February 18, 2011

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

Re: Study on Extraterritorial Private Rights of Action (File Number 4-617)

Dear Ms. Murphy:

The Securities Industry and Financial Markets Association ("SIFMA") and the Association for Financial Markets in Europe ("AFME") appreciate the opportunity to submit this letter to the Securities and Exchange Commission (the "Commission") commenting on its study regarding extraterritorial private rights of action under the antifraud provisions of the Securities Exchange Act of 1934 (the "Exchange Act").[1]

SIFMA and AFME strongly favor maintaining the current standard for determining the territorial scope of private actions under Section 10(b) of the Exchange Act articulated in Morrison v. National Australia Bank Ltd, 130 S. Ct. 2869 (2010). The Morrison standard provides much-needed clarity regarding the reach of U.S. law that will encourage foreign investment in the United States and bolster the competiveness of U.S. markets. The standard

[1] SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association. For more information, visit www.sifma.org.

AFME represents a broad array of European and global participants in the wholesale financial markets. Its 197 members comprise all pan-EU and global banks as well as key regional banks, brokers, law firms, investors, and other financial market participants. AFME aims to promote safe, sound, and efficient wholesale financial markets; engage constructively with stakeholders and policymakers toward ensuring open European and global markets that benefit from well-crafted, globally consistent regulations; foster the adoption of market-led solutions, standards, and practices; and provide authoritative industry expertise and views for public officials, private individuals, and the media.

SIFMA and AFME have long advocated rejection of an extraterritorial private right of action under Section 10(b) of the Exchange Act, including in *amicus* briefs in Morrison v. National Australia Bank Ltd., No. 08-1191 (U.S. 2010) (SIFMA and AFME), Morrison v. National Australia Bank Ltd., No. 07-0583 (2d Cir. 2007) (SIFMA), and In re Infineon Technologies, AG Securities Litigation, No. 09-15857 (9th Cir. 2009) (SIFMA).

also promotes effective global regulatory cooperation by respecting the authority of foreign nations, rather than the United States, to make rules governing securities transactions in foreign markets. It does so, moreover, in an evolving international legal and regulatory environment that offers increasingly robust protection of investors in appropriate venues – without requiring the United States to export the "perceived abuses of the § 10(b) private action."[2]

I. Introduction

Private rights of action under the securities laws, as the Commission is aware, have long raised difficult policy issues in the United States. Congress and the courts have struggled for decades to establish an appropriate balance between the potential benefits of authorizing private plaintiffs to commence actions to enforce the securities laws and the harms associated with potential abuse of the litigation process, particularly in the case of class actions.

Regardless of one's views on how to strike this balance properly, a considerably different question arises in assessing whether U.S. rules for private rights of action should be exported to other nations. Extraterritorial application of U.S. law in private litigation is generally disfavored by the courts – and this is for good reason: other countries, as a matter of comity and mutual respect, have a legitimate sovereign interest in making their own policy determinations for matters within their jurisdiction.

In Morrison, the Supreme Court determined that the scope of the private right of action under Section 10(b) of the Exchange Act extends only to "transactions in securities listed on domestic exchanges, and domestic transactions in other securities[.]" See 130 S. Ct. at 2884. The Court found that the statute's text, construed in light of the presumption against extraterritorial application of U.S. law grounded in comity considerations, compelled this determination. Id. at 2877, 2885. It thus rejected the unpredictable and inconsistent "conduct" and "effects" tests previously used by lower courts, id. at 2879-80, noting the adverse effect of transnational securities class actions on the U.S. economy, and the fear of many that the United States "has become the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets." Id. at 2886.

The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 91-190, 124 Stat. 1376 (2010) ("Dodd-Frank"), enacted shortly thereafter, sought to reintroduce a jurisdictional test comparable to the pre-Morrison regime, but only for governmental enforcement proceedings. In particular, Section 929P provides that U.S. courts have jurisdiction in actions by the Commission or the U.S. Department of Justice alleging violations based on either conduct within the United States that constituted "significant steps in furtherance of the violation" or conduct abroad which had a "foreseeable substantial effect within the United States." Section 929Y of Dodd-Frank also directed the Commission to conduct a study to determine the extent to which private rights of action should be similarly extended.

[2] Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 320 (2007).

As discussed in greater detail below, SIFMA and AFME consider it unnecessary and inadvisable for Congress to expand the current scope of private rights of action under the Exchange Act's antifraud provisions.

- *Expanding the Private Right Will Harm Foreign Direct Investment in the United States and the Competitiveness of U.S. Markets*: Allowing private investors to bring extraterritorial Section 10(b) claims based on a broad new "conduct" and "effects" test will harm U.S. competitiveness. It will deter U.S. investment by foreign companies concerned that acquisition of U.S. assets could expose them to class action liability for their securities activities around the world – the very dilemma presented to National Australia Bank in the Morrison case. Further, it will create a significant disincentive to accessing U.S. capital markets, by presenting companies with the risk of U.S. litigation exposure for their wholly foreign securities activities based on unrelated U.S. offerings or transactions, particularly given the unpredictable manner in which even limited U.S. capital market participation often formed the basis for claims before Morrison.
- *Allowing Private Investors to Bring U.S. Securities Class Actions Based on Foreign Transactions Conflicts with Critical Policy Interests of Other Nations*: Opening U.S. courts to private claims based on securities transactions in foreign markets will conflict with the deliberate policy choices of other nations as embodied in their unique litigation and enforcement regimes. Application of U.S. law under these circumstances – particularly through private actions – threatens to damage mutual respect and undermine current efforts toward greater global regulatory coordination.
- *Substantial Investor Protections Provided by Non-U.S. Regulatory Regimes and U.S. Enforcement Authorities Weaken Any Potential Justification for Exporting U.S. Private Securities Litigation*: Investors who engage in securities transactions abroad have access to remedies under the litigation and enforcement regimes of foreign jurisdictions. Moreover, U.S. enforcement agencies have significant tools to pursue transnational securities fraud effectively – recently strengthened by the expanded legal powers and enhanced FAIR Fund authority established under Dodd-Frank. Together, these ample existing foreign and domestic protections further weaken any justification for permitting private plaintiffs to bring Section 10(b) claims involving foreign transactions, particularly given the long-recognized potential for abuse in private U.S. securities actions.

Accordingly, SIFMA and AFME strongly urge the Commission to conclude in its study that Congress should maintain the bright-line rule embodied in Morrison.

II. Expanding the Private Right of Action to Extraterritorial Transactions Would Harm U.S. Markets and Deter Foreign Investment

In SIFMA and AFME's view, extending the extraterritorial scope of private actions under the Exchange Act would significantly harm U.S. markets and domestic capital formation. In contrast, the test established in Morrison has already begun to provide increased predictability and certainty, consistent with the needs of investors and other participants in U.S. markets.

A. Expanding Section 10(b) Beyond Morrison's Limits Would Deter Foreign Investment and Decrease the Competitiveness of U.S. Markets

Allowing private litigants to bring claims in U.S. courts for transactions outside the limits set in Morrison would substantially increase the risk of expensive and potentially abusive litigation for foreign companies – and thereby discourage cross-border economic activity involving the United States. The U.S. Supreme Court, foreign governments and U.S. governmental authorities, academics and industry leaders have all recognized this danger. Notably, European companies have ranked "fear of legal action" as the second-largest barrier to investing in the United States. See U.S. Dep't of Commerce, International Trade Administration, Assessing Trends and Policies of Foreign Direct Investment in the United States, at 7 (July 2008). Exposure to U.S. securities class actions, it is well understood, could cause "[o]verseas firms with no other exposure to our securities laws [to] be deterred from doing business here." Stoneridge Inv. Partners, LLC. v. Scientific-Atlanta, Inc., 552 U.S. 148, 164 (2008); 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, at 2-5 (Oct. 2008) (noting "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").[3]

As the United Kingdom of Britain and Northern Ireland (the "United Kingdom"), as *amicus curiae* in support of National Australia Bank before the Morrison Court, warned,

> [e]xtraterritorial extension of the Rule 10b-5 private right of action . . . substantially raises the risk of exposing foreign issuers to unforeseen class actions, thereby discouraging foreign investment in United States businesses and inhibiting cross-border capital flows . . . [,] raises the cost of doing business in the U.S. and could deter corporations from operating within the U.S[.]

Brief of the United Kingdom of Great Britain and Northern Ireland as *Amicus Curiae* in Support of Respondents at 25-26, Morrison v. Nat'l Austl. Bank Ltd., No. 08-1191 (2010) ("UK *Amicus*").

