February 18, 2011

Ms. Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Section 929Y of the Dodd-Frank Wall Street Reform and Consumer Protection Act re Study to Determine the Extent to which Private Rights of Action under the Antifraud Provisions of the Securities Exchange Act of 1934 Should Be Extended To Cover Transnational Securities Fraud [Release No. 34-63174; File No. 4-617].

Dear Ms. Murphy:

The Mouvement des Entreprises de France ("MEDEF"), the Federation of German Industries ("BDI"), Economiesuisse, the European Banking Federation ("EBF"), the Swiss Bankers Association ("SBA"), and the Institute of International Bankers (the "IIB") (collectively, the "Signatories"),[1] appreciate the opportunity to express the views set forth below on the Securities and Exchange Commission's (the "Commission") study pursuant to Section 929Y of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") of the extent to which private rights of action under the Securities Exchange Act of 1934 (the "Exchange Act") should be applied extraterritorially to cover transnational securities fraud.

I. Introduction

This comment addresses the adverse consequences of extending a private cause of action under the U.S. anti fraud provisions of the federal securities laws beyond those "transactions in securities listed on domestic [U.S.] exchanges, and domestic [U.S.] transactions in other securities."[2]

In the background section (Point II), we provide an overview of the anti-securities fraud regimes of several of the Signatories' home countries and cooperation between the Commission and its counterparts in other countries. This discussion shows that United States and other countries share the fundamental goal of combating securities fraud, and that non-U.S. jurisdictions are zealous and successful in achieving that end. However, other countries have made valid decisions to achieve those goals through procedural approaches that differ from those of the United States. In a diverse global economy, it is not possible to conclude that the United States has developed the only legitimate means, nor necessarily even the best means, to protect investors and keep securities markets safe from fraud.

In the discussion section (Point III), we cover four fundamental points.

First, any extraterritorial expansion of the U.S. private liability regime would be detrimental to comity between countries. Other countries view application of U.S. law to securities fraud occurring on their markets (or to private transactions on their soil) as an affront to their sovereignty. This conclusion is more than fair. Each jurisdiction is, after all, the most logical place to resolve securities fraud involving transactions taking place in that jurisdiction: its authorities and courts are most familiar with their own laws, languages, and cultures and have access to the relevant witnesses, evidence, and assets; and the majority of victims will be its own nationals. What is more, having to compete with U.S. private securities actions is counterproductive to non-U.S. authorities' ability to police against securities fraud. The threat of a U.S. class action, for example, can interfere with a foreign government's efforts to promise leniency to whistleblowers or to set its own enforcement priorities.

Second, extraterritorial expansion of the U.S. private liability regime is unnecessary to deter fraud and protect U.S. investors, given that other countries are fully committed to deterring securities fraud and to ensuring that fraud victims are made whole, including U.S. investors who invest outside the United States. Home country markets are anything but havens for fraud; they are highly protected and respected markets where investors can, and do, transact in securities with confidence. Nor does requiring investors in overseas markets to seek their remedies in the jurisdiction where the transaction took place confound investor expectations. Most U.S. investors in non-U.S. securities are sophisticated, and therefore should expect that, by investing outside the United States, they are subjecting themselves to the laws of another country, not U.S. law. Finally, extraterritorial expansion of the U.S. private liability regime is also unnecessary because the Commission can, if necessary, exercise its own extraterritorial jurisdiction pursuant to the Dodd-Frank Act. Unlike private plaintiffs, the Commission is an organ of a sovereign nation that can cooperate with foreign authorities, and moreover is guided by prosecutorial discretion. The instances requiring SEC intervention should be few and far between, not only because non-U.S. governments already adequately address fraud on their own, but also because the Commission enjoys a good working relationship with its counterparts and can always urge them to do more.

Third, any extraterritorial expansion of the U.S. private liability regime would be detrimental to U.S. interests. First, the ability of the United States to fight securities fraud will suffer. As the Commission has recognized, the cooperation of other countries is crucial to the Commission's ability to fulfill its mission, and extraterritorial U.S. litigation causes friction with those countries. Second, extraterritorial application of the U.S. securities laws could have a chilling effect on foreign direct investment in the United States as well as capital formation in U.S. markets for fear that their investment could expose them to costly, distracting and potentially meritless U.S. securities fraud class actions based on securities transactions that occur outside the United States. Third, the economic costs to the U.S. taxpayer militate against expending scarce U.S. judicial resources on transactions outside of U.S. markets, for which buyers already have ample recourse in the country with the closest nexus to the transaction.

Fourth, with all due respect, other countries have good reason to be skeptical of the U.S. securities class action mechanism and other peculiar aspects of U.S. litigation. Fellow sovereigns reasonably may question whether class actions truly provide a meaningful deterrent to securities fraud in the face of empirical evidence suggesting that any stock drop (regardless of its cause) may lead to a securities class action, and that responsible officers and directors rarely contribute personally to settlements. Other countries likewise may be doubtful of whether class actions are truly the best means to ensure that victims of securities fraud are compensated as fully and fairly as possible, given that U.S. lawyers' fees and costs often absorb much of any settlement, and that class actions transfer wealth from current shareholders (who tend to be smaller, buy-and-hold investors) to former shareholders (who tend to be larger, more sophisticated and more active traders). The fact that prior to the Supreme Court's decision in *Morrison,* U.S. litigation led to a number of large settlements in claims involving securities transactions that took place outside the United States does *not* show that the U.S. system is superior at providing appropriate recovery for claimants in meritorious cases and denying recovery (and discouraging claims) in meritless ones. Encouraging and rewarding "false positives" at significant cost should not be considered a virtue of any system.

In the final substantive section (Point IV), we provide recommendations as to certain additional "real world" research that the Commission may wish to undertake before concluding its study. Here, the Commission could benefit from investigating directly how *Morrison* affects U.S. persons investing abroad, as well as the decisions of non-U.S. investors whether to enter the U.S. marketplace.

II. Background

A. Anti-securities fraud regimes in the EU, its member states and Switzerland

Major European financial centers have implemented robust and effective regimes for combating securities fraud. More than the United States, European countries rely in the first instance on *ex ante* regulation, informal negotiations, and dispute resolution to ensure the safety of their securities markets.[3] But the Commission's European counterparts – *e.g.,* the Autorité des Marchés Financiers ("AMF") in France; the Federal Financial Supervisory Authority ("BaFin") in Germany; the Financial Supervisory Authority ("FSA")[4] in the UK; and the Financial Market Supervisory Authority ("FINMA") in Switzerland – also have ample authority to bring enforcement actions and criminal prosecutions against securities law violators and, in appropriate cases, do so.

- **France.** France has very strict laws for the oversight and protection of its markets. French law provides for a comprehensive set of rules to ensure financial market transparency[5] and to strictly punish market abuses.[6] French law prohibits false and misleading information, "insider dealing" and market manipulation.[7] Violators potentially are subject to criminal prosecution, incarceration, and significant administrative and criminal fines.[8] France's AMF has broad powers to investigate and punish securities fraud. For example, it "can seek administrative fines against authorized and unauthorized persons, suspend authorization to do business, require cessation of violations (which can take effect immediately on a provisional basis), seek and seize records and freeze assets (regardless of who is holding them) through court order," and shall refer misconduct for criminal prosecution when the facts could give rise to criminal violations.[9] Moreover, just as the SEC can impose administrative sanctions, French regulators can impose sanctions on rule-violators through an independent disciplinary tribunal—the *Commission des Sanctions*.[10] The AMF may refer violations concerning transactions occurring on the market of another EU member country to that country's regulator for prosecution. The AMF's ombudsman, an independent magistrate, provides cost-free mediation services to resolve numerous investor complaints and disputes, especially concerning compensation. The AMF further has made public a report to facilitate victim indemnification in any case in which the AMF identifies negligence.

- **Switzerland.** Swiss law provides for criminal sanctions for insider trading, price manipulation, and false statements regarding commercial businesses.[11] Both the federal government and the Swiss cantons can prosecute such offenses.[12] Violations must be prosecuted even if there is no complaining witness. FINMA, a relatively recent creation from pre-existing regulators, is responsible for conducting investigations and enforcing Switzerland's anti-fraud prohibitions, and has broad authority to supervise stock exchanges, securities dealers, collective investment schemes, and others involved in the securities markets. Its enforcement tools include the imposition of administrative sanctions and the referral of appropriate cases for prosecution. Swiss prosecutors focus on individuals, but corporations also may be punished if their failure to supervise is to blame for a violation. The administrative sanctions that FINMA may impose include the ordering of injunctive relief, prohibition of individuals from practicing their profession, suspension and revocation of licenses, and the confiscation of illegal gains.[13] Switzerland recently enacted new legislation designed to further combat securities fraud within FINMA's supervisory jurisdiction and to streamline procedures for investigating violations.

