C.A.N. 679, 690 (“The Committee intends to increase the likelihood that institutional investors will serve as lead plaintiffs by requiring the court to presume that the member of the purported class with the largest financial stake in the relief is the “most adequate plaintiff.”).

United States or conduct has substantial effects on investors in the United States. Restoring private litigants' rights to assert claims to the extent permitted by Section 929P would allow claims under Section 10(b) only in this limited context. Where a material component of the fraud occurred *in the United States*, it hardly makes sense to characterize the fraud as "extraterritorial" and refuse to apply the plain terms of Section 10(b). It is axiomatic that the application of a U.S. statute to *domestic* conduct does not raise concerns about extraterritoriality.¹⁰ As such, restoring private litigants' ability to seek legal redress (pursuant to the parameters of the "conduct" and "effects" tests) when they have incurred damages as a result of a transnational fraud would not offend notions of international comity.

The application of American law to a fraud that contains a material domestic component is supported by the *Restatement (Third) of Foreign Relations Law of the United States* (1987). Specifically, Section 416 of the Restatement applies to securities actions, and provides that federal securities laws apply to "conduct occurring predominantly in the United States that is related to a transaction in securities, even if the transaction takes place outside the United States." Even more broadly, Section 403 makes it clear that regulation is reasonable when there is a "link" to the regulating state, based on, among other things, conduct within the territory.¹²

Regulation is also reasonable when there is universal agreement among states that the activity should be regulated, when regulation is important to the international "economic

In re Cendant Corp. Litig., 264 F.3d 201, 243-244 (3d Cir. 2001).

¹⁰ See, e.g., *Pasquantino v. United States*, 544 U.S. 349, 371 (2005) ("Petitioners used U.S. interstate wires to execute a scheme to defraud a foreign sovereign of tax revenue. Their offense was complete the moment they executed the scheme inside the United States."), cited in Brief for United States as Amicus Curiae Supporting Respondents, *Morrison v. National Australia Bank*, No. 08-1191, 2010 WL 719337, at *22, 23 (Feb. 26, 2010); *Small v. United States*, 544 U.S. 385, 389 (2005) (in the context of gun possession law, an "extraterritorial" application is one that would "prohibit[] unlawful gun possession abroad as well as domestically"); *id.* at 400 (Scalia, J., dissenting) (describing the presumption against extraterritorial application as "restricting federal statutes from reaching conduct *beyond U. S. borders*," and having no role to play in a case involving "conduct *within U.S. borders*").

¹² *Id.* § 403(2)(a).

system,” and when there is little likelihood of international conflict.¹³ The Reporter of the Restatement specifically concluded that, when the law of American securities fraud is applied, “the likelihood of conflict with regulation by other states is slight.”¹⁴ Summarizing his findings, the Restatement Reporter observed that,

[i]n contrast to regulation under the antitrust laws which not infrequently involved prohibition of conduct which another state favored or required [citation omitted], United States securities regulation (other than transnational discovery efforts [citation omitted]) has not resulted in state-to-state conflict. . . . [N]o instance is known in which a transaction challenged under united States law—such as misrepresentation or insider trading—was asserted to be mandated or encouraged by the law of a foreign state.¹⁵

A single, transnational fraudulent scheme where substantial portions occur within the U.S. has an important “link” to the U.S. as a regulating territory; moreover, as discussed below, nations universally agree on the desirability of securities regulation.

(b) The United States and Foreign Countries Share a Common Interest in Preventing Securities Fraud and Protecting Investors

In light of securities frauds seen over the past decade that failed to recognize any national boundaries (*e.g.*, Enron, WorldCom, Royal Dutch/Shell), and the global financial crisis that caused significant damages to financial markets and investors worldwide, there can be no dispute that nations around the world *share* a significant interest in deterring securities fraud and protecting the rights of investors.¹⁶

¹³ *Id.* § 403(2) (c, e, h).

¹⁴ Restatement (Third) of Foreign Relations Law § 416, Reporter’s Note 3 (1987).

¹⁵ *Id.* (emphasis added). See also Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 Colum. J. Transnat’l L. 14, 62 (2007) (“[i]t must be said that . . . the extraterritorial application of U.S. law in the area of securities regulation has simply not generated the same level of difficulty and hostility as extraterritorial regulation in other areas.”).

¹⁶ See *Morrison*, 130 S. Ct. at 2894 (“it is the ‘public interest’ and ‘the interests of investors’ that are the objects of the statute’s solicitude”) (Stevens, J., concurring); Aiman Nariman Mohd-Sulaiman, *Australian Journal of*

Restoring U.S. investors' right to bring a transnational securities fraud claim would not raise comity concerns, which, as noted above, are implicated only when there is a true conflict between American law and the law of a foreign jurisdiction.¹⁷ The Supreme Court has found that there is no conflict for purposes of comity "where a person subject to regulation by two states can comply with the laws of both."¹⁸ The showing of a true conflict is a threshold issue; unless a true conflict exists, no further consideration of comity principles is permitted and dismissal of an action inappropriate.¹⁹

Notably, when determining whether comity is implicated, courts will look to whether the respective laws or policies *contradict* one another, not whether one set is stronger or more effective in achieving similar objectives. Accordingly, even if the U.S. federal securities laws are stronger than the laws of other nations in deterring securities fraud, these regimes are not in "conflict" with one another in light of their respective overlapping interests.²⁰

Corporate Law, Financial Misreporting and Securities Fraud: Public and Private Enforcement (discussion of private cause of action for securities fraud as a tool to prevent securities fraud and protect Australian investors); Amicus Mem. of Republic of France, *Morrison v. National Australia Bank*, No. 08-1191, 2010 WL 723010, at *4 (Feb. 26, 2010) (noting that "no nation [] condones securities fraud").

In furtherance of their common objective, securities commissions from more than 90 nations are members of the International Organization of Securities Commissions (the "IOSCO"). One of the IOSCO's main objectives is to "enhance investor protection and promote investor confidence in the integrity of securities markets."

¹⁷ The doctrine of comity "is not an imperative obligation of courts but rather is a discretionary rule of practice, convenience, and expediency." *In re South African Apartheid Litig.*, 617 F. Supp. 2d 228, 283 (S.D.N.Y. 2009); see also *Talisman*, 2005 WL 2082846, at *8 (international comity principles did not require deferring to Canadian interests because the public's interest in vindicating human rights outweighed the nexus between the lawsuit and Canadian foreign policy considerations).

¹⁸ *Harford Fire Ins. Co. v. California*, 509 U.S. 764, 798 (1993) (citing to Restatement (Third) Foreign Relations Law, § 403).

¹⁹ *Id.* at 799; *Filetech S.A. v. France Telecom S.A.*, 304 F.3d 180 (2d Cir. 2002) (dismissal inappropriate where record did not indicate that compliance with laws of both countries was impossible).

²⁰ See also *IIT, Int'l Inv. Trust v. Cornfield*, 619 F.2d 909, 921 (2d Cir. 1980) (the "primary interest of a foreign state is in the righting of a wrong done to an entity created by it. If our anti-fraud laws are stricter than those of a foreign state's, that country will surely not be offended by their application."); see also *United Int'l Holdings, Inc. v. Wharf Ltd.*, 210 F.3d 1207, 1223 (10th Cir. 2000) ("A true conflict would exist here only if Hong Kong law compelled securities fraud rather than just permitted it.").

In light of the similar set of values in the international community in deterring securities fraud, we respectfully submit that a private right of action for transnational securities fraud should be available to private U.S. litigants when either the “conduct” or the “effects” test²² is satisfied.²³

(c) Restoring Ability to Bring Transnational Fraud Claims Would Not Result in a Flood of Litigation in U.S. Courts

The UK and French government’s respective contentions in *Morrison* that a return to a pre-*Morrison* standard for private rights of actions would transform the United States into the world’s court are, among other things, belied by history.²⁶ U.S. courts have often sustained

²² See *Morrison*, 130 S. Ct. at 2887 (noting that the “Solicitor General points out that the ‘significant and material conduct’ test is in accord with prevailing notions of international comity”).