It is similarly well known that the fear of U.S. private antifraud litigation also deters foreign companies from "participating in U.S. financial markets." See UK *Amicus* at 25-26; 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).[4] A recent interview-based study confirms these concerns:

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[3] See also Richard M. Kovacevich et al., The Blueprint for U.S. Financial Competitiveness 63 (Fin. Servs. Roundtable 2007) (noting the "substantial uncertainties and costs" imposed by securities litigation "are the most significant impediments to the competitiveness of U.S. businesses").

[4] See also Michael Bloomberg & Charles Schumer, Sustaining New York's and the US' Global Financial Services Leadership, at 15-16, 73-77 (Jan. 22, 2007) ("Bloomberg & Schumer Study"); accord Stephen M. Bainbridge, Corporate Governance and U.S. Capital Market Competitiveness 7-8 (UCLA School of Law, Law-Econ Research Paper No. 10-13, 2010) ("[T]he litigious nature of U.S. society and capital markets has a negative impact on the competitiveness of those markets.").

> Many [experts on international securities regulation] cite U.S. anti-fraud laws – specifically Rule 10b-5 – as a "top concern" because they are the "most intrusive" and have the "biggest" impact on extraterritorial transactions. What drives foreign firms away from the U.S. capital markets is not U.S. regulatory compliance but rather the "fear that listing on a U.S. exchange exposes the foreign issuer to potentially bankrupting securities liabilities if its stock price were to decline sharply." . . . As a result, "the only way foreign companies can protect themselves from being exposed to costly class action litigation, is to move out of the United States altogether – and that is what a lot of companies are doing."

Howell E. Jackson, Summary of Research Findings on Extra-Territorial Application of Federal Securities Law, 1743 PLI/Corp. 1243, 1253-54 (2009); John C. Coffee, Corporate Securities, N.Y.L.J. (Sept. 18, 2008). Although foreign issuers recognize and can accept litigation exposure for the securities they actually sell or purchase on U.S. exchanges and markets, even a small presence in the U.S. capital markets has historically exposed firms to additional liability for foreign securities transactions (which is often a much larger portion of a company's capital), substantially increasing the cost of participating in U.S. capital markets.[5]

These fears are fueled by the international perception that the U.S. legal system – in particular the extraterritorial reach of U.S. law – is difficult to predict. For example, a McKinsey study commissioned by Michael Bloomberg and Charles Schumer which discovered that "a fair and predictable legal environment" was the second most important factor governing investment decisions also found that foreign companies perceived it as "harder to manage legal risk in the U.S. than in many other jurisdictions." Bloomberg & Schumer Study, at 15-16, 73-77; U.S. Dep't of Commerce, The U.S. Litigation Environment and Foreign Direct Investment, at 2 ("[T]here is the perception that, at least in some contexts, other countries' legal systems are more predictable and that the legal costs of doing business are substantially less."); see also Australian Chamber of Commerce and Industry, The Extraterritorial Application of National Laws: An Unwarranted Burden for International Business, at 5 (Aug. 2006) ("The extraterritorial application of national laws . . . notably [by] the [United States] . . . has created uncertainty and added" to the cost of doing business with U.S. corporations.).[6]

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[5] See, e.g., Itoba Ltd. v. LEP Group PLC, 54 F.3d 118, 122-23 (2d Cir. 1995) (finding foreign-issuer's filing of a Form 20-F in the United States sufficient under "conduct" test to permit foreign investors who had not bought ADRs or read the Form 20-F to pursue a Section 10(b) claim based on purchases of shares on a foreign exchange); In re Royal Ahold N.V. Sec. & ERISA Litig., 351 F. Supp. 2d 334, 362 (D. Md. 2004) (relying in part on foreign company's Commission filings to permit Section 10(b) claims by investors who purchased company's stock on foreign exchanges).

[6] See generally Task Force on Extraterritoriality, ICC, Policy Statement on Extraterritoriality and Business, at 2 (July 13, 2006) ("[Commercial and legal uncertainty] discourages international businesses from engaging in trade and investment and distorts trade and investment decisions by international businesses."); Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 188 (1994) (noting vague legal standards "lead[] to the undesirable result of decisions 'made on an ad hoc basis, offering little predictive value'") (citation omitted).

Morrison has now established a clear rule for assessing exposure to U.S. private securities actions (often in the form of class litigation): securities transactions on a U.S. exchange or domestic transactions in other securities fall within the scope of Section 10(b), while foreign securities transactions do not. Thus, investment in a U.S. company will not expose an issuer to private actions relating to foreign transactions. Nor, as post-Morrison cases have made clear, need companies fear world-wide litigation exposure relating to foreign securities transactions merely as a result of allowing some subset of their securities to trade on U.S. exchanges or in U.S. markets. Non-U.S. companies can rely on this rule, if it is maintained over time, to limit the costs of, and assuage longstanding concerns about, doing business and raising capital in the United States. In contrast, efforts to expand the private right of action under a new extraterritorial approach – in particular under the "conduct" or "effects" tests – can only revive the chilling effect of longstanding fears of U.S. class actions.

One need look no further than the pre-Morrison decisions – and plaintiffs' reliance on U.S. connections unrelated to the transactions at issue – to see the risks to foreign firms should Congress enact the "conduct" and "effects" tests (or a variant of those tests) for private investors.[7] For example, in Itoba Ltd. v. LEP Group PLC, 54 F.3d 118, 122-23 (2d Cir. 1995), the Court of Appeals found that a foreign-issuer's filing of a Form 20-F in the United States was sufficient under the "conduct" test to permit foreign investors (who had not bought ADRs or read the Form 20-F) to pursue a Section 10(b) claim based on purchases of the company's ordinary shares on a foreign exchange. See also, e.g., In re Royal Ahold N.V. Sec. & ERISA Litig., 351 F. Supp. 2d 334, 362 (D. Md. 2004) (relying in part on foreign company's Commission filings to permit Section 10(b) claims by investors who purchased company's stock on foreign exchanges); In re Cable & Wireless, PLC Sec. Litig., 321 F. Supp. 2d 749, 763 (E.D. Va. 2004) (refusing to dismiss Section 10(b) claim against British issuer under "conduct" test based upon allegations that British company entered into "sham" financial transactions in Virginia to artificially inflate the value of the British company on the London Stock exchange). Indeed, under the pre-Morrison regime, National Australia Bank – the defendant in Morrison – was forced to defend a securities class action lawsuit in the United States for over five years simply because it invested in a U.S. subsidiary.[8] The potential need to defend class actions for securities activity outside

[7] This includes extending the standard currently applicable to Commission actions to private suits. Although worded slightly differently, Dodd-Frank Section 929P codifies a similar standard that embodies many of the problems associated with the judicially-created pre-Morrison "conduct" and "effects" tests. Compare Dodd-Frank § 929P(b) ("conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors") with Morrison v. Nat'l Austl. Bank, 547 F.3d 167, 171 (2d Cir. 2008) ("activities in [the United States] were more than merely preparatory to a fraud and culpable acts or omissions occurring here directly caused losses to investors abroad," noting that whether U.S. activities "'directly' caused losses to foreigners depends on what and how much was done in the United States and on what and how much was done abroad"). Compare Dodd-Frank § 929P(b) ("conduct occurring outside the United States that has a foreseeable substantial effect within the United States") with Morrison, 547 F.3d at 171 (conduct that has "a substantial effect in the United States or upon United States citizens").

[8] See also, e.g., Blechner v. Daimler-Benz AG, 410 F. Supp. 2d 366 (D. Del. 2006), appeal dismissed per stipulation, No. 06-1641 (3rd Cir. Nov. 27, 2007) (German issuer spent over three years defending against claims of

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the United States based on U.S. contacts unrelated to the transaction at issue rightly will discourage foreign companies from trading and investing in the United States in the first place.[9] See Coffee, Corporate Securities, supra (noting that pre-Morrison, while an issuer may be prepared to face litigation relating to a small percentage of its outstanding shares which trade on a U.S. exchange, "litigation exposure grows by an order of magnitude if this [small] presence . . . allows plaintiffs' attorneys to tack on" claims relating to foreign transactions, resulting in "a multi-billion dollar class action that can threaten [the issuer's] solvency"); Jackson, supra, at 1253-54.[10]

In addition to establishing an unduly broad scope for U.S. private actions based on limited activities in the United States, the application of the highly fact-specific "conduct" and "effects" tests varied widely from case to case – providing neither fairness nor certainty. See Morrison, 130 S. Ct. at 2879-81 (acknowledging "conduct" and "effects" tests were long-criticized for their unpredictable and inconsistent application); Kauthar SDN BHD v. Sternberg,

(. . . continued)

foreign investors who purchased securities abroad for alleged fraud perpetrated by issuer and managers in Germany that was related to acquisition of U.S. company and involved non-plaintiff U.S. shareholders); In re Yukos Oil Co. Sec. Litig., No. 04 Civ. 5243 (WHP), 2006 WL 3026024 (S.D.N.Y. Oct. 25, 2006) (Russian issuer spent more than two years litigating claims of foreign investors who purchased stock on Russian exchange and bonds not registered or permitted to be traded in the United States, where U.S. ties included a single SEC filing, emails to bond investors not known to be in the United States, and efforts to solicit U.S. investors with respect to which no misstatements or omissions were alleged).

