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The SEC and Foreign Private Issuers: A Path to Optimal Public Enforcement

Yuliya Guseva
Rutgers Law School, yg235@law.rutgers.edu

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YULIYA GUSEVA*

Abstract: This Article examines SEC enforcement policies and seeks to find the optimum approach to enforcement against foreign private issuers. My previous empirical study of securities class actions against foreign firms identified a number of crucial developments that mainly occurred after *Morrison v. National Australia Bank.* In *Morrison*, the Supreme Court sought to limit the extraterritorial reach of the antifraud provisions of the U.S. securities laws. The Court has scaled down the exposure of foreign issuers to securities liability risk, particularly in class-action litigation. If the Supreme Court in *Morrison* has created a risky enforcement lacuna on the side of private class actions against foreign corporations, how should the SEC adjust its enforcement strategy? To answer this question, this Article presents an empirical survey of SEC enforcement actions against foreign issuers between 2005 and 2016. The results suggest that the SEC consistently pursues a lenient enforcement approach in this area. This low-key policy is the Commission's dominant strategy. The Article also discusses post-*Morrison* doctrinal developments, market trends, and red flags potentially indicative of an increased risk of fraud. Alt-

* Associate Professor of Law, Rutgers Law School, yguseva@kinoy.rutgers.edu. The author is grateful to Hannah Buxbaum; Eric C. Chaffee; Douglas Eakeley; Martin Gelter; Roberta Karmel; Arthur Laby; John Leubsdorf; Michael P. Malloy; David Rosenfeld; and the participants of the Annual Meeting of the American Law and Economics Association, Boston University School of Law, May 10–11, 2018; the Rutgers Law School Faculty Colloquium, March 22, 2018; the AALS Annual Meeting, Session "Emerging Voices in Securities Regulation" and Session "Crossing Borders," Conflicts of Laws Section, January 4, 2018; the 7th Annual ASIL Research Forum, Washington University School of Law, October 27–28, 2017; the 5th Annual Workshop for Corporate and Securities Litigation, UCLA School of Law, October 20–21, 2017; the 34th Annual Conference of the European Association of Law and Economics, University of Liverpool, UK, September 14–16, 2017; the 2017 National Business Law Scholars Conference, University of Utah, S.J. Quinney College of Law, June 8–9, 2017; the 4th International Workshop on Economic Analysis of Litigation, CNRS & Universite Paris Nanterre, June 22–23, 2017, for their comments and suggestions. The author thanks John J. Deluca, Brencis Navia, and JaeYoung Song for their research assistance. The author would like to thank the Securities Enforcement Empirical Database (SEED) of the NYU Pollack Center for Law and Business, which provided some data for this research. The views expressed in this Article are the views of the author and do not represent the views of the SEED. The empirical survey was prepared with the generous support of the Shuchman Fund for Empirical Research.

hough the traditional low-key enforcement policy may attract some foreign "lemons" in the post-*Morrison* environment, the SEC should not depart from its dominant strategy and engage in more enforcement actions. Instead, the warning signs identified in this paper call for better preventive monitoring. The Article suggests a number of low-cost fraud prevention policies, including promoting cooperation with foreign firms, using new data analysis programs, and galvanizing market "gatekeepers." Through implementing the mechanisms suggested in this Article, the SEC may reach a more efficient level of deterrence without ramping up enforcement and increasing the costs of foreign firms seeking to access American capital markets.

INTRODUCTION

As capital markets grow progressively more international, private firms face increasingly complex decisions regarding their strategies for raising capital in various jurisdictions. In this new world, the invisible hand of the market, the efficient market hypothesis,[1] or the spontaneous order[2] resulting from decisions of investors and corporations operate as loose proxies for cross-border listings. Issuing securities and raising capital in a jurisdiction outside a state of domicile is no longer solely a business decision; it has become primarily a legal decision. When doing a probabilistic risk assessment, international corporations must consider regulatory risks, projected compliance costs, the risk of enforcement, and the corresponding changes in enforcement policies in light of the evolution of jurisprudence and statutory reforms. In the United States, foreign firms' decisions largely depend on the interplay between the Securities and Exchange Commission (SEC or Commission), the American watchdog of securities markets, and United States courts.