²³ In contrast to the shared objectives and interests in preventing securities fraud, there are contexts in which the extra-territorial application of one nation’s laws governing certain conduct could potentially conflict with the interest and regulations of another country. For example, in light of national protectionist implications, conflicts may arise in the extraterritorial application of U.S. antitrust laws to conduct in a foreign jurisdiction. See White, “Protecting Foreign Investors from International Securities Fraud,” 32-34; Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 L. & Pol’y Int’l Bus. 1, 47 (1993). Specifically, in certain instances, the extraterritorial application of the U.S. antitrust laws (*i.e.*, the Sherman Act) arguably could interfere with another nation’s ability to independently regulate its own commerce where the underlying conduct “independently” affected foreign consumers and the U.S. consumer market. *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (unreasonable to apply U.S. antitrust laws to foreign conduct where the resulting foreign injury was independent of any domestic injury). Indeed, a foreign nation’s lack of regulation in the antitrust arena may itself constitute an economic policy to permit certain forms of conduct. While, as discussed above, in the securities fraud context, the lack of regulation or penalty of course in no way means that a country condones such wrongful conduct.

²⁶ We note that those governments’ respective arguments were largely framed in the context of a claim by a foreign investor (as opposed to a U.S. investor) where it was unclear whether there had been substantial misconduct on U.S. soil. The “conduct” or “effects” tests, however, fully address such concerns. Notably, the *Morrison* claims themselves had been held insufficient at both the district court and circuit court of appeals levels for failure to satisfy those tests. See *Morrison*, 130 S. Ct. at 2876; see also *id.* at 2895 (“this case has Australia written all over it”) (Stevens, J., concurring).

defense motions for dismissal for lack of subject matter jurisdiction over foreign investors under Fed. R. Civ. P. 12(b)(1) and, in class actions, at the class certification stage. In addition to these grounds, where a defendant has successfully shown that an adequate forum is available elsewhere, and that the private and public interests implicated in the case weighs strongly in favor of dismissal or removal to another forum courts have also dismissed actions under *forum non conveniens*.²⁷ Of course, as also discussed herein, Section 929P itself includes limits that preclude the prosecution of Section 10(b) claims that have an insignificant connection to the U.S. Accordingly, cases without sufficient, material ties to the U.S. – whether in the context of significant conduct in the U.S. or a significant effect on U.S. investors – could not be prosecuted in its courts. Indeed, the number of securities class actions against foreign issuers is just a fraction of the number of securities fraud cases litigated under the U.S. federal securities laws.²⁸

(d) The *Forum Non Conveniens* Doctrine Is a Safeguard Against Both Overburdening U.S. Court Dockets and Remaining Comity Concerns

The use of *forum non conveniens* as a limitation on inappropriate suits bears special emphasis. As the Supreme Court has explained, lower courts “properly takes the less burdensome course” and determine if personal jurisdiction or *forum non conveniens* considerations favor dismissal of an action.²⁹

In *Sinochem*, the Court held that:

²⁷ See Subsection (d) *infra*.

²⁸ See Advisen Quarterly Report – Q3 2010, at 11-12 (Eleven percent of the securities actions filed through the third quarter of 2010 (*i.e.*, prior and subsequent to the *Morrison* decision in June 2010) were against companies domiciled in a foreign country); see also Risk Metrics Blog, “*Morrison v. National Australia Bank – the Dawn of a New Age*” (June 25, 2010) (“[O]f the 530+ suits that settled in 2009, approximately 50 of them were against defendants domiciled in a country outside the U.S.[]”).

²⁹ *Sinochem Int’l Co. Ltd. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 436 (2007). “The common-law doctrine of *forum non conveniens* ‘has continuing application [in federal courts] only in cases where the alternative forum is abroad.’” *Id.* at 430 (quoting *American Dredging Co. v. Miller*, 510 U.S. 443, 447-48 (1994)).

a district court has discretion to respond at once to a defendant's *forum non conveniens* plea, and need not take up first any other threshold objection. In particular, a court need not resolve whether it has authority to adjudicate the cause (subject-matter jurisdiction) or personal jurisdiction over the defendant if it determines that, in any event, a foreign tribunal is plainly the more suitable arbiter of the merits of the case.³⁰

If the plaintiff's choice of forum is not supported by a "bona fide connection with the United States and the chosen forum, the defendant will obtain dismissal on the grounds of *forum non conveniens*. As the Supreme Court earlier said, "[w]hen the plaintiff's choice is not its home forum, . . . the presumption in the plaintiff's favor 'applies with less force for the assumption that the chosen forum is appropriate is in such cases 'less reasonable.'"³¹

Application of the *forum non conveniens* doctrine – a doctrine developed to deal precisely with concerns of overburdening U.S. courts and interfering with international comity – is surely a more appropriate way to address those concerns than a blanket denial of a remedy.

(e) Comity Concerns Can Be Raised by the State Department in Particular Cases, in Accordance With Long-Standing Practice

Certain foreign governments submitted amicus briefs in the *Morrison* case expressing concern as to challenges to their sovereign interests.³⁴ The history of "statement of interest" letters issued by the State Department, however – whether pursuant to the common law, so-called "Tate Letters," or the Foreign Sovereign Immunities Act of 1976³⁵ – shows that the

³⁰ *Id.* at 425.

³¹ *Id.* at 430 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981)).

³⁴ See, e.g., Brief of the United Kingdom of Great Britain and Northern Ireland as *Amicus Curiae* in Support of Respondents, *Morrison v. National Australia Bank*, No. 08-1191, 2010 WL 723009, at *2 (Feb. 25, 2010).

³⁵ 28 U.S.C. § 1602 *et seq.* ("FSIA").

legitimate interests of foreign governments can be presented to the judiciary by the State Department and that the judiciary will recognize legitimate comity issues.

For many years courts have recognized comity concerns raised by the Executive Branch. The doctrine of foreign sovereign immunity developed as a matter of common law long before the FSIA was enacted in 1976. In accordance with Chief Justice Marshall's observations in *Schooner Exchange v. McFaddon*,³⁶ that foreign sovereign immunity is a matter of grace and comity rather than a constitutional requirement, the Supreme Court "consistently . . . deferred to the decisions of the political branches – in particular, those of the Executive Branch – on whether to take jurisdiction" over particular actions against foreign sovereigns and their instrumentalities.³⁷

Until 1952, the Executive Branch followed a policy of requesting immunity in all actions against friendly sovereigns.³⁸ In 1952, however, the State Department concluded that "immunity should no longer be granted in certain types of cases"; rather, the State Department thereafter applied a "restrictive theory" of sovereign immunity, whereby "the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)."³⁹

As the Supreme Court noted in *Verlinden*, the change in State Department policy wrought by the Tate Letter had little, if any, impact on federal courts' approach to immunity analyses. While courts continued to "abide by" the State Department's "suggestions of immunity",⁴⁰

³⁶ 7 Cranch 116 (1812).

³⁷ *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983) (citing *Ex parte Peru*, 318 U.S. 578, 586-90 (1943)).

³⁸ *Id.* at 486.

³⁹ Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dept. of State, to Acting U.S. Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 Dept. State Bull. 984-85 (1952) and in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711-15 (1976).

⁴⁰ *Verlinden*, 461 U.S. at 487.

complications arose where: (1) the State Department filed suggestions of immunity as a result of political pressure in cases where immunity would not have been available under the restrictive theory; and (2) foreign nations failed to request immunity from the State Department.

In 1976 Congress sought to remedy these problems by enacting FSIA, which “codifies, as a matter of federal law, the restrictive theory of sovereign immunity,”⁴¹ and transfers primary responsibility for immunity determinations from the Executive Branch to the judiciary.

However, even under the FSIA, courts have continued to defer to the Executive Branch.⁴² Indeed, in the *Republic of Austria* case, the Supreme Court reinforced continued deference to the Executive Branch in this area. “[S]hould the State Department choose to express its opinion on the implications of exercising jurisdiction over particular petitioners in connection with their alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy.”⁴³

Therefore, comity interests of any country that felt itself aggrieved by the overreaching of U.S. securities laws could make its voice heard through the State Department.