[9] Notably, the Morrison test preserves the ability to bring actions where the claim relates to a securities transaction in the United States. At the same time, it does not countenance the commencement of actions involving foreign transactions in reliance on U.S. activities not related to the transactions at issue. See, e.g., Schoenbaum v. Firstbrook, 405 F.2d 200, 208-09 (2d Cir. 1968) (finding that district court had subject matter jurisdiction for Section 10(b) claim relating to an allegedly fraudulent sale of securities by a Canadian issuer in Canada because of the effect the transaction would have on the issuer's U.S. share price, where only harm alleged was to foreign corporation); Cont'l Grain (Austl.) Pty. Ltd. v. Pac. Oilseeds, Inc., 592 F.2d 409, 415 (8th Cir. 1979) (finding subject matter jurisdiction existed for Section 10(b) claim brought by an Australian plaintiff against an Australian issuer for securities purchased from Australian vendors because of the foreign issuer's use of U.S. mail and other instrumentalities of interstate commerce); In re Gaming Lottery Sec. Litig., 58 F. Supp. 2d 62, 74 (S.D.N.Y. 1999) (permitting Canadian plaintiffs, under facts similar to Morrison, to pursue their Section 10(b) claim for securities sold on the Toronto Stock Exchange because of the Canadian issuer's operation of a subsidiary in the United States).

[10] This issue is not a theoretical one. Many foreign companies have left the U.S. market since the Commission amended its rules in June 2007 to remove barriers to deregistration: 15 out of 27 French companies registered in the United States at the end 2005 had deregistered by the end of 2008, as had 19 of 44 U.K. companies, 7 of 20 German companies, 6 of 11 Italian companies, and 15 of 24 Australian companies. See Securities and Exchange Commission, International Registered and Reporting Companies (June 11, 2009). A recent survey of senior executives found that "nine out of 10 companies who de-listed from a U.S. exchange [from 2003-2007] said the litigation environment played some role in that decision." Fin. Servs. Forum, 2007 Global Capital Markets Survey 8 (2007); see also Vanessa Fuhrmans & Laura Stevens, Symbolic Shift: Why Daimler is Delisting, Wall St. J., May 18, 2010, at C2 ("A U.S. listing was supposed to be a win-win for European companies: more international exposure and an entrée to serious American expansion. But . . . many have come to view it as a liability. . . . Simply put, the costs have come to outweigh the benefits[.]").

149 F.3d 659, 665 (7th Cir. 1998) ("Identification of those circumstances that warrant such [extraterritorial application] has produced a disparity in approach, to some degree doctrinal and to some degree attitudinal[.]").[11] As the courts acknowledged, "the presence or absence of any single factor which was considered significant" in one case was "not necessarily dispositive" in future cases. IIT v. Cornfeld, 619 F.2d 909, 918 (2d Cir. 1980) (internal quotation marks and citation omitted). Applying the tests, one court observed that "any notion that a single precedent or cohesive doctrine . . . 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." In re Alstom SA Sec. Litig., 406 F. Supp. 2d 346, 375 (S.D.N.Y. 2005).[12]

The potential damage from an overbroad and uncertain test is amplified by current economic trends showing that foreign direct investment in the United States is on the decline and U.S. capital markets have become less competitive globally. Although there was a slight improvement in 2008 and 2009, "by nearly all measures, the U.S. capital market today remains 'much less competitive than it was historically.'" Stephen M. Bainbridge, Corporate Governance and U.S. Capital Market Competitiveness 5 (UCLA School of Law, Law-Econ Research Paper No. 10-13, 2010) (citing Press Release, Comm. on Capital Mkts. Reg., Q1 2010 Sees Fresh Deterioration in Competitiveness of U.S. Public Equity Markets, Reversing Mild Improvements (June 2, 2010)).[13] For example, the U.S. percentage of global IPOs – widely viewed as an indicator of the relative competitiveness of capital markets – has rapidly decreased in the last 10 years, with the United States capturing a paltry 2.7% of global IPO activity in the first quarter of 2010. Id.; Press Release, Comm. on Capital Mkts. Reg., Latest CCMR Study Confirms Resumed Deterioration in Competitiveness of U.S. Public Equity Markets 2 (Sept. 22, 2010).[14] The United States' position as the most attractive destination for foreign investment has also eroded since the late 1980s: foreign investment in the United States "in 2009 totaled $152.1 billion, down by more than 50 percent compared to the $319.7 billion in 2008." Organization for International Investment, Foreign Direct Investment in the United States, at 1 (Mar. 18, 2010);

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[11] See also UK *Amicus* at 3 (requesting Morrison Court "set forth a clear rule limiting the extraterritorial application of [Section] 10(b)"); see generally Stephen J. Choi & Linda J. Silberman, Transnational Litigation and Global Securities Class-Action Lawsuits, 2009 Wis. L. Rev. 456, 456-77 (2009) (discussing inconsistent application by courts of "conduct" and "effects" tests).

[12] The erratic history of the "conduct" and "effects" tests reflects not merely a drafting problem, but a conceptual one inherent in any effort to create a standard that (in contrast to Morrison) attempts to permit private actions by investors who did not purchase or sell securities in the United States. By definition, in those cases, any connection to the United States must arise from facts unrelated to the (wholly foreign) transaction itself – facts that will not bear directly on the question at hand: whether private remedies under U.S. law are appropriate.

[13] See also Press Release, Comm. on Capital Mkts. Reg., Latest CCMR Study Confirms Resumed Deterioration in Competitiveness of U.S. Public Equity Markets 2 (Sept. 22, 2010) ("Overall, Q2 2010 evidences a continued, overall decline in U.S. competitiveness."); Press Release, Comm. on Capital Mkts. Reg., Third Quarter 2009 Demonstrates First Signs of Mild Improvement in Competitiveness of U.S. Public Equity Markets (Dec. 1, 2009).

[14] See also Luigi Zingales, Is the U.S. Capital Market Losing its Competitive Edge? 2 (ECGI Fin., Working Paper 192, 2007) (forthcoming in J. Econ. Persp.).

U.S. Dep't of Commerce, International Trade Administration, Assessing Trends and Policies of Foreign Direct Investment in the United States, at 1 (July 2008).

At a time when companies have better access than ever to cheaper, foreign sources of capital and investors have increasingly directed resources to their own (or other non-U.S.) markets, abandonment of the Morrison test would – illogically and unnecessarily – make U.S. markets less competitive and discourage beneficial investment in the United States when economic conditions most strongly counsel to the contrary.

B. Morrison's Clear Transaction-Based Rule Properly Defines the Scope of U.S. Private Securities Actions, Consistent with the Needs of U.S. Markets and the U.S. Economy

Morrison's clear, transaction-based test appropriately defines the scope of U.S. private securities actions by providing both predictability and limits on potentially abusive litigation. In the past six months, courts have developed a notably consistent body of case law applying the test in a variety of factual situations, thereby enabling companies to better assess the risks associated with their activities. Further, the application of the test in practice has offered needed guidance limiting the potential harms associated with U.S. class actions.

