Defrauded Investors Deserve Their Day in Court

Dissenting Statement Regarding the Study on the Cross-Border Scope of the Private Right of Action Under Section 10(b) of the Securities Exchange Act of 1934 as required by Section 929Y of the Dodd-Frank Wall Street Reform and Consumer Protection Act

By

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Washington D.C.

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Today the Commission has authorized that a Study expressing the views of the Staff be sent to Congress. However, my conscience compels me to write separately to record my views on the Study. I write to convey my strong disappointment that the Study fails to satisfactorily answer the Congressional request, contains no specific recommendations, and does not portray a complete picture of the immense and irreparable investor harm that has resulted, and will continue to result, due to *Morrison v. National Australia Bank, Ltd.*[1]

In the United States we have a strong belief that, whether rich or poor, we are all entitled to our day in court. Sadly, for many American investors this is no longer true.

If American investors are defrauded by a company that they have invested in – and that company is listed on a foreign exchange – investors may be unable to have their day in court and seek redress against this company for its lies and misrepresentations. Thus, investors have been stripped of a traditional American right.

This was not always the case. For decades, federal courts applied the same standard to determine whether U.S. federal securities law applied to frauds that took place, in whole or in part, outside of the United States. Under that standard, Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and other antifraud provisions applied "when there was 'significant U.S. fraudulent conduct that directly caused the plaintiffs losses' (the conduct test) or when there were 'significant effects' on the U.S. securities markets (the effects test)." [2]

Under the conduct test, an investor could bring a Section 10(b) claim if a sufficient level of conduct comprising the fraud occurred in the United States, even if the victims or the purchases and sales were overseas. [3]

Under the effects test, an investor could bring a Section 10(b) claim in a transnational securities fraud when the conduct occurring in foreign countries caused foreseeable and substantial harm to U.S. interests. [4]

As a result of the conduct and effects test, if an American investor was lied to or defrauded in a securities transaction, that investor had the ability to have his or her day in court and seek legal recourse, even if the securities transaction was overseas.

However, this dramatically changed when, in *Morrison*, the Supreme Court severely restricted the extraterritorial scope of Section 10(b) of the Exchange Act. After *Morrison*, investors are restricted to bringing Section 10(b) claims related to frauds 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."[5] As a result of *Morrison*, investors have been stripped of the ability to seek redress against those who have harmed them in a transnational securities fraud.

The United States Congress, realizing the danger, immediately responded to mitigate the Supreme Court's decision. The first step was to fully restore the ability of the Securities and Exchange Commission ("SEC" or "Commission") and the Department of Justice ("DOJ") to bring enforcement actions[6] under Section 10(b) in cases involving transnational securities fraud pursuant to the pre-*Morrison* tests of conduct and effect.[7] The second step was to request that the Commission conduct a Study on the Extraterritorial Scope of the Private Rights of Action under Section 10(b) of the Exchange Act ("Study").[8]

Section 929Y of Title IX of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") requires that the Commission's Study provide recommendations to Congress on whether private rights of action under the antifraud provisions of the Exchange Act 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.[9]

The Study falls far short of providing Congress with an informed recommendation and falls far short in fulfilling the Commission's mission to protect investors. I am particularly astonished that the Study states (at pages 58-59) that an option "would be for Congress to take no action" and, thus, would continue to deny American investors who have been harmed by fraud the ability to seek redress in court.

The evidence post-*Morrison* is stark and compelling. All of the predictions of the harm that the *Morrison* decision would inflict on investors have come to pass.[10] It is clear that *Morrison* has deprived investors of their private rights of action under the Exchange Act with respect to a wide range of potentially fraudulent conduct that the United States has a compelling interest to regulate.

The answer to the Congressional query about whether to re-establish extraterritorial private rights of action under Section 10(b) of the Exchange Act through the application of the pre-*Morrison* tests of conduct and effect is an unequivocal yes.

The Study is incomplete in many ways, but I will just highlight the following:

- It Fails to Adequately Explain how Private Rights of Action are a Vital Complement to SEC Actions and Essential to Investor Protection;

- It Overstates the International Comity Concerns Associated with Restoring Investors' Rights to Assert Private Claims Under Section 10(b);

- It Does Not Accurately Portray Investor Harm Resulting from *Morrison* and Fails to Convey a Sense of Urgency as to the Harm Being Suffered; and

- It Provides as an Option That Congress Take No Action at All Despite the Continuing Harm to Investors.

