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February 18, 2011

Release No. 34-63174, File Number 4-617

Dear Ms. Murphy:

In connection with the Securities and Exchange Commission's "Study on Extraterritorial Private Rights of Action" (Release No. 34-63174; File No. 4-617), enclosed please find a comment submitted on behalf of Vivendi, S.A.

We appreciate the opportunity to comment on this important issue. Please do not hesitate to contact me with any questions.

Respectfully,

Dl Slifkin

Daniel Slifkin

Elizabeth M. Murphy, Esq.
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Encl.

Copy w/ encl. to:

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Comment of Vivendi, S.A., in Response to the Securities and Exchange Commission's Study on "Extraterritorial Private Rights of Action"

Release No. 34-63174, File No. 4-617

February 18, 2011

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I. INTRODUCTION.

In Morrison v. National Australia Bank, Ltd., ___ U.S. ___, 130 S. Ct. 2869 (2010), the Supreme Court rejected decades of jurisprudence in the lower federal courts that had previously applied Section 10(b) of the Securities Exchange Act of 1934 extraterritorially, including in cases in which courts were able to find that certain "conduct" or "effects" relating to a foreign securities transaction had occurred in the U.S. Extraterritorial application of Section 10(b) under these standards, although a boon to the plaintiffs' securities bar, wreaked havoc on America's relations with its foreign neighbors and created a breed of "transnational" class action litigation that would take a lasting toll on America's status as a destination for foreign investment. In place of this "conduct" and "effects" jurisprudence, the Supreme Court established a bright-line "transactional" test for determining when recourse to Section 10(b) would be available: "Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only 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." Id. at 2888.

In response to the Securities and Exchange Commission's ("SEC") October 25, 2010, Request for Comments in connection with its "Study on Extraterritorial Private Rights of Action", Vivendi, S.A. ("Vivendi"), respectfully submits this Comment to highlight the serious, adverse legal and public policy consequences of extending the Section 10(b) private right of action beyond the limits set forth in Morrison, including to cases involving "conduct within the United States that constitutes significant steps in the furtherance of the violation" or "conduct occurring outside the United States that has a foreseeable substantial effect within the United States". See

Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P, 124 Stat. 1864 (2010).

The SEC already is well aware of a number of these adverse consequences. In its amicus brief before the Supreme Court in Morrison, the SEC highlighted many of the concerns associated with "private suits alleging multinational securities frauds", including their potential for "conflict with foreign nations" and "the danger that the resources of the United States courts will be diverted to redress securities-related harms having only an attenuated connection to this country".[1] In contrast to public enforcement bodies like the SEC, private plaintiffs – as the SEC correctly put it – "have little incentive to consider whether resolution of their securities-related grievances represents a wise use of federal judicial resources".[2]

Vivendi has experienced first hand the serious, costly consequences of the "conduct" and "effects" class action regime. Since 2002, it has been defending itself against a Section 10(b) action in U.S. district court that is based predominantly on transactions in the ordinary shares of Vivendi, a French company, purchased on a French securities exchange by non-U.S. investors. France, like many other foreign nations, has expressly rejected the U.S. opt-out class action regime as unconstitutional and contrary to public policy. Vivendi is therefore firmly of the view that France will not recognize or enforce any judgment rendered in the U.S. opt-out class action. Consequently, Vivendi has been forced to spend hundreds of millions of dollars defending against, inter alia, a

[1] Brief for the United States as Amicus Curiae Supporting Respondents, in Morrison v. Nat'l Australia Bank, Ltd., 130 S. Ct. 2869 (2010) (No. 08-1191), 2010 WL 719337, at *8, 28.

[2] Id. at *28.

U.S. class action that, even if resolved in Vivendi's favor, would fail to preclude further suits by French members of the U.S. class, who did not seek to participate in the U.S. litigation and whose local country, Vivendi believes, would refuse to recognize a U.S. judgment. As set forth below, such a system of "transnational" U.S. securities litigation should not be restored.

First, to restore any version of the pre-Morrison "conduct" and "effects" standards in private antifraud actions is to extend America's own unique brand of securities regulation to transactions in securities that take place entirely overseas and that are appropriately the subject of their own jurisdictions' local securities regimes. Nations have a sovereign right to regulate commerce occurring within their borders. In exercise of this prerogative, many countries have enacted systems of securities regulation that depart sharply from the U.S. model. To extend Section 10(b) extraterritorially in private actions, and thereby allow foreign nationals to bypass local law in favor of the U.S. class action regime, would disrespect the deliberate, considered policy choices made by other nations, in violation of established principles of international law and comity. As the Supreme Court observed in Morrison, "The probability of incompatibility with other countries' laws is so obvious that if Congress intended such foreign application it would have addressed the subject of conflicts with foreign laws and procedures." 130 S. Ct. at 2885 (internal quotation marks omitted). This "superimposition" of U.S. securities laws on foreign countries risks dissuading those countries from participating in cross-border cooperation efforts that have proved so critical in the wake of the global economic crisis. (Infra Section III.)

Second, as Vivendi's experience illustrates, extending private antifraud class actions to encompass investors whose home countries have explicitly rejected the U.S. opt-out class action regime not only subjects foreign companies like Vivendi to the severe cost, burden and uncertainty of defending duplicative parallel actions in two jurisdictions, but also creates needless burden for courts and motivates improper forum shopping by private plaintiffs. (Infra Section IV.)

Third, by creating an uncertain and costly litigation environment for foreign companies like Vivendi, extraterritorial expansion of the private right of action under Section 10(b) dangerously weakens America's ability to attract foreign capital. The "conduct" and "effects" standards in place prior to Morrison created a cloud of uncertainty for foreign companies, causing many of them to delist from U.S. exchanges and to abandon their investments in U.S. companies. As the International Chamber of Commerce summarized in its amicus brief in Morrison, "Vague, expansive standards for the extraterritorial reach of U.S. securities fraud prohibitions . . . would substantially undermine the country's ability to obtain [foreign direct investment]."[3] At a time when foreign investment is more important than ever to revitalizing the U.S. economy, these risks must be avoided. (Infra Section V.)

In light of these consequences, Vivendi submits that the bright-line transactional test announced in Morrison sets the proper boundaries on transnational private securities actions. Such a test – under which private Section 10(b) actions are

[3] Brief of the International Chamber of Commerce, The Swiss Bankers Association, Economiesuisse, The Federation of German Industries and The French Business Confederation as Amici Curiae in Support of Respondents, Morrison v. Nat'l Australia Bank, Ltd., 130 S. Ct. 2869 (2010) (No. 08-1191), 2010 WL 719334, at *6.

limited to transactions that occur on U.S. exchanges or otherwise in the U.S. – is necessary to establish a jurisprudence that respects the sovereignty of foreign nations, avoids interference with global coordination efforts, avoids the unfairness of subjective foreign companies to duplicative litigation and provides the clarity and predictability that foreign companies need to make investments in the U.S. (Infra Section VI.)

II. BACKGROUND.

For more than 40 years prior to the Supreme Court's decision in Morrison, the lower federal courts permitted foreign securities transactions to form the basis of actions in the U.S. brought by private plaintiffs under the Securities Exchange Act of 1934, even though that statute contained no text expressly providing for such extraterritorial reach. Beginning with a 1968 decision, the Second Circuit held that "neither the usual presumption against extraterritorial application of legislation nor the specific language of the [Exchange Act] show Congressional intent to preclude application of the Exchange Act to transactions regarding stocks traded in the United States which are effected outside the United States". Schoenbaum v. Firstbrook, 405 F.2d 200, 206 (2d Cir.), modified en banc, 405 F.2d 215 (2d Cir. 1968). That case involved a transaction executed entirely outside of the U.S.: a sale in Canada of the treasury shares of a Canadian company. Nevertheless, Section 10(b) was extended to the transaction on the basis that it had "a sufficiently serious effect upon United States commerce". Id. at 209 (emphasis added). By 1975, the Second Circuit had supplemented this "effect" test with what became known as the "conduct test", under which foreign transactions could give rise to a federal securities action if they were "caused" by "acts (or culpable failures to act) within the United States". Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 993 (2d Cir. 1975).

Thus, until the Supreme Court's decision in Morrison, the Second Circuit's case law permitted actions under Section 10(b) premised upon either some "effect" on American securities markets or investors or significant "conduct" in the United States. As later formalized, the "effects" test considered "whether the wrongful conduct had a substantial effect in the United States", while the "conduct test" was met based on "whether the wrongful conduct occurred in the United States". SEC v. Berger, 322 F.3d 187, 192-93 (2d Cir. 2003). Other courts of appeals followed the Second Circuit's extraterritorial application of Section 10(b), adopting variations of the "conduct" and "effects" tests. See, e.g., Kauthar SDN BHD v. Sternberg, 149 F.3d 659, 666-67 (7th Cir. 1998); Robinson v. TCI/US West Commc'ns Inc., 117 F.3d 900, 905-06 (5th Cir. 1997); Grunenthal GmbH v. Hotz, 712 F.2d 421, 425-26 (9th Cir. 1983).

Despite their use by the federal courts, the "conduct" and "effects" tests were the subject of frequent criticism by commentators and even by some of the courts asked to apply them. Much of the criticism centered on the difficulties in applying flexible, multi-factor standards that often led to unpredictable and inconsistent results.[4] As one court summarized the state of the law prior to Morrison:

> "[A]ny notion that a single precedent or cohesive doctrine may be found which may apply to dispose of all jurisdictional controversies in this sphere is bound to prove as elusive as the quest for a unified field theory explaining the whole of the physical universe. . . . [R]ather than offering explicit counsel and a clear path towards the resolution of a jurisdictional challenge in a complex case such as the one at hand, [the conduct and effects tests] serve only to confirm that the determination is by no means an easy task."