As lower courts have recognized, "[The Morrison] Court manifested an intent to weed the ['conduct' and 'effects'] doctrine at its roots and replace it with a new bright-line transactional rule embodying the clarity, simplicity, certainty and consistency that the tests from the Second and other circuits lacked." Cornwell v. Credit Suisse Group, No. 08 Civ. 3758 (VM), 2010 WL 3069597, at *3 (S.D.N.Y. July 27, 2010).[15] Morrison's clear, transactional test – in marked contrast to prior law – signals to foreign companies who wish to invest or raise capital in the United States exactly which securities transactions are subject to Section 10(b) liability. See Daniel S. Kahn, The Collapsing Jurisdictional Boundaries of the Antifraud Provisions of US Securities Laws, 6 N.Y.U. J. L. & Bus. 365 (2010).[16]

Post-Morrison decisions already have begun to confirm the Court's success in establishing an effective bright-line rule. All lower courts since Morrison, in addressing claims arising out of exchange-based trading, have consistently interpreted the Supreme Court's decision as requiring them to look only to the exchange where the particular securities at issue in

[15] See also Sarah L. Cave, F-Cubed = 0: Supreme Court's Decision in 'Morrison v. National Australia Bank', 244 N.Y.L.J. 4, (col. 1) (July 7, 2010) ("The Court . . . adopted a simpler, easier-to administer standard[.]"); Sarah S. Gold & Richard L. Spinogatti, Applicability to SEC of Private Action Requirements in § 10(B) Cases, 244 N.Y.L.J. 3, (col. 1) (Aug. 11, 2010).

[16] Naturally, even under Morrison factual issues may arise. See, e.g., In re Banco Santander Sec.-Optimal Litig., Nos. 09-MD-02073-CIV, 09-CV-20215-CIV, 2010 WL 303699 (S.D. Fla. July 30, 2010) (addressing whether private securities transaction was "domestic"); Anwar v. Fairfield Greenwich Ltd., No. 09 Civ. 0118(VM), 2010 WL 3341636 (S.D.N.Y. Aug. 18, 2010) (stating more developed factual record was necessary to determine whether private securities transaction was "domestic"). The Morrison test, however, drastically reduces the areas of uncertainty and provides important direction and predictability.

the litigation were bought or sold to determine whether a plaintiff can pursue a securities claim under U.S. federal law. See, e.g., In re Royal Bank of Scotland Grp. plc Sec. Litig., No. 09 Civ. 300 (DAB), 2011 WL 167749, at *6-7 (S.D.N.Y. Jan. 11, 2011).[17] Courts have thus taken a uniform and consistent position in disregarding issues that previously could have required a fact-intensive and largely standardless inquiry under the "conduct" and "effects" tests, including the implications of an ADR program in the United States or trading on U.S. exchanges when the claim itself involves a transaction on a foreign exchange,[18] the purchaser's citizenship or domicile,[19] or where the transaction was initiated.[20] To hold otherwise would adopt a "selective and overly technical reading of Morrison that ignores the larger point of the decision," which is the "focus on where the securities transaction actually occurs," Alstom, 2010 WL 3718863, at *2. Consideration of other factors would also be "utterly inconsistent" with the Morrison's Court's aim to avoid the inevitable conflicts with foreign sovereigns that would ensue if U.S. law was applied to transactions on foreign exchanges, Royal Bank of Scotland, 2011 WL 167749, at

[17] See also, e.g., In re Celestica Inc. Sec. Litig., No. 07 CV 312 (GBD), 2010 WL 4159587, at *1 n.1 (S.D.N.Y. Oct. 14, 2010); Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co., No. 08 Civ. 1958 (JGK), 2010 WL 3860397, at *9 (S.D.N.Y. Oct. 4, 2010); In re Société Générale Sec. Litig., No. 08 Civ. 2495 (RMB), 2010 WL 3910286, at *1, 5 (S.D.N.Y. Sept. 29, 2010); In re Alstom SA Sec. Litig., No. 03 Civ. 6595 (VM), 2010 WL 3718863, at *1, 2 (S.D.N.Y. Sept. 14, 2010); Terra Sec. ASA Konkursbo v. Citigroup, Inc., No. 09 Civ. 7058 (VM), 2010 WL 3291579, at *5 (S.D.N.Y. Aug. 16, 2010); Sgalambo v. McKenzie, No. 09 Civ. 10087 (SAS), 2010 WL 3119349, at *17 (S.D.N.Y. Aug. 6, 2010); Cornwell, 2010 WL 3069597, at *1, 5; see also Stackhouse v. Toyota Motor Co., Nos. CV 10-0922 DSF (AJWx), CV 10-1429 DSF (AJWx), CV 10-1452 DSF (AJWx), CV 10-1911 DSF (AJWx), CV 10-2196 DSF (AJWx), CV-2253 DSF (AJWx), CV 10-2578 DSF (AJWx), 2010 WL 3377409, at *1, 2 (C.D. Cal. July 16, 2010) (noting court believes a fair reading of Morrison excludes claims by plaintiffs who purchased securities on Tokyo Stock Exchange without making final decision); In re IMAX Sec. Litig., No. 06 Civ. 6128 (NRB), 2010 WL 5185076, at *1 n.1 (S.D.N.Y. Dec. 22, 2010) (noting in light of Morrison, plaintiffs submitted a revised definition of the proposed Class including those who purchased shares on the NASDAQ and excluding those who purchased shares on the Toronto Stock Exchange); In re BP PLC Sec. Litig., No. 10-md-2185, 2010 WL 5343465, at *4 n.7 (S.D. Tex. Dec. 28, 2010) (noting argument that stock purchases abroad are not covered by federal securities laws and should not be counted in determining which potential lead plaintiff has largest financial interest). Courts have similarly focused on the place of the purchase or sale with respect to securities transactions executed off exchange. See, e.g., Gannon Int'l v. Blocker, No. 4:10CV0835, 2011 WL 111885, at *15 (E.D. Mo. Jan. 13, 2011).

[18] See, e.g., Royal Bank of Scotland, 2011 WL 167749, at *6-7 (listing on U.S. exchange for ADR purposes irrelevant to transactions on foreign exchange); Alstom, 2010 WL 3718863, at *2 (same); Société Générale, 2010 WL 3910286, at *1, 5-6 (same); Cornwell, 2010 WL 3069597, at *1 (same); Celestica, 2010 WL 4159587, at *1 n.1 (trading on U.S. exchange irrelevant to transactions on foreign exchange); Sgalambo, 2010 WL 3119349, at *1, 17 (same).

[19] See, e.g., Royal Bank of Scotland, 2011 WL 167749, at *7-8 (investor's residence is irrelevant); Cornwell, 2010 WL 3069597, at *5 (investor's citizenship is irrelevant); Plumbers' Union Local No. 12 Pension Fund, 2010 WL 3860397, at *9 (purchaser's citizenship and residence are irrelevant).

[20] See, e.g., Société Générale, 2010 WL 3910286, at *5 (location of purchaser irrelevant); Alstom, 2010 WL 3718863, at *2 (place of initiation irrelevant); Royal Bank of Scotland, 2011 WL 167749, at *7-8 (location of decision-making is irrelevant); Plumbers' Union Local No. 12 Pension Fund, 2010 WL 3860397, at *9 (purchaser's location of decision is irrelevant); Cornwell, 2010 WL 3069597, at *5 (location of preparatory activities or contacts is immaterial).

*7, and revive the sort of "difficult-to-employ, fact intensive" test Morrison rejected. Id. at *8; Cornwell, 2010 WL 3069597, at *3-5.

In addition to providing substantially greater predictability and certainty, the Morrison rule tempers the widely-acknowledged potential for abuse associated with securities class actions. Private securities class actions present a unique potential for vexatious litigation, including "strike suits, and protracted discovery, with little chance of reasonable resolution by pretrial process," Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1105 (1991), such that "if not adequately contained, [the private right of action] can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law." Tellabs, 551 U.S. at 313. It has been long-recognized that "[e]ven weak cases brought under [Section 10(b)] may have substantial settlement value." Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71, 80-81 (2006); Stoneridge, 552 U.S. at 163 ("[T]he potential for uncertainty and disruption . . . allow plaintiffs with weak claims to extort settlements from innocent companies.") (citation omitted); see also S. Rep. No. 104-98, at 6 (1995), reprinted in 1995 U.S.C.C.A.N. 679, 685 ("Many such actions are brought on the basis of their settlement value. The settlement value of defendants turns more on the expected costs of defense than the merits of the underlying claim.").[21] The problem of abusive "strike suits" – the harms of which are amplified when foreign companies are subject to U.S. class actions for securities transactions consummated overseas – would only be exacerbated if Congress expanded the private right of action extraterritorially.

III. Expanding the Private Right of Action Conflicts with the Policy Choices of Other Nations, Thereby Undermining Global Regulatory Cooperation

Expanding the private right of action to cover securities fraud on foreign markets and foreign exchanges would also conflict with other nations' policy choices and work against vital efforts at international regulatory cooperation and enforcement.