The Study should have recommended that Congress enact for private litigants a standard that is identical to the standard set forth in Section 929P of the Dodd-Frank Act – the standard for SEC and DOJ actions. The harm that has resulted and continues to result to investors is significant, and Congress should act to rectify this with haste.

A Private Right of Action Is a Vital Complement to an SEC Action and Essential For Investor Protection

The Study did not substantially address the importance of private rights of action as an essential tool for investor protection. The primary purpose of the Exchange Act is to "protect investors."[11] Given the explicit mandate provided in the Dodd-Frank Act to apply the U.S. securities laws to transnational frauds with strong connections to the United States,[12] the purpose of the Exchange Act and the Commission's core mission to protect investors, it is clear that investors must have private rights of action co-extensive with the Commission's under Section 10(b). It is unrealistic to expect that the Commission will have the resources to police all securities frauds on its own, and as a result, it is essential that investors be given private rights of action to complement and complete the Commission's efforts.

Congress has long recognized the importance of a private action. In the Private Securities Litigation Reform Act of 1995, Congress reaffirmed that "[p]rivate securities litigation is an indispensable tool with which defrauded investors can recover their losses without having to rely upon government action. Such private lawsuits promote public and global confidence in our capital markets and help deter wrongdoing and to guarantee that corporate officers, auditors, directors, lawyers, and others properly perform their jobs."[13]

The Supreme Court itself also "has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission."[14] The Supreme Court has stated that this is especially true when it comes to actions under Section 10(b): "a private right of action under Section 10(b) of the [Exchange] Act and Rule 10b-5 has been consistently recognized for more than 35 years."[15]

Private litigation has historically played a complementary role to government enforcement in the Section 10(b) context, and to preclude private litigation, even where government actions are theoretically available, would lead to a material deficiency in the enforcement of Section 10(b). If one aspect of Section 10(b) enforcement (the protection of U.S. investors in connection with their non-U.S. securities transactions) is reserved solely to the SEC and DOJ, and private actions remain limited, a serious gap in the securities law framework is created. This gap strips investors of the right to seek accountability and redress directly when they have been harmed.

The Study fails to adequately address the negative effects of the SEC's limited resources on investor protection in transnational securities fraud matters. By contrast, our senior management has publicly spoken about SEC actions being detrimentally impacted by budget constraints.[16] The truth of the matter is that the SEC, does not, and will not, ever have enough resources to investigate all of the fraud cases that exist. The SEC will never be able to seek justice in all of the potential transnational securities fraud matters. Thus, the SEC will not be able to seek redress for all investors who are harmed by those who violate the securities laws. Knowing this, we should support providing investors with the ability to protect themselves.

In fact, even if the SEC exercises its discretion to bring a case, rarely are investors made whole. Quite often, investors receive only pennies on the dollars for their losses.[17] Moreover, issuers, aware of the SEC's inability to pursue all fraud, will not be incentivized to obey the law when they know that investors are barred from seeking accountability for wrongdoing.

Private litigation provides investors the opportunity to seek redress against those who harmed them.[18] In light of the limited resources available to the SEC, private enforcement of the federal securities laws is a necessary tool to combat securities fraud. The current *Morrison* prohibition of private litigation where government actions are permitted is resulting in harm to investors now.[19]

Historically, the Commission has consistently advocated private rights of action precisely because they are a vital complement to the Commission's enforcement program in deterring misconduct.[20] Investors who have been harmed must have the ability to seek redress. I believe that private litigation is critical to investor protection, especially in light of the Commission's limited resources.

The Study Overstates the International Comity Concerns Associated with Restoring Investors' Rights to Assert Private Claims under Section 10(b)

The Study provides that the enactment of the "Commission and DOJ conduct and effects tests for Section 10(b) private actions would involve policy trade-offs that could carry significant implications in many areas, including … international comity."[21] The Study states that "[i]nternational comity is frequently implicated in the context of transnational securities fraud, particularly given that issuers and investors may be located in multiple jurisdictions and various parts of their securities transactions may occur in each of these jurisdictions."[22] However, the Study did not provide a single instance where private securities fraud litigation has actually

interfered with a non-U.S. sovereign's ability to independently regulate its own securities market.