The Supreme Court, unquestionably one of the leading global policy setters, has already acknowledged the new economic realities of international markets, as Justice Breyer emphasized in *The Court and the World*.[3] It appears that the SEC, for its part, has also been responsive to globalization. In the past fifteen years, the Commission has engaged in a series of regulatory reforms and has introduced extensive international cooperation programs with foreign regulators.[4] The Commission also serves as an international standard-setter, a member of the Steering Committee of the Finan-

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[1] *See generally* Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398 (2014) (discussing the efficient capital market hypothesis).

[2] F.A. HAYEK, STUDIES IN PHILOSOPHY, POLITICS AND ECONOMICS 97 (1969).

[3] *See* STEPHEN BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES 119–24 (2015).

[4] *See infra* notes 95, 174–177.

cial Stability Board, and a longstanding member of the International Organization of Securities Commissions (IOSCO).[5]

More important from the perspective of American markets and investors is the reality that at home the SEC is overseeing the largest financial market in the world. About a thousand foreign corporations that are registered with the SEC and have access to U.S. investors represent a significant part of this market.[6] The Commission sets the rules for their corporate reporting and enforces those rules to protect investors and ensure market efficiency and integrity.[7] The ascendant enforcement philosophy and the nuances of prosecutorial actions in response to statutory and case law developments become the variables at the forefront of international listings.

The breathtaking pace of international markets after the financial crisis of 2007–2008 demands that the Commission continuously recalibrate its regulations and enforcement. In the words of former Chair Mary Jo White, "[t]he SEC needs to find its precisely right place in that global market."[8] This Article examines what that right place should be in the enforcement of the securities laws against foreign corporations and how the Commission should respond to *Morrison v. National Australia Bank*, a crucial Supreme Court decision that has reduced the exposure of international corporations to the risk of investor class-action litigation in the United States.[9]

This topic is increasingly well-timed and touches upon the ongoing political "battles," spanning what one can tentatively dub "regulation and enforcement versus deregulation, laissez faire, and limited extraterritoriality." To give a few examples, in March 2017, a federal district court explicated a previously murky provision of the Dodd-Frank Act[10] regarding the ability of the SEC to rely on a broad, essentially pre-*Morrison* interpretation of the extraterritorial reach of securities law in enforcement actions.[11] The deci-

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[5] *See Homepage*, INT'L ORG. SEC. COMMISSIONS, https://www.iosco.org [https://perma.cc/4E72-GF5Z]; *Members of the Steering Committee*, FIN. STABILITY BOARD, http://www.fsb.org/about/organisation-and-governance/members-of-the-steering-committee/ [https://perma.cc/F9B2-U247].

[6] *International Registered and Reporting Companies*, SEC, https://www.sec.gov/divisions/corpfin/internatl/companies.shtml [https://perma.cc/S7ZN-AXQL].

[7] 15 U.S.C. § 78c(f) (2012).

[8] CTR. FOR STRATEGIC & INT'L STUDIES, THE FUTURE OF THE SECURITIES AND EXCHANGE COMMISSION IN A CHANGING WORLD 19 (2015), https://americanassembly.org/sites/default/files/download/events/the_future_of_the_sec_in_a_changing_world.pdf [https://perma.cc/SZV2-EY4Q].

[9] *See* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 270–73 (2010).

[10] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, § 929P, 124 Stat. 1376, 1864 (codified in sections of 7 U.S.C., 12 U.S.C., and 15 U.S.C. (2015)).