- **United Kingdom.** The UK prohibits the misuse of information, misleading practices, and market manipulation, as well as "insider dealing."[14] The FSA is an independent entity vested by statute with responsibility for regulating securities markets and undertaking related enforcement activities. It has the power to impose fines and penalties for rule violations and market abuse, bring criminal proceedings for specified misleading statements and practices, fine and censure authorized firms, apply for injunctions, and order restitution.[15] The FSA is aggressive in its enforcement of UK anti-fraud laws, and in 2008 it issued the highest number of fines since it was granted the power to do so in 2001.[16]

- **Germany.** Germany has enacted comprehensive legislation, the Securities Trading Act ("WpHG"), that prohibits insider trading, market manipulation, and the provision of untrue information of crucial importance to the valuation of securities. German law also imposes liability upon wrongdoers, in particular issuers, for failing promptly to publish inside information that directly affects them, or for publishing such information that is false.[17] BaFin is chiefly responsible for ensuring compliance with the WpHG, and has wide-ranging powers of investigation.[18] BaFin may impose fines of up to 1 million euros for administrative violations. It also may suspend the trading of certain securities, as well as the trading privileges of certain persons or entities.[19] In practice, BaFin pursues both individuals and entities responsible for violations. Further, in cases in which BaFin suspects a criminal violation of Germany's securities laws, it may refer the case to prosecutors. Victims of securities fraud may also alert prosecutors and BaFin to potential criminal or administrative violations. Overall, enforcement is on the rise: in 2009, BaFin launched 150 new investigations of market manipulation—double the level in 2008.[20]

Like the United States, most European countries have in place laws that allow private civil plaintiffs to bring suit to recover for securities fraud. In the UK, for example, there is a statutory cause of action for misstatements or omissions in prospectuses and other prescribed disclosures.[21] In Switzerland, a plaintiff may file a private damages claim for financial loss caused by violations of the duties of corporate managers, misstatements or omissions in a prospectus or similar disclosure, misconduct by auditors, and other violations of the securities laws.[22] Victims may also participate in criminal proceedings, and Swiss criminal courts may confiscate ill-gotten gains and make them available to victims. In Germany, investors suffering damages from securities fraud may bring suit against issuers in national courts.[23] Further, proceeds from violations of German criminal or administrative offenses may be ordered frozen pursuant to the German Code of Criminal Procedure and then recovered by victims bringing civil actions. In France, investors who have been injured by violations may file an application with the AMF seeking an administrative sanction, initiate civil proceedings to recover losses, initiate criminal proceedings that may result in restitution based on civil liability standards, or avail themselves of the services of the AMF ombudsman.[24] In the *Vivendi* case, for example, a Paris criminal court awarded 1.2 million euros in compensatory damages to 200 shareholders.

European systems place a lesser emphasis than the United States on private civil actions as an enforcement mechanism.[25] Moreover, as discussed below, EU member states and Switzerland are more skeptical than the United States of the value of mass litigation, and express deeper concern about the costs that such actions impose on companies, economies, and investors.

Some key differences in the European approach to private securities litigation that reflect these divergent views are as follows:

- **Private suits and group litigation.** While an increasing number of countries authorize some form of group litigation,[26] "[o]nly a few other countries have adopted the class action device even to a limited extent."[27] And few of the countries that have adopted mechanisms for group litigation have structured it "in a manner similar to the U.S. class action."[28] The other EU countries that permit class action securities litigation—such as the UK, Sweden, and Italy—require plaintiffs to affirmatively "opt in" to a case.[29]

  Most European countries do not permit U.S.-style class actions, but do provide for some kind of collective redress. In France, for example, victims of securities fraud may bring collective civil actions under the auspices of a certified association representing investor interests.[30] Recent French discussions about whether to enact an "opt in" securities class action mechanism have, thus far, not resulted in any legislative action.[31] Germany likewise has declined to adopt the class action model, although in 2005 it enacted a "representative action" statute that provides for a type of group litigation.[32] The statute allows courts to consolidate securities cases that raise common questions into a "model case," and to rule on common questions.[33] But unique issues such as damages must be litigated on a person-by-person basis and even decisions on common issues are not preclusive as to absent parties.[34] A representative action concerning claims of about 17,000 plaintiffs, for example, is currently pending against Deutsche Telekom AG in connection with its third public offering.[35] Swiss law, which likewise does not permit class actions, provides several types of group litigation devices, including a provision that certain judgments in shareholder litigation are binding on all, or an extended group of, shareholders.[36]

- **Discovery.** Most European countries subscribe to the typical civil law view that the gathering of evidence is strictly a judicial function.[37] In France, for example, the civil and criminal judges have significant investigatory powers. Accordingly, parties to litigation do not serve document requests or take depositions. Instead, the courts may issue orders requiring the production of documents or conduct pretrial examination of the witnesses.[38] Further, the scope of discovery under judicial auspices is far more limited than the U.S. norm. In most instances, only evidence specifically identified and demonstrably relevant may be obtained through document discovery. Broad requests for general categories of documents in the hope of turning up something relevant generally are disallowed as improper "fishing expeditions."[39]

- **Fee system.** Civil regimes forbid or limit the use of contingency fees.[40] Further, in Europe (with the exception of Luxembourg) the loser-pays rule is applicable.[41] Even countries that permit some forms of group litigation eschew the U.S. fee model. For example, Germany prohibits an attorney acting on behalf of a plaintiff in a model case from being compensated for work done for anyone other than his or her own client.[42]

- **Jury trials.** Jury trials are unknown in civil law systems in securities fraud cases.[43] In the UK, juries sit on a few categories of civil cases, but not securities fraud actions.[44]

- **Reliance.** Most countries other than the United States have rejected the fraud-on-the-market ("FOTM") theory.[45] And while the UK has joined the U.S. in presuming reliance in certain circumstances,[46] the UK requires a higher showing of actual reliance when suit is predicated on information in periodic financial reports.[47]

To illustrate the similarities and differences between U.S. and non-U.S. systems, we have attached a chart setting forth key points as an Appendix hereto.

B. Cooperation between U.S. and non-U.S. regimes.

Because of advances in technology and growing cross-border investment, it is clear that, as Commissioner Kathleen Casey has observed, "national regulators . . . need cooperative relationships and coordination with other jurisdictions if they are to be effective in regulating and overseeing their markets."[48] According to former SEC Chairman Cox, "[e]nforcement . . . has always been the bread and butter of international securities regulatory cooperation."[49]

"The efficacy of information sharing arrangements has resulted in more than just increasingly effective enforcement programs at the domestic level. The dialogue between regulators and the negotiation process leading to such arrangements has fostered a greater understanding of what works and what does not work in an enforcement program."[50] Collaborative relationships between the Commission and the regulatory authorities in EU countries and Switzerland are close, with all of these authorities having entered enforcement cooperation agreements with the Commission.[51] In 2009, for example, the Commission cooperated with UK authorities in proceedings against Robert Stanford and his companies, as well as in a number of other enforcement actions.[52] In the Vivendi Universal case, French authorities assisted the Commission's investigation of false disclosures regarding the French company's liquidity.[53] The Swiss regulatory agency, FINMA, also regularly coordinates with the Commission.[54] The mutual legal assistance treaty between the United States and Switzerland has provided a particularly "useful mechanism for the Commission, working with the U.S. Justice Department, to obtain information located in Switzerland, including detailed banking information."[55]

C. Investors in non-U.S. securities

Research shows that those U.S. investors who transact directly in non-U.S. securities on non-U.S. exchanges are almost exclusively sophisticated investors. Although U.S. domestic assets are heavily weighted in U.S. investors' portfolios, such "home bias" is less evident in the portfolios of large, sophisticated investors such as pension funds, hedge funds and mutual funds. For example, CalPERS and the New York State Common Retirement Fund both target a greater than 25 percent weighting of non-U.S. stocks in their equity portfolios.[56] And "[i]ncreasingly, . . . major institutional investors have established offices overseas in key financial centers, like

London and Tokyo, and prefer to trade their foreign securities in the home market of issuers. . . ."[57]

By contrast, unsophisticated individual U.S. investors are exceedingly unlikely to hold directly stocks and bonds of non-U.S. issuers. (They may, of course, rely on sophisticated investors such as pension or mutual funds to make such investments on their behalf, and some may invest though employee stock option plans.). A recent five-year study found that 88 percent of U.S. stockholders directly held no non-U.S. equities at all, and that only the most sophisticated investors were significantly more likely to hold such securities.[58] Another study confirmed that "[w]ealthier or more experienced investors, who are likely to enjoy an informational advantage, are more likely to use [non-U.S.] securities."[59]

Moreover, although institutional investors enjoy "multifaceted" ways to engage in non-U.S. transactions, including through their overseas offices and branches, fewer avenues are available to retail investors.[60] U.S. retail investors seeking to purchase securities on a non-U.S. exchange are limited to one of three channels: (1) a non-U.S. broker-dealer; (2) a U.S. broker-dealer that is a member of the non-U.S. exchange, and that purchases directly through a trading screen located in the United States; or (3) a U.S. broker-dealer that transmits the order to a non-U.S. broker dealer. The first option is available only in very limited circumstances, *e.g.*, on an unsolicited basis. This second option also is rarely available, because the Commission generally prohibits the placement of trading screens for other countries' exchanges in the United States unless the associated exchange complies with U.S. regulatory requirements.[61]

Nor is there any reason to believe that the landscape will change in light of the possible exchange merger between Deutsche Börse and NYSE Euronext. Nothing in that merger contemplates listing of large numbers of NYSE equities outside of the United States for purchase and sale by U.S. investors, and nothing in that merger, in and of itself, would remove any existing barriers that prevent that from happening today. Concerns that some have voiced—that the long-established U.S. infrastructure for securities trading by U.S. persons will be abandoned—are both premature and wholly unfounded.