I do not believe that international comity should prevent investors from seeking to assert private claims under Section 10(b). The doctrine of international comity is implicated only when there is a true conflict between American law and the law of a foreign jurisdiction.[23] The Supreme Court has found that there is no conflict for purposes of comity "where a person subject to regulation by two states can comply with the laws of both."[24] In determining whether comity is implicated, courts will look to whether the respective laws or policies contradict one another, not to whether one set is stronger or more effective in achieving similar objectives.[25]

While I recognize that foreign nations have a significant interest in determining the legal remedies their own residents should receive, I believe the United States has a legitimate interest in making that determination for its citizens in the context of transnational securities, regardless of where the actual securities transaction occurred. I agree with the 42 law professors who signed a comment letter stating that international "comity does not require that the U.S. tolerate or protect fraudulent conduct that emanates from or has significant effects within its borders."[26] I believe it is also important to point out that international comity was not undermined by the application of the conduct and effects test in the 40 years of transnational securities fraud cases preceding *Morrison*. [27]

In fact, comity concerns argue in favor of permitting even foreign fraud victims a remedy under the U.S. securities laws, to the extent they were damaged by conduct in the United States, even if the fraud relates to a security purchased on a foreign exchange. Failure to accord such a remedy would allow the United States to be a platform for fraud and leave some fraud victims with no recourse in any jurisdiction. As Judge Friendly noted:

> This country would surely look askance if one of our neighbors stood by silently and permitted misrepresented securities to be poured into the United States.[28]

The conduct and effects test was designed, in part, to prevent the U.S. from being used as a launching pad for the exporting of fraud. Allowing investors the ability to bring a transnational fraud claim within the parameters of the conduct and effects test would, in fact, enhance international comity by promoting a global marketplace in which investors are protected.

Restoring Private Litigants' Ability to Bring Transnational Fraud Claims Would Not Result In a Flood of Litigation in U.S. Courts

The Study failed to adequately discuss the evidence illustrating that restoring private litigants' ability to bring transnational fraud claims would not result in a flood of litigation involving foreign issuers in U.S. courts. Section 929P itself includes limits that preclude the prosecution of Section 10(b) claims that have an insignificant connection to the U.S.[29] Accordingly, cases without sufficient material ties to the U.S. – whether in the context of significant conduct in the U.S. or a significant effect on U.S. investors – would not be prosecuted in its courts.[30]

In addition, the number of securities class actions against foreign issuers has historically been a small fraction of the number of securities fraud cases litigated under the U.S. federal securities laws. From 1996 through 2009, on average, only 9.7% of securities actions filed were against foreign issuers.[31] Moreover, only 11% of the securities actions filed through the third quarter of 2010 (*i.e.*, prior and subsequent to the *Morrison* decision in June 2010) were against companies domiciled in a foreign country.[32] Of the over 530 suits settled in 2009, only approximately 50 of them were against defendants domiciled in a country outside the U.S.[33] Statistical data indicates that restoring U.S. investors' ability to bring transnational fraud claims would not result in a flood of litigation in U.S. courts.

The Study also fails to adequately discuss the fact that many meritorious litigation claims involving thousands upon thousands of investors are now no longer being brought. Under *Morrison*, for example, cases such as *In re Tyco International Ltd.*,[34] would have been dismissed. In this matter, Tyco International Ltd. ("Tyco") misrepresented the value of several different companies Tyco acquired and misreported its financial condition. U.S. investors received, in part, $3.2 billion in monetary relief as a result of this private litigation. [35] After *Morrison, Tyco* investors may not have had their day in court.

Thus, not only is there not a flood of litigation – there is now a severe curtailment of the ability of investors to seek redress as to fraudulent activity.

Morrison Weakens the Federal Securities Laws and Strips Investor Protections

The Study also did not adequately focus on how *Morrison* has harmed investors by weakening the federal securities laws and stripping investor protections. Under *Morrison*, the private right of action only reaches the purchase or sale of a security listed on an American stock exchange, or other *domestic* transactions.[36] However, determining whether a transaction occurred domestically can prove difficult, and can result in anomalous results for investors worldwide.

Under *Morrison*, as applied, a private plaintiff trading outside the U.S. may not be able to recover for fraud "even if the securities at issue were registered and listed on a U.S. exchange unless it also can establish that the *particular* shares it traded were registered and listed on a U.S. exchange."[37] But in today's global economy, many investors may not know where purchase orders for particular securities are actually carried out. As commentators have noted, "markets are moving to a point where the site of a trade is happenstance."[38] Investors cannot be certain when they place an order to purchase or sell securities – even those listed on a U.S. exchange – that their brokers will not use a foreign exchange to execute the order. Many securities are often listed on at least two exchanges – one foreign and one domestic. In fact, such household names as GE, IBM, Pfizer, and Bank of America are traded on multiple domestic and foreign exchanges.[39] As a result, depending on how these shares were purchased, holders of these securities may not have private rights of action, should fraud occur at these companies.