[11] SEC v. Traffic Monsoon, LLC, 245 F. Supp. 3d 1275, 1291 (D. Utah 2017) ("The fact that the Supreme Court issued *Morrison* on the last day that the conference committee met to negotiate a reconciliation between the House and Senate bills, and five days before the final version of the

sion was in favor of the Commission. As of the time of this writing, the appeal was pending in the U.S. Court of Appeals for the Tenth Circuit. In their Reply Brief, the appellants claimed, *inter alia*, that "the District Court engaged in both the application of overruled case law and the examination of outside legislative intent of the unambiguous statute."[12]

On June 5, 2017, Justice Sotomayor delivered a unanimous opinion of the Court in *Kokesh v. SEC.*[13] The Court overruled the formerly ingrained position that disgorgement—a typical remedy sought by the SEC in district courts and in administrative proceedings—is an equitable remedy. The Supreme Court held that SEC disgorgement was a penalty and, hence, was subject to the five-year statute of limitations.[14] *Kokesh* may have wide-ranging ramifications for complex investigations, including enforcement actions involving cooperation with foreign regulators and international enforcement requests.[15] If the SEC shuns foreign investigations that appear time-consuming, the exposure of international corporations to liability risk in the United States may drop.[16]

Consider also that the Commissioners approve SEC enforcement actions and that President Trump's Administration has nominated new Commissioners whose conservative bona fides are beyond question.[17] Furthermore, reports on SEC enforcement and some preliminary data on enforce-

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bill was published, does not convincingly demonstrate that Congress had changed its mind about codifying the conduct and effects test.").

[12] Appellants' Reply Brief at 11, SEC v. Traffic Monsoon, LLC, No. 17-4059, 2017 WL 5989247 (10th Cir. Nov. 27, 2017).

[13] 137 S. Ct. 1635, 1639 (2017).

[14] *Id.* at 1644–45.

[15] For the consequences of *Kokesh*, see generally *Reflections on* Kokesh v. SEC: *Potential Ramifications of SEC Disgorgement Being a Penalty*, KING & SPALDING CLIENT ALERT: SPECIAL MATTERS & GOVERNMENT INVESTIGATIONS PRACTICE GROUP (June 14, 2017), https://s3.amazonaws.com/kslaw-staging/attachments/000/004/567/original/ca061417.pdf?1498139481 [https://perma.cc/4H5Y-GN75].

[16] There is, of course, some evidence that international enforcement cooperation is improving, which should reduce the SEC's costs as enforcement actions proceed in other jurisdictions. *See, e.g.*, Roger Silvers, The Effects of Cross-Border Cooperation on Enforcement and Earnings Attributes 10–11 (Oct. 4, 2017) (unpublished manuscript), https://ssrn.com/abstract=3047913 [hereinafter The Effects of Cross-Border Cooperation]; Roger Silvers, The Influence of Cross-Border Cooperation on Market Quality 5–6 (Nov. 19, 2017) (unpublished manuscript), https://ssrn.com/abstract=3073831 [hereinafter The Influence of Cross-Border Cooperation]; Steven R. Peikin, *Reflections on the Past, Present, and Future of the SEC's Enforcement of the Foreign Corrupt Practices Act*, PROGRAM ON CORP. COMPLIANCE & ENFORCEMENT (Nov. 9, 2017), https://wp.nyu.edu/compliance_enforcement/2017/11/10/reflections-on-the-past-present-and-future-of-the-secs-enforcement-of-the-foreign-corrupt-practices-act/ [https://perma.cc/462V-VDYM].

[17] *See, e.g.*, Dave Michaels, *White House to Nominate Hester Peirce as Republican SEC Commissioner*, WALL ST. J. (July 18, 2017), https://www.wsj.com/articles/white-house-to-nominate-hester-peirce-as-republican-sec-commissioner-1500417225 [https://perma.cc/HB2M-34QQ].

ment actions under the Foreign Corrupt Practices Act ("FCPA") indicate that there is a temporal association between the changes in the Administration and the decline in SEC enforcement in 2017.[18]

At the same time, other recent reports suggest that despite a decrease in the number of standalone cases, the overall intensity of SEC enforcement in 2016 and 2017 was fairly comparable.[19] In addition, Chairman Clayton in his testimony to Congress requested a staggering $1.602 billion for the Commission's 2018 budget and highlighted that the SEC's priorities are, *inter alia*, enforcement and technological support of enforcement.[20]