III. DISCUSSION

A. Extraterritorial expansion of the U.S. private liability regime would cause friction with other countries, injure comity and be unfair to defendants.

1. Stated objections of other countries. The approach European countries have taken to tackling securities fraud reflects deeply held cultural values and legitimate policy choices. Accordingly, imposition of the U.S. regime, and the different policy choices and values it reflects, through the extraterritorial extension of U.S. private liability would generate "frequent conflicts between the United States and other nations."[62] As the *Morrison* Court observed, "[t]he probability of incompatibility" between extraterritorial application of private liability under the securities laws and the "applicable laws of other countries is . . . obvious."[63]

For example, the EC declared in a 2008 green paper that the United States' use of contingency fees, its failure to adopt "loser pays," and its embracing of the "opt-out" mechanism, together constitute a "'toxic cocktail' [that] should not be introduced in Europe."[64] An opinion from the European Economic and Social Committee ("EESC")—a consultative body of the European Union—similarly "rejected the features of U.S. style 'class actions,' which are incompatible with [the EU's common legal tradition and civil procedure principles]."[65] U.S.-style discovery is particularly disfavored by Europeans. As the Restatement (Second) of Foreign Relations observes, "[n]o aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States."[66]

National officials have echoed these concerns. The German Minister of Justice pointedly called Germany's recently-extended representative action law "a way to handle capital market mass proceedings without transferring existing models . . . such as the American class action, into German law."[67] And in the context of France's own recent debate about whether to adopt a class action mechanism, French officials and others repeatedly expressed concern that "opt out" class actions would violate fundamental French legal principles of notice, consent, and autonomy,[68] and French Constitutional principles and public policy as currently understood.[69] In a message to the Swiss Parliament explaining why the proposed Federal Code of Civil Procedure did not include a class mechanism, the Swiss Federal Council described class actions as alien to European legal theory—and of disputed value even in the United States.[70]

The *Morrison* case provided European countries with a high-profile forum in which to object to the broad extraterritorial reach of the U.S. class action model, and they did so vociferously. In its amicus brief, France observed that "foreign countries—including France—have struck their own balance in regulating securities fraud in accordance with their own legal cultures, traditions, and public policy objectives. . . . U.S. securities fraud class actions would upset that delicate balance and offend the sovereign interests of foreign nations in cases where the U.S. has no good reason to do so."[71] France's brief went on to note more generally that "[t]he U.S. has no valid interest in undermining the policy judgments of foreign nations by applying its chosen method of remedying securities fraud to foreign securities transactions,"[72] and that "application of U.S. rules to foreign securities transactions could upset a foreign nation's carefully thought out balancing of plaintiffs' and defendants' interests."[73] The UK's *amicus* brief in *Morrison* similarly observed that "the panoply of procedural rules and remedies that accompany litigation in federal courts under U.S. securities laws creates a very different environment for the commencement, prosecution and settlement of lawsuits than exists in other jurisdictions," and "[a]pplication of U.S. securities laws brings with it the full force of the U.S. legal system and real conflicts with other legal systems," including that of the UK.[74] Switzerland sent a diplomatic note to the U.S. State Department conveying its congruent views on these issues, and observing that "foreign nations . . . have the right to regulate securities-related activities within their own territory without interference from U.S. civil lawsuits."[75]

2. *Morrison* remedied the unfair prospect of duplicative litigation and duplicative liability. Prior to *Morrison*, a company could be sued in its home country *and* in the

United States by the *same* persons and based upon the *same* allegations of wrongdoing. Moreover, because certain countries, including some of the Signatories' home countries, consider "opt out" class actions contrary to constitutional guarantees, public policy and fundamental fairness to absent class members, they do not recognize U.S. judgments against, or even in favor of, absent class members.[76] In the pre-*Morrison* world, such non-recognition exposed defendants in a U.S. securities class action concerning transactions on non-U.S. markets to additional suits in other countries by absent class members.[77] This deprived such defendants of the repose to which their victory, settlement and/or final judgment in the U.S. case should have entitled them, and in case of a settlement or adverse judgment, exposed them to the prospect of duplicative liability.[78]

Other countries have repeatedly brought this problem to the attention of the U.S. courts. As long ago as 1975, in *Bersch v. Drexel Firestone, Inc.*, Germany, England, Switzerland, Italy, and France submitted affidavits explaining that, in the context of a class action by non-U.S. plaintiffs against non-U.S. issuers, they "would not recognize a United States judgment in favor of the defendant as a bar to an action by [their] own citizens."[79] In April 2005, Germany enacted a law that expressly grants exclusive venue to the issuer's home court in securities fraud cases, and thus blocks the enforcement of judgments or settlements in U.S. securities fraud class actions against German issuers in Germany.[80] Allowing the prospect of duplicative liability is completely at odds with basic principles of fairness and proportionality that U.S. law should, and generally does, embody.

As well, by directing litigation to the forum in which the shares are traded, *Morrison* minimizes the instances in which non-U.S. corporations will be placed in the unfair position in which they are subject to U.S. discovery demands with which they cannot lawfully comply under the home country's laws. This is a particular issue in light of European data protection laws, as well as blocking statutes and non-U.S. financial privacy laws.[81]

3. Commission action preferable to private action. To the extent that extraterritorial enforcement of U.S. securities laws is warranted, public enforcement is the way to achieve it.[82] First, because the Commission is an organ of a sovereign nation, and because it already enjoys a good relationship with its counterparts in other countries, the Commission is more likely than private parties to be sensitive to concerns of comity. Second, the Commission, is more likely to enforce the securities laws even-handedly—and to eliminate the risk of duplicative litigation and liability—than plaintiffs' attorneys. As the Supreme Court has explained elsewhere, "[t]he creation of a private right of action raises issues … [such as whether] to permit enforcement without the check imposed by prosecutorial discretion."[83]

B. Extraterritorial expansion of the U.S. private liability regime is unnecessary to deter fraud and protect U.S. investors

1. Other countries' enforcement regimes. Other nations are perfectly capable of safeguarding their own markets.

First, national regulators are best positioned to police their own markets. They interact with those markets on a day-to-day basis, and are vastly more familiar than the Commission with their laws, language and culture, and the other unique characteristics of those markets. They know the most of any country about their own issuers, their own investors, and even their local wrongdoers. Other governments have the best access to, and compulsory process to obtain, documents, witness testimony and on-site investigations concerning fraud within their own borders. They also are most likely to be able to freeze accounts and obtain the disgorgement of assets relating to any fraud that has occurred locally. They are less likely to need to rely upon extradition to arrest and bring criminal charges against wrongdoers.

Second, as shown above (Point II.A), other economic powers share the United States' core belief in the value of market integrity and recognize the importance of combating securities fraud.[84]

Third, the supervisors responsible for protecting major markets are fully capable of doing so. The IMF, for example, has praised securities regulation in both France and Germany, declaring that "[t]he enforcement and cooperation powers of the AMF are exemplary,"[85] and that German regulators "have a demonstrable record in key areas such as insider trading where its referrals to the public prosecutors have a good success rate."[86]

Fourth, sophisticated U.S. investors (Point II.C) routinely make a monetary vote of confidence in the safety of these markets when they choose to buy securities on them, and there is no sign that investors are slackening in their continued appetite for foreign equity investments post-*Morrison*, knowing full well that they will not be able to avail themselves of U.S. private remedies. "When sophisticated institutional investors make substantial investments in a country's financial markets and depend on that market's trading systems and support mechanisms . . . that confidence represents another source of market-based information on the quality of foreign markets."[87] To conclude that non-U.S. enforcement mechanisms and investor protection is somehow sub-par simply cannot be squared with the lessons taught by the conduct of the world's leading investors.

A review of foreign activities relating to securities class action suits dismissed by U.S. courts under *Morrison* confirms dismissals pursuant to *Morrison* will not leave an enforcement or remedial gap.