A. Allowing Private Investors to Bring Extraterritorial Securities Fraud Claims Would Conflict with Other Nations' Approaches to Remedying Securities Fraud

The United States is not alone in fighting securities fraud: like the United States, foreign countries police securities fraud both through government enforcement and private litigation. In *amicus* briefs submitted to the Morrison Court, the United Kingdom, Australia and France

[21] Once a securities class action survives a motion to dismiss, it almost always settles because of high discovery costs and the potential for astronomical class-wide damage awards. Electronic discovery costs alone for litigants exceeded $2.8 billion in 2009, and the costs are expected to increase by 10% to 15% in each of 2010 and 2011. See George Socha & Tom Gelbmann, Climbing Back: Consultants George Socha and Tom Glebmann Highlight Key Trends They Identified in Their Annual E-Discovery Survey, L. Tech. News, Aug. 1, 2010. Indeed, of the "over 3,400 cases [that] have been filed since the passage of the PSLRA, . . . only 27 have gone to trial . . . [and] fewer suits end in a verdict at trial[.]" Dr. Jordan Milev et al., Trends 2010 Mid-Year Study: Filings Decline as the Wave of Credit Crisis Cases Subsides, Median Settlement at Record High 19 (NERA Economic Consulting 2010).

voiced concerns that an expansive Section 10(b) private right of action would interfere with the policy choices underlying these foreign enforcement and remedial regimes. For example, "the U.K., like many other nations, has a sophisticated financial regulatory system and substantive and procedural rules for remedying securities fraud; and . . . the U.K.'s approach to securities regulation and litigation differs in important respects from that of the U.S., and those differences represent legitimate policy choices and sovereign interests that ought to be respected by the United States." UK *Amicus* at 5-6 (emphasis added). The Australian government also has "established a comprehensive and highly detailed legislative regime" that provides legal remedies for parties injured by securities fraud for transactions within its own borders "reflecting a series of different sovereign choices [than the United States]." Brief of the Government of the Commonwealth of Australia as *Amicus Curiae* in Support of the Defendants-Appellees at 12, Morrison v. Nat'l Austl. Bank Ltd., No. 08-1191 (2010) ("Australia *Amicus*"); see also id. at 5-12, 15-23, 27. As France explained to the Morrison Court:

> [t]o be sure, most foreign countries proscribe securities fraud. But foreign nations have made very different choices with respect to the best way to implement that proscription. In particular, the U.S. approach to policing securities fraud – by privately initiated class actions instituted by plaintiffs' attorneys working on a contingency-fee basis – is not one that has commended itself to most foreign nations.

See Brief for the Republic of France as *Amicus Curiae* in Support of Respondents at 20, Morrison v. Nat'l Austl. Bank Ltd., No. 08-1191 (2010) ("France *Amicus*"); Morrison, 130 S. Ct. at 2885 ("[T]he 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 in litigation, what individual actions may be joined in a single suit, what attorney's fees are recoverable, and many other matters."). Further, in discussing the substantial conflict that extraterritorial application of U.S. law would pose, France specifically noted its rejection of the U.S. class action "opt out" procedure. Id. at 23-28.[22] Indeed, England, Estonia, Finland, Germany, Italy, Spain and Taiwan have all adopted "opt-in" procedures for representative proceedings in the securities fraud context and otherwise.[23]

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[22] See also Samuel P. Baumgartner, The Globalization of Class Actions: Switzerland, 622 Annals Am. Acad. Pol. & Soc. Sci. 179, 180-81 (2009) (explaining Swiss Parliament "decided to refrain from introducing a U.S.-style class action practice into its draft code, noting that such a device is foreign to Swiss traditions").

[23] See Civil Procedure Rule (U.K.) 19.10-.12 (2008); Global Legal Group, The International Comparative Legal Guide to: Class & Group Actions 2010, at 19 (2009) ("C&G 2010"), at 66; C&G 2010, at 74; French C. Com. arts. 225-120, 225-252 (2010); C&G 2010, at 80-81; Bundesministerium der Justiz, The German 'Capital Markets Model Case Act,' at 2, available at http://www.bmj.bund.de/files/-/1056/EnglishInfoKapMuG.pdf; Brief for German and Italian Legal Scholars as *Amici Curiae* at 27-30, Infineon Technologies AG v. Dolan, No. 09-15857 (9th Cir. Sept. 9, 2009); Spanish Law of Civil Judgment 1/200; Lawrence S. Liu, Simulating Securities Class Actions: The Case in Taiwan, at 4 (2000), available at http://ssrn.com/abstract=251224.

In addition to using an "opt-in" procedure, foreign countries' collective securities actions vary in other ways. For example, Israel permits class actions where investors can meet the threshold requirement that their claims have the likelihood of prevailing, the Netherlands permits associations representing the interests of injured parties to seek a judicial declaration of liability (but not pursue collective damages) and to enter into a binding settlement agreement of compensation on behalf of those parties, and South Korea allows collective actions where the class is comprised of at least fifty members who hold at least .01% of a corporation's securities. C&G 2010, at 91 (Israel); Dutch Civil Code (Burgerlinjk Weboek) arts. 3:305a, 3:305b (2008) (Netherlands); Daw Hwan Chung, Introduction to South Korea's New Securities-Related Class Action, 20 J. Compl. L. 165, 175 (2004) (South Korea). Thus, even where countries permit securities class actions (as set forth in more detail in Section IV(A) below), the U.S. model still reflects vastly different policy choices.

Morrison acknowledged this inevitable interference with foreign private and government enforcement regimes in the absence of a transaction-based test. See 130 S. Ct. at 2885-86. Indeed, it has long-been recognized that extraterritorial application of U.S. laws "creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs" and "to apply our remedies would unjustifiably permit [foreign] citizens to bypass their [countries'] own . . . remedial schemes, thereby upsetting a balance of competing considerations that their own domestic . . . laws embody[.]" See, e.g., F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S 155, 165, 167 (2004). As the Morrison Court explained:

> [Foreign countries, and foreign and international organizations, as *amici*,] all complain of the interference with foreign securities regulation that application of § 10(b) abroad would produce, and urge the adoption of a clear test that will avoid that consequence. The transactional test we have adopted . . . meets that requirement.

130 S. Ct. at 2886 (emphasis added).[24]

B. The Unavoidable Conflict Among Nations Posed by Extraterritorial Expansion of the Exchange Act's Private Antifraud Provisions Would Damage Essential Global Cooperation at a Time of Ongoing Challenges to International Markets

Respect for the conflicting policy choices of foreign sovereigns is particularly important in the context of highly regulated and interdependent markets, such as those involving securities. Effective international regulatory cooperation and communication plays a critical part in these globalized markets, where no single jurisdiction can achieve key policy objectives acting alone. Rejecting other nations' policy determinations for extraterritorial transactions (i.e., transactions effected in their own countries and not in the United States) risks substantial damage to mutually

[24] See also Plumbers' Union Local, 2010 WL 3860397, at *6-8 (noting that Morrison Court adopted "'a clear test' to avoid . . . 'interference with foreign securities regulation'") (citation omitted); Elliott Assocs. v. Porsche Automobil Holding SE, Nos. 10 Civ. 0532 (HB), 10 Civ. 4155 (HB), slip op. at 12-13 (S.D.N.Y. Dec. 30, 2010).

beneficial regulatory relationships and even potential retaliatory countermeasures. This is especially true in the context of securities class actions, where other nations have gone out of their way to express these concerns directly in U.S. proceedings.

The United Kingdom underscored in its brief to the Morrison Court that U.S. judicial interference with foreign nations' strong interest in enforcing their own regulations, procedural rules and penalty structures "risks damaging the mutual respect that comity is meant to protect and could be perceived as an attempt to impose American economic, social and judicial values [abroad]." UK *Amicus* at 22-23 (emphasis added). Damaging this respect could lead to retaliation:

> If other nations believe that American policy unfairly disadvantages their citizens . . . they are apt to resist enforcement efforts and perhaps to retaliate with countermeasures of their own. In the past, other nations . . . have enacted measures to restrain efforts to enforce U.S. law extraterritorially; the clearest examples were the 'blocking' statutes that Australia and other countries enacted in the 1980's in response to what were regarded as overly broad jurisdictional claims being made under U.S. antitrust laws in cases involving the uranium industry.