These conflicting policy signals and case law developments may be confusing to foreign corporations seeking to tap American capital markets. Will the SEC become more conservative in its enforcement policies? To what extent should we expect a complete departure from the "Broken Windows" philosophy, an enforcement approach championed by Chair White to signal that the SEC should target all violations, large and small?[21] Often, speeches by Chairman Clayton and other SEC officials either mention in passing or largely omit the international enforcement perspective.[22] The

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[18] *See* Stephen Choi & Mitu Gulati, *Trump v. Obama: U.S. SEC Anti-Corruption Enforcement Actions Scorecard*, PROGRAM ON CORP. COMPLIANCE & ENF'T (Oct. 9, 2017), https://wp.nyu.edu/compliance_enforcement/2017/10/09/trump-v-obama-u-s-sec-anti-corruption-enforcement-actions-scorecard/ [https://perma.cc/VUE3-Z62A]; Cornerstone Research & NYU Pollack Center for Law and Business, SEC Enforcement Activity: Public Companies and Subsidiaries, Midyear FY 2018 Update 1–2 (2018), http://www.law.nyu.edu/sites/default/files/upload_documents/SEC-Enforcement-Activity-1HFY2018-Update_0.pdf [https://perma.cc/LBF8-H53J] (reporting a general decrease in enforcement against public companies).

[19] *See* Urska Velikonja, Behind the Annual SEC Enforcement Report: 2017 and Beyond 1–2 (Nov. 19, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3074073 [https://perma.cc/AV6W-6TTQ].

[20] Jay Clayton, SEC Chairman, Testimony on the Fiscal Year 2018 Budget Request (June 27, 2017), https://www.sec.gov/news/testimony/testimony-fiscal-year-2018-budget-request [https://perma.cc/YXD6-VRAX].

[21] "[T]he Broken Windows policy presumes that aggressive action against infractions of all sizes . . . sends a broad message that deters others from violating the law." CTR. FOR CAPITAL MKTS. COMPETITIVENESS, EXAMINING U.S. SECURITIES AND EXCHANGE COMMISSION ENFORCEMENT: RECOMMENDATIONS ON CURRENT PROCESSES AND PRACTICES 5 (2015), https://www.centerforcapitalmarkets.com/wp-content/uploads/2015/07/021882_SEC_Reform_FIN1.pdf [https://perma.cc/A9RX-8NV7]; *see* Mary Jo White, Former SEC Chair, Remarks at the Securities Enforcement Forum (Oct. 9, 2013), https://www.sec.gov/news/speech/spch100913mjw [https://perma.cc/E9JD-77V9] (discussing the Broken Windows approach and observing that "[the] theory can be applied to our securities markets—minor violations that are overlooked or ignored can feed bigger ones, and, perhaps more importantly, can foster a culture where laws are increasingly treated as toothless guidelines").

[22] *See, e.g.,* Stephanie Avakian, Co-Director, SEC Enforcement Division, The SEC Enforcement Division's Initiatives Regarding Retail Investor Protection and Cybersecurity (Oct. 26, 2017), https://www.sec.gov/news/speech/speech-avakian-2017-10-26 [https://perma.cc/6W7V-XS5N]; Jay Clayton, SEC Chair, Governance and Transparency at the Commission and in Our Markets, Remarks at the PLI 49th Annual Institute on Securities Regulation (Nov. 8, 2017), https://www.sec.gov/news/

question of finding an optimal approach to foreign issuer enforcement remains open.

This Article seeks to shed light on these policy questions by focusing on the following theoretical inquiries. The first inquiry is whether the SEC needs to take into account the recent changes in the judicial interpretation of the extraterritorial provisions of U.S. law *and* the developments in the class-action regime. In other words, how should the SEC respond to *Morrison* and its implications? If the Supreme Court in *Morrison* has created a risky enforcement lacuna on the side of private class actions against foreign corporations, should the SEC's response be necessary and inevitable? This question dovetails with and explains the second inquiry regarding an optimal policy approach to enforcement of the U.S. securities laws against international issuers.