For example, in *Elliott Associates v. Porsche Automobil Holding SE*, the U.S. District Court for the Southern District of New York dismissed the claims of a group of global hedge funds against Porsche alleging that it engaged in market manipulation in connection with certain swap transactions referencing Volkswagen securities traded on a German exchange.[88] But as Germany's Acting Consul General in New York, Dr. Oliver Schnakenberg, explained in a letter to the court: "Germany is following up the allegations against Porsche … with all due vigor" and moreover "[t]he German law on damages permits both domestic and foreign injured parties to obtain full compensation for their losses," and "[t]he plaintiffs [in the U.S. case against Porsche] could join [the German conciliation proceedings with Porsche] without further ado."[89]

Prosecutors in Stuttgart now are investigating the former CEO and CFO of Porsche for alleged market manipulation.[90]

Similarly, in *Terra Securities Asa Konkursbo v. Citigroup, Inc.*, the court made note of other countries' enforcement efforts in dismissing claims by a group of Norwegian municipalities and other non-U.S. investors against Citigroup alleging fraud in connection with transactions in Citigroup securities listed on European exchanges.[91] Specifically, the court observed that Norway's Financial Supervisory Agency had launched an investigation into a broker involved in the transaction, "forcing it to cease operations and declare bankruptcy."[92]

In *In re Banco Santander Securities-Optimal Litigation*,[93] the Southern District of Florida dismissed a suit by non-U.S. plaintiffs who purchased shares of a non-U.S. Madoff investment fund traded on the Bahamian stock exchange. Switzerland is now investigating the conduct of one of the defendants in the U.S. case, a Swiss subsidiary of Santander,[94] and Spain has opened an investigation of the parent company's role in the Madoff fraud.[95] In *In re Royal Bank of Scotland Group PLC Securities Litigation*,[96] the Southern District of New York dismissed a suit concerning shares traded in the UK and on Euronext Amsterdam, in which plaintiffs alleged losses in shareholder value as a result of a series of write-downs that occurred due to Royal Bank of Scotland's substantial holdings in subprime and other mortgage-related assets. The FSA, however, cleared the bank of wrongdoing and pledged to publish a report on its findings.[97]

In some situations other governments may not make public their investigations. Or, they may choose not to investigate because (as the FSA investigation of Royal Bank of Scotland suggests) it should not be presumed that every suit brought in the United States is meritorious.

2. Utilization of U.S. enforcement mechanism. The apparent popularity of the U.S. class action mechanism, even with plaintiffs from other countries, does not undercut the conclusion that other countries' enforcement regimes are effective. To be sure, plaintiffs from other countries do file or join in U.S. securities class actions, and settlements in U.S. class actions do redistribute large sums of money.[98] But such metrics are not a good measure of the success of U.S. actions at achieving appropriate levels of compensation and deterrence, nor do they demonstrate that other countries fail to provide an adequate remedy to victims of securities fraud. As the Supreme Court has explained, "extensive discovery and the potential for uncertainty and disruption in a [securities class action] lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies."[99] The resulting huge settlement sums are a strong enticement to anyone with a claim that can be brought in U.S. court,[100] even if a remedy also is available in another jurisdiction. Although injured investors can be awarded substantial compensation in many other countries, no other legal system produces massive settlements—including for dubious claims—with the same regularity as the U.S. system. On top of that, the availability of large attorney fee awards in "opt out" securities class actions is a powerful incentive for plaintiffs' attorneys to steer their clients towards U.S. court. This may also account for the apparent absence of statistics concerning the frequency with which plaintiffs avail themselves of non-U.S. remedies, and on the amount of assets distributed to victims through such systems.

3. Investor Expectations. Requiring U.S. persons who choose to invest outside the United States to avail themselves of non-U.S. remedies is consistent with investor expectations. As discussed above (Point II.C), investors in non-U.S. securities tend to be the most sophisticated, and many—particularly retirement and hedge funds—are repeat players in U.S. and non-U.S. securities litigation. Sophisticated investors in particular will recognize that when investing outside the United States, they may also be required to seek their remedy outside the United States.

4. Possible action by the Commission. In the rare instance where it is necessary, the Commission and the DOJ may exercise jurisdiction as a backstop to protect investors in cases that involve "conduct within the United States that constitutes significant steps in furtherance of the violation" or "conduct occurring outside the United States that has a foreseeable substantial effect within the United States."[101] But, for the reasons set forth above, we anticipate that instances in which the Commission determines that other regulators' securities enforcement efforts are insufficient will be rare. Initiating an investigation or enforcement action in those rare cases should not pose an undue burden on the Commission, nor should the Commission need assistance from the private securities bar. Moreover, given the strong working relationship between the Commission and its counterparts in Europe (Point II.B), the first and most logical step for the Commission to take in cases in which it feels that non-U.S. regulators could be doing more should be to communicate with them directly.

C. Extraterritorial expansion of the U.S. private liability model would be detrimental to U.S. interests.

1. Contrary to U.S. enforcement objectives. Running roughshod over the objections of U.S. friends and allies will surely not redound to the long-term benefit of the United States, nor aid the Commission in achieving its objectives.

First, as discussed above (Point II.B), the Commission relies on, and recognizes the importance of, ready and willing cooperation from its fellow regulators to investigate and prosecute cross-border securities fraud. And most national regulators are prepared to cooperate actively with the Commission in cross-border enforcement efforts. Supporting a rule that evinces a lack of respect for the views of those countries regarding the proper means to achieve enforcement may threaten to dull their enthusiasm for bilateral cooperation in securities enforcement matters. Given a choice between meaningful bilateral cooperation in matters that the Commission deems enforcement priorities, on one hand, and endorsing a rule allowing private plaintiffs indiscriminately to bring extraterritorial actions that alienate the Commission's friends and allies, the former would seem to be the wiser option.

Second, "[e]xtraterritorial application of law has become worrisome to many observers because it interferes with sovereign authority by limiting the extent to which a State can control the local conditions."[102] As the Supreme Court has noted in an analogous context, "[t]he procedural costs and delays" that such actions would entail "could themselves threaten interference with a foreign country's ability to maintain the integrity of its own . . . enforcement system."[103] For example, local law enforcement may wish to foster cooperation by promising leniency to cooperating corporations or individual whistleblowers, only to be stymied because would-be cooperators are deterred by the threat of U.S. civil litigation.[104] Or, another country's regulator may wish to remove several bad actors from a corporation and then allow that entity, under other management, to move forward to fulfill important societal objectives, only to be thwarted in its efforts by U.S. litigation that is aimed at an entirely different outcome.

2. Discouragement of foreign direct investment. Concerns about abusive U.S. litigation practices coupled with the related risk of paying massive securities settlements disproportionate to corporate fault, or worse, in cases that lack merit, are serious deterrents to non-U.S. companies considering activities that might subject them to U.S. jurisdiction, including making direct investments in the United States. These concerns are exacerbated when a non-U.S. company's direct investment in the United States (*e.g.*, ownership of a U.S. subsidiary, participation in a U.S. joint venture, transactions with U.S. banks or broker-dealers) may expose it to extraterritorial litigation concerning the securities transactions that take place outside the United States or non-U.S. activities of its global enterprise. A 2006 study commissioned by Senator Charles E. Schumer and Mayor Michael R. Bloomberg identified (based on surveys and interviews of global corporate executives and business leaders) "the increasing *extraterritorial* reach of US law" as a "significant factor[] that caused" U.S. markets to lag in competiveness.[105]

There is a genuine risk that some non-U.S. companies—*e.g.*, certain members of the Signatories, who collectively represent over 800,000 non-U.S. businesses—will choose to avoid the U.S. market altogether rather than incur the risk of such suits, particularly if a U.S. investment will expose their entire organization to extraterritorial litigation.[106] That, in turn, would have a correspondingly adverse impact on the U.S. economy generally.

3. Discouragement of non-U.S. issuers. An additional consideration weighing against extraterritorial expansion of private liability is that a return to the pre-*Morrison* approach would discourage non-U.S. issuers from raising capital in the United States, not because the securities sold in the United States would be subject to U.S. litigation, but because selling securities in the United States would provide a hook for the extraterritorial application of U.S. law to securities sold overseas. A pre-*Morrison* decision, *Itoba Ltd. v. LEP Group PLC*, illustrates the concern.[107] There, the court held that a non-U.S.-issuer's filing of a Form 20-F in the United States for its ADRs traded on a U.S. exchange was sufficient under the "conduct" test to permit non-U.S. 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 another country's exchange. Post-*Morrison*, at least two courts have rejected the argument that *Morrison* permits suit based on the purchase of shares on a non-U.S. exchange merely because the same shares also are listed on a U.S. exchange.[108] If the United States were to return to the pre-*Morrison* approach—in which an issuance of ADRs may subject a non-U.S. issuer to a U.S. securities class action relating to trading of its non-U.S. securities (or even raises the specter of such risk)—non-U.S. issuers will be discouraged from listing in the United States in the first place,[109] or from raising capital in the U.S. private unlisted market.[110]

Compounding the problem is that the pre-*Morrison* test was notoriously "unpredictable" in its application.[111] Transparency and predictability are the critical underpinnings of efficient capital markets; without them, businesses and investors will be reluctant to commit themselves to operating in the U.S. market or to making long-term investments here.[112]

4. Unwarranted burden on U.S. resources. Providing a forum for private plaintiffs to bring suits concerning securities transactions that occur outside of the United States carries a significant price tag in U.S. taxpayer dollars and resources. Such suits strain scarce judicial resources and impose on U.S. taxpayers the economic costs of adjudicating in U.S. courts disputes over transactions that occurred abroad. Particularly in these difficult economic times, such expenses are more appropriately borne by the jurisdictions where the underlying transactions occurred. For the same reason, the Commission too is best served by deferring to its able non-U.S. counterparts to address any securities violations occurring on their own soil.