See Australia *Amicus* at 26 (internal quotation marks and citation omitted) (first alteration in original); Stephen J. Choi & Andrew Guzman, Portable Reciprocity: Rethinking the International Reach of Securities Regulation, 71 S. Cal. L. Rev. 903, 914 (1998).[25]

Regulators here and abroad, including of course the Commission, have repeatedly highlighted the vital importance of international cooperation in the current economic climate and, specifically, that "robust cooperation among regulators is vital to the effective oversight of cross-border entities and to the prevention of international securities fraud." See Elisse B. Walter, Commissioner, SEC, Supervisory Cooperation: The Next Frontier for International Securities Regulation, Speech at the International Institute on the Inspection and Oversight of Market Intermediaries (July 6, 2010).[26] On October 6, 2010, Treasury Secretary Timothy Geithner had this to say about the state of the global financial system:

[25] In contrast to harmful retaliatory actions by other nations, the bright-line approach in Morrison is likely to "encourage less developed financial regulatory regimes to adopt clear and enforceable rules" to the benefit of U.S. businesses and investors doing business abroad, and of global coordination more generally. See UK *Amicus* at 27-28.

[26] See also Kathleen L. Casey, Commissioner, SEC, The Role of Regulatory Cooperation and Coordination in Promoting Efficient Capital Markets, Speech at the Instituto Bruno Leoni (June 12, 2010) ("Strong international cooperation is vital to the quick, effective and appropriate resolution of international enforcement investigations."); Christopher Cox, Chairman, SEC, International Business – An SEC Perspective, Address to the American Institute of Certified Public Accountants' International Issues Conference (Jan. 10, 2008) ("Enforcement . . . has always been the bread and butter of international securities regulatory cooperation[.]"); UK *Amicus* at 23-24 (noting G-20 issued

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> This is not a challenge that is best resolved by nations acting independently. In the heat of the crisis, we all recognized that our actions would be more powerful if we acted together. Even though the most dangerous part of the crisis is behind us, we are still in a place where we can achieve better overall growth outcomes if we make policy in a cooperative framework.

Remarks at the Brookings Institution (October 6, 2010).[27] As the Commission has warned, "[t]he alternative is the Balkanization of our markets at precisely the time when cooperation could help to fuel an international financial recovery." SEC Commissioner Walter's July 6, 2010 Speech, supra.

Dodd-Frank itself reflects the significance of expanding the existing cooperative framework. As Commissioner Walters noted in her September 29, 2010 speech to the Eurofi Financial Forum in Brussels, "Dodd-Frank recognizes that the time when lawmakers could focus narrowly on one issue, in one economy, has passed, encouraging consultation and collaboration with our overseas counterparts." Elisse B. Walter, Commissioner, SEC, Keynote Address at the Eurofi Financial Forum 2010 (Sept. 29, 2010).

Expanding the extraterritorial application of Section 10(b)'s private right of action to transactions on foreign exchanges and in foreign countries runs directly counter to this widely-recognized policy goal of improving relationships among regulators around the globe. It "risks undermining the kind of global regulatory cooperation that the current economic situation demands" because "the effectiveness of any action by a foreign regulator . . . is threatened by the unpredictable specter of private litigation in U.S. courts." UK *Amicus* at 23-24. Additionally, "[i]f other nations believe that American policy unfairly disadvantages their citizens . . . they are apt to resist enforcement efforts and perhaps to retaliate," further eroding global cooperation. Australia *Amicus* at 26 (internal quotation marks and citation omitted); see also Hannah L. Buxbaum, Transnational Regulatory Litigation, 46 Va. J. Int'l L. 251, 304-05 (2006) ("[E]xpanding the use of civil litigation in U.S. courts to serve global regulatory goals is highly problematic from an international relations point of view.").

Further, expanding Section 10(b)'s right of action to private citizens presents distinct foreign relations problems that Commission enforcement authority alone does not. As opposed to the Commission (a professional agency tasked with protecting investors and the U.S. market),

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declaration on financial crisis reaffirming "its commitment to reinforcing international cooperation and strengthening international regulatory standards" in late 2008).

[27] See also Neal Wolin, Deputy Secretary, U.S. Dep't of Treasury, A New Financial Framework: Dodd-Frank's Contribution to Global Reform, Remarks to the London Stock Exchange (Nov. 17, 2010) ("In the wake of the severe, globally synchronized financial crisis, we must develop the most globally convergent financial protections the world has ever attempted. So as we protect against future crisis; and as we promote lasting global growth; we need to act in a coordinated fashion.").

class action lawsuits are brought by private plaintiffs (and their lawyers) to further their own private financial interests, creating significant risk of abuse. And, as Justice Breyer noted in his concurring opinion in Morrison, "[t]he Commission's enforcement proceedings not only differ from private § 10(b) actions in numerous potentially relevant respects, but they also pose a lesser threat to international comity." See Morrison, 130 S. Ct. at 2895 n.12 (Breyer, J., concurring) (citations omitted). Moreover, the Commission has enforcement Memoranda of Understanding ("MOUs") and other relations with foreign regulators and typically acts in coordination with them in cross-border cases. In marked contrast, "private plaintiffs often are unwilling to exercise the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U.S. Government." Empagran, 542 U.S. at 171 (internal quotation marks and citation omitted).[28]

Accordingly, granting individual plaintiffs (or, more accurately, the plaintiffs' bar) the discretion to bring a securities claim based on a transaction abroad poses a different – and far greater – threat to cooperative efforts than granting discretion to a governmental body such as the Commission (or the Department of Justice) that must respect the broad issues of sovereign cooperation critical to the effective functioning of international markets.

[28] It is also no secret that private securities class actions in the United States are also driven, in large, part by the lawyers who bring them. As one court noted: "'manipulation by class action lawyers of the clients whom they purportedly represent' [in securities class actions] has long been rampant, and these abuses result in extortionate settlements with no substantial benefit to anyone but the lawyers. The damaged shareholders in this lawsuit stand to gain . . . about one cent per damaged share. The lawyers, however, seek . . . roughly $10.5 million dollars. It is clear from these numbers who exactly had an incentive to bring this case, and who is the ultimate victor. It is neither the Plaintiffs nor the Defendants, but the lawyers." In re Dell Inc. Sec. Litig., No. A-06-CA-726-55, 2010 WL 2371834, at *11 (W.D. Tex. June 11, 2010) (citation omitted); see also John C. Coffee, Jr., Litigation Governance: Taking Accountability Seriously, 110 Colum. L. Rev. 288, 307, 310 (2010) (noting the "typical securities class action settles for only a modest percentage of the investors' losses (often between only two and three percent)" and that class action attorney fees are usually between ten and thirty percent of recovery); Katrin Benhold, Law Firm Seeks Publicity for Société Générale Class-Action Suit, N.Y. Times, July 31, 2008, at C4 (reporting on American lawyers seeking European plaintiffs to bring securities class actions in United States, in part, to raise their fees); Mary Jacoby, Courting Abroad: For the Tort Bar, A New Client Base: European Investors, Wall Street J., Sept. 2, 2005, at A1 (same).

IV. Significant Investor Protections under Non-U.S. Legal Regimes and Dodd-Frank Further Weaken Any Arguable Justification for Expanding the Harms Associated with Section 10(b)'s Private Right of Action

Courts, commentators and foreign governments have all recognized, as described above, the dangers of extraterritorial expansion of private rights of action under Section 10(b), including the threats to international comity and regulatory cooperation. These considerations, standing alone, amply confirm the wisdom of the Morrison test. The lack of any justification for expanding the private right of action abroad is further underscored by the existence of significant investor protections under the laws of foreign jurisdictions, as well as the enhanced investor protections of Dodd-Frank.

A. Foreign Jurisdictions Protect Investors Who Transact in Securities Abroad Through Government Enforcement and Private Rights of Action

Foreign governments, as described above, have developed sophisticated regulatory and enforcement regimes for policing securities fraud which provide considerable protection to investors who engage in securities transactions in those markets.