[4] See, e.g., Stephen J. Choi & Linda J. Silberman, Transnational Litigation and Global Securities Class-Action Lawsuits, 2009 Wis. L. Rev. 465, 467 (2009) ("The individual doctrines applied within the courts – such as the conduct and effects tests – are often ambiguous and difficult to predict.").

In re Alstom SA Sec. Litig., 406 F. Supp. 2d 346, 375 (S.D.N.Y. 2005). Indeed, in Morrison, the Supreme Court observed,

> "There is no more damning indictment of the 'conduct' and 'effects' tests than the Second Circuit's own declaration that 'the presence or absence of any single factor which was considered significant in other cases . . . is not necessarily dispositive in future cases."

Morrison, 130 S. Ct. at 2879 (citation omitted).

As it became clear that courts were willing to entertain private suits based on foreign transactions whenever such actions could be found to meet a nebulous, subjective standard, American class-action lawyers rushed to recruit foreign investors to serve as plaintiffs in U.S. class actions against foreign companies. "If you want to enter new markets", one plaintiff-side lawyer told the Wall Street Journal, "you have to go outside the United States".[5] Securities class actions thus became a fast-growing American export, as confusion over the conduct and effects tests allowed the plaintiffs' bar to coerce billion-dollar settlements from some foreign issuers and to burden many others in expensive motion practice and discovery. By 2008, approximately 17% of securities class actions filed in American courts were brought against foreign companies.[6] The trend continued through the present, as in recent years plaintiffs' lawyers targeted foreign financial institutions, including Credit Suisse, UBS, RBS, CIBC, Société Générale and Fortis, that had suffered losses on U.S. mortgage-related investments.

[5] Mary Jacoby, Courting Abroad: For the Tort Bar, A New Client Base: European Investors – Often, Overseas Shareholders Are Plaintiffs in U.S. Suits; The Business Lobby Frets – Mr. Lerach Battles Belgians, Wall Street Journal, at A1 (Sept. 2, 2005).

[6] PricewaterhouseCoopers LLP, 2008 Securities Litigation Study, at 43 (Apr. 1, 2009), available at http://10b5.pwc.com/PDF/NY-09-0894%20SECURITIES%20LIT%20STUDY%20FINAL.PDF.

In the process, vast amounts of U.S. taxpayer dollars, and the scarce judicial resources of the U.S. courts, were misdirected towards resolving claims of foreign investors suing foreign companies based on foreign securities transactions. The Vivendi class action, for example – which concerned many foreign shareholders who, under Morrison, have no claim – has occupied the U.S. courts for over eight years, including countless motions and a four-month jury trial.

A. The Morrison Decision.

In Morrison, the Supreme Court reversed this trend, rejecting the "conduct" and "effects" tests. The Morrison case involved a class of foreign investors who brought claims in the Southern District of New York under Section 10(b) and Rule 10b-5 against National Australia Bank ("NAB"), an Australian company, on the basis of allegedly fraudulent statements concerning the financial performance of one of NAB's U.S. subsidiaries. 130 S. Ct. at 2875. The losses suffered by the class were alleged to have resulted from trades in NAB's "Ordinary Shares" (i.e., common stock) on the Australian Stock Exchange and other foreign exchanges, in addition to American Depository Shares purchased on the New York Stock Exchange. Id. at 2875-76. Applying the "conduct" and "effects" tests, both the district court and Second Circuit found subject matter jurisdiction lacking because "[o]n balance, it [was] the foreign acts – not any domestic ones – that 'directly caused' the alleged harm". In re Nat'l Australia Bank Sec. Litig., No. 03 Civ. 6537 (BSJ), 2006 WL 3844465, at *8 (S.D.N.Y. Oct. 25, 2006), affirmed by 547 F.3d 167 (2d Cir. 2008). The Supreme Court granted certiorari to address "the extraterritorial reach of Section 10(b)". Morrison, 130 S. Ct. at 2877.

Despite affirming the judgments of the lower courts, the Supreme Court in Morrison soundly rejected the 40 years of jurisprudence on which they were based. As a threshold matter, the Court corrected an "error" made by the lower courts of treating the extraterritorial reach of Section 10(b) as a question of subject matter jurisdiction. Id. As the Court explained, subject matter jurisdiction "refers to a tribunal's power to hear a case". Id. (internal quotations omitted). By contrast, as the Court made clear, "to ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question". Id.

Next, the Court roundly criticized "the unpredictable and inconsistent application" of the lower courts' "conduct" and "effects" standards. Id. at 2880. Apart from lacking "a textual or even extratextual basis" in the Exchange Act, these tests, the Court observed, were "not easy to administer", and had "produced a proliferation of vaguely related variations". Id. at 2879-80. Most fundamentally, the Court criticized the lower courts for ignoring the presumption against extraterritorial legislation – the "longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States". Id. at 2877 (internal quotation marks omitted). The Court observed that "[t]he results of judicial-speculation-made-law – divining what Congress would have wanted if it had thought of the situation before the court – demonstrate the wisdom of the presumption against extraterritoriality." Id. at 2881.

Applying the presumption, the Court ruled that Section 10(b) "contains nothing to suggest it applies abroad", and thus does not apply abroad. Id. at 2881. The Court noted that "the focus of the Exchange Act is not upon the place where the [alleged] deception originated, but upon purchases and sales of securities in the United States". Id. at 2884. As a result, "it is . . . only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which § 10(b) applies". Id. Put another way, "it is the foreign location of the transaction that establishes . . . the Act's inapplicability". Id. at 2885 (emphasis in original). The Court noted that "adoption of [this] clear test" would assuage the concerns – expressed by several foreign governments in amicus briefs – "of the interference with foreign securities regulation that application of § 10(b) abroad would produce". Id. at 2886.

Finally, the Court rejected any suggestion that the Court retain the "conduct" and "effects" test, in order to "prevent[] the United States from becoming a 'Barbary Coast' for malefactors perpetrating frauds in foreign markets". Id. The Court's response: If "one is to be attracted" by this consideration, "one should also be repulsed by [the] adverse consequences" of the conduct test – namely, that it has arguably caused the United States to "become the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets". Id.

B. The State of the Law Post-Morrison.

After Morrison, the law is clear that Section 10(b) of the Exchange Act reaches only domestic securities transactions – i.e., "the purchase or sale of a security listed on an American exchange, and the purchase or sale of any other security in the United States". Id. at 2888. In the wake of Morrison, some plaintiffs' lawyers accepted the clear implications of the Supreme Court's holding and began voluntarily withdrawing claims based upon foreign transactions. See, e.g., Sgalambo v. McKenzie, No. 09 Civ. 10087 (SAS), 2010 WL 3119349, at *17 (S.D.N.Y. Aug. 6, 2010). Although others continued to press their claims, the lower federal courts have had no difficulty applying the Supreme Court's bright-line "transactional" test to dismiss claims based on foreign securities transactions. In doing so, the courts have confirmed at least two clear implications of the Morrison decision.

First, as post-Morrison decisions make clear, the purchase or sale of a security on a foreign exchange is not within the reach of Section 10(b), even if the transaction was initiated in the U.S., involved U.S. parties or was otherwise connected to the U.S. See Plumbers' Union Local No. 12 Pension Fund v. Swiss Reins. Co., No. 08 Civ. 1958 (JGK), 2010 WL 3860397, at *9-10 (S.D.N.Y. Oct. 4, 2010) (dismissing claims of U.S. residents who placed buy orders in the U.S. for securities traded on Swiss exchange); Cornwell v. Credit Suisse Group, 729 F. Supp. 2d 620, 622 (S.D.N.Y. 2010) (same). As these post-Morrison decisions have observed, the Supreme Court in Morrison brought about "a new bright-line transactional rule embodying the clarity, simplicity, certainty and consistency that the tests from the Second and other circuits lacked". Cornwell, 729 F. Supp. 2d at 624. Under this test, it is the location of the transaction that matters: "the Court considered that under its new test § 10(b) would not extend to foreign securities trades executed on foreign exchanges even if purchased or sold by American investors, and even if some aspects of the transaction occurred in the United States". Id. at 625-26.[7]

Second, courts have confirmed in the wake of Morrison that the Supreme Court's limitation of Section 10(b) to transactions in securities "listed on an American exchange" means "[t]hat the transactions themselves must occur on a domestic exchange

[7] See also In re Royal Bank of Scotland Group PLC Sec. Litig., No. 09 Civ. 300 (DAB), 2011 WL 167749, at *8 (S.D.N.Y. Jan. 11, 2011) ("Plaintiffs' approach – that it is enough to allege that Plaintiffs are U.S. residents who were in the country when they decided to buy RBS shares – is exactly the type of analysis that Morrison seeks to prevent.").

to trigger application of § 10(b)". See In re Alstom SA Sec. Litig., No. 03 Civ. 6595 (VM), ___ F. Supp. 2d ____, 2010 WL 3718863, at *3 (S.D.N.Y. Sept. 14, 2010). Thus, under Morrison, the purchase or sale of a security on a foreign exchange is outside the reach of Section 10(b), even if the issuer has American Depository Shares on the New York Stock Exchange (as National Australia Bank had in Morrison). See, e.g., In re Royal Bank of Scotland, 2011 WL 167749, at *7.