D. Other countries have good reason to be skeptical of the U.S. approach to securities enforcement through private shareholder class actions

As discussed (Points II.A), the approaches to securities enforcement in other countries differ in important respects from the U.S. model—reflecting the varied and deliberate judgments of those countries—not on the importance of combating securities fraud, but rather on how most effectively to achieve that goal.[113] The Supreme Court in *Morrison* aptly explained: "[l]ike the United States, foreign countries regulate their domestic securities exchanges and securities transactions occurring within their territorial jurisdiction. [But] the regulation of other countries often differs from ours as to … 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."[114]

1. Legitimate concerns with class actions. While the United States relies on class actions as a central pillar of its securities enforcement approach, most countries do not permit such suits. This is a valid choice that in no way compromises the effectiveness of securities regulation. In the words of Professor Adam C. Pritchard of the University of Michigan Law School, "[n]o other country has adopted the open-ended private liability for misrepresentations affecting the secondary market price of corporate securities that we have in the United States, and for good reason."[115] Many have expressed deep skepticism that securities class actions are effective at compensating investors or deterring wrongdoing, particularly when public securities regulators can police the securities markets and take the lead in recouping ill-gotten gains and distributing them to investors.[116]

2. Legitimate preference for governmental enforcement. Consistent with the concerns described above, many European countries place relatively less reliance on private enforcement, as benchmarked against the United States, and comparatively greater reliance on public enforcement actions.[117] Commentators have noted that, in part due to differences in the structure of the litigation mechanism throughout much of Europe—namely, lack of contingency fees, opt-out mechanism, and jury trials; the necessity of proving actual reliance; the "loser pays" rule; and rules limiting discovery—"Europe has had little litigation compared to the United States."[118] Policymakers in Europe recognize that certain aspects of their laws may reduce incentives for plaintiffs' lawyers to bring civil securities litigation. But they see that as a worthwhile trade-off for avoiding a judicial culture dominated by disproportionate fiscal incentives for lawyers.[119] Europeans generally, and reasonably, disfavor the prospect of a system in which plaintiffs' lawyers are provided incentives to bring speculative claims in hopes of obtaining windfall settlements and fees, and to use the threat of litigation to extract settlements from defendant firms.[120]

E. No alternate formulation of the test for extraterritorial application of the U.S. securities laws can solve the problems set forth above.

The Commission has asked for comment on whether the test for extraterritorial application of the U.S. securities laws should include a "conduct" test, an "effects" test, or some other variant, as well as whether the test should be fine-tuned based on factors such as (1) whether the transaction involves a U.S. issuer, occurs on a traditional exchange, or involves securities available exclusively outside the United States and (2) whether the purchaser is a U.S. person or an institutional investor. But any formulation, no matter how artfully crafted, that goes beyond transactions in securities listed on domestic exchanges and domestic transactions in other securities, would give rise to the adverse consequences described above.

First, other countries will be offended by any extraterritorial U.S. lawsuit that encroaches on their sovereignty—the wording of the test that allows the lawsuit, or the fact that the test might not allow a different lawsuit, will not mollify them. If, for example, the United States entertains litigation concerning shares of a European issuer sold on a European public market, but does not entertain litigation concerning shares of a European issuer sold on a private market or alternative platform, the absence of suits in the latter category will be cold comfort to European countries when a suit in the former category encroaches upon their sovereignty.

Second, for similar reasons, reformulating the test for extraterritorial application of U.S. laws can hardly be expected to entice non-U.S. investors who would otherwise be reluctant to subject themselves to personal jurisdiction in the United States. Their concern is the risk of extraterritorial litigation that investment in the United States poses, not the niceties of whether the rule imposing such risks is framed as a "conduct" test, an "effects test," or something else. Nor would any of the proposed constraints on such suits that are less than full measures (*e.g.*, limiting suits to only certain types of investors, or certain types of non-U.S. securities trades) afford non-U.S. investors the clarity they seek, given the extreme risks that *any* U.S. securities class action poses (Point III.D.1). Any test that could expose would-be investors from other countries to extraterritorial litigation (including, *inter alia*, strike suits, settlements divorced from the merits, and massive discovery costs) based upon direct investment in the United States exacerbates exactly the concerns that chill such investment.

There is no legislative solution to these problems, because any test that strays from *Morrison*'s bright line would require highly fact-intensive, case-by-case assessments. As the

Supreme Court observed in *Morrison*, pre-*Morrison* tests were "complex in formulation," "unpredictable [and inconsistent] in application," and "not easy to administer."[121] The alleged U.S. nexus in *Morrison*, for example, was the (comparatively minor) conduct of a U.S. subsidiary. Indeed, the lower court in *Morrison* declined to exercise jurisdiction based on that alleged conduct, but the pre-*Morrison* test still invited prolonged litigation.

IV. Next steps for Commission study

We urge the Commission, in conducting the study directed by Section 929Y of the Dodd-Frank Act, to go beyond the current round of public comments and other strictly academic approaches to understanding the issues, and to conduct its own "real world" fact-gathering before concluding its study and issuing any recommendations.

A. Importance of empirical data and "real world" feedback

The Commission has a long history—going back to the early years of its existence—of conducting sound and policy-relevant empirical research in connection with its activities.[122] Recent examples of the Commission conducting such empirical research to inform its decision-making include:

- In 2005, the Commission convened investor focus groups on the customer disclosures required of broker-dealers offering fee-based brokerage accounts. As a result, the Commission made modifications to the broker-dealer disclosures to "help achieve th[e] goal" of plain-English disclosure.[123]

- In 2006, the Commission retained the Rand Corporation to "conduct interviews of interested parties, including industry groups, regulators, and investor advocates; . . . interview broker-dealers, investment advisers, and their respective associated persons; [and] . . . conduct investor focus group interviews . . . for the Commission's use in assessing the current legal and regulatory environment" affecting broker-dealers and investment advisors in various jurisdictions.[124] The RAND study has helped shape the current debate about broker-dealer regulation.[125] In fact, Commission staff relied upon it, and another Commission-sponsored outside study, in issuing their own recent study on the subject.[126]

- In 2009, the Commission's Office of Economic Analysis (the "OEA") (now the Division of Risk, Strategy, and Financial Innovation) issued a study—based on real data concerning "companies' actual experiences"[127]—looking at the effects of certain reforms implemented in 2007 on the costs of compliance with Section 404 of the Sarbanes-Oxley Act.[128] The report combined two complementary methodological approaches: a web-based survey of the financial executives, including telephone follow-up with some respondents, and in-depth interviews with external users of financial statements and independent auditors.[129]

- In 2006, the OEA gathered and analyzed "empirical data" relating to the temporary suspension of Rule 10a-1(a)—restricting short-selling in a declining market—"to help assess whether [the] price test should be removed, in part or in whole, for some or all securities, or if retained, should be applied to additional securities." The OEA concluded that the price test had no overall discernable impact on the markets (except in making it more difficult and expensive for short sellers to obtain immediate liquidity) and, therefore, that there was no real empirical justification for retaining that limitation on short-selling.[130] As a result, the Commission temporarily suspended Rule 10a-1(a).[131]

As these examples demonstrate, empirical studies and outreach to real world stakeholders are enormously helpful in refining the Commission's thinking.

B. Subjects for further study

Additional empirical research would shed light on a number of key issues relevant to the decision whether to extend the private right of action under the securities law extraterritorially. At a minimum, we would recommend that the Commission investigate:

- The views of the Commission's counterparts in other countries as to how the extraterritorial application of the U.S. securities laws would affect their ability to supervise and protect their domestic markets.

- Whether investors who invest in non-U.S. securities do so knowingly, and whether they expect that, when doing so, they will be able to avail themselves of non-U.S. remedies in the event that they are victims of securities fraud.

- How non-U.S. corporations contemplating a direct investment in the United States would react to the reintroduction of the pre-*Morrison* rule for private securities fraud actions.

- Whether U.S. investors who have availed themselves of non-U.S. mechanisms to seek compensation for securities fraud have been satisfied with the results.

- Based upon economic analysis, how *Morrison* has affected the performance of other countries' markets. Accounting for extraneous factors, have share prices increased (now that the risk of extraterritorial litigation has decreased) or decreased (due to concerns that U.S. protections are no longer available)?