Nearly all countries that have developed securities exchanges also have local regulation and investor protection laws. See 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 information disclosure by firms, define restrictions on insider trading, and impose constraints on corporate governance choices."); Joan MacLeod Heminway, The Best of Times, the Worst of Times: Securities Regulation Scholarship and Teaching in the Global Financial Crisis, 5 J. Bus. & Tech. L. 59, 68 (2010) ("[T]he U.S. model for securities regulation has been adopted in many countries around the world (resulting in a convergence of overall regulatory concepts)[.]") (citations omitted); see also Morrison, 130 S. Ct. at 2885 ("Like the United States, foreign countries regulate their domestic securities exchanges and securities transactions occurring within their territorial jurisdiction."). Indeed, the United States' myriad cooperation agreements and treaties with foreign regulators, including bilateral enforcement cooperation memoranda and Mutual Legal Assistance Treaties, as well as the International Organization of Securities Commission ("IOSCO") Multilateral Memorandum of Understanding,[29] recognize the extent to which foreign jurisdictions effectively regulate their own securities markets and regularly work with

[29] IOSCO's membership – which includes securities commissions (or similar government or statutory regulatory bodies), public regulatory bodies and self-regulatory and international bodies – regulates more than 95 percent of the world's securities markets in over 100 jurisdictions. See IOSCO, IOSCO Historical Background, http://www.iosco.org/about/index.cfm?section=background (last visited Jan. 13, 2011).

international counterparts to successfully pursue enforcement actions with transnational implications. See Australian *Amicus* at 9.[30]

Increasingly, foreign regulators possess expansive statutory powers to police the markets they oversee. For example, both the U.K. and Australian enforcement agencies possess broad statutory authority to investigate fraudulent behavior, impose fines and penalties for breaches, and bring criminal, administrative and/or civil proceedings against suspected perpetrators of securities fraud. See Financial Services and Markets Act 2000 (U.K.) §§ 91,397, 380-381, 382-382; UK *Amicus* at 7; Australian Securities and Investments Commission Act, 2001 (Austl.) ("ASIC Act") §§ 49, 50; Corporations Act, 2001 (Austl.) ("CA") §§ 739, 794D, 914A, 1020E, 1043L, 1315, 1325; Australia *Amicus* at 8. In France, the Autorité des Marchés Financiers possesses similar statutory powers, including the authority to conduct investigations and inspections of issuers, refer misconduct for criminal prosecution, and impose sanctions and penalties for misrepresentations, including substantial fines and the withdrawal of licenses. See French C. Com. (Fr.) art. L621-15; International Monetary Fund, France: Financial Sector Assessment Program 157 (IMF Country Report No. 05/186, 2005), available at http://www.imf.org/external/pubs/ft/scr/2005/cr05186.pdf (last visited Feb 1, 2011).[31]

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[30] The Commission has entered into bilateral enforcement cooperation memoranda with 20 individual foreign regulatory commissions, including regulatory authorities in Argentina, Australia, Brazil, Canada, Chile, France, Germany, Hong Kong, Israel, Italy, Japan, Jersey, Mexico, the Netherlands, Norway, Portugal, Singapore, Spain, Switzerland and the United Kingdom, in addition to Joint Statements for Enforcement with Costa Rica, South Africa and Sweden. See SEC Office of International Affairs: Cooperative Arrangements with Foreign Regulators, available at http://www.sec.gov/about/offices/oia/oia_cooparrangements.shtml (last visited Jan. 13, 2011). The United States has entered into Mutual Legal Assistance Treaties with more than 50 countries. These treaties commit countries to cooperate with the SEC and other law enforcement agencies in criminal and regulatory investigations. See Treaties: Hearing Before the Comm. on Foreign Relations, 109th Cong. 9 (2005) (statement of Samuel M. Witten, Deputy Legal Adviser, Dep't of State) available at http://ftp.resource.org/gpo.gov/hearings/109s/26831.pdf (last visited Jan. 13, 2011). Further, the IOSCO Multilateral Memorandum of Understanding – an agreement setting forth how its signatories will consult, cooperate, and exchange information for securities regulatory enforcement purposes – has been counter-signed by 63 foreign regulatory authorities. See IOSCO, List of Signatories to the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information, available at http://www.iosco.org/library/index.cfm?section=mou_siglist (last visited Jan. 13, 2011). For example, in FY 2010 alone, the Commission made 605 information requests abroad and responded to 457. See Securities and Exchange Commission, 2010 Performance and Accountability Report 53 (Nov. 15, 2010), available at http://www.sec.gov/about/secpar/secpar2010.pdf (last visited Feb. 1, 2011).

[31] Similarly, in Ontario, Canada – the location of Canada's largest exchange – the Ontario Securities Commission has authority to investigate suspected violations of Ontario's securities laws; prosecute securities fraud in criminal, administrative and civil proceedings; and issue a wide array of orders pursuant to its broad "public interest" power including the suspension of issuing privileges, penalties for the violation of securities laws and the disgorgement of profits. See Ontario Securities Act (Can.) ("OSA") §§ 11, 122, 126.2, 127, 380-384. The Swiss Financial Market Supervisory Authority likewise has broad authority to supervise Swiss markets, including the power to investigate and prosecute violations of the Federal Act on Stock Exchanges and Securities, suspend or revoke licenses, refer cases for criminal prosecution, and confiscate illegal gains made by issuers. See Letter from the Embassy of Switzerland, Appendix A to Brief of the International Chamber of Commerce, et al. as *Amici Curiae* in Support of Respondents at 2a-3a, Morrison v. Nat'l Austl. Bank Ltd., No. 08-1191 (U.S. Feb. 2010). In Mexico, the National Banking and Securities Commission is authorized to investigate suspected violations of Mexico's

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Foreign jurisdictions also have well-developed private litigation regimes to protect investors. In many instances, the remedies available to investors in foreign jurisdictions are comparable to, or indeed surpass, those available under Section 10(b). Under the statutory causes of action for securities fraud in the United Kingdom, France, and Ontario for instance, plaintiffs benefit from less onerous fault requirements as compared to the United States, including the absence of a need to make a showing of scienter or reliance. See UK *Amicus* at 8-9; French Civil Code art. 1383; OSA §§ 130, 138.3. Further, some jurisdictions permit securities claims for conduct that is not actionable in the United States. For example, Australia recognizes private claims against persons indirectly responsible for false or misleading statements, and allows claims for injunctive relief against aiders and abettors in certain circumstances. See CA, c. 7 § 1022B(3); ASIC Act § 12GD.

In fact, many countries provide collective action procedures to injured investors. See Mark A. Behrens, et al., Global Litigation Trends, 17 Mich. St. J. Int'l L. 165, 167-168 (2009) ("Many countries, including most European and several South American nations, now recognize some form of multiclaimant litigation – whether class actions, group actions, or representative actions by consumer or public organizations.").[32] Although some countries may have adopted procedures which differ from the U.S. model in various ways – including in the areas of class membership, contingency fees, and cost-shifting – they nonetheless permit some form of collective redress. For instance, France allows securities fraud claims on a collective basis by associations that represent investors who opt-in to the procedure, see French C. Mon. Fin. arts. L452-1, L452-2 (2010), and Israel permits class actions to proceed where investors show a threshold likelihood of prevailing. C&G 2010, at 91. In other counties like Canada (Ontario) and Australia, however, the collective action procedures closely follow the model adopted under

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securities laws, order the suspension of illegal activities, impose fines for violations of securities law and recommend criminal sanctions for violations. See Securities Market Law (Mex.) art. 51-52; ch. 5, art. 41, § III; ch. 5, art. 47. In Japan, the Securities Bureau enforces securities laws through its powers of investigation, the initiation of administrative and civil actions and by recommending criminal prosecutions. See Harold S. Bloomenthal & Samuel Wolff, eds., International Capital Markets and Securities Regulation § 54:2 (2010). The Securities and Futures Commission in Hong Kong is also given a wide array of powers, including the power to conduct investigations, authority to inspect and seize documents and the power to discipline misconduct through fines and other orders. Id. §§ 56:259-262.

[32] See also Richard S. Taffet & Davina Garrod, EU Eschews Features of U.S. Class Action Model, 245 N.Y. L.J. S5, S5 (Jan. 18, 2011) ("Increasingly, EU countries are introducing procedures for private representative, opt-in collective, opt-out class and other hybrid model actions, which have come to be known generally as 'collective redress' actions. Most EU countries now have some form of procedure for such collective redress actions[.]"); 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, 282 (2006) ("European member states are increasingly adopting variations of U.S.-style securities class action mechanisms that may soon help restore investor confidence and provide greater protections against corporate malfeasance in Europe."); Laurel J. Harbour & Marc E. Shelley, The Emerging European Class Action: Expanding Multi-Party Litigation To A Shrinking World (ABA Annual Meeting, Section of Litigation, August 2006) ("Most European countries now recognize some form of multi-claimant litigation – whether class actions, group actions or representative actions by consumer or public organizations.").

Rule 23 of the Federal Rules of Civil Procedure and, in some ways, are even more relaxed than in the United States. For example, these two jurisdictions impose less rigorous class certification requirements, making it easier for investor groups to bring their collective securities fraud claims. See Australia *Amicus* at 18-19; Ontario Class Proceedings Act, 1992 (Can.) § 5.