C. The Dodd-Frank Act.

Just days after the Supreme Court granted certiorari in Morrison, Representative Barney Frank introduced on the House floor a bill that would later become signed into law as the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010).

As finally enacted, the Dodd-Frank Act included a section titled "Extraterritorial Jurisdiction of the Antifraud Provisions of the Federal Securities Laws". See Pub. L. No. 111-203, § 929P, 124 Stat. 1864-65 (codified as amended at 15 U.S.C. § 78aa). The Act did not prohibit any new conduct, nor did it otherwise alter the substantive reach of the antifraud provisions of the federal securities laws. The Act did, however, expressly grant to the district courts subject matter jurisdiction over actions brought by the SEC or Department of Justice for transnational securities fraud violations, based upon the presence of either (a) "conduct" within the United States that constitutes "significant steps" in furtherance of the violation; or (b) conduct occurring outside of the United States that has a "foreseeable substantial effect within the United States". Id.

The Dodd-Frank Act also included a section titled "Study on Extraterritorial Private Rights of Action", which directed the SEC to conduct the present study on the following question:

> "the extent to which private rights of action under [Section 10(b)] should be extended to cover—(1) conduct 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; and (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States."

Dodd-Frank Act § 929Y(a), 124 Stat. 1871. In conducting its study, the SEC is directed to "consider and analyze" at least the following topics:

> (1) "the scope of such a private right of action, including whether it should extend to all private actors or whether it should be more limited to extend just to institutional investors or otherwise";
>
> (2) "what implications such a private right of action would have on international comity";
>
> (3) "the economic costs and benefits of extending a private right of action for transnational securities frauds"; and
>
> (4) "whether a narrower extraterritorial standard should be adopted".

Dodd-Frank Act, § 929Y(b).

III. SECTION 10(b) SHOULD NOT BE EXTENDED TO INTERFERE WITH THE RIGHT OF A FOREIGN GOVERNMENT TO REGULATE SECURITIES TRANSACTIONS OCCURRING WITHIN ITS BORDERS.

At the heart of a nation's sovereignty is the ability to regulate commerce occurring within its territory. As recognized by the Supreme Court in Morrison, nearly all countries have exercised this prerogative by enacting local regimes aimed at investor protection: "Like the United States, foreign countries regulate their domestic securities exchanges and securities transactions occurring within their territorial jurisdiction." 130 S. Ct. at 2885.[8]

[8] See also Glenn Boyle & Richard Meade, Intra-Country Regulation of Share Markets: Does One Size Fit All?, 25 Eur. J. Law & Econ. 151, 153 (2008) ("All major stock markets are subject to regulations that, among other things, specify required

When sophisticated foreign nations like France and the U.K. arrive at calculated public policy judgments about how to regulate securities transactions occurring within their borders, they expect those judgments to be respected. They do not expect that those careful policy choices will be systematically undermined by a U.S. "conduct" and "effects" regime under which investors in their own countries are able to bypass local law in favor of the U.S. class action system.

Thus, when Morrison reached the Supreme Court, many foreign nations were adamant in voicing their objections to the extraterritorial extension of the Section 10(b) right of action under the pre-Morrison "conduct" and "effects" regime. As France said in its amicus brief:

> "The extraterritorial application of U.S. securities fraud laws at the behest of plaintiffs who are not citizens or residents of the U.S., against defendants who are not citizens or residents of the U.S., for frauds perpetrated on exchanges that are not within the territory of the U.S., does not respect the laws and public policies of those foreign nations in which the parties reside and under which the exchanges operate."[9]

The U.K. and Australia voiced similar views:

> "The Australian Government believes that the broad assertion of jurisdiction to provide civil remedies in national courts for violations allegedly perpetrated by foreign issuers of securities against foreign investors in foreign places is inconsistent with international law and may

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information disclosure by firms, define restrictions on insider trading, and impose constraints on corporate governance choices.").

[9] See, e.g., Brief for the Republic of France as Amicus Curiae in Support of Respondents, Morrison v. Nat'l Australia Bank Ltd., 130 S. Ct. 2869 (2010) (No. 08-1191), 2010 WL 723010, *2.

> interfere with the regimes that Australia and other nations have established to regulate companies and protect investors in their markets."[10]

> "Although there is no U.K. party in this case, the broad assertion of extraterritorial jurisdiction by United States courts implicates the legitimate sovereign interests and policy choices of the United Kingdom."[11]

Indeed, in its comment submitted in connection with this very Study, the U.K. reiterated:

> "If extraterritorial claims under the antifraud provisions of the Exchange Act were permitted, the United Kingdom's policy would be undermined because of the different legal standards applied to such claims and the different litigation system in the United States."[12]

The reasons for these objections are clear: while the governments of the world generally are in agreement that fraud should be discouraged, the determination of whether and under what circumstances a class of private individuals may bring a securities class action involves a myriad of policy judgments about which nations can, and do, disagree. Even the current state of the U.S. securities regulation was born out of decisions on a number of hotly debated policy questions in an ongoing attempt to achieve what this country believes is the correct balance between protecting investors, deterring wrongdoing and avoiding abusive litigation.

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[10] Brief of the Gov't of the Commonwealth of Australia as Amicus Curiae in Support of the Defendants-Appellees, Morrison v. Nat'l Australia Bank Ltd., 130 S. Ct. 2869 (2010) (No. 08-1191), 2010 WL 723006, *1.

[11] Brief of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Respondents, Morrison v. Nat'l Australia Bank Ltd., 130 S. Ct. 2869 (2010) (No. 08-1191), 2010 WL 723009, *2.

[12] Comment of HM Treasury, submitted on behalf of the Government of the United Kingdom, File No. 4-617, at 3 (Feb. 11, 2011), available at http://www.sec.gov/comments/4-617/4617-4.pdf.

Not surprisingly, other countries have reached different policy conclusions. As set forth below, many of the substantive and procedural aspects of U.S. investor protection – particularly in class action litigation – conflict sharply with the practices of foreign nations. As summarized in Morrison, "the regulation of other countries often differs from ours as to what constitutes fraud, what disclosures must be made, what damages are recoverable, what discovery is available, what individual actions may be joined in a single suit, what attorney's fees are recoverable, and many other matters." Morrison, 130 S. Ct. at 2885 (emphasis added).

A. Different Approaches to Private Class Action Litigation.

Perhaps most significant to the present study, many foreign nations have legislated with the express intent of departing from the U.S. model for securities class action litigation and the policy choices that it embodies. The U.S. is one of the few countries that allows for the "opt-out" style of class action, codified in Federal Rule of Procedure 23(b)(3), under which plaintiffs' attorneys are permitted to sue on behalf of a large number of individuals, each of whom is automatically included in the class and must affirmatively "opt out" of the class to pursue a separate action.

France has expressly rejected the "opt-out" regime as contrary to public policy and French constitutional principles.[13] This is true of a number of other countries as well – which, like France, view the opt-out mechanism as providing plaintiffs' counsel with a comparatively low-cost method to recruit class members, and include them without their knowledge in a class action, and thereby increase their fee award in the

[13] See Brief for the Republic of France as Amicus Curiae in Support of Respondents, Morrison v. Nat'l Australia Bank Ltd., 130 S. Ct. 2869 (2010) (No. 08-1191), 2010 WL 723010, at *26.

event of success.[14] Thus, if Congress were to extend the private right of action under Section 10(b) to foreign securities, the U.S. class action regime effectively would be exported to countries that have made a deliberate policy choice to avoid many of the practices unique to U.S. class action litigation, or that have chosen to avoid the system entirely.

B. Varying Discovery Regimes.

Civil law systems throughout the world have markedly different approaches to discovery than those found in the U.S. American discovery is extremely broad and tends to be controlled primarily by the parties in pre-trial proceedings. By contrast, in France, discovery is much narrower and some aspects, particularly the taking of oral testimony, are controlled by the court. Broad requests for "all documents referring or relating to" a general subject matter – while typical in the U.S. – would not be permitted in France absent a specific showing of the relevance of all such documents. Moreover, "relevance" in French terms means evidence that will in fact be admissible at

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[14] See Richard A. Nagareda, Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism, 62 Vand. L. Rev. 1, 28-29 (2009) ("An opt-out rule, coupled with the relative rarity of opt-outs in practice, has the further effect of boosting the size of the class and thus the basis for class counsel's fee award in the event of success – again, at least by comparison to an opt-in proceeding."); Hannah L. Buxbaum, Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict, 46 Colum. J. Transnat'l L. 14, 63 (2007) ("U.S. entrepreneurial-style lawyering is viewed with hostility in many other countries. It depends on procedural mechanisms such as contingency fees that are not permitted in most other legal systems. When coupled with class actions – whose opt-out mechanism is seen as contrary to public policy in most countries – it triggers particularly adverse reactions."); Richard H. Dreyfuss, Class Action Judgment Enforcement in Italy: Procedural "Due Process" Requirements, 10 Tul. J. Int'l & Comp. L. 5, 14, 34-36 (2002) (noting that an Italian court might find a U.S.-style class action "fundamentally unfair to the absent members of the class because, even though they knew nothing of the lawsuit, they are fully bound by the res judicata effect of the judgment").

trial,[15] whereas U.S. rules expressly permit discovery of information that need not be "admissible at trial" if it is "reasonably calculated to lead to the discovery of admissible evidence". Fed. R. Civ. P. 26(b)(1). Oral testimony is rarely permitted in French civil litigation. And, when it is permitted, the judge personally conducts the taking of testimony and determines the questions that may be asked.