- The incidence of securities fraud on non-U.S. markets and the costs imposed by such fraud, and how these findings compare with conditions on U.S. markets.

- The effect of *Morrison* on investor perception that particular non-U.S. markets are safe.

For the reasons set forth above, having this type of practical information from myriad international stakeholders would be invaluable to the Commission's study.

V. Conclusion

Should you have any questions about this submission, please do not hesitate to contact the undersigned.

Respectfully submitted by,

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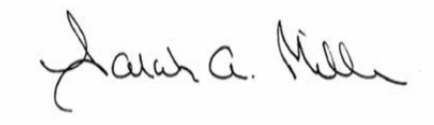

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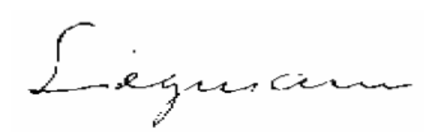

By ________________________
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[1] The Mouvement des Entreprises de France ("MEDEF") represents more than 700,000 companies of all sizes and sectors of business, including industry, commerce and services. About 15 million persons are employed by MEDEF members. MEDEF attempts to ensure that, in the development of rules affecting cross-border business, equity and consistency are respected for all countries.

The BDI is the umbrella organization for all industrial businesses and industry related service providers in Germany. It represents 37 industrial sector federations and has 15 regional offices in Germany. The BDI speak for more than 100,000 private enterprises employing roughly 8 million people.

The SBA is the leading professional organization of the Swiss financial center, the members of which include the vast majority of banks and other financial institutions operating in Switzerland. Its purposes include setting standards that govern the operation of banks in Switzerland and promoting the interests of the Swiss financial center, both at home and abroad.

The EBF is the leading professional organization of European banks. It is a forum in which European banks discuss good practices and legislative proposals and adopt common positions on matters affecting the European banking industry. The EBF actively promotes the positions of the European financial services industry, and in particular the banking industry, in international forums.

Economiesuisse is the largest umbrella organization representing the Swiss economy. Economiesuisse is comprised of more than 30,000 businesses of all sizes, employing a total of 1.5 million people in Switzerland. Economiesuisse's missions is to create an optimal economic environment for Swiss business, to continuously improve Switzerland's global competitiveness in manufacturing, services and research, and to promote sustained growth as a prerequisite for a high level of employment in Switzerland.

The IIB's mission is to help resolve the many special legislative, regulatory, tax and compliance issues confronting internationally headquartered banks, operating branches and agencies, and bank and broker-dealer subsidiaries in the United States. Collectively, the U.S. operations of internationally headquartered banks contribute significantly to the U.S. economy and to the depth, liquidity and vitality of the U.S. financial markets. The IIB comments regularly on matters that raise significant issues related to international banking.

[2] *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2884 (2010).

[3] John C. Coffee, *Law and the Market: The Impact of Enforcement*, 156 U. Pa. L. Rev. 229, 309-10 (2007) (hereinafter "*Law and the Market*").

[4] The FSA is scheduled to be replaced by the Financial Policy Committee within the Bank of England (responsible for guarding against excessive risk), the Prudential Regulations Authority (responsible for regulating financial institutions), and a new Consumer Protection and Markets Authority.

[5] These rules are found principally in the French Commercial Code, http://tinyurl.com/ykex96r, the French Monetary and Financial Code, http://tinyurl.com/yjq3v5o, and in Book II of the General Regulation of the AMF, http://tinyurl.com/yfzhehr.

[6] These rules implement the January 28, 2003 European Directive n° 2003/6/EC of the European Parliament and Council on insider trading and market manipulation, http://tinyurl.com/3643nqb.

[7] *See* General Regulation of the AMF, supra note 5, Book VI, Arts. 611-1 *et seq.*, http://tinyurl.com/yzro3v5.

[8] *See* French Monetary and Financial Code, supra note 5, Arts. L465-1 *et seq.* (authorizing up to 2-years imprisonment and 1,500,000 euros fine or ten times the amount of the realized profit; the fine cannot be less than the realized profit); *id.* Art. L621-15 (authorizing up to 10,000,000 euros fine or ten times the amount of the realized profit).

[9] International Monetary Fund ("IMF"), *France: Financial Sector Assessment Program*, IMF Country Report No. 05/186, at 157 (2005) (hereinafter "IMF, French Report"), http://tinyurl.com/4m8n6re.

[10] *See* Eddy O. Wymeersch, *The Structure of Financial Supervision in Europe: About Single, Twin Peaks and Multiple Financial Supervisors* 42 (working paper, 2006), http://tinyurl.com/4cmtfh5.

[11] *See* Swiss Diplomatic Note No. 17/2010, at 2a-3a, Brief of the International Chamber of Commerce et al. as Amici Curiae in Support of Respondents (appendix), *Morrison*, 130 S. Ct. at 2869 (No. 08-1191), 2010 WL 719334. *See also* Swiss Penal Code Arts. 146, 161 1., 161 bis 1., http://tinyurl.com/4sl479f.

[12] *See* Swiss Diplomatic Note No. 17/2010, supra note 11, at 2a.

[13] *See id.* at 2a-3a; *see also* FINMA, Enforcement/Market Supervision, http://tinyurl.com/yhztkny (last visited Feb. 17, 2011).

[14] *See* Financial Services and Markets Act ("FSMA"), 2000, c. 8 (Eng.) (as amended 2006), http://tinyurl.com/39mmv5f.

[15] *See id.* Pt. VI, § 91; Pt. VIII; Pt. XXVII, § 397; Pt. XIV; Pt. XXV, §§ 380-384.

[16] PriceWaterhouseCoopers LLP, *2008 Securities Litigation Study* 54 (Apr. 1, 2009), http://tinyurl.com/cwxrv9.

[17] *See* WpHG, http://tinyurl.com/47wg5e2.

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[18] *See, e.g.*, Bundesanstalt für Finanzdienstleistungsaufsicht ("BaFin"), Annual Report 2009, at 174-81 (Jan. 25, 2011), http://tinyurl.com/4jthqvz (describing recent prosecution of insider trading and market manipulation).
[19] *See* WpHG, *supra* note 17.
[20] BaFin, Annual Report 2009, *supra* note 19, at 177.
[21] *See* FSMA, *supra* note 14, Pt. VI, § 90A.
[22] *See* Swiss Diplomatic Note No. 17/2010, *supra* note 11, at 3a; *see also* Swiss Code of Obligations Art. 41 ¶ 2, *reprinted in* Robert Briner, *Insider Trading in Switzerland*, 10 Int'l Bus. L. 348 (1982), http://tinyurl.com/yzvq9ss.
[23] *See* Kapitalanleger-Musterverfahrensgesetz ("KapMuG") [Act on Streamlined Procedure for Investor Suits] (Aug. 16, 2005), http://tinyurl.com/479344h.
[24] *See* French Civil Code Arts. 1382 (fault), 1383 (negligence) and 1384 (supervisory responsibility), http://tinyurl.com/4zlwwjz.
[25] *See* Coffee, *Law and the Market, supra* note 3, at 266-67.
[26] Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 Colum. J. Transnat'l L. 14, 60 (2007).
[27] Thomas D. Rowe, Jr., *Debates Over Group Litigation in Comparative Perspective: What Can We Learn From Each Other?*, 11 Duke J. Comp. & Int'l L. 157, 157-58 (2001); *see also, e.g.*, Coffee, *Law and the Market*, *supra* note 3, at 266 ("Class actions remain rare to unknown in Europe[.]").
[28] Ilana T. Buschkin, *The Viability of Class Action Lawsuits in a Globalized Economy—Permitting Foreign Claimants to be Members of Class Action Lawsuits in the U.S. Federal Courts*, 90 Cornell L. Rev. 1563, 1597 (2005).
[29] Buxbaum, *supra* note 26, at 63.
[30] French Monetary and Financial Code, supra note 5, Art. L452-2.
[31] *See* Leslie Schulman, *France Parliament Puts Off Class Actions Legislation Debate*, Jurist, Feb. 1, 2007, http://tinyurl.com/4c5gw6d.
[32] *See* KapMuG, *supra* note 23.
[33] *See* Luke Green, *German Securities Class Actions: Status Quo Prevails*, RiskMetrics Group (Nov. 5, 2010), http://tinyurl.com/4femkdo.
[34] *See id.*
[35] *See* Fin. Times Deutschland Report, Dec. 16, 2010, http://www.ftd.de/finanzen/maerkte/:portfolio-t-aktie-wird-zum-fall-fuer-den-bgh/50205975.html (Ger.).
[36] Samuel P. Baumgartner, *Class Actions & Group Litigation in Switzerland*, 27 Nw. J. Int'l L. & Bus. 301, 303 (2007).
[37] *See* Denis Waelbroeck et al., Executive Summary, *Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules—Comparative Report*, at 61-64 (Ashurst, Aug. 31, 2004) ("Ashurst Report"), http://tinyurl.com/yb3pfvu.
[38] *Id.*
[39] *Id.*
[40] *See* Buxbaum, *supra* note 26, at 63; Coffee, *Law and the Market, supra* note 3, at 267.
[41] 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, 289 (2005).
[42] Dietmar Baetge, *Class Actions, Group Litigation & Other Forms of Collective Litigation (Germany)* 27 (2007), http://tinyurl.com/4cruarq.
[43] *See* Hein Kotz, *Civil Justice Systems in Europe and the United States*, 13 Duke J. Comp. & Int'l L. 61 (2003).
[44] *See id.* at 73.
[45] *See, e.g.*, Marco G. Carbonare et al., *Liability and Due Diligence in Connection with Equity Securities Offerings: An overview of U.S., Swiss, and German Law*, GesKR 2/2008, 129 n.62 ("no rebuttable presumption in favour of the existence of transactions causation exists" under French law), http://tinyurl.com/ylaq775; Judgment of the Bundesgerichtshof (the German Federal Supreme Court), dated 28 November 2005—II ZR 80/04 (rejecting fraud-on-the-market theory under German law).