III. The Benefits of Allowing Private Investors to Pursue Securities Fraud Claims in Cases of Transnational Securities Fraud Greatly Outweigh Any Purported Costs

Whereas *Morrison* expressed concern over the supposed detrimental effect that permitting private actions under the United States securities laws in cases of transnational frauds

⁴¹ *Id.* at 488

⁴² See, e.g., *Republic of Austria v. Altmann*, 541 U.S. 677, 689 (2004) (Supreme Court noted that “[t]hroughout history, courts have resolved questions of foreign service immunity by deferring to the “decisions of the political branches . . . on whether to take jurisdiction.”); *Flatow v. Islamic Republic of Iran*, 305 F.2d 1249, 1251-52 and n.4 (D.C. Cir. 2002) (statement of interest concerning attachment of property that is owned by a foreign state but located in the United States); *Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634, 642 (4th Cir. 2000) (statement of interest concerning sovereign immunity of foreign state’s vessels); *767 Third Ave. Assoc. v. Consulate General of Socialist Federal Republic of Yugoslavia*, 218 F.3d 152, 157 (2d Cir. 2000) (statement of interest concerning successor states to the Socialist Federal Republic of Yugoslavia).

⁴³ 541 U.S. at 702 (emphasis and footnotes omitted).

might have on foreign financial systems and securities markets,⁴⁴ consideration of the pertinent facts shows that the benefits to domestic financial systems and securities markets would far outweigh any such purported detriment – which detriment is largely illusory in any event.

United States financial systems and securities markets benefit in a number of ways from private actions for transnational fraud. First, institutional investors – who hold by far the majority of investments in the United States⁴⁵ and do the dominant share of trading – are required by law and fiduciary duty to diversify their investments.⁴⁶

In today's global economy, diversification requires investment in foreign securities as well as domestic ones. But fiduciary obligations may also constrain institutional investors to retain the ability to recover for their beneficiaries any losses caused by issuers' fraud. They thus may be unable to forego the ability to maintain private securities fraud actions under the United States securities laws. If *Morrison* limits institutional investors to investments in securities listed on United States exchanges or purchased in the United States when seeking the protections of the federal securities laws, their primary investment option for purposes of diversifying their respective portfolios with respect to global securities would be to purchase American Depositary Receipts ("ADRs").⁴⁷ This is a very severe limitation on the securities available for institutional investment when compared with the amount of available foreign stock.⁴⁸

⁴⁴ 130 S. Ct. at 2885-86.

⁴⁵ See The Conference Board, The 2010 Institutional Investment Report: Trends in Asset Allocation and Portfolio Composition (available at <http://www.conference-board.org/publications/publicationdetail.cfm?publicationid=1872&subtopicid=20>).

⁴⁶ See Restatement (Third) of Trusts § 90(b); Restatement (Third) of Trusts, Introductory Note to Pt. 6, Ch. 17 ("A duty to diversify . . . is so central to modern concepts of prudence that it has been incorporated into the prudent investor rule . . ."); see also *infra* at 19.

⁴⁷ Some district courts, however, have gone so far as to (erroneously) held that *Morrison* precludes Section 10(b) claims even based on purchases of ADRs on American exchanges. See, e.g., *Cornwell v. Credit Suisse Group*, No. 08 Civ. 3758 (VM), 2010 WL 3069597, at *1 (S.D.N.Y. July 27, 2010), *recon. denied* (S.D.N.Y. Aug. 11, 2010). While we believe such holdings are insupportable as such ADRs are clearly securities traded on United States exchanges (or otherwise purchased in the United States), they demonstrate the necessity of a legislative correction of *Morrison*, as in purportedly following that decision, courts are cutting off American investors' rights to

Moreover, investing in ADRs is disadvantageous in comparison to direct investment in foreign stock. Academic literature establishes that ADRs are overpriced in comparison to the underlying stock, by reason of such factors as transaction costs and consumer sentiment,⁴⁹ exchange rate expectations,⁵⁰ and differences in liquidity between the ADR and the underlying stock.⁵¹ Moreover, the relative illiquidity of ADRs,⁵² imposes its own costs and disadvantages.

Yet, these are the very costs that *Morrison* imposes on institutional investors, and their beneficiaries, who attempt to balance their mandate to diversify their investments with an effort to ensure that they can recover losses caused by fraud. It is severely detrimental to the United States markets and financial systems to impose such high costs on diversification by institutional investors.

Second, domestic financial systems would benefit if private investors are able to recover for themselves damages they sustain as a result of misconduct *in America* that injures *American*

any even greater extent than the Supreme Court clearly intended. Even the *Morrison* Court recognized that, by its terms, Section 10(b) applies to claims asserted in connection with the purchase or sale of a “security listed on an American stock exchange, and the purchase or sale of any other security in the United States.” 2010 WL 2518523 at *14. It should make no difference whether, in the case of foreign issuers, the listing is of Common Share, or ADRs. “ADRs are negotiable certificates, issued in registered form, and evidence an interest in segregated securities of a foreign issuer. ADRs are usually issued by a U.S. commercial bank (the “Depository”) with whose foreign correspondence (the “Custodian”) the underlying shares have been deposited. An ADR holder generally can exchange ADRs for the underlying shares at any time, and similarly, additional shares generally can be deposited against issuance of additional ADRs.” Greene, et al., *U.S. Regulation of the International Securities and Derivatives Markets* §2.02[1] at 2-19.(9th ed. 2009). Under the SEC’s rules, registration of any security on a national exchange registers the entire class of that security regardless of where else the shares may also trade. 17 C.F.R. § 240.12d1-1. The issues of any security listed on a U.S. exchange must comply with U.S. disclosure rules. Anyone buying a security based on the disclosures is entitled to the protection of Section 10(b).

⁴⁸ For example, only 24 British companies list ADRs on the NYSE, whereas there are some 2,060 British companies that list stock on the London Stock Exchange. See the websites for the NYSE (http://www.nyse.com/about/listed/lc_ny_region_6.html?country=294), and London Stock Exchange (<http://www.londonstockexchange.com/statistics/companies-and-issuers/companies-and-issuers.htm>).

⁴⁹ See Axel Grossman, Teofilo Ozuna & Marc W. Simpson, *ADR Mispricing: Do Costly Arbitrage and Consumer Sentiment Explain the Price Deviation?*, 17 J. Int’l Fin’l Markets, Institutions & Money 361 (2007).

⁵⁰ See Stefan Eichler, Alexander Karmann & Dominik Maltritz, *The ADR Shadow Exchange Rate as an Early Warning Indicator for Currency Crises*, 33 J. Banking & Finance 1983 (2009).

⁵¹ See Justin S.P. Chan, Doug Hong & Marti G. Subrahmanyam, *A Tale of Two Prices: Liquidity and Asset Prices in Multiple Markets*, 32 J. Banking & Finance 947 (2008).

⁵² See Chan, et al., *supra* n.51.

investors – with the concomitant disincentives for foreign interests to engage in financial misconduct *in the United States*. The Supreme Court in *Morrison* repudiated, as a matter of statutory interpretation, the long line of cases that held that one concern of the United States securities laws was to prevent this country from becoming a “Barbary Coast” used as a base for foreign companies that commit wrongful conduct injuring domestic and foreign investors who purchase their stock on foreign exchanges.⁵³ While the Supreme Court repudiated those cases as a matter of statutory interpretation, it did not repudiate their holdings as a matter of legislative policy.

Indeed, concurring in the judgment but not in the majority’s rejection of the “conduct” or “effects” tests in *Morrison*, Justice Stevens noted precisely the anomalous result that the majority’s ruling, as subsequently interpreted by the lower courts, has created:

Imagine, for example, an American investor who buys shares in a company listed only on an overseas exchange. That company has a major American subsidiary with executives based in New York City; and it was in New York City that the executives masterminded and implemented a massive deception which artificially inflated the stock price – and which will, upon its disclosure, cause the price to plummet. Or, imagine that those same executives go knocking on doors in Manhattan and convince an unsophisticated retiree, on the basis of material misrepresentations, to invest her life savings in the company’s doomed securities. Both of these investors would, under the Court’s new test, be barred from seeking relief under § 10(b).