C. Conflicting Views on Acceptable Fee Arrangements.

U.S. rules regarding responsibility for attorneys' fees differ significantly from the policies prevalent in Europe and other parts of the world. In the United States, each party bears its own legal costs, unless a statute specifically provides for cost-shifting. By contrast, France, Germany, the Netherlands, as well as other members of the EU, generally require the losing party to pay the legal fees of both litigants.[16] In addition,

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[15] See French Code of Civil Procedure, arts. 9-11, available at http://195.83.177.9/code/liste.phtml?lang=uk&c=39&r =7079; id. arts. 132-41, available at http://195.83.177.9/code/liste.phtml?lang=uk&c=39&r =7115; see generally Serge Guinchard, Droit et Pratique de la Procédure Civile, at 803-06 (2009/2010). The parties in France are generally required to produce only documents that are explicitly or implicitly referred to in their briefs. Further discovery is restricted: the court may, upon request, order the production of additional documents, but only if they are identified with the precision required to verify that they are relevant to the case.

[16] See, e.g., Edward F. Sherman, Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions, 52 DePaul L. Rev. 401, 421 (2002) ("EU countries follow the 'loser pays' rule requiring the losing side to pay the other side's attorney's fees, in contrast to the 'American rule' by which the parties pay their own attorney's fees."); Roald Nashi, Italy's Class Action Experiment, 43 Cornell Int'l L. J. 147, 160 (2010) ("[M]ost European countries have a 'loser pays costs' system, which requires the losing side to pay the other side's attorneys' fees."); Tiana L. Russell, Exporting Class Actions to the European Union, 28 B.U. Int'l L. J. 141, 179 (2010) ("In most of Europe, a losing party is usually responsible for a substantial portion of the winning adversary's reasonable legal fees, and contingency fee arrangements between plaintiffs and their attorneys are generally not acceptable.").

contingency fee arrangements, which are routine in U.S. securities litigation, are prohibited or severely limited in most countries in Europe.[17]

These rules reflect the considered policy judgment that more restrictive fee rules may reduce the incentives for plaintiffs to bring meritless civil securities litigation or so-called "strike suits". Moreover, European countries believe that their fee rules avoid conflicts of interest between plaintiffs and their attorneys – for example, the conflicts that could arise if attorneys compensated on a contingency basis press to settle claims for less than is in their client's interest (or decline settlements that might be in the client's interest) to ensure a recovery that will cover their investment in the litigation. Permitting plaintiffs who are discouraged from litigating in Europe by European fee structures to take advantage of U.S. courts where contingency arrangements are permitted undermines the significant policy choices made by these foreign nations.[18]

D. Differences in Liability Standards.

In addition to using vastly different procedural mechanisms that govern the assertion of collective private securities claims, nations also apply different substantive standards in evaluating claims of securities fraud.

A basic question is how much information a corporation must publicly disclose. Virtually all securities regulatory regimes impose some level of disclosure obligations on issuers, but, in determining disclosure standards, nations must strike a

[17] See Samuel Issacharoff & Geoffrey P. Miller, Will Aggregate Litigation Come to Europe?, 62 Vand. L. Rev. 179, 198 (2009).

[18] See Stefano M. Grace, Strengthening Investor Confidence in Europe: U.S.-Style Securities Class Actions and the Acquis Communautaire, 15 J. Transnat'l L. & Pol'y 281, 287-88 (2006).

"balance between the need to insure adequate disclosure and the need to avoid the adverse consequences of setting too low a threshold for civil liability". TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 n.10 (1976). Different countries have struck this balance differently, creating significant differences among the world's disclosure regimes, including as to the subject matter of required disclosures and methods of establishing a contravention of the substantive standards.[19] These differences in materiality formulations are not only matters of language or nuance; they reflect legitimate policy decisions that must be respected.

The same is true of the varying standards for establishing the element of reliance in a securities class action. In adopting the "fraud on the market" theory of reliance in Basic Inc. v. Levinson, the U.S. Supreme Court afforded class action plaintiffs a presumption of reliance under most circumstances, in an effort to avoid placing what the Supreme Court perceived as an "unnecessarily unrealistic evidentiary burden on the Rule 10b-5 plaintiff". 485 U.S. 224, 241-42, 245-47 (1988). However, the fraud on the market theory represents judicial acceptance of simply one strand of financial economics. Many countries have expressly rejected the "fraud on the market" theory, making "the

[19] In the U.S., issuers must disclose information called for by statute or regulation, and when an issuer does disclose information, must not "omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading". 17 C.F.R. § 240.10b-5; see 15 U.S.C. § 78j(b). In the U.K., by contrast, the statutory formulation of disclosure obligations varies with the type of corporate statement (prospectuses and other fund-raising documents, periodic corporate reports and ad hoc corporate announcements).

United States . . . unusual in recognizing presumed reliance . . . , rather than requiring investors to prove actual reliance on misleading information."[20]

E. Private Versus Public Enforcement.

Finally, a critical question for each nation is who should enforce its securities laws. This entails a complex weighing of the risks and costs of varying alternative approaches – a balance often influenced by factors unique to the local jurisdiction. See, e.g., Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 164 (2008) (analyzing "risks" of private enforcement). A nation might choose purely public enforcement of securities laws (with civil penalties, criminal penalties or both); purely private enforcement; or some combination.[21] And, as described above, in those nations that do allow private enforcement, private actions often bear little resemblance to private enforcement in the United States.

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[20] Buxbaum, supra note 14, at 61; Marco G. Carbonare et al., Liability and Due Diligence in Connection with Equity Securities Offerings: An Overview of U.S., Swiss and German Law, GesKR 2/2008, 129 n.62, available at http://tinyurl.com/ylaq775 ("According to Swiss law . . . no rebuttable presumption in favour of the existence of transaction causation exists".); see also Michael Duffy, 'Fraud on the Market': Judicial Approaches to Causation and Loss from Securities Nondisclosure in the United States, Canada and Australia, 29 Melb. U. L. Rev. 621, 655 (2005) ("There is no statutory presumption of reliance in relation to actions by shareholders for compensation in Australia. . . . [T]here is no case law in Australia where shareholders have attempted to invoke the 'fraud on the market' theory before Australian courts.").

[21] These choices can be finely tuned. Although the U.S. generally permits private actions for securities fraud, Congress has determined that alleged aiders and abettors "should be pursued by the SEC and not by private litigants". Stoneridge, 552 U.S. at 163; see also Committee of European Securities Regulators, Executive Summary to the Report on Administrative Measures and Sanctions as well as the Criminal Sanctions Available in Member States under the Market Abuse D[ir]ective, CESR-08-099, at 2 (Feb. 2008) (noting wide divergence in civil and criminal sanctions that apply to fraud, insider trading and market manipulation in enforcement proceedings), available at http://www.esma.europa.eu/popup2.php?id=4975.

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These careful policy choices struck in other countries as to how to regulate securities transactions within their borders would be effectively overridden if Congress were to provide for extraterritorial application of Section 10(b) in private actions. To do so would be to export the U.S. class action mechanism to countries that have made a deliberate policy choice to avoid many of the practices unique to the U.S. style of opt-out class action litigation, including its discovery and liability rules, or that have chosen to avoid the system entirely.

As we discuss below, this not only violates established principles of international comity, but it also creates an unfair litigation regime for foreign companies.

IV. EXTRATERRITORIAL APPLICATION OF SECTION 10(b) IN PRIVATE ACTIONS CREATES AN UNWORKABLE REGIME FOR FOREIGN COMPANIES FORCED TO DEFEND "TRANSNATIONAL" ANTIFRAUD CLASS ACTIONS.

The significant differences in U.S. and foreign securities regulation are not simply theoretical. For foreign companies like Vivendi, they have consequences that can cost into the hundreds of millions of dollars. A "conduct" and "effects" test allowing extraterritorial application of Section 10(b) imposes the U.S. class action regime on foreign securities transactions that very often are subject to parallel private or public enforcement in the foreign issuer's home country. This creates the distinct risk of duplicative, parallel litigation in two different courts, in two different countries, and – because of the differences in those two jurisdictions – creates an unfair litigation landscape for companies like Vivendi, who find themselves as defendants in "transnational" securities actions subject to conflicting standards of liability, conflicting discovery regimes and the inability to resolve the claims of investors in one forum.

A. The Refusal by Foreign Countries to Recognize U.S. Opt-Out Class Action Judgments Creates an Unfair Burden for Foreign Companies and an Unfair Windfall for Foreign Investors.

Most fundamentally, a foreign company subjected to a U.S. "transnational" securities class action may be deprived of the one critical benefit normally available in U.S. class action litigation: claim preclusion. The basic tenet of the Rule 23 class action system is the ability of a defendant to resolve its liability in one action and to preclude, through the doctrine of res judicata, absent class members from asserting subsequent claims premised upon the same allegations.[22] This mechanism protects the fruits of a favorable outcome and prevents duplicative, vexatious and wasteful litigation. For defendants, it is the significant, indeed perhaps the only, advantage of the U.S. class action device. It is beyond question that a U.S. corporate defendant sued in a class action will receive the benefits of claim preclusion in other U.S. courts following a judgment in its favor.