[46] The UK does not have a judicially created FOTM theory, but a similar principle exists by statute for disclosures in prospectuses. *See* Paul Davies, *Liability for Misstatements to the Market* ¶ 27 (Mar. 2007), http://tinyurl.com/6gq4tjk.
[47] *See* Eilis Ferran, *Are U.S.-Style Investor Suits Coming to the UK?*, J. of Corp. L. Studies (Oct. 2009), http://tinyurl.com/4kvmgg3.
[48] Kathleen L. Casey, Comm'r, SEC, Address at Instituto Bruno Leoni, *The Role of International Regulatory Cooperation and Coordination in Promoting Efficient Capital Markets* (June 12, 2010), http://tinyurl.com/4mnrasm.
[49] Christopher Cox, Chairman, SEC, Address to the American Institute of Certified Public Accountants' International Issues Conference: *International Business—An SEC Perspective* (Jan. 10, 2008), http://tinyurl.com/4jfxa4k.
[50] Michael D. Mann et al., *Developments in the Internationalization of Securities Enforcement*, 1743 PLI/Corp. 789, 793 (2009).
[51] *See* SEC, Office of International Affairs*: Cooperative Arrangements with Foreign Regulators*, http://tinyurl.com/4kekwak (last visited Feb. 17, 2011).
[52] *See* SEC, *SEC Speaks in 2010*, 1784 PLI/Corp. 519, 542-44 (2010).
[53] *See* Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 Yale J. Int'l L. 113, 145 n.130 (2009).
[54] *See* SEC, *SEC Speaks*, *supra* note 52, at 544-45.
[55] Mann, *supra* note 50, at 794.
[56] *See* Alan Ahearne et al., *Information Costs and Home Bias: An Analysis of U.S. Holdings of Foreign Equities*, Fed. Reserve Board, Int'l Fin. Discussion Paper No. 691, at 11 (May 2001), http://tinyurl.com/6b4kjee.
[57] Howell E. Jackson, *A System of Selective Substitute Compliance*, 48 Harv. J. Int'l L. 105, 108 (2007).
[58] *See* V. Kyrychenko & P. Shum, *Who holds foreign stocks and bonds? Characteristics of active investors in foreign securities*, 18 Fin. Services Review 1, 6-8 (2009). The study also found that practically all foreign bond holders in the sample fell under the study's definition of "sophisticated investors," with only 3 to 5 percent of bondholders owning foreign bonds.
[59] Warren Bailey et al., *Foreign Investments of U.S. Individual Investors: Causes and Consequences* 22 (working paper Apr. 2007), http://tinyurl.com/464txef (published in Management Science 54 (2008)).
[60] Howell E. Jackson et al., *Foreign Trading Screens in the United States*, 1 Capital Markets L.J. 54, 71 (2006).
[61] *See id.* at 71-74.
[62] Stephen J. Choi & Andrew T. Guzman, *The Dangerous Extraterritoriality of American Securities Law*, 17 Nw. J. Int'l L. & Bus. 207, 208 (1996).
[63] *Morrison*, 130 S. Ct. at 2885.
[64] Green Paper on Consumer Collective Redress - Questions and Answers, Memo/08/741, at 4 (Nov. 27, 2008), http://tinyurl.com/4nkqry3.
[65] Opinion of the European Economic and Social Committee on Defining the Collective Actions System and its Role in the Context of Community Consumer Law, 2008/C 162/01 , ¶ 1.6, http://tinyurl.com/4hazqmn.
[66] Restatement (Third) of Foreign Relations Law of the U.S., § 442, reporters' note 11.
[67] *See The International Comparative Legal Guide to: Class and Group Actions 2010*, at 15, CLG Global Legal Group (2010), http://tinyurl.com/4fldf4w.
[68] *See In re Vivendi Universal, S.A. Sec. Litig.*, No. 02 Civ. 5571, 2009 WL 855799, at *5 (S.D.N.Y. 2009) (observing that two working groups appointed by the French government had recently concluded that any class action procedure in France should be "opt in," and had raised doubts about the permissibility of an "opt out" procedure under the French Constitution); *see also In re Alstom SA Sec. Litig.*, 253 F.R.D. 266, 287 (S.D.N.Y. 2008) (observing that "recent legal developments demonstrate that French authorities have repeatedly rejected the adoption of an opt-out class action system in France because that type of system violates French constitutional principles and public policy").
[69] Brief for the Republic of France as Amicus Curiae in Support of Respondents, at 29, *Morrison*, 130 S. Ct. 2869 (No. 08-1191), 2010 WL 723010.
[70] Swiss Message to Parliament on the Federal Code of Civil Procedure (June 28, 2006), BBI 2006-7221, at 7290, http://tinyurl.com/6fkf9nw (Ger.).

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[71] France Amicus Br., *supra* note 69, at 25-26.
[72] *Id.* at 22.
[73] *Id.* at 24.
[74] Brief of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Respondents at 15-16, *Morrison*, 130 S. Ct. 2869 (No. 08-1191), 2010 WL 723009.
[75] *See* Swiss Diplomatic Note No. 17/2010, *supra* note 11, at 2a-3a.
[76] *See, e.g., In re Alstom*, 253 F.R.D. at 282-87 (holding that French courts probably would not recognize a judgment in a U.S. opt-out class action).
[77] *See* Steven J. Choi & Linda Silberman, *Transnational Litigation and Global Securities Class Actions*, 2009 Wis. L. Rev. 465, 480 (an opt-out class action's "'binding effect' is not known or generally accepted by many countries, supporting the argument that the judgment will not have any preclusive effect outside the United States."); Buxbaum, *supra* note 26, at 32 ("It is therefore possible that courts in one or more foreign systems would refuse to recognize a U.S. class action settlement or judgment, creating the risk that a defendant would face further litigation in a country in which transactions in its securities had taken place."); *see, e.g.*, *In re U. S. Fin. Sec. Litig.*, 69 F.R.D. 24, 48 (S.D. Cal. 1975) (describing affidavits submitted by foreign lawyers explaining that "a class member [in a U.S. action] who had taken neither affirmative action, such as 'opting-in,' nor affirmative participation, such as joining with other plaintiffs in the prosecution of an action against a defendant, probably would not be bound in their countries by any adverse judgment in the United States").
[78] *See* Buxbaum, *supra* note 26, at 61.
[79] *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 996-97 (2d Cir. 1975).
[80] *See* Zivilprozessordnung [ZPO] [civil procedure statute] Art. 32b (F.R.G.).
[81] *See, e.g.,* EU Directive 95/46/EC, http://tinyurl.com/4j6ophp (setting forth general principles on data privacy throughout European Commission and the European Economic Area); French Blocking Statute, N° 80-538 of July 16, 1980; Swiss Banking Act Art. 47 (financial privacy).
[82] John C. Coffee, *Foreign Issuers Fear Global Class Actions*, Nat'l L. J., June 14, 2007 (hereinafter "*Global Class Actions*") (Judge Friendly's rationale for extraterritorial enforcement of the U.S. securities laws—that "a good neighbor does not allow fraudulent schemes to be perpetrated within its borders, even though directed against individuals in a neighboring jurisdiction"—"works much better as a justification for public enforcement than for private enforcement").
[83] *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004).
[84] *See* Buxbaum, *supra* note 26, at 61 (observing that "the central concerns addressed by anti-fraud rules may be the same across systems").
[85] IMF, *French Report*, *supra* note 9, at 193.
[86] IMF, *Germany: Financial System Stability Assessment*, IMF Country Report No. 03/343, at 41 (2003) http://tinyurl.com/4bkws3m.
[87] Howell E. Jackson, *The Impact of Enforcement: A Reflection*, 156 U. Pa. L. Rev. PENNumbra 400, 410-11 (2008).
[88] *See Elliott Assocs. v. Porsche Automobil Holding SE*, No. 10 Civ. 0532, 2010 WL 5463846 (S.D.N.Y. Dec. 30, 2010).
[89] Letter from Dr. Oliver Schnakenberg, Acting Consul General of the Federal Republic of Germany, to the Honorable Harold Baer, Jr., United States District Judge, United States District Court for the Southern District of New York (Aug. 23, 2010), *attached as* Ex. 38 to Declaration of Goldolfo v. DiBlasi in Support *re:* Motion to Dismiss, Porsche Automobile Holding SE, *Elliott Assocs.*, 2010 WL 5463846 (entered Oct. 26, 2010, dkt no. 45).
[90] *See* Frank Dohmen & Dietmar Hawranek, *Porsche's Poker: Turning the Car Business into a Casino*, Spiegel Online Int'l, Nov. 24, 2010, http://tinyurl.com/37qxq8t.
[91] No. 09 Civ. 7058, 2010 WL 3291579, at *4-*5 (S.D.N.Y. Aug. 16, 2010).
[92] *Id.* at *3.
[93] No. 09-md-02073, 2010 WL 3036990, at *5-*6 (S.D. Fla. July 30, 2010) (Huck, J.).
[94] Thomas Catan, *Switzerland Investigates Santander*, Wall St. J., June 19, 2009.
[95] Charles Penty & Esteban Duarte, *Santander's Madoff Sales Mean "Catastrophe" for Teacher, Vendor*, Bloomberg, Jan. 20, 2009.