The oddity of that result should give pause. For in walling off such individuals from § 10(b), the Court narrows the provision’s reach to a degree that would surprise and alarm generations of American investors – and, I am convinced, the Congress that passed the Exchange Act.⁵⁴

⁵³ 130 S.Ct. at 2886; *see SEC v. Kasser*, 548 F.2d 109, 116 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977) (securities laws should not be interpreted to “allow the United States to become a ‘Barbary Coast’ . . . harboring international securities ‘pirates.’”).

⁵⁴ 130 S. Ct. at 2895.

Domestic financial markets are surely hurt if, for example, a foreign corporation's *American* subsidiary can commit a fraud in *America*, using *American* financial and investment advisors and accountants, with no recompense available to victims in American courts under American law.

Finally, the majority opinion in *Morrison* expressed an antipathy to class actions and their supposedly detrimental effect on securities markets.⁵⁵ Studies have shown, however, that robust disclosure requirements and enforcement mechanisms – very much including securities class actions – make American markets *more* attractive, not less. Thus, a recent Thomson Financial paper concluded that, following passage of the Sarbanes-Oxley Act, “foreign issuers of IPOs are flocking to US exchanges at unprecedented levels,” with the number of foreign IPOs listed on U.S. exchanges *increasing* since enactment of that statute.⁵⁶ Similarly, a recent National Bureau of Economic Research Working Paper found that foreign listings on the NYSE have not decreased, post-Sarbanes-Oxley, relative to listings on the London Stock Exchange; other studies purporting to find to the contrary miscalculate by considering listings on London's Alternative Investment Market, which typically lists small firms that would not cross-list in New York.⁵⁷ As the authors of that study told the *Wall Street Journal*:

“All of our evidence is consistent with the theory that there is a *distinct governance benefit* for firms that list on the U.S. exchanges,” say the authors, Andrew Karolyi and Rene Stulz of Ohio State University and Craig Dodge of the University of Toronto. “There is no evidence . . . this benefit has weakened over time.”⁵⁸

⁵⁵ 130 S. Ct. at 2886.

⁵⁶ M. Thompson & R. Peterson, *Making It In The USA: Foreign IPO Issuers Continue To Flock To US-Based Exchanges*, Lab Thomson 1 (Jan. 30, 2007).

⁵⁷ Craig Dodge, Andrew Karolyi, Renee Stultz, *Has New York Become Less Competitive in Global Markets? Evaluating Foreign Listings Over Time*, National Bureau of Economic Research Working Paper 13079 (2007).

⁵⁸ G. Ip, *Maybe U.S. Markets Are Still Supreme*, Wall St. J. Online (April 27, 2007) (http://online.wsj.com/article_print/SB11776225449588392.html) (emphasis added).

The United States should not shy away from the robust securities regulation regime that helped it attain international economic preeminence after the Great Depression of the 20th Century, and which will aid its recovery from the current economic crisis. United States and foreign markets will not be injured by the vigorous enforcement of anti-fraud provisions – including private actions by parties injured by conduct that occurred in or substantially affects the United States. Rather, they will be benefited.

IV. Private Investors Should Be Allowed Pursue Securities Fraud Claims With Respect to Securities Purchased Outside the United States When Either the “Conduct” or the “Effects” Test Is Satisfied

As many have recognized, the notion of a truly domestic fraud has been rendered obsolete by the globalization of the world’s financial markets. Whether a material misrepresentation is issued in the U.S. or abroad, its impact is felt globally. Also, there is strong evidence of a global efficient market.⁵⁹

Given this emerging reality, it is very important that the “conduct” or “effects” tests, which were in place for decades, continue to be used to determine whether the antifraud provisions of the Exchange Act reach purchases or sales outside the United States by U.S. investors (in individual or class actions).⁶⁰ Indeed, where a significant component of a transnational fraud occurs on American soil, American investors who purchased the securities should also be able to seek the protection of the antifraud provisions of the Exchange Act,

⁵⁹ See, e.g., Julie B. Rubenstein, Note, *Fraud on the Global Market: U.S. Courts Don’t Buy It; Subject-Matter Jurisdiction in F-Cubed Securities Class Actions*, 95 Cornell L.R. 627, 652 (2010) (“The financial crisis makes plain that in today’s interconnected world, information travels rapidly and can affect securities prices around the globe, no matter where that information is disseminated.”); see also Stephen J. Choi, *Promoting Issuer Choice in Securities Regulation*, 41 Va. J. Int’l L. 815, 848 n.116 (2001) (“capital markets across the world are increasing their integration, leading to one global efficient market”).

⁶⁰ In an Appendix, we present a sample of cases that gave American investors redress for massive transnational securities frauds under prior law, where a remedy would likely be denied under *Morrison*.

⁶² See, e.g., *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir. 1968) (“We believe that Congress intended the Exchange Act to have extraterritorial application in order to protect domestic investors who have purchased

whether they purchased the security on a U.S. or foreign exchange.. In those circumstances, the protection of U.S. investors and the maintenance of high ethical standards in the U.S. market are inextricably tied to protecting those who engaged solely in foreign securities transactions.⁶²

The application of *Morrison* by certain district courts to foreign securities transactions by U.S. investors is especially egregious, leaving U.S. investors with, in reality, no opportunity to recover their losses.⁶³ The diversification of portfolios is critically important to investors, including pension funds that are critically important to the financial health of tens of millions of American retirees.⁶⁴ In fact, as noted *supra* at 14, pension fund fiduciaries have a legal duty to diversify.⁶⁵ There is an urgent need to encourage diversification given the current underfunding of many U.S. pension funds.⁶⁶

foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities.”).

⁶³ Under the Supreme Court’s ruling in *Morrison*, even if a foreign issuer’s misrepresentations are expressly targeted at Americans, American investors will, nevertheless, have no remedy under the Exchange Act if they purchased or sold the issuer’s securities abroad.

⁶⁴ See, e.g., *In re Cigna Corp. Sec. Litig.*, 459 F. Supp. 2d 338, 343 (E.D. Pa. 2006) (expert report submitted to court stated, “According to [Modern Portfolio Theory], an important means to control portfolio risk is diversification, whereby investments are made in a wide variety of assets so that exposure to the risk of any particular security is limited.”); U.S. Securities and Exchange Commission, Office of Investor Education and Advocacy, *Beginners’ Guide to Asset Allocation, Diversification, and Rebalancing*, August 28, 2009, <http://www.sec.gov/investor/pubs/assetallocation.htm> (under heading “Why Asset Allocation Is So Important,” stating, “The Magic of Diversification. The practice of spreading money among different investments to reduce risk is known as diversification. By picking the right group of investments, you may be able to limit your losses and reduce the fluctuations of investment returns without sacrificing too much potential gain.”).

⁶⁵ See, e.g., *Liss v. Smith*, 991 F. Supp. 278, 306 (S.D.N.Y. 1998) (“As counsel to the funds, McCarthy clearly knew or should have known that...the failure to diversify [pension] Fund assets...constituted breaches of the trustees’ fiduciary duties.”); *In re: Miller*, 133 B.R. 405, 409 (Bankr. S.D. Ohio 1991) (employer and plan administrator is a fiduciary under a duty to use prudence to diversify the investments to minimize the risk of large losses).

⁶⁶ See, e.g., Daniel P. Collins, Interview of Lee Partridge, founder, Integrity Capital, August 1, 2010, <http://www.futuresmag.com/Issues/2010/August-2010/Pages/A-diversified.aspx>, (quoting a former public pension deputy chief investment officer and current head of an institutional investor consultancy as stating, “Most public pension plans are underfunded right now. ... A lot of the cause for that was the heavy reliance on equities as an asset class to achieve intended income returns. That is why I felt that most public pension plans are under diversified.”).