Not so for foreign companies like Vivendi, when they find themselves defendants in U.S. securities actions targeting foreign transactions and asserting claims on behalf of a class that includes foreign investors. As set forth above, France has rejected the U.S. "opt-out" class action system of Rule 23. (See supra Section III.A.) French courts, therefore, as France itself stated in its amicus brief in Morrison, "would

[22] See Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867, 874 (1984) ("There is of course no dispute that under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation.").

almost certainly refuse to enforce a judgment in a U.S. 'opt-out' class action".[23] Indeed, the French Conseil Constitutionnel, the highest authority in France for the interpretation of the French Constitution – equivalent to the Supreme Court of the United States in constitutional matters – issued a decision on August 16, 2007, that was accompanied by an authoritative and binding official Commentary that makes it clear that opt-out class actions are not only unconstitutional, but are also a violation of a fundamental public policy in France, namely that of "personal freedom".[24] Confirming this view, the French Ministry of Justice issued a letter and accompanying brief on April 3, 2007, stating clearly that a judgment in Vivendi's case would not comply with French concepts of international public policy, thereby precluding recognition of the judgment in France, because (1) the opt-out mechanism is unconstitutional under French law; (2) the preclusive effect associated with a class action decision is "incompatible with [a French] constitutional requirement"; and (3) the mechanisms provided for by the Federal Rules of Civil Procedure are "contrary to fundamental principles".[25]

France is not the only foreign nation that, in Vivendi's view, would refuse to recognize or enforce judgments arising out of U.S. opt-out class actions. In the pre-

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[23] See, e.g., Brief for the Republic of France as Amicus Curiae in Support of Respondents, Morrison v. Nat'l Australia Bank Ltd., 130 S. Ct. 2869 (2010) (No. 08-1191), 2010 WL 723010, *26.

[24] See CC decision no. 2007-556 DC (Aug. 16, 2007), English Translation available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/a2007556dc.pdf.

[25] See Exs. A-B, Decl. of Timothy Cameron in Support of Vivendi's Motion for Partial Reconsideration of the Court's Decision Certifying a Plaintiff Class that Includes French Shareholders (March 12, 2008), In re Vivendi Universal, S.A. Sec. Litig., No. 02 Civ. 5571 (RJH/HBP).

Morrison "conduct" and "effects" era, many foreign nations began refusing to enforce the final judgments of U.S. courts.[26] Some foreign nations even enacted "judgment blocking statutes" to protest U.S. transnational assertions of jurisdiction. For example, a 2005 German law expressly grants, in securities fraud cases, exclusive venue to the issuer's home court, and consequently blocks the enforcement of judgments or settlements in the U.S. securities fraud class actions against German issuers.[27]

What this means for the defendant involved in transnational securities litigation is the invariable prospect of two lawsuits – one in the U.S. and one overseas – because the U.S. judgment either will not bind foreign class members, or will not be recognized overseas at all.[28] In the U.S. class action involving Vivendi, the majority of

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[26] Ilana T. Buschkin, The Viability of Class Action Lawsuits in a Globalized Economy – Permitting Foreign Claimants to be Members of Class Action Lawsuits in the U.S. Federal Courts, 90 Cornell L. Rev. 1563, 1566 (2005) ("Many foreign courts routinely refuse to enforce U.S. judgments, particularly those arising from class litigation."); Vishali Singal, Preserving Power Without Sacrificing Justice: Creating an Effective Reciprocity Regime for the Recognition and Enforcement of Foreign Judgments, 59 Hastings L. J. 943, 958 (2007-2008) ("Although empirical data is unavailable to demonstrate how often U.S. judgments are refused recognition and enforcement in foreign nations, scholars have noted that 'some countries are particularly hostile to recognition or enforcement of U.S. judgments.'"); Samuel P. Baumgartner, How Well Do U.S. Judgments Fare in Europe?, 40 Geo. Wash. Int'l L. Rev. 173, 175 (2008-2009) ("For quite some time, the perception in the United States has been that U.S. judgments do not fare very well when the time comes to recognize or enforce them abroad.").

[27] See Zivilprozessordnung [Germany's civil procedure statute] art. 32b, available at http://www.zivilprozessordnung.de.; see also Foreign Proceedings (Excess of Jurisdiction) Act 1984, No. 3 (Austl.) (Australia's "blocking statute").

[28] This potential for double exposure has been widely recognized. See Buxbaum, supra note 14, at 60 (jurisdictional overlap created by extraterritorial U.S. class actions "presents the possibility of duplicate recovery, as a court in one country cannot enforce in other jurisdictions an order to release all future claims as a condition of settlement or judgment").

class members were French shareholders who bought shares on the Paris Bourse. While the U.S. action remained pending, as many as 33 lawsuits were filed in France against Vivendi premised upon the same allegations at issue in the U.S. case. At the same time, Vivendi's executives were prosecuted criminally in France on behalf of alleged investor victims who were nominally members of the same U.S. class.

Yet, Vivendi was forced to spend hundreds of millions of dollars litigating all of these actions at the same time, not least because it firmly believed that no judgment from the U.S. class action would be recognized in France.[29] Indeed, even if it were to win the U.S. action, Vivendi believes that France would not recognize that judgment, forcing Vivendi to go on litigating duplicative parallel suits by much of the same investor class in other fora. Nor is Vivendi alone in this regard. "German companies", arguing as amici curiae in Morrison, "face this dilemma in every United States securities class action by unnamed foreign investors filed against them, because German courts, in particular, will neither recognize any judgment that purports to adjudicate the claims of absent class members nor enforce any such judgment".[30] Such a regime, in which foreign companies effectively are forced to "win twice", is fundamentally unfair.

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[29] Moreover, in the worst case scenarios, companies faced with crippling liability are far more limited under French law in their ability to undergo a reorganization proceeding akin to Chapter 11 in the U.S. See Global Legal Group, The International Comparative Legal Guide to: Corporate Recovery and Insolvency 2010, Chapter 12 (2010), available at http://www.iclg.co.uk/khadmin/Publications/pdf/3764.pdf; see also George A. Bermann & Pierre Kirch, French Business Law in Translation, at IV-3 (2d ed. 2008) ("The French bankruptcy rules are widely considered to be somewhat rigid, in that it is difficult for a company to work its way out of trouble once it has gone into bankruptcy proceedings.").

[30] Brief of Infineon Techs. AG as Amicus Curiae Supporting Respondents, Morrison v. Nat'l Australia Bank, Ltd., 130 S. Ct. 2869 (No. 08-1191), 2010 WL 723007, at *18.

For foreign investors and their lawyers, allowing for the possibility that a class will be certified that includes absent foreign purchasers whose claims overseas will not subsequently be barred creates a system of "two bites at the apple" that allows pervasive abuse. Foreign investors certified as part of a securities class action proceeding in the U.S. get the cost-free option of simply waiting until the litigation has concluded, and any appeal period has expired, before determining whether to participate in any judgment or settlement. This opportunity often will be available, given that historically fewer than 0.3 percent of all private securities class actions filed ever reach a verdict at trial.[31] If, in the unlikely event that the defendant proceeds to a verdict and wins, foreign investors simply can file individual suits in their home countries, without worry that the U.S. judgment will have any preclusive effect. If the defendant loses, the foreign shareholders will then be able to decide whether they like that recovery or think they can get a higher (or supplemental) recovery through individual suits in their home countries. This "heads-I-win-tails-you-lose" system cannot be tolerated.

B. Extending Private Antifraud Actions to Foreign Transactions Places Undue Burden on the Courts and Creates Inconsistent Obligations for Litigants.

Apart from the problems of preclusion when the U.S. litigation ends, the maintenance of duplicative litigation in two different jurisdictions creates severe and undue burdens for the litigants and courts involved.

[31] See Cornerstone Research, Securities Class Action Filings: 2010 Year in Review, at 14 (2011) available at http://securities.stanford.edu/clearinghouse_research/2010_YIR/Cornerstone_Research_Filings_2010_YIR.pdf.

1. Transnational Securities Class Actions Burden Litigants With Conflicting Discovery Obligations.

For litigants, securities proceedings in multiple jurisdictions often means the substantially increased cost of attempting to comply with the conflicting discovery obligations of different legal systems. One persistent source of conflict is "discovery blocking" legislation enacted in many foreign countries specifically in response to extensions of U.S. discovery obligations abroad. At least fifteen foreign countries – including France, the Netherlands, Germany, Great Britain, Italy, and Belgium – have enacted blocking legislation in an effort to ensure that their sovereign policy choices regarding the conduct of civil litigation are not overridden by U.S. courts.[32] France's blocking statute, for example, prohibits the disclosure to authorities outside of France of "documents or information of an economic, commercial, industrial, financial or technical nature" with a view to foreign judicial or administrative proceedings.[33]

2. Transnational Private Actions Under Section 10(b) Place Undue Burden on the U.S. Courts and Waste Scarce Judicial Resources.

The complexities that a litigant faces are also felt by the courts. Duplicative transnational securities litigation means the needless waste of scarce judicial resources and the often untenable position of attempting to predict complicated questions

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[32] See Restatement (Third) of Foreign Relations Law § 442, reporters' notes 1, 4 (1987); see also Société Nationale Industrielle Aérospatiale v. United States Dist. Court for S. Dist of Iowa, 482 U.S. 522, 526 & n.6 (1987) (discussing French statute).