By seeking to answer these questions, the Article contributes to the salient longstanding debate about the relative merits of public and private enforcement of securities law. Numerous researchers weighed in on whether public enforcement and class-action litigation are complements or substitutes;[23] whether the U.S. "multienforcer" system is redundant;[24] which prong, public or private, is associated with a healthy capital market;[25] and how a liability regime may deter foreign companies from listing on American exchanges.[26] This Article presents relevant doctrinal, socioeconomic, institutional, and empirical arguments. To my knowledge, this paper presents the first empirical survey of the recent changes in enforcement against foreign issuers.[27] The research will identify the dominant strategy for the

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speech/speech-clayton-2017-11-08 [https://perma.cc/SB9H-4QDU]; Jay Clayton, SEC Chair, Remarks at the Economic Club of New York (July 12, 2017), https://www.sec.gov/news/speech/remarks-economic-club-new-york [https://perma.cc/N6XG-Z832].

[23] *See infra* notes 42–86. For new empirical data and literature review, see Stephen Choi & Adam C. Pritchard, *SEC Investigations and Securities Class Actions: An Empirical Comparison*, 13 J. EMPIRICAL LEGAL STUD. 27, 27–29 (2016).

[24] *See generally* Zachary D. Clopton, *Redundant Public-Private Enforcement,* 69 VAND. L. REV. 285 (2016); Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1 (2000); James J. Park, *Rules, Principles, and the Competition to Enforce the Securities Laws*, 100 CALIF. L. REV. 115 (2012); Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 U. PA. L. REV. 2173 (2010).

[25] *See infra* notes 42–48.

[26] *See, e.g.*, John C. Coffee, Jr., *Law and the Market: The Impact of Enforcement*, 156 U. PA L. REV. 229, 302–04 (2007); Hal S. Scott & Leslie N. Silverman, *Stockholder Adoption of Mandatory Individual Arbitration for Stockholder Disputes*, 36 HARV. J.L. & PUB. POL'Y 1187, 1190, 1202–06 (2013).

[27] The research covers only foreign private issuers. The term is defined in Rule 405 of the Securities Act (17 C.F.R. § 230.405 (2018)) and Exchange Act Rule 3b-4 (17 C.F.R. § 240.3b-4

SEC and suggest several policy adjustments necessitated by the recent doctrinal and economic developments.

The paper proceeds in six parts. Part I delineates the contours of *Morrison* and summarizes theoretical arguments on enforcement and the role of the SEC. Part II examines the Commission's approach to enforcement against international corporations. Section C of Part II tracks enforcement actions against foreign firms five years before and five years after *Morrison*, between 2005 and 2016. The results suggest that enforcement remained relatively stable, with the exception of a continuous increase in minor actions for reporting violations throughout the research period.

Part III explains this low-key enforcement approach and suggests that it is rational and inevitable. Overall, it is the *dominant* strategy for the Commission. Part IV demonstrates, however, that the traditional enforcement philosophy may attract low-quality firms to American markets and raises a number of post-*Morrison* red flags associated with foreign listings and class action litigation. The remaining sections seek to reconcile the rationality of low-key enforcement with the realities and risks of post-*Morrison* cross-listings.

Part V reviews the doctrinal implications of *Morrison* and concludes that, if necessary, the SEC has the capacity to act aggressively against foreign issuers. At the same time, the doctrinal ambiguity created by *Morrison* should dampen the Commission's incentives to act and further support its institutional preference for low-key enforcement. Part VI suggests solutions to these dilemmas. It argues that although the SEC needs to act in response to the red flags identified in this paper, the Commission should not strengthen prosecution *qua* prosecution. Instead, the post-*Morrison* trends call upon the Commission to design better tools for *preventive* monitoring. By focusing on *low-cost preventive* monitoring, the SEC should be able to maintain a certain level of fraud deterrence without actually ramping up enforcement and increasing the costs of both the SEC and the international companies considering listing in the United States.

I. Theories of Efficient Enforcement: Class Actions and Public Enforcement Against Foreign Firms

In enforcement, the first-order line of analysis should focus on a bird's eye view on the social value, realities, and implications of having multiple enforcers such as the SEC and the plaintiffs' bar. The following discussion touches upon the pros and cons of private litigation and public enforcement,

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(2018)). The Article refers to foreign private issuers as "international companies," "international corporations," "foreign corporations," "foreign issuers," or "foreign firms."

their potential redundancy, and the possible efficiencies of this dual system, such as filling the gaps in enforcement where private plaintiffs are unlikely to pursue certain types of cases. What is the place of *Morrison* in this debate? Why should the SEC consider this decision in designing its enforcement policy against foreign firms?