Thus, the “effects” test should be revived, so that United States investors significantly effected by securities fraud can seek redress even when they purchased their securities on foreign exchanges. The primary purpose of the United States securities laws is to protect investors.⁶⁷ Before *Morrison*, the courts almost universally agreed that American investors aggrieved by securities fraud could sue even with respect to purchases on foreign exchanges.⁶⁸ As Justice Stevens said in his concurring opinion in *Morrison*, “the Congress that passed the Exchange Act” would be “surprised and alarmed” that American investors injured by fraud were denied a remedy.⁶⁹

The “conduct” test should also be reinstated for private actions. As set forth in the Solicitor General’s amicus brief to the Supreme Court in *Morrison*, “[a] transnational securities fraud violates Section 10(b) if significant conduct material to the fraud’s success occurs in the United States[]” and that this standard promotes “Section 10(b)’s goals of ensuring high ethical standards in the securities industry and protecting investors”⁷⁰ We adopt the standards set forth in the SEC’s amicus brief for the “conduct” test as applicable to private actions⁷¹ (understanding the “conduct” test takes account of the *totality* of the conduct constituting the fraud – not just where the misleading statements were uttered). As the SEC emphasized, abandoning the “conduct” test “would risk permitting the United States to become a base for

⁶⁷ See *Morrison*, 130 S.Ct. at 2894 (“it is the ‘public interest’ and ‘the interests of investors’ that are the objects of the statute’s solicitude”) (Stevens, J., concurring); see also Mary Schapiro, Testimony before the House Financial Services Subcommittee (March 11, 2009) (“we must have a renewed commitment to protecting investors, as it is investors who provide the capital used to fund the productive enterprises that create jobs and wealth. While we have a tripartite mission at the SEC, investor protection is an essential piece from which our other responsibilities flow.”).

⁶⁸ See *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 989 (2d Cir. 1975); see also, e.g., *Securities Exchange Commission v. Banner Fund International*, 211 F.3d 602, 609 (D.C. Cir. 2000) (following *Bersch*).

⁶⁹ 130 S. Ct. at 2886; see *supra* at 16.

⁷⁰ Brief for United States as Amicus Curiae Supporting Respondents, *Morrison v. National Australia Bank*, No. 08-1191, 2010 WL 719337, at *6 (Feb. 26, 2010).

⁷¹ *Id.* at 13-30.

orchestrating securities frauds for export. That approach would erode ethical standards in the securities industry and undermine investor confidence, and it could lead to diminished protections for United States citizens targeted by foreign fraudsters.”⁷²

V. The Test Should Be Whether Significant Conduct Occurred in the U.S. or Whether There Were Significant Effects on U.S. Investors, Not Where a Purchase or Sale Can Be Said to Have Taken Place

The fundamental purpose of the securities laws is to protect American investors.⁷³

Consistent with those principles, numerous cases have extended the protections of the Exchange Act to U.S. purchasers of foreign companies’ shares.⁷⁴ Because the actual exchange where the transaction takes place (if it even occurs on an exchange as opposed to a computer match outside of an exchange) is often not under the control of the investor, the Securities Laws should protect claims arising out of purchases by American investors wherever those transactions took place, so long as the facts meet the “effects” or “conduct” tests’ standards.

The *Morrison* test, based on where a transaction takes place, both underserves the securities laws’ purpose to protect American investors by requiring greater disclosures and is difficult if not impossible to apply in the current global trading environment. When securities are cross-listed on an American and a foreign exchange, the clearing agent for the broker of an

⁷² *Id.* at 6.

⁷³ See *Roby v. Corp. of Lloyd’s*, 996 F.2d 1353, 1364 (2d Cir. 1993) (“[T]he securities laws are aimed at prospectively protecting American investors from injury by demanding ‘full and fair disclosure’ from issuers” and “deter[ring] issuers from exploiting American investors.”).

⁷⁴ See, e.g., *In re Parmalat Sec. Litig.*, 2008 U.S. Dist. LEXIS 64296 (S.D.N.Y. Aug. 20, 2008) (certifying class of U.S. investors who purchased or otherwise acquired Parmalat ordinary shares during the class period); *In re Bayer AG Sec. Litig.*, 2008 U.S. Dist. LEXIS 101350 (S.D.N.Y. Dec. 15, 2008) (certifying class of those who purchased shares over-the-counter, purchased ADRs on NYSE or ordinary shares or ADRs on any other exchange, and were citizens or residents of the United States at the time); *In re Rhodia S.A. Sec. Litig.*, 531 F. Supp. 2d 527 (S.D.N.Y. 2007) (finding subject-matter jurisdiction over investors who resided in the United States and traded shares on the Paris Bourse); *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 346, 369 (S.D.N.Y. 2005) (on a motion to dismiss, noting that “Defendants’ motions are not directed at either domestic investors in Alstom securities, wherever their stock may have been purchased, or at holders of Alstom ADSs that were traded on the NYSE”); *In re Royal Dutch/Shell Transp. Sec. Litig.*, 380 F. Supp. 2d 509, 540 (D.N.J. 2005) (defendants did not challenge the court’s subject-matter jurisdiction over the claims of domestic investors who purchased on foreign exchanges); *Tri-*

American purchaser might effect the transaction on whichever exchange currently offers better terms, and the American purchaser might not even know on which exchange her stock was purchased.

Morrison's insufficient recognition of the global nature of today's securities markets is driven home by the proposed takeover of the New York Stock Exchange by the Deutsche Börse in Frankfurt. As reported in the New York Times, under the terms of the proposed takeover, "the Deutsche Börse would own as much as 60 percent of the new company, which would be incorporated in the Netherlands."⁷⁶ The Times explained:

A combination, after the mergers of other exchanges, would be another illustration of how globalization and technology have changed marketplaces. The New York Stock Exchange is a giant among exchanges, yet in a world of around-the-clock trading and rapid-fire algorithmic programs, its significance to investors has diminished.⁷⁷

If the takeover occurs and the United States' largest and most significant securities exchange becomes foreign-owned and linked to foreign exchanges, who will even be able to say what a "national exchange" is any more? The Times explained, "[a] merger would potentially let customers trade stocks in New York, options tied to those shares in Paris and derivatives linked to them in Frankfurt."⁷⁸ Does this mean that options trades effectuated through the New York Stock Exchange will thenceforth be beyond the reach of the United States securities laws because they are consummated on the Paris Exchange?

Star Farms Ltd., v. Marconi, PLC, 225 F. Supp. 2d 567, 573 (W.D. Pa. 2002) ("Jurisdiction likewise would extend to any United States purchasers of Marconi ordinary shares.")

⁷⁶ Michael J. de la Merced & Jack Ewing, "German Börse in Talks to Buy Big Board," New York Times (Online Edition) (Feb. 9, 2011) (at <http://dealbook.nytimes.com/2011/02/09/nyse-uronext-and-deutsche-borse-in-merger-talks/?scp=1&sq=frankfurt&st=cse>).

⁷⁷ *Id.*

⁷⁸ *Id.*

A focus on whether significant fraudulent “conduct” occurred in the United States, or whether the fraud had significant “effects” on United States investors, both better serves the purposes of the securities laws and – despite the *Morrison* Court’s desire to establish an easily applicable bright-line rule – is easier to apply in today’s global market, which indeed is becoming more global every day. The *Morrison* rule, on the other hand, disregards the realities of today’s global markets, and cuts off the rights of American investors arbitrarily.

VI. Remedies Available Outside of the United States Are Problematic

Although remedies for U.S. investors are theoretically available outside of the United States, in reality a number of hurdles – such as the lack of a developed class action mechanism, the lack of contingency fee litigation, “loser pays” fee shifting rules, the need for U.S. investors to retain foreign counsel and uncertainty about laws governing investors’ rights (including whether U.S. residents are even protected by the foreign law) – effectively preclude a majority of U.S. investors from pursuing any relief for injuries suffered from securities purchased outside of the United States. These concerns become even more daunting when individual losses are relatively small – regardless of the overall loss to a class. The limited number of investor lawsuits filed outside of the United States in 2010 – 36 across the world⁷⁹ – supports the notion that relying on foreign litigation as an exclusive avenue to remedy injuries *sustained by U.S. investors in the United States* effectively insulates fraudsters, leaving U.S. investors with no legitimate means to seek redress for injuries now barred by *Morrison*.

Nevertheless, we briefly survey the legal landscape in a handful of foreign countries to provide the Commission with a synopsis about the litigation possibilities available to U.S.