[33] Law No. 80-538 of July 16, 1980, Journal Officiel de la Republique Francaise, July 17, 1980, p. 1799 (France's blocking statute). As recently as 2007, France's highest court upheld the criminal conviction of a French lawyer prosecuted under the blocking statute for gathering evidence in France to assist in the defense of a client accused of fraud in the U.S. In re Advocat "Christopher X", Cass., Chambre criminelle, Dec. 12, 2007, No. 07-83.228, Bulletin Criminel 2007, no. 309).

of foreign law. The pre-Morrison case law from the U.S. makes this stark. In the Vivendi and Alstom cases from the Southern District of New York, for example, two judges on that same court came to opposite conclusions – in decisions only fifteen months apart – on the question of whether, under French law, a U.S. opt-out class action judgment would be afforded preclusive effect in France. In Vivendi, the court certified a class that included French shareholders after concluding that a French court would "more likely than not" recognize and grant preclusive effect to a U.S. opt-out class action judgment. In re Vivendi Universal, S.A., Sec. Litig., 242 F.R.D. 76, 102 (S.D.N.Y. 2007). Conversely, in In re Alstom SA Securities Litigation, 253 F.R.D. 266, 282 (S.D.N.Y. 2008), the court – on essentially the same record – determined that the plaintiffs failed to demonstrate that the French courts would "more likely than not" recognize a class judgment rendered by a U.S. court.

The net result: a foreign company named in a securities action in the Southern District of New York could face a drastically different class of investors simply based on which judge happens to be assigned to its case. Indeed, a defendant named in a transnational securities class action would have little to no way of predicting what the result might be when any judge is asked to apply a test framed as "more likely than not", which essentially turns complex foreign legal questions into a preponderance of the evidence standard. These uncertainties demonstrate that, in cases of transnational securities fraud, deciding questions of foreign law based on foreign securities transactions is best left to foreign tribunals.

Finally, the problem with predicting foreign legal questions is not simply that they are difficult. In transnational securities class actions that might meet the "conduct" and "effect" standards, it is a waste of judicial resources to decide these questions at all. As a federal law-enforcement agency, the SEC can be expected to take account of national interests when it determines whether particular enforcement suits represent sound uses of its resources and the resources of the federal courts. This is not the case for private plaintiffs, and in particular for the plaintiff-side attorneys who have made a cottage-industry of collecting multi-million-dollar fees suing foreign companies under Section 10(b).[34] In contrast to the SEC, the overarching concern of such attorneys is generating fees. In deciding whether to take legal action, such plaintiffs have little incentive to consider whether resolution of their securities-related grievances represents a wise use of federal judicial resources. The net result: the scarce judicial resources of the U.S. courts are misdirected towards resolution of foreign disputes, with little to no connection to the U.S., except the desire by U.S. plaintiffs' lawyers to extract a fee. Such a system must be avoided.

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[34] Indeed, several of the plaintiffs-side lawyers who helped initiate the trend of "foreign-cubed" class action litigation, including two of the lawyers from the Milberg Weiss firm who had successfully sought lead counsel status in the Vivendi action, pled guilty to criminal charges arising from schemes to pay kick-backs to investors in exchange for serving as named plaintiffs in their class actions. See generally Associated Press, 2 Sentenced to 6 Months for Role in Kickback Scheme, N.Y. Times, Oct. 28, 2008, at B2; see also In re Vivendi Universal, S.A., Sec. Litig., No. 02 Civ. 5571 (RJH/HBP) (S.D.N.Y.), Pl. Mem. of Law in Support of the Motion of Retirement System for General Employees of the City of Miami Beach, Oliver M. Gerard, Francois R. Gerard, Prigest S.A. and Tocqueville Finance S.A. for Consolidation, Appointment as Lead Plaintiff, Approval of Selection of Lead Counsel and Preservation [of] Documents, at 9 (Motion dated Sept. 16, 2002 and signed by members of Milberg Weiss Bershad Hynes & Lerach LLP, including Steven G. Schulman); United States v. Schulman, No. 05-CR-587(C) (C.D. Cal.), Plea Agmt. for Defendant Steven G. Schulman (Filed Sept. 20, 2007).

V. INTERNATIONAL COMITY AND INTERNATIONAL RELATIONS WILL BE SEVERELY IMPEDED BY EXTENDING THE SECTION 10(b) PRIVATE RIGHT OF ACTION TO FOREIGN SECURITIES TRANSACTIONS.

Extending U.S. securities class actions to transactions in foreign securities harms not only foreign companies with investments in the U.S. but America's relations with its foreign neighbors. To depart from the U.S. on fundamental questions of securities regulation is a sovereign right of each nation that must be respected under bedrock principles of international law and comity. Corfu Channel Case (UK v. Albania), 1949 I.C.J. 4, at 35 (Apr. 9) ("Between independent States, respect for territorial sovereignty is an essential foundation of international relations."); U.S. Dep't of Justice Antitrust Enforcement Guidelines for International Operations, (Nov. 10, 1988) ("[W]ell-recognized principles of international comity among nations . . . give due deference to the lawful acts of foreign sovereigns acting within their legitimate spheres of authority.").[35] Yet, if Congress were to extend the private right of action under Section 10(b) to foreign securities, the U.S. class action regime effectively would be exported to countries that have made a deliberate policy choice to avoid many of the practices unique to U.S. class action litigation, or that have chosen to avoid the system entirely.

In reaction to the extraterritorial extension of U.S. class action litigation abroad, offended foreign nations will not be content simply to register objections in

[35] See generally Shari-Ellen Bourque, Comment, The Illegality of the Cuban Embargo in the Current Int'l System, 13 B. U. Int'l L. J. 191, 218 (1995) (extraterritorial application of U.S. law in an "attempt to control and regulate the commerce and finance of foreign sovereignties" violates international law).

judicial proceedings or cease recognition of U.S. judgments.[36] With their legitimate sovereign interests being ignored, some nations may instead take affirmative steps to withdraw from cooperation arrangements with U.S. securities regulators. See McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21 (1963) (recognizing that infringements of foreign sovereignty caused by overbroad applications of U.S. law may "invite retaliatory action from other nations"). As set forth below, this consequence must be avoided.

A. Extraterritorial Extension of the Section 10(b) Private Right of Action Will Undermine Cross-Border Cooperation.

Many foreign nations – including America's closest allies – regularly have objected to extraterritorial applications of U.S. law of the type that the SEC is now considering.[37] As was evident from the amicus briefs submitted in Morrison (see supra Section III), the extraterritorial extension of class actions in the securities context stirs

[36] Kellye Y. Testy, Comity and Cooperation: Securities Regulation in a Global Marketplace, 45 Ala. L. Rev. 927, 957 (1994) ("applying the U.S. securities laws to transactions having only a tangential relationship to the U.S. risks offending other nations by perpetuating an already problematic image of American pomposity"); Stevan Sandberg, The Extraterritorial Reach of American Economic Regulation: The Case of Securities Law, 17 Harv. Int'l L. J. 315, 326 (1976) (citing the "dangers of United States intrusion into a foreign nation's regulation of its securities markets and American interference with a sovereign state's management of its economy"); Jill E. Fisch, Imprudent Power: Reconsidering U.S. Regulation of Foreign Tender Offers, 87 Nw. U. L. Rev. 523, 524 (1993) (applying U.S. securities laws abroad "has offended the sovereignty of other countries which have reacted by passing retaliatory legislation of their own").

[37] See, e.g., Fisch, supra note 36, at 523-24 ("The United States has offended the sovereignty of other countries" by "impos[ing] its regulations on [securities] transactions that may be viewed as essentially foreign"); F. Hoffman-LaRoche Ltd. v. Empagran, S.A., 542 U.S. 155, 167-68 (2004) (discussing objections by Germany, Canada, and Japan to application of U.S. law to claims of "private foreign plaintiffs" when alleged "injuries were sustained in transactions entirely outside United States commerce" (internal quotation marks omitted)).

particularly strong responses from the U.S.'s foreign neighbors, which justifiably "fear that a global class action in a U.S. court may threaten the solvency of even their largest companies and could have an adverse impact on the interests of local constituencies, including labor, creditors and local communities".[38]

One lesson of the recent worldwide financial crisis is that global regulatory cooperation is essential to ensuring the stability of financial systems: "No longer can the United States regulate in a vacuum. Coordination with other national regulators and cooperation with regional and international authorities is required."[39] The international community has repeatedly reaffirmed this commitment. As recently as the 2008 Group of 20 Summit, the member nations were unanimous in declaring that regulations must carefully "avoid potentially adverse impacts on other countries" in structuring their domestic regimes.[40] Indeed, as the SEC is well aware, due to the global financial crisis, the U.S. and other "national governments and international organizations have taken significant steps both to stem further economic deterioration and to prevent a recurrence of the factors that helped cause it".[41] These steps include dozens of cooperation agreements and treaties between the U.S. and foreign regulators and

[38] John C. Coffee, Jr., Foreign Issuers Fear Global Class Actions, Nat'l L. J., June 14, 2007.

[39] See Committee on Capital Markets Regulation, The Global Financial Crisis: A Plan for Regulatory Reform, at i (May 2009), available at http://www.capmktsreg.org/pdfs/TGFC-CCMR_Report_(5-26-09).pdf.

[40] G-20, Washington Declaration: G-20 Summit on Financial Markets and the World Economy ¶ 8 (Nov. 15, 2008), available at http://www.g20.org/Documents/g20_summit_declaration.pdf.