A. Morrison *and Its Implications*

The Supreme Court in 2010, in *Morrison*, sought to limit the extraterritorial reach of the antifraud provisions of securities law and to rein in global class actions against international corporations. The decision has restricted the ability of private plaintiffs to bring actions against foreign companies under the key antifraud provisions of the U.S. securities laws, including Section 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder, as well as Sections 11 and 12(a)(2) of the Securities Act.[28] After *Morrison*, a foreign issuer no longer faces the same uncertainty and risk of investor class-action litigation in connection with its decision to enter U.S. capital markets.[29]

In the name of a faithful reading of the statute and of certainty, the majority in *Morrison* rejected the long-established "conduct test" and the "effects test" of a half a century of Second Circuit jurisprudence.[30] The Second Circuit's tests were laid out primarily by the legendary Judge Henry Friendly.[31] The old jurisdictional approach was painted with broad strokes. It guided courts to inquire if the significant culpable conduct took place in the United States and caused harm to investors, *viz.*, *all* investors, including in some cases foreign plaintiffs. This test was dubbed the "conduct test." Under the second test, the detrimental "substantial effect" of a defendant's activity upon U.S. investors or upon American markets and exchanges allowed federal courts to exercise jurisdiction over the actions.[32]

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[28] 15 U.S.C. § 77k (2012); *id.* § 77*l*(a)(2); *id.* § 78j(b); 17 C.F.R. § 240.10b-5.

[29] *See, e.g.*, Yuliya Guseva, *Extraterritoriality of Securities Law Redux: Litigation Five Years After* Morrison v. National Australia Bank, 2017 COLUM. BUS. L. REV. 199, 279.

[30] Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 274–82 (2010).

[31] *See generally* Merritt B. Fox, *Securities Class Actions Against Foreign Issuers*, 64 STAN. L. REV. 1173 (2012) (comparing the old tests with the new test).

[32] *See Morrison*, 561 U.S. at 257–58; SEC, STUDY ON THE CROSS-BORDER SCOPE OF THE PRIVATE RIGHT OF ACTION UNDER SECTION 10(B) OF THE SECURITIES EXCHANGE ACT OF 1934, at ii (2012), https://www.sec.gov/news/studies/2012/929y-study-cross-border-private-rights.pdf [https://perma.cc/CH9B-4FKG]. For an excellent overview of the case see Eric C. Chaffee, *The Supreme Court as Museum Curator: Securities Regulation and the Roberts Court,* 67 CASE W. RES. L. REV. 847, 857–59 (2017).

This "judicial oak [of Section 10(b)] which has grown from little more than a legislative acorn"[33] was mercilessly pruned by the late Justice Scalia. The Court observed, *inter alia*, that:

> The concurrence seemingly believes that the Courts of Appeals have carefully trimmed and sculpted this "judicial oak" into a cohesive canopy, under the watchful eye of Judge Henry Friendly, the "master arborist." Even if one thinks that the "conduct" and "effects" tests are numbered among Judge Friendly's many fine contributions to the law, his successors, though perhaps under the impression that they nurture the same mighty oak, are in reality tending each its own botanically distinct tree.[34]

The Court cogitated about its new approach along the lines of the leading academics' conclusions regarding the considerable uncertainty of the old tests and their inconsistent application.[35] The *Morrison* Court shifted the emphasis of an inquiry from the conduct of defendants or the effects of their actions to purchases and sales of securities.[36] For this reason, the new approach circumscribes the reach of Section 10(b) of the Exchange Act within the realm of "domestic" transactions and listed securities.[37]

An appurtenant motivation behind the decision was the global ramifications of unrestrained cross-border litigation implicating international capital markets and deterring foreign companies from listing on U.S. exchanges. Echoing academic commentators,[38] Justice Scalia quipped that "while there is no reason to believe that the United States has become the Barbary Coast for those perpetrating frauds on foreign securities markets,

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[33] Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975).