The *Morrison* test fails to recognize the realities of today's modern global trading environment, and it punishes investors who often do not know whether their respective securities transactions were ultimately executed on a U.S or foreign exchange.[40]

As Justice Stevens' concurrence in *Morrison* points out, the current *Morrison* test for private rights of action is also at odds with the primary purpose of the Exchange Act: to protect the interests of investors.[41] *Morrison* and its recent progeny increasingly are making it clear that the anti-fraud protections of the Exchange Act will not be extended to those U.S. investors who purchase securities listed on non-U.S. exchanges, regardless of the extent of the fraudulent conduct that took place in the United States, or the effect of the effect of fraudulent conduct on the United States or on U.S. citizens.[42] U.S. investors have been deprived rights to sue, even though the fraud is perpetuated upon them within the United States. The inability of investors to hold those responsible for committing fraud within the U.S. accountable for their actions leaves investors harmed and weakens confidence in the market as a whole.

In sum, the *Morrison* test disadvantages investors and is at odds with the very purpose of the securities laws.

The Study Did Not Adequately Address the Lack of Available Remedies Outside of the United States

The Study also did not adequately detail the lack of remedies available to investors if private rights of action were precluded for transnational securities fraud. Although remedies for U.S. investors are theoretically available outside of the United States, in reality, a number of hurdles exists – such as the need for U.S. investors to retain foreign counsel, the uncertainty about laws governing investors' rights (including whether U.S. residents are even protected by foreign law), the lack of a developed class action mechanism, and the lack of contingency fee litigation. These are obstacles that effectively preclude a majority of U.S. investors from pursuing any relief for injuries suffered from securities purchased outside of the United States.[43]

The danger investors' face is real. The practical reality is that investors have been stripped of certain legal remedies to address fraudulent activity that may occur in connection with their securities transactions.

Given this new harsh and tragic reality, it is only rational that the staff should issue a study that actually advocates for investors by recommending a clear direction that would enhance investor protection – and that supports over four decades of federal court jurisprudence that provided investors access to the federal securities laws in order to protect against fraud arising from purchased securities, even if purchased on foreign markets. Unfortunately, the staff has failed investors by shirking this basic obligation.

Conclusion

As I have stated above, *Morrison* and its recent progeny increasingly are making it clear that the anti-fraud protections of the Exchange Act will not be restored to those U.S. investors who purchase securities listed on non-U.S. exchanges, regardless of the extent of the fraudulent conduct in which foreign companies engage in the United States, or the effect of such conduct in the United States or on U.S. citizens.

Investor protection is at the core of the SEC's mission; supporting all of its other responsibilities. Properly functioning financial markets require the protection of investors' rights. U.S. investors expect to be protected by U.S. securities laws, regardless of where the securities transaction ultimately occurs. It is my view that investors should have a private right of action under the antifraud provisions of the Exchange Act in transnational securities fraud cases, in accordance with the conduct and effects test. This would be consistent with the authority granted by Congress to the SEC and DOJ, as has been the case for 40 years prior to the *Morrison* decision.

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[1] 130 S. Ct. 2869 (2010).

[2]Linda J. Silberman, *Morrison v. National Australia Bank: Implications for Global Securities Class Actions*, New York University School of Law, Public Law & Legal Theory Research Paper Series, Working Paper No. 11-41 (June 2011). *See, e.g. Alfadda v. Fenn*, 935 F. 2d 475, 478 (2d. Cir. 1991), *Itoba Ltd. v. LEP Group PLC*, 54 F.3d 121-22 (2d Cir. 1995). Courts also applied an admixture of the two tests. *See generally*, Dennis R. Dumas, *United States Antifraud Jurisdiction Over Transnational Securities Transactions: Merger of the Conduct and Effects Tests*, 16 U. PA. J. Int'l Bus. L. 721 (1995).

[3]*Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1045 (2d Cir. 1983), *S.A. v. Banque Paribas London*, 147 F.3d 118, 125 (2d Cir. 1998).

[4]*Mak v. Womcom Commodities Ltd.*, 112 F.3d 287, 289 (7th Cir. 1997) (quoting *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 730 F.2d 1103, 1108 (7th Cir. 1984)). *See also*, *Banque Paribas London*, 147 F.3d at 125; *S.A. v. Edperbrascan Corp.*, 23 F. Supp. 2d 425, 430 (S.D.N.Y. 1998).