[41] Securities and Exchange Commission, Strategic Plan for Fiscal Years 2010-2015, Draft for Comments, at 5, available at http://www.sec.gov/about/secstratplan1015.pdf.

governments to facilitate the international enforcement of securities laws. Those agreements reflect the judgment that foreign nations can (and do) effectively regulate their own securities markets, and that it is appropriate to cooperate with those governments in support of their systems of regulation and enforcement.[42]

Yet, the prospect of private U.S. antifraud actions challenging foreign securities transactions threatens severely to undercut this global regulatory cooperation. Foreign nations "may not view the United States as a 'good neighbor' when a billion-dollar class action settlement threatens the solvency of one of their major corporations".[43] And no foreign regulator will be inclined to cooperate with the U.S. if that regulator's effectiveness in regulating securities transactions in its own country is repeatedly undermined by the unpredictable specter of private litigation in the U.S. courts concerning the same transactions. To have any hope of regaining the confidence of foreign regulators and of salvaging global cooperation efforts, Congress must avoid extending the Section 10(b) private right of action extraterritorially, including to the

[42] See, e.g., Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information Related to Market Oversight, SEC-Euronext, Preamble, Jan. 2007 (expressing the SEC's and Euronext's "willingness to cooperate with each other in the interest of fulfilling their respective regulatory mandates, particularly in the areas of investor protection, fostering market integrity, and maintaining investor confidence and systematic stability"); Treaty with Canada on Mutual Legal Assistance in Criminal Matters, U.S.-Can., Preamble, Mar. 18, 1985 (stating that the sovereignties "desir[ed] to improve the effectiveness of both countries in the investigation, prosecution and suppression of crime through cooperation and mutual assistance in law enforcement matters"). In fiscal year 2008, the SEC made 594 requests for information to foreign regulatory authorities and responded to 414 requests for information from foreign authorities. See Office of International Affairs, International Enforcement Assistance, available at http://www.sec.gov/about/offices/oia/oia_bilateral/euronext-mou-eng.pdf.

[43] John C. Coffee, Jr., Securities Policeman to the World? The Cost of Global Class Actions, N.Y.L.J., Sept. 18, 2008, at 5.

"conduct" and "effects" standards that existed prior to Morrison and that justifiably outraged the rest of the world.

B. Restraining Extraterritorial Application of the Section 10(b) Private Right of Action Will Not Leave an Enforcement Void.

As the Supreme Court commented in Morrison, there is no reason to believe that, absent an extraterritorial right of action, the United States will become "the Barbary Coast for those perpetrating frauds on foreign securities markets". 130 S. Ct. at 2886. To the contrary, foreign nations are adequately equipped to use their own well-developed legal and regulatory regimes to combat fraudulent practices.

In the European Union, each member state has its own securities regulators that police securities fraud and insider trading, and investigate and prosecute violations. In France, for example, securities regulation is entrusted to the Autorité des Marchés Financiers ("AMF") (i.e., the "Financial Markets Authority") – the French equivalent of the SEC – which is responsible for safeguarding investments, ensuring that issuers disclose material information and supervising financial markets.[44]

Indeed, many nations permit securities claims for conduct that would not be actionable in the United States. For instance, Australia recognizes private claims against persons indirectly responsible for false or misleading statements, and allows

[44] Other European countries have their own securities enforcement regimes. In Germany, BaFin is a single, integrated regulator of Germany's banking, insurance, and securities markets. Swethaa Ballakrishnen et al., An Overview of Securities Enforcement in Germany, at 9 (draft May 11, 2008). BaFin is responsible for ensuring the stability and integrity of the German financial system, and has wide-ranging powers of investigation and intervention. Id. at 12. In the securities arena, BaFin regulates, among other things, information disclosure, insider trading, and market manipulation. Id. at 16-17.

claims for injunctive relief against aiders and abettors in certain circumstances.[45] Similarly, the EU and some member states enable plaintiffs to recover for securities law violations without proof of fraudulent intent.[46]

Thus, foreign nations have bristled at the idea that investors purchasing stocks on foreign exchanges will not adequately be protected from corporate fraud unless U.S. courts extend jurisdiction over their claims.[47] There is no reason to believe that France, Germany, the Netherlands, Australia or other developed countries are unable to effectively regulate securities markets within their jurisdictions, or that they need or want U.S. assistance in prosecuting fraudulent activity.

VI. EXTRATERRITORIAL EXPANSION OF THE PRIVATE RIGHT OF ACTION UNDER SECTION 10(b) WOULD DETER FOREIGN INVESTMENT IN THE UNITED STATES.

Vivendi is not alone in suffering the costly effects of extraterritorial private actions under Section 10(b). As detailed below, there is substantial empirical evidence that allowing use of U.S. courts by private plaintiffs to pursue private

[45] See Corporations Act 2001 § 1022B(3) (Austl.); Securities and Investments Commission Act 2001 § 12GD (Austl.). By contrast, the U.S. Supreme Court has precluded such "aider and abettor" liability in private suits under Section 10(b). See Stoneridge, 552 U.S. at 166.

[46] Code Civil art. 1383 (Fr.) (imposing liability for negligence); Spector Photo Group NV v. CBFA (European Court of Justice, Dec. 23, 2009), ¶¶ 36-38, 62, available at http://tinyurl.com/48t894z (intent is presumed where an individual knowingly in possession of inside information purchases or sells a security, unless it is shown that the inside information did not influence his actions). By contrast, a Section 10(b) plaintiff must prove intentional wrongdoing. See Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976).

[47] See John D. Kelly, Let There Be Fraud (Abroad): A Proposal for a New U.S. Jurisprudence with Regard to the Extraterritorial Application of the Anti-Fraud Provisions of the 1933 and 1934 Securities Acts, 28 Law & Pol'y Int'l Bus. 477, 495 (1997).

transnational securities claims dramatically increases the cost for foreign companies of accessing U.S. capital markets and often causes them to abandon those markets altogether. At a time when foreign investment in the United States and the attractiveness of U.S. capital markets are already challenged, the U.S. should be taking measures to make its financial markets more attractive to foreign capital, not less attractive by allowing U.S. class action litigation to target foreign securities transactions.

A. Attracting Foreign Investment is a Critical Priority for the U.S.

Foreign investment has always been essential to the health of the U.S. economy. Foreign direct investment in the U.S. "plays a major role in the U.S. economy as a key driver of the economy and as an important source of innovation, exports, and jobs".[48] As former Treasury Secretary Henry Paulson has summarized, "U.S. affiliates of foreign companies bring investments to our shores, creating jobs and revitalizing communities".[49]

Yet, with globalization of world markets, the U.S. has seen increased challenges to its standing as a preeminent center for foreign investment and to the prominence of its capital markets. Moreover, in the wake of the recent global economic crisis, cross-border capital flows have significantly diminished as investors, companies, banks, and other financial institutions have increasingly turned inward, directing their

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[48] U.S. Dep't of Commerce, The U.S. Litigation Environment and Foreign Direct Investment: Supporting U.S. Competitiveness by Reducing Legal Costs and Uncertainty (Oct. 2008), available at http://tinyurl.com/uslitfdi.

[49] Henry M. Paulson, Secretary, U.S. Dep't of Treasury, Remarks at Forum on International Investment (May 10, 2007), available at http://www.treasury.gov/press/releases/hp398.htm.

resources to domestic markets.[50] Indeed, the past few years have witnessed a retraction in the United States' share of overall global investment and a lag in the growth rate of such investment as compared to other nations.[51]

B. The Fear of U.S. Securities Class Actions Is a Major Deterrent of Foreign Investment.

In a time when the costs of deterring foreign investment are especially high, the extraterritorial expansion of private Section 10(b) actions poses an intolerable threat to the U.S. economy. During the pre-Morrison "conduct" and "effects" era, U.S. government officials, industry leaders, and academics alike cited the "fear of U.S. private antifraud litigation" as a major factor in deterring foreign issuers from investing in the U.S.[52] The international business community has been unanimous in voicing similar views. As the Australian Chamber of Commerce and Industry recently observed:

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[50] See McKinsey Global Institute, Global Capital Markets: Entering a New Era, at 13-15 (Sept. 2009), available at http://tinyurl.com/yb7pmyt (describing decline in global financial assets and foreign direct investment).

[51] See Rick L. Weddle, Supplemental Report to Testimony before the Subcommittee on Economic Policy – Funding for Invest in America to Attract Investment, Create Jobs and Stimulate Growth Industries: A Comparative Review of the Structure, Funding and Program Focus of Competitor Nation Investment Promotion Agencies, at 2-3 (submitted Dec. 18, 2009); see also U.S. Dep't of Commerce, supra note 48, at 2.

[52] See, e.g., Coffee, supra note 43, at n.3 (the "fear of U.S. private antifraud litigation" is tied to the "growing disenchantment of foreign issuers with the U.S. market"); see also U.S. Dep't of Commerce, supra note 48, at 2-5 ("concerns with excessive litigation and navigating what is seen as an expensive U.S. legal system" could "affect the decision by foreign investors to invest in the United States"); Paulson, supra note 49 ("[W]e must assess the cost versus the benefits of our regulatory structure and certain aspects of our legal system that may discourage foreign investment."); Committee on Capital Markets Regulation, Committee on Capital Markets Regulation Completes Survey Regarding the Use By Foreign Issuers of the Private Rule 144A Equity Market, at 3 (Feb. 2009), available at http://www.capmktsreg.org/pdfs/09-Feb-13_Summary_of_Rule_144A_survey.pdf.

> "The extraterritorial application of national laws by some countries, notably the USA, has created uncertainty and added cost to the operation of businesses involved in international trade and commerce. Beyond the standard risks, . . . businesses operating across national borders are confronted with the added burden of potential uncertainty in legal jurisdiction."[53]

The International Chamber of Commerce similarly has recognized that the extraterritorial application of laws "creates considerable commercial and legal uncertainty. This uncertainty discourages international businesses from engaging in trade and investment and distorts trade and investment decisions by international business."[54]

Empirical data shows that these concerns cause companies to take real action. By the time that use of the "conduct" and "effects" became pervasive, many foreign issuers simply decided to abandon the U.S. capital markets: 15 out of 27 French companies registered in the U.S. at the end of 2006 had deregistered by the end of 2008, as had 19 of 63 U.K. companies, 7 of 20 German companies, 6 of 11 Italian companies, and 9 of 24 Australian companies.[55] As a specific example, in December 2007, the Swiss company SCOR Holding voluntarily delisted from the NYSE after being sued in the U.S.