[96] No. 09 Civ. 300, 2011 WL 167749 (S.D.N.Y. Jan. 11, 2011).
[97] *RBS: FSA to Publish Limited Report Into Failings*, BBC News, Dec. 15, 2010.
[98] *See generally* Laura E. Simmons & Ellen M. Ryan, Cornerstone Research, *Securities Class Action Settlements: 2009 Review and Analysis* (2010), http://tinyurl.com/4h29v8h.
[99] *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008).
[100] Committee on Capital Markets Regulation, *Interim Report* 74 (Nov. 2006), http://tinyurl.com/35gayn.
[101] Dodd-Frank Act, § 929P(b).
[102] Rochelle C. Dreyfuss & Jane C. Ginsburg, *Draft Convention on Jurisdiction and Recognition of Judgments in Intellectual Property Matters*, 77 Chi.-Kent L. Rev. 1065, 1117 (2002).
[103] *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 169 (2004).
[104] *Cf. id.* at 168 (noting concern that "a decision permitting independently injured foreign plaintiffs to pursue private treble-damages remedies [extraterritorially] would undermine foreign antitrust enforcement policies by diminishing foreign firms' incentive to cooperate with antitrust authorities in return for prosecutorial amnesty").
[105] Michael R. Bloomberg & Charles E. Schumer, *Sustaining New York's and the US' Global Financial Services Leadership* 73 (Dec. 2006) (emphasis added), http://tinyurl.com/yf3uu6o.
[106] *Stoneridge Inv. Partners*, 552 U.S. at 164 (noting that adoption of scheme liability theory could deter "[o]verseas firms with no other exposure to our securities laws" than contracting with U.S. companies from doing business [in the United States]").
[107] 54 F.3d 118, 122-23 (2d Cir. 1995).
[108] *See In re Alstom Sec. Litig.*, No. 03-cv-6595, 2010 WL 3718863, at *3 (S.D.N.Y. Sept. 14, 2010) (Marrero, J.); *Royal Bank of Scotland*, 2011 WL 167749, at *7.
[109] *See* John C. Coffee, Jr., *Securities Policeman to the World?: The Cost of Global Class Actions,* N.Y.L.J., Sept. 18, 2008 (noting that in such instances "the issuer may face a multi-billion dollar class action that can threaten its solvency"); *see also In re Royal Ahold N.V. Sec. & ERISA Litig.*, 351 F. Supp. 2d 334, 362 (D. Md. 2004) (citing *Itoba* and relying in part on foreign company's SEC filings to permit Section 10(b) claims of non-U.S. investors who purchased company's stock on foreign exchanges).
[110] *See, e.g.*, Howell E. Jackson, *Summary of Research Findings on Extra-Territorial Application of Federal Securities Law*, 1743 PLI/ Corp. 1243, 1254 (2009).
[111] *Morrison*, 130 S. Ct. at 2878.
[112] Bloomberg & Schumer, *supra* note 105, at 73-78; *see also Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1193 (2010) ("Predictability is valuable to corporations making business and investment decisions.").
[113] *See Empagran*, 542 U.S. at 167 (noting that "even where nations agree about primary conduct, . . . they disagree dramatically about appropriate remedies").
[114] 130 S. Ct. at 2885.
[115] *Evaluating S. 1551: The Liability for Aiding and Abetting Securities Violations Act of 2009: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong., at 3 (Sept. 17, 2009), http://tinyurl.com/4thqkpv (statement of Adam C. Pritchard, Professor, University of Michigan Law School).
[116] *See, e.g.*, *id.*; John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 Colum. L. Rev. 1534 (2006).
[117] *See* Buxbaum, *supra* note 26, at 61.
[118] Laurel J. Harbour & Marc E. Shelley, *The Emerging European Class Action: Expanding Multi-Party Litigation to a Shrinking World* 23 (ABA Annual Meeting 2006), http://tinyurl.com/46kttwg.
[119] Buxbaum, *supra* note 26, at 63.
[120] *See id.*; *see also* Grace, *supra* note 41, at 284-88.
[121] *Morrison*, 130 S. Ct. at 2878.
[122] *See* SEC, *Report on Investment Counsel, Investment Management, Investment Supervisory, and Investment Advisory Services* 1-2 (1939) (H.R. Doc. No. 477); *see also* 15 U.S.C. 79z-4 (mandating study).
[123] *See* SEC, *Final Rule, Certain Broker-Dealers Deemed Not to Be Investment Advisers*, 70 Fed. Reg. 20,424, 20,435 (2005).
[124] Press Release, SEC, "SEC Awards Contract for Study to Compare Roles of Investment Advisers, Broker-Dealers," 2006-162, http://tinyurl.com/6crbd2h.

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[125] *See* Tara Siegel Bernard, *Struggling over a Rule for Brokers*, N.Y. Times, Feb. 15, 2010.
[126] SEC, *Study on Investment Advisers and Broker-Dealers* (Jan. 2011), http://tinyurl.com/4sopash.
[127] *See Sarbanes-Oxley Section 404: New Evidence on the Cost for Small Companies: Hearing Before H. Comm. On Small Business*, 110th Cong. (Dec. 12, 2007) (statement of Christopher Cox, Chairman, SEC), http://tinyurl.com/4f95f35.
[128] See SEC, *Study of the Sarbanes-Oxley Act of 2002 Section 404 Internal Control over Financial Reporting Requirements* (Sept. 2009), http://tinyurl.com/yglqpey.
[129] *Id.*
[130] Exchange Act Release No. 54891 (Dec. 7, 2006).
[131] *See* Exchange Act Release No. 55970 (June 28, 2007); *see also* Release No. 54891.

Appendix: Comparison of U.S. and major European securities enforcement regimes					
	US	**UK**	**Switzerland**	**Germany**	**France**
Primary anti-securities fraud regulator responsible for combating securities fraud	SEC	FSA	Finma	BaFin	AMF
Insider trading, market manipulation and false and misleading information prohibited	Yes	Yes	Yes	Yes	Yes
Regulator routinely cooperates with regulators in other countries for cross-border investigations of securities fraud	Yes	Yes	Yes	Yes	Yes
Regulator may bring criminal prosecution or bring criminal actions itself. Or, if regulator may not bring criminal actions, it may refer securities fraud to criminal prosecutors.	Yes	Yes	Yes	Yes	Yes
Regulator may impose administrative penalties for securities fraud	Yes	Yes	Yes	Yes	Yes
Individuals injured by securities fraud may receive compensation from the regulator, (e.g., via restitution orders, distribution of disgorged funds) or through a process facilitated by the regulator (e.g., Ombudsman, government mediation).	Yes	Yes	Yes	No	Yes
Individuals injured by securities fraud may bring private cause of action to recover for securities fraud	Yes	Yes	Yes	Yes	Yes
Individuals injured by securities fraud may bring certain forms of collective action (e.g., opt-in class actions, model actions, actions through investor organizations)	Yes	Yes	Yes	Yes	Yes
Private cause of action for securities fraud may be organized as an opt-out class action	Yes	No	No	No	No
As a general rule, each party bears its own costs (no "loser pays" rule)	Yes	No	No	No	No
Private cause of action allows payment of attorneys on contingency fee basis	Yes	No	No	No	No
Private cause of action allows "fraud on the market" theory of reliance	Yes	No	No	No	No
Private causes of action for securities fraud may be resolved by a jury	Yes	No	No	No	No
Will or may decline to recognize U.S. class action judgments concerning securities fraud related to shares issued domestically	No	Yes	Yes	Yes	Yes