[34] *Morrison*, 561 U.S. at 259 n.4 (2010) (citations omitted).

[35] BREYER, *supra* note 3, at 123–24 (emphasizing that a need for a "more definite" territorial scope of the statute was recognized by the Court); Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM J. TRANSNAT'L L. 14, 67 (2007); Stephen J. Choi & Andrew T. Guzman, *The Dangerous Extraterritoriality of American Securities Regulation*, 17 NW. J. INT'L L. & BUS. 207, 228–29 (1996); Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 WIS. L. REV. 465, 467, 489–90; Fox, *supra* note 31, at 1184 (observing that "[c]ompared to restoring the conduct/effects test, using the *Morrison* test would reduce confusion and likely lead to more consistent court decision-making," but generally proposing an alternative test).

[36] *Morrison*, 561 U.S. at 266 ("Section 10(b) does not punish deceptive conduct, but only deceptive conduct 'in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered.'" (citations omitted)).

[37] *Id.* at 267 ("And it is in our view only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which § 10(b) applies."); *see* Vincent M. Chiappini, *How American Are American Depositary Receipts? ADRs, Rule 10b-5 Suits, and* Morrison v. National Australia Bank, 52 B.C. L. REV. 1795, 1796 (2011).

[38] Buxbaum, *supra* note 35, at 16–18, 38–41, 62; Coffee, *supra* note 26*,* at 300–05.

some fear that it has become the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets."[39]

After *Morrison*, federal courts have faithfully narrowed down the application of the securities laws, namely, Section 10(b) of the Exchange Act and Rule 10b-5, to only those transactions that involve securities listed on U.S. exchanges and "domestic" transactions, in which either the title to the securities at issue passes in the United States or parties incur "irrevocable liability" to execute a securities transaction within the United States.[40] Courts have also extended the application of *Morrison* to actions brought under Sections 11 and 12(a)(2) of the Securities Act.[41] As a result, there is a new status quo in private litigation against international issuers. This begs the question whether the SEC should recalibrate its policies and take *Morrison* into account.

B. Public and Private Enforcers

The first normative question is whether SEC enforcement would serve capital markets better than the extensive class-action litigation of the pre-*Morrison* kind. The weight of the evidence seems to favor the SEC. On the one hand, researchers typically disagree on which enforcement prong—private or public—is more efficient,[42] and which one fosters a healthy secu-

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[39] *Morrison*, 561 U.S. at 270.

[40] *See, e.g.*, SEC v. World Capital Mkt., Inc., 864 F.3d 996, 1008–09 n.11 (9th Cir. 2017); United States v. Georgiou, 777 F.3d 125, 135–37 (3d Cir. 2015); United States v. Isaacson, 752 F.3d 1291, 1299–1300 (11th Cir. 2014); United States v. Mandell, 752 F.3d 544, 548 (2d Cir. 2014); United States v. Vilar, 729 F.3d 62, 76–77 (2d Cir. 2013); Absolute Activist Value Master Fund Ltd. v. Ficeto, 677 F.3d 60, 69 (2d Cir. 2012); Quail Cruises Ship Mgmt. Ltd. v. Agencia de Viagens CVC Tur Limitada, 645 F.3d 1307, 1310–11 (11th Cir. 2011); SEC v. Benger, No. 09 C 676, 2013 WL 593952, at *9–12 (N.D. Ill. 2013); *see also* Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings SE, 763 F.3d 198, 212–17 (2d Cir. 2014).

[41] *Morrison*, 561 U.S. at 268 ("The same focus on domestic transactions is evident in the Securities Act . . . ."); *In re* Smart Techs., Inc. S'holder Litig., 295 F.R.D. 50, 56 (S.D.N.Y. 2013).