⁷⁹ See John W. Moka III, et al., *2010 a Record Year for Securities Litigation – An Advisen Quarterly Report – 2010 Review*, Advisen (“Advisen recorded 36 securities suits filed in courts outside the U.S., in line with 2006-2008 totals. The Madoff Ponzi scheme, which drew in a number of non-U.S. investors and banks, led to a spike in non-U.S. securities cases in 2009”).

residents in foreign courts. This section will primarily focus on remedies available under the class/collective action mechanism.⁸⁰

Australia

Australia allows investors to assert claims through a class action device; however, this development is “relatively recent” and has not resulted in significant litigation.⁸¹ According to a study by NERA Economic Consulting, only twenty-two lawsuits have been filed between 2004 and 2009. Two significant hurdles to investors filing suit here is that Australia does not allow for contingency fee litigation and follows a loser pay system where investors could be saddled with costs for bringing unsuccessful actions. In addition, although there is some case law that appears to be favorable to the doctrine, Australia has not yet clearly recognized a “fraud on the market” doctrine. A few commercial litigation firms have begun funding litigation, easing some of these hurdles, yet the limited number of actions under Australian law undercut the notion that Australia is an adequate forum for defrauded investors residing in the United States.

Canada

Although Canada permits claims to be litigated as a class, investors’ reliance on the class action vehicle has been limited. For example, in 2009 there were a total of 8 investor class actions filed under Canadian law.⁸²

Investors were provided some guidance on the scope of Canada’s antifraud laws in December 2009, when an Ontario Superior Court judge certified a world-wide class of investors against IMAX Corp. for issuing misleading claims about its financial health. Investors’ claims

⁸⁰ A full analysis of case law from each country discussed herein is beyond the scope of our comment. All emphases are added.

⁸¹ Greg Houston, Svetlana Starykh, Astrid Dahl, and Shane Anderson, *Trends in Australian Securities Class Actions: 1 January 1993 – 31 December 2009*, NERA (2010).

⁸² Mark L. Berenblut, et al., *Trends in Canadian Securities Class Actions: 2009 Update*, NERA (2009).

were asserted under, *inter alia*, the Ontario Securities Act.⁸³ The certified class included investors purchasing shares on the Toronto Stock Exchange and the NASDAQ. While *IMAX* suggests that Canada may provide injured investors from the U.S. a viable forum, at this point, it is unclear how broadly accepted the *IMAX* decision will be in future cases. Moreover, in British Columbia, Newfoundland, Saskatchewan, and New Brunswick there must be a representative plaintiff who is a resident of the respective province in order to bring a class action. Thus, in these provinces a U.S. investor cannot bring an action without partnering with a local resident.⁸⁴

Japan

While there is no class action mechanism under Japanese law, in a few cases some plaintiffs have begun to organize large investor groups to bring claims for damages under Japanese securities laws. At this point, it is unclear whether foreign investors may serve as class representatives or recover losses under Japanese law.

The Netherlands

The Dutch Act on the Collective Settlement of Mass Claims (the “WCAM”) became effective on July 27, 2005. Pursuant to the WCAM, parties to a settlement agreement may request the Amsterdam Court of Appeal to declare the settlement agreement binding on all persons to which it applies. If the Court declares the settlement agreement binding, all interested persons are bound by its terms unless an interested person timely submits an “opt out” notice. The Court will refuse to declare the settlement agreement binding if, among other things, the amount of settlement relief provided for in the settlement agreement is not reasonable or the

⁸³ *Silver, et al., v. IMAX Corp.*, No. 06-3257-00 (Ontario Super. Dec. 14, 2009).

⁸⁴ www.stikeman.com/en/pdf/byers_lang_class_actions_chapter.pdf

⁸⁶ http://www.newsletter-nautadutilh.com/EN/xzine/class_actions/interim_ruling_by_amsterdam_court_of_appeal_on_international_jurisdicti_on_in_collective_settlement_cases.html?cid=4&xzine_id=4488#

petitioners jointly are not sufficiently representative of the interests of the interested persons. Between the WCAM's entry into force in 2005 and 2009, the Court had declared a settlement agreement binding in five cases – the most notable being the Royal Dutch Shell plc (“Shell”) settlement approved by the Court in May 2009.

Relying on the *Shell* decision, on November 12, 2010, the Amsterdam Court of Appeal delivered a decision involving Converium Holding AG (currently known as SCOR Holding AG) and Zurich Financial Services Ltd. regarding an international collective settlement of mass claims. The court assumed jurisdiction to declare an international collective settlement binding in a case where none of the potentially liable parties and only a limited number of the potential claimants were domiciled in the Netherlands. The *Converium* decision is provisional, but if it becomes final, it will have to be recognized in all European Members States, Switzerland, Iceland, and Norway under the Brussels I Regulation and the Lugano Convention. It should be noted that the *Converium* court seemed fully aware of the significance of its judgment as creating an alternative venue to declare international collective settlements in mass claims. The court explicitly referred to the limitations for the U.S. courts to do so in securities cases as a result of *Morrison*.⁸⁶

Based on our research, it appears that U.S. investors are likely able to settle claims in the Netherlands as “Dutch courts have jurisdiction if at least one of the parties requesting the binding declaration or one of the defendants is domiciled in the Netherlands.”⁸⁷ “However, pursuant to the WCAM, only court approved representative organizations can pursue a securities class action on behalf of investors. Furthermore, such organizations cannot seek damages in court. The Dutch court may only certify the class and decide whether to approve an out-of-court settlement

⁸⁷ www.iclg.co.uk/khadmin/Publications/pdf/3964.pdf.

between the parties. This ‘representative action’ system, therefore, could limit the number of successful settlements in the Netherlands simply because potential plaintiffs may have less leverage to achieve an out-of-court settlement. . . .”⁸⁸

The United Kingdom

Where claims give rise to common or related issues of fact or law, English courts have the power to enter a group litigation order (“GLO”) enabling the court to manage claims covered by the GLO in a coordinated manner. The statute granting this procedure, however, is construed extremely narrowly. Before granting a GLO, the court must be satisfied that it is the most proportionate means of resolving the claims and that no other order is more appropriate. A GLO must establish:

- a group register on which details of the claims to be managed under the GLO must be entered;
- the GLO issues, which will identify the claims to be managed under the GLO; and
- the “management court” responsible for managing the claims.⁸⁹

Parties must “opt in” to group litigation. Moreover, U.K. follows a loser pays system where the unsuccessful party pays the costs, including legal fees, of the successful party.

Investors suffering losses in the United Kingdom have begun grouping together in “action groups” to pursue claims for fraud. Investor backed litigation is funded by the action group itself which in turn requires members to pay a fee for joining the group.⁹⁰

While group actions are available under U.K. law to non-U.K. residents, given the cost of joining an action group and the prospects of fee shifting, we do not believe the U.K. provides a

⁸⁸ <http://blog.riskmetrics.com/slw/2011/01/multi-national-securities-class-action-go-international.html>

⁸⁹ www.iclg.co.uk/khadmin/Publications/pdf/3973.pdf.

⁹⁰ See, e.g., http://www.rbsactiongroup.co.uk/?page_id=2

reasonable forum for U.S. investors. This is especially so if the U.S. investors suffered relatively insubstantial losses.

Germany

Enacted in 2005, the Capital Markets Model Case Act (Kapitalanleger-Musterverfahrensgesetz), allows for group actions in the securities litigation context.⁹¹ The so-called KapMuG law establishes a lead case procedure for handling collective individual securities actions. The KapMuG law was introduced for a trial period only and was originally set to expire in November 2010. The German legislature recently extended the KapMuG law to at least October 31, 2012. According to a paper on German law, it appears that non-German residents may assert claims under the KapMuG law: “claims can be brought by residents from other jurisdictions. In fact, the introduction of the KapMuG was aimed in part to provide a forum in Germany for claimants from other jurisdictions.”⁹² However, we are not aware of a case where a non-German resident relied on the KapMuG law to recover for an injury.

Other Nations With Collective/Class Action Rules

A handful of countries other than the ones already discussed – Brazil, Poland, Mexico, Denmark, Hong Kong, Estonian, Russia, Italy, and Thailand – have established some rules for asserting claims through a class action/collective action vehicle. Whether or not U.S. investors can avail themselves of these nations’ class/collective action vehicles in order to recover investment losses is an open question.⁹³

⁹¹ Quoted from www.iclg.co.uk/khadmin/Publications/pdf/3977.pdf.