[5]*Supra* Note 1 at 2888. *See also, Morrison,* 130 S. Ct. at 2884 ("[I[t is in our view only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which § 10(b) applies.").

[6]With respect to Commission and DOJ actions under Section 10(b), Dodd-Frank Act Section 929P(b) codified, the pre-*Morrison* view that the extraterritoriality inquiry is one of subject matter jurisdiction by adding the following provision to Section 27 of the Exchange Act:

> (b) EXTRATERRITORIAL JURISDICTION. – The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of the antifraud provisions of this title involving –
>
> (1) 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; or
>
> (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.

[7]Section 929P of the Dodd-Frank Act was intended to negate the harmful effects of the *Morrison* decision and to protect investors affected by transnational frauds by codifying the authority to bring proceedings under the conduct and the effects tests developed by the federal courts regardless of the jurisdiction of the proceedings. Cong. Record, June 30, 2010, p. H5237, *available at* http://www.gpo.gov/fdsys/pkg/CREC-2010-06-30/html/CREC-2010-06-30-pt1-PgH5233.htm.

[8]As required by Section 929Y of Title IX of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

[9]*Supra Note* 6.

[10]*See, e.g., In re Royal Bank of Scotland Grp. PLC Sec. Litig.*, No. 09 Civ. 300 (DAB), 2011 WL 167749 (S.D.N.Y. Jan. 11, 2011); *Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co.,* No. 08 Civ. 1958 (JGK), 2010 WL 3860397; *In re Alstom SA Securities Litigation*, No. 03 Civ. 6595 (VM), 2010 WL 3718863 (S.D.N.Y. 2010); *In re Societe Generale Sec. Litig.*, No. 08 Civ. 2495 (RMB), 2010 WL 3910286 (S.D.N.Y. Sep. 29, 2010); *Cornwell v. Credit Suisse Group*, 729 F. Supp. 2d 620 (S.D.N.Y. 2010); *In re Banco Santander Securities – Optimal Litig.*, 732 F. Supp. 2d 1305 (S.D. Fla. 2010); and *Terra Secs. ASA Konkursbo v. Citigroup, Inc.*, No. 09 Civ. 7058 (VM), (S.D.N.Y. Aug. 16, 2010)

[11]*See, Morrison*, 130 S. Ct. at 2894 ("it is the 'public interest' and 'interest of investors' that are the objects of the statute's solicitude") (Stevens, J., concurring).

[12]*Supra note* 6.

[13]Securities Litigation Reform Act, *Conference Report*, H.R. 104-369, 104th Cong., 1st Sess. (Nov. 28, 1995), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-104hrpt369/pdf/CRPT-104hrpt369.pdf.

[14]*Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 28, 313 (2007); *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964) (private rights of action under the securities laws are a "necessary supplement to Commission action.").

[15]*Herman & McLean v. Huddleston*, 459 U.S. 375, 380 (1983).

[16]Testimony on Budget and Management of the U.S. Securities and Exchange Commission by Robert Khuzami, Division of Enforcement, Meredith Cross, Director, Division of Corporation Finance, Robert Cook, Director, Division of Trading and Markets, Carlo di Florio, Director, Office of Compliance Inspections and Examinations, Eileen Rominger, Director, Division of Investment Management, Before the United State House of Representatives Committee on Financial Services, Subcommittee on Capital Markets, Insurance and Government-Sponsored Enterprises, (March 10, 2011), *available at* http://sec.gov/news/testimony/2011/ts031011directors.htm. Testimony on the President's FY 2012 Budget Request for the SEC by Chairman Mary Schapiro, Before the United States Senate Subcommittee on Financial Services and General Government, Committee on Appropriations (May 4, 2011), *available at* http://sec.gov/news/testimony/2011/ts050411mls.htm.

[17]Although the SEC recovered $140 million for investors defrauded by Enron, investors recovered more than $7 billion in private suits. *See,* Thomas C. Pearson, *Enron's Bank s Escape Liability* (2010), *available at* http://www.bus.lsu.edu/accounting/faculty/lcrumbley/jfia/Articles/FullText/2010v2n1a5.pdf.