In the past decade, additional countries have adopted collective action vehicles for combating securities fraud which has led to an increase in securities class actions globally. See Deborah R. Hensler, The Globalization of Class Actions: An Overview, 622 Annals Am. Acad. Pol. & Soc. Sci. 7, 7 (March 2009) ("In less than a decade, the number of countries that permit representative litigation by private actors has multiplied dramatically."). In 2005, for instance, the Netherlands enacted legislation that created a comprehensive collective settlement procedure which, among other things, adopts the U.S. style "opt out" system of class membership. See Grace, supra, at 296. In the same year, both Germany and South Korea enacted legislation to expand access to collective securities fraud actions. Germany adopted an innovative class action procedure based on "model cases" which allows courts to issue a binding ruling on common elements of claims while South Korea has joined the ranks of countries to adopt "opt out" class actions. See id. 299; Dae Hwan Chung, Introduction to South Korea's New Securities-Related Class Action, 30 J. Corp. L. 165 (2004). In 2009, Russia adopted new class action procedures that apply to securities litigation. Global Legal Group, The International Comparative Legal Guide to: Class & Group Actions 2011, at 129 (2010).[33] Overall, "securities class actions and accompanying settlements outside the United States have been increasing, and the number of countries enacting legislation allowing shareholders to bring claims for investment losses has been on the rise." Gary L. Gassman & Perry S. Granof, Global Issues Affecting Securities Claims at the Beginning of the Twenty First Century, 43 Tort Trial & Ins. Prac. L.J. 85, 86 (Fall 2007).

Accordingly, investors who transact in securities abroad can look to the significant regulatory schemes and private and public enforcement regimes in the foreign jurisdiction in which they chose to buy or sell securities (which is precisely the place a reasonable investor should expect to be protected).[34] Through treaties, agreements and other cooperative

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[33] More recently, Italy's new class action procedure effective in 2010 allows individual purchasers of financial contracts to bring collective actions, which may include collective securities claims against issuers. See Renzo Comolli, et al., Italian Class Actions Eight Months In: The Driving Forces (NERA Economic Consulting, Sept. 16, 2010) available at http://www.nera.com/67_6971.htm (last visited Jan. 24, 2011) (noting that although there is question as to whether the new law applies to an action analogous to that covered under Section 10(b) and Rule 10b-5, certain consumer associations have claimed "10b-5 like damages").

[34] Indeed, Section 10(b) actions that have been dismissed post-Morrison because they involved transactions in securities outside the United States are still subject to private and public enforcement in the relevant country where the securities transactions transpired. For example, even though the district court dismissed plaintiffs' Section 10(b) claims in Elliott Associates because the securities swap agreements "were the functional equivalent of trading underlying [Volkswagon] shares on a German exchange," Nos. 10 Civ. 0532 (HB), 10 Civ. 4155 (HB), slip op. at 12, the Federal Financial Supervisory Authority – Germany's Commission equivalent – and the Stuttgart public prosecutor's office are conducting an investigation of the market manipulation allegations and several investors have applied for consolidation proceedings regarding alleged false statements and omissions (which the U.S.-action

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arrangements, the United States and foreign countries can continue to ensure that securities frauds across jurisdictions are effectively pursued.

B. Dodd-Frank Provides Strengthened Investor Protections That Also Counsel Against Expansion of the Private Right of Action

Dodd-Frank significantly enhanced the Commission's already powerful set of tools for enforcing U.S. securities laws. These strengthened investor protections further undermine any potential arguments for expanding private rights of action to extraterritorial activities.

Most importantly, Dodd-Frank expressly establishes U.S. jurisdiction for the Commission and the United States to pursue violations of the antifraud provisions of the Exchange Act where there is (i) "conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States" or (ii) "conduct occurring outside the United States that has a foreseeable substantial effect within the United States." Dodd-Frank § 929P(b). Thus, even if there were circumstances in which considerations of comity did not militate against extraterritorial application of U.S. law, Congress has established the jurisdictional authority for the Commission and the Department of Justice to seek remedies against those involved.[35] Others of Dodd-Frank's provisions augment the

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plaintiffs could join). Letter from Mr. Oliver Schnakenberg, Acting Consul General of the Federal Republic of Germany, to the Honorable Judge Baer, Aug. 20, 2010, Ex. 38 to Decl. of Gandolfo V. Diblasi at 2, Elliott Assocs., Nos. 10 Civ. 0532 (HB), 10 Civ. 4155 (HB) (S.D.N.Y. Oct. 26, 2010). Similarly, Swiss and Spanish authorities announced investigations into some of the Banco Santander entities who invested in funds run by Bernard L. Madoff and against whom Section 10(b) claims were asserted and dismissed under the Morrison transaction-based test in Banco Santander, 2010 WL 3036990. See Warren Giles, Geneva Probes Santander Madoff Links as Investor Alleges Scam, Bloomberg, June 18, 2009, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aDSPfZ1zCyNA (last visited Feb. 2, 2011) (Switzerland); Banco Santander Optimal Fund Clients Hit Hard by Madoff Fraud, NewsInferno, Jan. 22, 2009, http://www.newsinferno.com/legal-news/banco-santander-optimal-fund-clients-hit-hard-by-madoff-fraud/ (last visited Feb. 2, 2011) (Spain). Confidence in such foreign regulatory and enforcement regimes is further illustrated by the fact that investors continue to purchase and sell securities in foreign markets post-Morrison.

[35] Because Morrison made clear that the extraterritorial scope of federal law was not one of jurisdiction (but rather one of substance), some commentators have argued that the language of Dodd-Frank Section 929P granting "*jurisdiction*" to the "district courts of the United States" to hear cases with extraterritorial elements "clearly does not expand the geographic scope of any substantive regulatory provision." See George T. Conway III, Extraterritoriality After Dodd-Frank, The Harvard School Forum on Corporate Governance and Financial Regulation (blog) (Aug. 5, 2010, 8:58 am), http://blogs.law.harvard.edu/corpgov/2010/08/05/extraterritoriality-after-dodd-frank/#comments (last visited Jan. 12, 2011) (internal quotation marks and citation omitted). Without taking a position on the merits of that argument, SIFMA assumes for the purposes of this letter that the Commission's substantive authority to bring Section 10(b) claims is coextensive with its jurisdictional authority.

Commission's already-robust enforcement authority and the resources it can bring to bear in these suits.[36]

Moreover, the Commission has the ability to ensure that amounts recovered in its actions directly benefit investors under its FAIR Fund authority – without, notably, any deduction for sizable fees paid to the plaintiffs' bar. Dodd-Frank expands access to SEC FAIR Funds, enabling private parties to regain losses in a greater number of actions, including those where no Section 10(b) private right of action exists (such as is the case for securities purchased abroad post-Morrison). Specifically, as amended by Dodd-Frank, the Sarbanes-Oxley Act of 2002 now authorizes the Commission to impose civil payments to a fund for distribution to victims of a securities law violation, regardless of whether the Commission also obtains disgorgement against the violator. See Dodd-Frank § 929B. Since their enactment, the FAIR Fund provisions have effectively compensated injured parties more efficiently than private lawsuits where legal fees often consume a large portion of the recovery. Indeed, since 2002, the Commission has returned more than $6.6 billion to injured investors, with $2.1 billion returned in 2009 alone. See SEC, 2009 Performance and Accountability Report 11, 29 (2009). Combined with other Dodd-Frank provisions strengthening the Commission's enforcement arsenal, FAIR Funds provide a significant tool for compensating private parties injured by securities fraud without recourse to the potential harms of extraterritorial class actions.

V. Conclusion

For the reasons set forth above, SIFMA and AFME strongly urge the Commission to recommend maintaining the bright-line rule embodied in Morrison.

[36] For example, Dodd-Frank expands the Commission's subpoena power by granting it nationwide service of process for witnesses and the production of documents, Dodd-Frank § 929E, and authorizes it to impose civil penalties in cease-and-desist proceedings under the Exchange Act, Securities Act of 1933 ("Securities Act"), the Investment Advisers Act of 1940 ("Investment Advisers Act"), and the Investment Company Act of 1940, against individuals not regulated by the Commission, see Dodd-Frank § 929P(a). Dodd-Frank also lowers the scienter standard for aiding and abetting claims under Section 20(e) of the Exchange Act to include "reckless" conduct, see id. § 929O, and authorizes the Commission to impose penalties for aiding and abetting violations of the Securities Act and the Investment Advisers Act, see id. §§ 929M, 929N. Further, the new legislation substantially augments the Commissions' funding and personnel resources. Id. § 991 (increasing Commission's budget from $1.3 billion in 2011 to $2.25 billion in 2015).

Please do not hesitate to contact the undersigned if you should have any questions or would like to discuss this matter.

Respectfully yours,

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