⁹² Quoted from www.iclg.co.uk/khadmin/Publications/pdf/3977.pdf.

⁹³ For example, “while Italy began allowing class action litigation at the beginning of 2010 . . . the list of groups eligible for class certification does not include investors.” Zack Phillips, *Class Actions Falter in Europe*, BUSINESS INSURANCE (Jul. 26, 2010).

The information on foreign litigation options is not substantial and cannot be relied upon to provide U.S. residents with adequate venues for recovering losses sustained in the United States. Given the uncertainty of foreign law and the logistical issues U.S. investors are likely to face if they are to seek redress overseas, we believe allowing *Morrison*'s limitations to stand will effectively preclude any recovery by U.S. investors for investments made outside of the United States. Such a limitation is particularly inappropriate when the relief being sought is based on *injuries suffered in the United States*. Indeed, as noted *supra*, a return to pre-*Morrison* standard for assessing the scope of the federal securities laws would balance investors' right to pursue claims properly heard in the U.S. while avoiding the application of U.S. law to essentially foreign frauds.

Conclusion

NASCAT urges the reinstatement of the “conduct” or “effects” tests for private transnational securities fraud actions.

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APPENDIX

Had *Morrison*'s holding been in effect prior to June 2010, a vast number of cases, including cases involving some of the most notorious shareholder frauds in recent history, would have been decided differently, with large swaths of investors (both foreign and domestic) being stripped of a remedy. The list below is a sampling of such cases since the passage of the PSLRA:

- ***In re Royal Ahold Securities Litigation***, MDL 1539 – In a case involving gross and fraudulent overstatement of earnings based on conduct at Ahold's wholly-owned subsidiary, U.S. Foodservice, Inc., Ahold eventually announced restatements exceeding \$24 billion in revenues and \$1.1 billion in income.

This case resulted in a settlement of \$1.1 billion dollars, on behalf of both common stock and ADR purchasers. If *Morrison* had been in effect, only ADR purchasers could have maintained this action.

- ***In re Parmalat Securities Litigation***, No. 04 Civ. 0030 (LAK) – After Parmalat announced that a €4 billion (\$4.8 billion) Parmalat bank account did not exist, a fraudulent financial scheme between Parmalat, the giant international Italian dairy company, and several other companies was revealed. The fraud resulted in the understatement of Parmalat's debt by nearly \$10 billion and the overstatement of its net assets by more than \$16 billion.

A settlement of \$50 million and 10,500,000 shares of New Parmalat was reached on behalf of a global class of shareholders (regardless of where they purchased their shares). If *Morrison* had been in effect, only investors who purchased on a US exchange could have maintained this action.

- ***In re Royal Dutch/Shell Transport Securities Litigation***, Civil No. 04-374 (JAP) (filed January 29, 2004) – Shell Defendants knowingly or recklessly made materially false and misleading statements regarding certain of its oil and gas reserves.

A settlement of \$89,508,000 was reached on behalf of purchasers of Shell ADR purchasers anywhere in the world and Shell ordinary share purchasers who resided in or were citizens of the U.S. If *Morrison* had been in effect, only investors who purchased Shell ADRs could have maintained this action. Additionally, a settlement of \$352.6 million was reached on behalf of non-U.S. ordinary share purchasers, which is being administered in the Netherlands. This settlement would likely have been impossible unless these purchasers had potential claims in the U.S., which now, under *Morrison*, they do not.

- ***In re SCOR Holding (Switzerland) AG Litigation***, 04-CV-7897 (S.D.N.Y.) (filed October 4, 2004) -- Scor f/k/a Converium failed to disclose that Converium maintained inadequate loss reserves in its Converium North America subsidiary.

A settlement of \$84,600,000 was reached on behalf of purchasers of Converium ADR purchasers anywhere in the world and Converium ordinary share purchasers who resided in or were citizens of the U.S. If *Morrison* had been in effect, only investors who purchased Converium ADRs could have maintained this action. Additionally, a settlement of \$58.4 million was reached on behalf of non-U.S. ordinary share purchasers, which is being administered in the Netherlands. This settlement would likely have been impossible unless these purchasers had potential claims in the U.S., which, under *Morrison*, they do not.

- ***In re Canadian Superior Energy, Inc. Securities Litigation***, 04-CV-2020 (S.D.N.Y.) (filed March 15, 2004) -- Canadian Superior and certain of its officers and directors issued a number of materially false and misleading statements about its El Paso Mariner I-85 well offshore operations in Nova Scotia, Canada.

A settlement of \$3.2 million was reached on behalf of investors who purchased on both the New York and Toronto stock exchanges. If *Morrison* had been in effect, only investors who purchased on the NYSE could have maintained this action.

- ***In re Mamma.com Securities Litigation***, 05-cv-02313 (HB) (S.D.N.Y.) – A notorious Canadian stock swindler, Irving Kott, secretly owned, influenced, and controlled the Company, including the price of the Company's shares.

A settlement of \$3.15 million included purchasers on both U.S. and German exchanges. Under *Morrison*, the purchasers on the German Exchange would have been excluded.

- ***In re CP Ships Securities Litigation***, 05 MD 1656 (M.D. Fla.) – Defendant (a container shipping company) overstated its net income figures, allowing the Company to fraudulently complete a convertible note offering that generated \$200 million in net proceeds.

A settlement of \$12.8 million included all purchasers on the U.S. exchange and all non-Canadian investors who purchased on the Toronto Exchange. Under *Morrison* the purchasers on the Toronto Exchange would have been excluded.

- ***In re Bayer Securities Litigation***, 03-1546 (S.D.N.Y.) -- Defendants publicly misrepresented the prospects for Bayer's cholesterol-lowering drug, Baycol, while failing to disclose serious health risks, which led Bayer to withdraw Baycol on August 8, 2001.

An \$18,500,000 Settlement was on behalf of purchasers on U.S. exchanges or domestic purchasers of Bayer on foreign exchanges. Under *Morrison*, domestic purchasers of Bayer on foreign exchanges would have been excluded.

- ***Wagner v. Barrick Gold Corp, et al.***, 1:03-cv-4302 (RMB) (S.D.N.Y.) -- Defendant (a gold producer with a portfolio of 27 operating mines and exploration and development projects

located across five continents) made materially false and/or misleading statements regarding Barrick's financial condition, operations, accounting, growth, income, earnings and prospects.

This case resulted in a \$24,000,000 settlement on behalf of common stock purchasers on both the New York and Toronto stock exchanges. If *Morrison* had been in effect, only investors who purchased on the NYSE could have maintained this action.

* * * * *

In the wake of the *Morrison* decision, many pending cases have been wholly or partially dismissed, demonstrating the broad (and deleterious) reach of the holding. These cases include:

- ***In re Alstom S.A. Securities Litigation***, 03-CV-06595 (S.D.N.Y.) – Alstom, a French company, issued numerous false and misleading positive statements concerning the growth and financial performance of Alstom's transportation subsidiary, including statements that the Company had failed to recognize costs incurred in a rolling-stock supply railcar contract at its transportation unit in anticipation of shifting the costs to other contracts

On September 14, 2010, the Court dismissed all non-ADR purchasers from the action based on *Morrison*. 2010 U.S. Dist. LEXIS 98242 (S.D.N.Y. Sept. 13, 2010).

- ***In re Swiss Reinsurance Company Securities Litigation***, 08-CV-01958, (S.D.N.Y.) – Defendants failed to disclose that Swiss Re's Credit Solutions unit had written two credit default swaps that exposed the Company to great financial risk concerning subprime and collateralized debt obligations.

On October 1, 2010, the Court dismissed all claims, finding that, since Swiss Re only traded on a non-U.S. exchange (Switzerland), *Morrison* precluded all federal securities claims. 2010 U.S. Dist. LEXIS 105720 (S.D.N.Y. Oct. 1, 2010).