[18]*See, e.g., Itoba Ltd. v. LEP Group PLC*, 54 F.3d 118 (2d Cir. 1995); *In re DaimlerChrysler AG Sec. Litig.*, Case No. 00-993 (D. Del.); and *In re Nortel Networks Corp. Sec. Litig.*, 238 F. Supp. 2d. 613 (S.D.N.Y. 2003)..

[19]*Supra note* 10.

[20]With respect to implied rights under Section 10(b) and Rule 10b-5, the Commission filed amicus briefs in *Matheson v. Armburst*, 284 F.2d 670 (9th Cir. 1960), *cert. denied*, 365 U.S. 870 (1961) (opposition to petition for certiorari only); *Hooper v. Mountain States Sec. Corp.*, 282 F.2d 195 (5th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961); *Errion v. Connell*, 236 F.2d 447, 454 (9th Cir. 1956); *Fratt v. Robinson*, 203 F.2d 627, 628 (9th Cir. 1953); *Slavin v. Germantown Fire Ins. Co.*, 174 F.2d 799, 800 (3d Cir. 1949); *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983); and Blue *Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975).

[21]Study by the Staff of the U.S. Securities and Exchange Commission: "*Study on the Extraterritorial Scope of the Private Right of Action Under Section 10(b) of the Securities Exchange Act of 1934"* at 60 (March 2012).

[22]*Id.* at 10.

[23]*Hartford Fire Ins. Co v. California*, 509 U.S. 764, 798 (1993).

[24]*Id. (citing*, Restatement (Third Foreign Relations Law, Section 403)).

[25]*In re South African Apartheid Litig.*, 617 F. Supp. 2d 228, 283 (S.D.N.Y. 2009).

[26]Comments by Forty-Two Law Professors, SEC File No. 4-617 (February 18, 2011), *available at* http://www.sec.gov/comments/4-617/4617-28.pdf.

[27]*See, e.g., Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir. 1991); *Grunenthal GmbH v. Hotz*, 712 F.2d 421, 425 (9th Cir. 1983); *Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409, 421 (8th Cir. 1979); *SEC v. Kasser*, 548 F.2d 109 (3d Cir. 1977); *Mak v. Wocom Commodities Ltd.*, 112 F.3d 287, 289 (7th Cir. 1997) (quoting *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 730 F.2d 1103, 1108 (7th Cir. 1984)). *See also, Banque Paribas London*, 147 F.3d at 125. *See also, Interbrew S.A. v. Edperbrascan Corp.*, 23 F. Supp. 2d 425, 430 (S.D.N.Y. 1998). *In re Parmalat Sec. Litig* 375 F. Supp. 2d 278 (S.D.N.Y. 2004); *In re Tyco International Ltd.* 535 F. Supp. 2d 249 (D.N.H. 2007); *In re Nortel Networks Sec. Litig* 238 F. Supp. 2d. 613 (S.D.N.Y. 2003); and *In re Deutsche Telekom AG Sec. Litig* F. Supp 2d 277 (S.D.N.Y. 2007). According to a group of sixty-nine institutional investors from outside of the United States (with over 2 trillion U.S. dollars in assets under management) restoring investors' rights to assert private claims under Section 10(b) to the extent the Commission or DOJ is permitted will not undermine international comity. *See*, February 18, 2011 Letter from AGEST Superannuation Fund; Alecta pensionsförsäkring, ömsesidigt; AMF Fonder AB; AMF Pensionsförsäkring AB; APG Algemene Pensioen Groep N.V.; ASSETSuper Superannuation Fund; ATP - Arbejdsmarkedets Tillægspension; AUST (Q) Superannuation Fund; Australian Catholic Superannuation & Retirement Fund; Australian Institute of Superannuation Trustees; Australian Reward Investment Alliance; Australian Superannuation Fund; Australia's Unclaimed Super Fund; AustSafe Superannuation Fund; AVSuper Superannuation Fund; Catholic Superannuation Fund; Construction & Building Industry Superannuation Fund; Danica Pension; Danske Invest Management A/S; Electricity Supply Industry Superannuation Fund; Emergency Services & State Superannuation Fund; Energy Industries Superannuation Scheme; FIL Investments International; FirstSuper Superannuation Fund; Folksam; Forsta AP-Founden; GMB Trade Union; Health Employees Superannuation Trust Australia; Health Superannuation Fund; HOSTPLUS Superannuation Fund; Industriens Pension; KLP Kapitalforvaltning; Labour Union Co-operative Retirement Fund; Legalsuper Superannuation Fund; Local Government Superannuation Scheme; Local Super (SA-NT) Superannuation Fund; Maritime Superannuation Fund; Media Superannuation Fund; Merseyside Pension Fund; Motor Trades Association of Australia Superannuation Fund; Non-Government Schools Superannuation Fund; Nordea Fondbolag Finland AB; Nordea Fondene Norge AS; Nordea Fonder AB; Nordea Investment Funds Company I S.A.; OMERS Administration Corporation; PFA Pension; PGGM Vermogensbeheer B.V. (PGGM Investments); Raiffiesien Capital Management; Retail Employees Superannuation Trust; Royal Mail Pension Plan; Sampension KP Livsforsikring A/S; SKAGEN A/S; Skandinaviska Enskilda Banken AB; SPEC Superannuation Fund; State Superannuation Scheme // SAS Trustee Corporation; Statewide Superannuation Fund; Sunsuper Superannuation Fund; Swedbank Robur Fonder AB; Syntrus Achmea; Tasplan Superannuation Fund; Telstra Superannuation Fund; The Australian Council of Superannuation Investors; TWUSUPER Superannuation Fund; UniSuper Superannuation Fund; Universities Superannuation Scheme; Varma Mutual Pension Insurance Company; VicSuper Superannuation Fund; and VisionSuper Superannuation Fund (AGEST, *et al.*"), *available at* http://www.sec.gov/comments/4-617/4617-42.pdf.