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[53] Australian Chamber of Commerce and Industry, The ExtraTerritorial Application of National Laws: An Unwarranted Burden for International Business, 138 Acci Review 9, 12 (Aug. 2006).

[54] Int'l Chamber of Commerce, Policy Statement: Extraterritoriality and Business, at 2 (July 13, 2006).

[55] See Securities and Exchange Commission, International Registered and Reporting Companies (June 11, 2009), available at http://www.sec.gov/divisions/corpfin/internatl/companies.shtml.

under Section 10(b) by a putative class that included foreign investors who purchased their securities on foreign stock exchanges.[56]

In addition, three recent studies confirm that these concerns are pervasive.

First, in the mid-2000s, a survey of hundreds of business leaders commissioned by United States Senator Charles Schumer and New York City Mayor Michael Bloomberg found that "a fair and predictable legal environment" was ranked second (behind only the skill of the labor force) among the most important factors considered in making investment decisions.[57] Foreign companies responded to the survey by stating that they were less likely to invest in the U.S. than ever before because they perceive risks posed by, among other things, "the increasing extraterritorial reach of U.S. law and the unpredictable nature of the [American] legal system".[58] Survey respondents noted that it is "harder to manage legal risk in the U.S. than in many other jurisdictions".[59]

Second, "Obstacles to Transatlantic Trade and Investment", a study conducted by Eurochambres and the U.S. Chamber of Commerce, found that European

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[56] See In re SCOR Holding (Switz.) AG Litig., 537 F. Supp. 2d 556 (S.D.N.Y. 2008); Press Release, SCOR SE, SCOR announces intention of SCOR Holding (Switzerland) Ltd. to delist American Depositary Shares and to deregister in the US (Dec. 14, 2007), available at http://www.scor.com/en/scor-talks/press-releases/49/276.html.

[57] Sustaining New York's and the U.S.' Global Financial Services Leadership, at 15-16 (Jan. 2007) ("Schumer-Bloomberg Report").

[58] Id. at 73-77; see also, e.g., United States Dep't of Commerce, supra note 48, at 2 ("[T]he U.S. share of global FDI [foreign direct investment] has declined since the 1980s and the competition to attract FDI has grown more intense".).

[59] Schumer-Bloomberg Report, supra note 57, at 77.

companies doing business in the United States rank "fear of legal action being taken against them" among their top concerns.[60]

Third, a study prepared for the Organization for International Investment, titled "Insourcing Survey: A CEO-Level Survey of U.S. Subsidiaries of Foreign Companies", listed the U.S. legal system as a drawback of investing in the U.S. Among the chief concerns from high-level executives of major U.S. subsidiaries of foreign companies: class action lawsuits.[61]

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To avoid the flight of foreign capital endemic to the pre-Morrison era, Congress should refrain from any extraterritorial extension of the Section 10(b) private right of action. At a time when the U.S. economy is struggling to recover, the risks of deterring foreign capital are far too great.

As set forth above, many foreign nations have carefully chosen to depart from U.S. practices on a number of significant aspects of private securities litigation. Extraterritorial application of Section 10(b) in private actions demonstrates a flagrant disrespect for those nations' sovereign rights under international law and violates principles of international comity.

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[60] Eurochambres and U.S. Chamber of Commerce, Obstacles to Transatlantic Trade and Investment, at 5, 10-12 (June 2005), available at http://www.cp3group.com/EurochambresReport.pdf.

[61] Neil Newhouse Public Opinion Strategies, Insourcing Survey: A CEO-Level Survey of U.S. Subsidiaries of Foreign Companies (April 2008), available at http://www.ofii.org/docs/ceo2008.pdf.

VII. CONGRESS SHOULD NOT EXTEND THE PRIVATE RIGHT OF ACTION UNDER SECTION 10(b) BEYOND THE LIMITS DEFINED IN MORRISON.

Nothing short of the bright-line transactional test announced in Morrison is adequate to address the concerns of international comity and economic deterrence set forth above. A transactional test – limiting private Section 10(b) suits to transactions occurring within the U.S. – properly requires U.S. courts to defer to the regulatory regimes of other countries when those countries' securities transactions are at issue and when those countries accordingly have a greater interest in regulating the relevant conduct. Similarly, the bright-line test in Morrison provides an easily understandable and intuitively appealing rule for foreign companies that is most likely to comport with their expectations of when U.S. laws will apply to their conduct, most likely to reduce uncertainty and accordingly most likely to attract the foreign investment so critical to the U.S. economy.

A. The Bright-Line Test Announced in Morrison Is Necessary to Ensure Respect for International Comity.

As set forth above, principles of international comity demand respect for the decisions that other countries have made regarding how to regulate securities transactions within their territorial jurisdiction. Adherence to this principle cannot be carried out through use of a set of flexible, fact-specific judicial standards such as the "conduct" and "effects" tests used prior to Morrison. The procedural costs and delays associated with case-by-case litigation alone threaten interference with a foreign nation's ability to regulate its own nationals and to make policy decisions to provide certain remedies (but not others) to investors alleging injury from transactions occurring within its own borders.[62] This is particularly true in the area of securities litigation, where a case-by-case analysis would require foreign companies to bear the immense burden, expense, and uncertainty of U.S. discovery, dispositive motions, and perhaps trial before a court rules on the extraterritoriality issue – and the concomitant pressure to settle that accompanies such uncertainty.

Only the bright-line test announced in Morrison can remedy these concerns and encourage a jurisprudence that respects the sovereignty of foreign nations, allows those nations to establish liability rules best-suited to their markets for transactions that take place there, avoids potential interference with global coordination efforts and eliminates a reciprocal retaliatory risk to U.S. companies.

B. A Bright-Line Test is Needed to Avoid Deterring Foreign Investment in the United States.

Similarly, the attractiveness of the U.S. as a destination for foreign capital depends not only on a class action regime that is confined to within its borders but also on a set of transparent and predictable standards that are readily understood by local and foreign issuers and investors, without the need for costly and time-consuming case-by-case legal advice. There can be no question that the transactional test in Morrison generates predictable results that comport with investor and issuer expectations:

> "If an investor travels to Japan to purchase securities on the Tokyo Stock Exchange, the typical investor will expect that Japanese law applies to the

[62] See Note, Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction, 98 Harv. L. Rev. 1310, 1321 (1985) (a nebulous test would make it impossible for foreign companies "to determine in advance whether their activities are likely to subject them to [suit in the United States]," and thus would unavoidably extend the reach of U.S. law into conduct properly governed by other nations' laws).

> transaction (much like Japanese law applies to other actions the investor may take in Japan, such as driving above the speed limit)."[63]

In contrast, under the "conduct" and "effects" regime – or under any facts-and-circumstances set of standards – the extraterritorial reach of Section 10(b) will be far from certain. Relevant considerations might include whether "activities in this country were more than merely preparatory"; "what and how much was done in the United States and on what and how much was done abroad"; and, ultimately, in which country corporate authority for each allegedly actionable statement or material omission rested. See Morrison v. Nat'l Australia Bank Ltd., 547 F.3d 167, 171 (2d Cir. 2008). Under such a test, depending on the allegations in the case, detailed discovery might be necessary on a vast range of subjects, including where each statement was made; whether each statement was designed for U.S. investors or foreign investors, the locations of persons responsible for ensuring the accuracy of information disclosed to the public; and where the defendant should be considered "headquartered".[64]

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[63] Choi & Silberman, supra note 4, at 500.

[64] See, e.g., In re CP Ships Ltd. Sec. Litig., 578 F.3d 1306, 1316 (11th Cir. 2009) ("Although other divisions of the Company's headquarters were located in … England, the headquarters operations which were central to the misconduct in this case were located … in Tampa." (internal quotation marks omitted; alteration incorporated)); Cornwell v. Credit Suisse Group, 666 F. Supp. 2d 381, 392-93 (S.D.N.Y. 2009) (discussing relevance of allegation that certain executives who participated in conference calls "resided in the United States at the time [the] calls were made"); City of Edinburgh Council ex rel. Lothian Pension Fund v. Vodafone Group Public Co., No. 07 Civ. 9921, 2008 WL 5062669, at *4 (S.D.N.Y. Nov. 24, 2008) (reviewing "evidentiary submissions includ[ing] slides from [a] … presentation held in New York City"); In re SCOR Holding, 537 F. Supp. 2d at 565, 566 n.11 ("key decisions underlying the alleged misrepresentations … were made in Switzerland," though the "scheme necessarily involved communication with the North American employees"); In re Vivendi Universal, S.A., 381 F. Supp. 2d 158, 169-170 (S.D.N.Y. 2003) (focusing on two corporate officers' "decision to move to the United States, allegedly to better direct corporate operations").

Such flexible, fact-specific limits are as good as having no limits at all. Application of any "conduct" and "effects" test is so difficult to predict that it imposes massive transaction costs on overseas issuers and, at worst, incentivizes them simply to avoid doing business with the U.S. entirely. Such risks cannot be tolerated.

VIII. CONCLUSION

For the foregoing reasons, we urge the SEC to conclude in the present Study that there should be no extraterritorial expansion of the Section 10(b) private right of action beyond the limits set forth in Morrison.