- ***In re Societe Generale Securities Litigation***, 08-CV-02495 (S.D.N.Y.) – SocGen misled investors regarding its activities and exposure in the subprime mortgage markets and regarding the highly irregular and unauthorized trades by its Delta One derivative trading desk, handled by junior trader Jerome Kerviel. SocGen had to take write downs of close to \$4 billion relating to the subprime market, and \$7 billion in losses due to the highly risky and irregular trading by Kerviel.

On September 29, 2010, the Court dismissed all claims, relying on *Morrison* and finding that SocGen's shares only traded on foreign exchanges (the Court also dismissed ADR purchasers, finding them to be the equivalent of a foreign transaction). 2010 U.S. Dist. LEXIS 107719 (S.D.N.Y. Sept. 29, 2010).

- ***In re Credit Suisse Securities Litigation***, 08-CV-3758 (S.D.N.Y.) -- Defendants fraudulently failed to write down impaired securities containing mortgage-related debt..

On July 27, 2010, the Court dismissed all claims on behalf of investors who purchased shares of Credit Suisse on non-U.S. exchanges. 729 F. Supp. 2d 620 (S.D.N.Y. 2010).

- ***In re Elan Corporation Securities Litigation***, 08-CV-08761 (S.D.N.Y.) -- Defendants made materially false and misleading statements about bapineuzumab, a drug the defendants was developing in association with another company for the treatment of Alzheimer's disease. Specifically, defendants failed to disclose unfavorable results from a Phase II clinical study of bapineuzumab that the defendants and the other company conducted.

The appointed lead plaintiff, Tyne & Wear Pension Fund, was a foreign purchaser on a foreign exchange. Defendants moved to force withdrawal of the Lead Plaintiff based on *Morrison*. Lead Plaintiff has been replaced with a purchaser of Elan ADRs. A motion to dismiss is pending.

- ***In re Royal Bank of Scotland Securities Litigation***, 09-CV-00300 (S.D.N.Y.) -- RBS misrepresented the bank's exposure to sub-prime and toxic assets as well as the economic consequences of RBS' acquisition of ABN AMRO.

On January 11, 2011, the Court dismissed all claims on behalf of purchasers of ordinary shares (which trade in the UK) based on *Morrison*. 2011 U.S. Dist. LEXIS 3974 (S.D.N.Y. Jan. 11, 2011).

- ***In re Santander-Optimal Securities***, 09-CV-20215 (M.D. Florida) -- Defendants were negligent and reckless in investing substantially all of the assets of the Strategic US Equity Fund with Bernard L. Madoff and Bernard L. Madoff Investment Securities LLC without conducting reasonable and adequate due diligence.

On July 30, 2010, the Court dismissed all federal claims in light of *Morrison* and granted a *forum non conveniens* motion, in part because there were no federal claims remaining.

- ***In re Canadian Superior Energy Inc.***, 09-CV-10087 (S.D.N.Y.) -- Defendants failed to disclose that their energy reserves were below the economic threshold for development and that Canadian Superior failed to timely pay its drilling operator and other obligations.

On August 6, 2010, the Court dismissed all claims on behalf of purchasers on the Toronto Stock Exchange based on *Morrison*.

- ***Elliott Associates v. Porsche***, 10-CV-0532 (S.D.N.Y.) -- Porsche and its former executives engaged in market manipulation and fraud during their four-year takeover attempt of VW.

On December 30, 2010, the Court dismissed the federal securities law claims in light of *Morrison*, finding that "swap agreements . . . [where] the issuer of the reference security, VW, and the perpetrator of the alleged fraud, Porsche, are located in Germany" is not a

domestic transaction in other securities” as required by *Morrison*, even when the “purchaser is located in the United States.” 2010 U.S. Dist. LEXIS 138399 (S.D.N.Y. Dec. 30, 2010).

- ***Absolute Activist Value Master Fund v. Himm***, 09-CV-8862 – a group of Cayman Island based hedge funds engaged in a pump-and-dump scheme to purchase shares of "Penny Stock Companies" not traded on a U.S. domestic exchange at artificially inflated prices.

On December 22, 2010, the Court dismissed the claims in light of *Morrison*, finding that the case involved no domestic transactions. 2010 U.S. Dist. LEXIS 137150 (S.D.N.Y. Dec. 22, 2010).

- ***Terra Erra Securities v. Citigroup, Inc.***, 09-7058 (S.D.N.Y.) – Defendants made false and misleading statements concerning Citigroup’s Fund Linked Investments because they failed to correctly disclose credit and liquidity risks.

On August 16, 2010, the Court dismissed the federal securities claims in light of *Morrison*, finding that “the FLNs that Plaintiffs purchased were listed on European stock exchanges and the TRS was sold in Europe.” 2010 U.S. Dist. LEXIS 84881 (S.D.N.Y. Aug. 16, 2010).

* * * * *

Additionally, there are many ongoing cases in which a challenge to the claims based on *Morrison* has been filed and is currently pending, or the class definition has been voluntarily narrowed by the Lead Plaintiff to conform with *Morrison*.

- ***In re Vivendi Securities Litigation***, 02-5571 (S.D.N.Y.) -- Defendants made false and misleading statements regarding the financial condition of Vivendi that inflated the share price and caused economic harm to investors.

After Plaintiffs’ verdict at trial prior to the *Morrison* ruling (amounting to an estimated \$9.3 billion), Defendants moved to vacate judgment as to purchasers of Vivendi on foreign exchanges. This motion is pending

- ***In re Satyam Computer Services, Ltd., Securities Litigation***, 09-MD-02027 (S.D.N.Y.) -- the Company and its two top executives admitted to a “multi-year” fraud in which Satyam's financial accounts and disclosures were systematically falsified, inflating the amount of cash on the Company's balance sheet by nearly \$1 billion.

Defendants have moved to dismiss all non-ADR purchasers from the case based on *Morrison*. This motion is pending.

- ***In re Siemens Securities Litigation***, 09-CV-05310 (E.D.N.Y.) – Siemens made materially false and misleading statements concerning its ability to generate revenues and achieve

earnings expectations once it had put an end to systemic and extensive fraud, bribery and other illegal and corrupt activities.

Defendants have moved to dismiss the claims of all non-ADR purchasers based on *Morrison*. This motion is pending.

- ***In re Toyota Securities Litigation***, 10-CV-00922, (C.D. Cal.) -- Defendants misled investors by failing to disclose that there was a major design defect in Toyota's acceleration system, which could cause unintended acceleration.

Plaintiffs' Amended Complaint excludes federal securities law claims on behalf of non-domestic purchases. The Complaint does include claims under Japanese law on behalf of such purchasers. Defendants have challenged application of Japanese law.

- ***Anwar v. Fairfield Greenwich Funds***, 09-118 (S.D.N.Y.) – investors have sued entities, executives, and other professional service providers who audited, administered, or served as custodian of investments that were actually invested by a Ponzi scheme operator (Bernie Madoff).

Defendants moved to dismiss federal claims based on *Morrison*. Court has deferred a ruling while discovery into the locations of the transactions is undertaken. 2010 U.S. Dist. LEXIS 86716 (S.D.N.Y. Aug. 18, 2010).

- ***In re Kingate Mgt. Ltd. Litig.***, No. 09 Civ. 5386 (DAB) (S.D.N.Y.) and ***In re Herald, Primeo and Thema Funds Sec. Litig.***, No. 09 Civ. 289 (RMB) (S.D.N.Y.) -- brought on behalf of investors in Madoff feeder funds, these cases allege that the funds' administrators, custodians, advisors, directors, and other individuals involved in the marketing and sale of the funds misrepresented material facts concerning investments in the Funds and failed to perform the due diligence they promised. Shares of the feeder funds were issued and sold abroad to primarily foreign investors.

In light of *Morrison*, certain Plaintiffs voluntarily dismissed the Exchange Act claims.

- ***In re BP Securities Litigation*** – BP falsely and misleadingly portrayed its safety systems and operational integrity, the truth of which was revealed when the Deepwater Horizon oil rig was destroyed, creating the largest oil spill in the history of the petroleum industry.

The consolidated complaint has yet to be filed, but already certain movants for lead plaintiff have objected to the inclusion of BP ordinary share purchasers in light of *Morrison*. 2010 U.S. Dist. LEXIS 136871 (S.D. Tex. Dec. 28, 2010).