[28]*IIT v. Vencap, Ltd*., 519 F.2d 1001, 1017 (2d Cir. 1975).

[29]Dodd-Frank Act Section 929P(b) requires "conduct within the United States that constitutes significant steps in furtherance of the violation, even if the violation is committed by a foreign adviser and involves only foreign investors; or conduct occurring outside the United States that has a foreseeable substantial effect within the United States."

[30]U.S courts often have sustained defense motions for dismissal for lack of subject matter jurisdiction over foreign investors under Fed. R. Civ. P. 12 (b) (l) and, in class actions, at the class certification stage. In addition to these grounds, where a defendant has successfully shown that an adequate forum is available elsewhere, and that the private and public interests implicated in the case weighs strongly in favor of dismissal or removal to another forum

courts have also dismissed actions under *forum non conveniens*. *See*, *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 504 U.S. 422, 436 (2007).

[31]*See*, Cornerstone Research, Securities Class Action Filings – 2010 Year in Review (2011).

[32] *See*, Advisen Quarterly Report – Q3 2010, at 11-12.

[33] *See*, Risk Metrics Blog, "*Morrison v. National Australia Bank – the Dawn of a New Age*" (June 25, 2010), *available at* http://blog.issgovernance.com/slw/2010/06/morrison-v-national-australia-bank---the-dawn-of-a-new-age.html.

[34] 535 F. Supp. 2d 249 (D.N.H. 2007)

[35]*In re Tyco International Ltd.* 535 F. Supp. 2d 249 (D.N.H. 2007) – The plaintiffs (the lead plaintiffs were several U.S. pension funds) also alleged that the individual defendants looted the company by misappropriating corporate funds in the form of undisclosed cash bonuses and forgiven loans. The proceeds were then used to reward the individual defendants for their participation in the accounting fraud scheme. The plaintiffs argued that this looting and accounting fraud scheme defrauded the investing public in violation of the federal securities laws. The plaintiffs also claimed that the defendants made materially false and misleading statements and omitted material information in various registration statements and publications, which concealed the corporate misconduct and mismanagement. Other example of pre-*Morrison* cases that would have been dismissed under *Morrison* include: *In re Deutsche Telekom AG Sec. Litig.* F. Supp. 2d 277 (SDNY 2002) – In this matter the prospectus and registration statement issued in connection Deutsche Telekom's IPO were alleged to be materially false and misleading on the grounds that the documents (1) failed to disclose that Deutsche Telecom was at that time engaged in advanced merger talks with VoiceStream Wireless Corp., and (2) overstated Deutsche Telekom's real estate portfolio by at least $1.8 billion dollars. U.S investors received in part $120 million in monetary relief as a result of this litigation. *In re Nortel Networks Sec. Litig* 238 F. Supp. 2d. 613 (2003 SDNY) – In this matter Nortel issued false and misleading press releases about its financial strength and projected growth. U.S. investors received in part $1.14 billion in monetary relief as a result of this litigation. *In re Parmalat Sec. Litig.* 375 F. Supp. 2d 278 (2004 SDNY) – In this matter Parmalat allegedly underreported its debts by nearly $10 billion and over-reported its net assets by $16.4 billion. The complaint alleged that insiders at Parmalat created a scheme involving misleading transactions and off-shore entities that created the appearance of financial health. U.S. investors received in part $86.8 million in monetary relief as a result of this litigation. *In re Royal Ahold N.V. Sec. Litig* 351 F. Supp. 2d 334 (2004 Dist MD) – In this matter accounting irregularities and discrepancies were discovered, which stemmed mainly from two company practices: (1) the company inflated the reporting of its income from vendor rebates or promotional allowances by its subsidiary USF; and (2) the company improperly attributed its revenues from joint ventures in which it did not have a controlling stake. As a result, on May 8, 2003 the company announced an $885 million restatement. U.S. investors received in part $1.1 billion in monetary relief as a result of this litigation.

[36]130 S. Ct. at 2888 ("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.").

[37]*Supra* Note 26 at page 13.

[38]*Supra* Note 26 at page 7.

[39] *See*, General Electric Co. Investor Relations *available at* http://www.ge.com/investors/personal_investing/index.html; International Business Machines Investor Relations *available at* http://www.ibm.com/investor/faq/item/stock-exchanges.wss; Pfizer Inc Investor Relations *available at* http://www.pfizer.com/investors/shareholder_services/shareholder_faqs.jsp; and Bank of America Investor Relations *available at* http://investor.bankofamerica.com/phoenix.zhtml?c=71595&p=irol-contact

[40]*See, e.g.*, letters from AGEST, *et al*, *available at* http://www.sec.gov/comments/4-617/4617-42.pdf; CalPERS, *available at* http://www.sec.gov/comments/4-617/4617-43.pdf; National Association of Shareholder and Consumer Attorneys ("NASCAT"), *available at* http://www.sec.gov/comments/4-617/4617-18.pdf; Leandro Perucchi, *available at* http://www.sec.gov/comments/4-617/4617-40.pdf; California State Teachers' Retirement System (CalSTRS), Colorado Public Employees' Retirement System, Delaware Public Employees' Retirement System, State Board of Administration of Florida, North Carolina Department of State Treasurer, Connecticut Treasurer's Office, Maryland State Retirement and Pension System, Pennsylvania Public School Employees' Retirement System, Rhode Island General Treasurer, Pennsylvania State Employees' Retirement System, New York City Employees' Retirement System, New York City Police Pension Fund, Teachers' Retirement System of the City of New York, New York Fire Department Pension Fund, Board of Education Retirement System of the City of New York, Pension Reserves Investment Management Board Commonwealth of Massachusetts ("CalSTRS, *et al.*"), *available at* http://www.sec.gov/comments/4-617/4617-13.pdf.

[41]*See, Morrison*, 130 S. Ct. at 2894

[42]*See, e.g., In re Royal Bank of Scotland Grp. PLC Sec. Litig.*, No. 09 Civ. 300 (DAB), 2011 WL 167749 (S.D.N.Y. Jan. 11, 2011); *Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co.,* No. 08 Civ. 1958 (JGK), 2010 WL 3860397; *In re Alstom SA Securities Litigation*, No. 03 Civ. 6595 (VM), 2010 WL 3718863 (S.D.N.Y. 2010); *In re Societe Generale Sec. Litig.*, No. 08 Civ. 2495 (RMB), 2010 WL 3910286 (S.D.N.Y. Sep. 29, 2010); *Cornwell v. Credit Suisse Group*, 729 F. Supp. 2d 620 (S.D.N.Y. 2010); *In re Banco Santander Securities – Optimal Litig.*, 732 F. Supp. 2d 1305 (S.D. Fla. 2010); and *Terra Secs. ASA Konkursbo v. Citigroup, Inc.*, No. 09 Civ. 7058 (VM), (S.D.N.Y. Aug. 16, 2010)

[43]*See,* John W. Moka III, *et al.*, *2010 a Record Year for Securities Litigation – An Advisen Quarterly Report – 2010 Review*, Advisen (Only "[t]hree percent of [securities suits] were filed in courts outside the United States"), *available at* https://www.advisen.com/downloads/sec_lit_Q42010_report.pdf. *See also, e.g.*, Johnathan Stempel and Sinead Cruise "*Olympus investors may find courthouse door closed*" Thomson Reuters (November 9, 2011), *available at* http://newsandinsight.thomsonreuters.com/Legal/News/2011/11_-_November/Analysis__Olympus_investors_may_find_courthouse_door_closed/.