[42] On the theories of efficient enforcement, see generally Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance and Compensation of Enforcers*, 3 J. LEGAL STUD. 1 (1974); William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 (1975); A. Mitchell Polinsky, *Private Versus Public Enforcement of Fines*, 9 J. LEGAL STUD. 105 (1980). On ideal public enforcement and comparative benefits of the two enforcement systems, see, for example, Elizabeth Chamblee Burch, *Securities Class Actions as Pragmatic* Ex Post *Regulation*, 43 GA. L. REV. 63, 99–100 (2008) (arguing that private actions "guard against" SEC inaction and that "market-based accountability, discipline, and sanctions hold private attorneys externally accountable"); John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 226–27 (1983) (discussing the pros and cons of private enforcement and observing that "private enforcement may be able to mobilize and reallocate its resources more quickly than the public enforcer," that "[p]rivate

rities market. A series of famous papers—written mainly between 1998 and 2008 and often referred to as the "LLSV," "Law and Finance," and "Legal Origins Theory"—identify the common law legal system, disclosure, robust investor protection rules, and private enforcement as crucial factors associated with and, possibly, spurring the growth of capital markets.[43] In an influential 2009 rebuttal, Jackson and Roe refuted at least one conclusion by suggesting that disclosure rules supported by *public* enforcement are more impactful variables.[44] That titanic debate inspired a host of research papers on the topic.[45]

Some papers, for instance, suggest that the inherent value of public enforcement is that it "level[s] the playing field for small firms who struggle for adequate access to equity capital."[46] Private enforcement does not produce the same equalizing effect in terms of access to capital markets.[47] Researchers also argue that regulatory oversight is associated with better compliance, improvements in liquidity, and fewer restatements of financial reports.[48]

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enforcement also is potentially 'fairer' because the private plaintiff does not have the same built-in advantage as the public prosecutor or regulatory agency, to whom courts have a tendency to defer," and that a private plaintiff "performs an important failsafe function by ensuring that legal norms are not wholly dependent on the current attitudes of public enforcers"); David Freeman Engstrom, *Agencies as Litigation Gatekeepers,* 123 YALE L.J. 616, 626–30, 632 (2013) (discussing, *inter alia*, information processing and economies of scale and observing that "[i]n theory, at least, public enforcement is a more efficient means of achieving optimal deterrence of undesirable conduct"); Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1298 (1982); David H. Webber, *Shareholder Litigation Without Class Actions,* 57 ARIZ. L. REV. 201, 266 (2015) (suggesting "that loss of the class action would mark a dramatic change to shareholder rights, to shareholder regulation more generally, and to the private attorney-general model that has served as a cornerstone of securities enforcement policy for decades" and that "[w]hile loss of the class action could prompt enhanced public enforcement via the SEC and other regulatory bodies, resource constraints suggest that public actors may be limited in their ability to fill the void").

43 *See generally* Rafael La Porta et al., *What Works in Securities Laws?*, 61 J. FINANCE 1 (2006).

44 *See* Howell E. Jackson & Mark J. Roe, *Public and Private Enforcement of Securities Laws: Resource-based Evidence*, 93 J. FIN. ECON. 207, 207 (2009).

45 *See, e.g.*, Coffee, *supra* note 26, at 242–98, 302; John Echeverri-Gent & Benjamin Bloom, Am. Pol. Sci. Meeting Paper, Do Competitive Politics Produce Competitive Markets? Politics of Financial Market Development 8–9 (Sept. 1–5, 2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1644631 [https://perma.cc/4XPM-958B]. For a review of the literature, see Howell E. Jackson & Jeffery Y. Zhang, *Private and Public Enforcement of Securities Regulation*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE (2015).

46 Douglas Cumming et al., *Firm Size and the Impact of Securities Regulation*, 43 J. COMP. ECON. 417, 427 (2015).

47 *Id.*

48 *See, e.g.*, Terrence Blackburne, Regulatory Oversight and Reporting Incentives: Evidence from SEC Budget Allocations 28–29 (Jan. 2014) (unpublished manuscript) (on file with the University of Pennsylvania Dissertation Repository); Tim Lohse et al., *Public Enforcement of Securi-*

On the other hand, empirical studies aside, the comparative benefits of public enforcement are often explored by unearthing the imperfections of private litigation. The germane benefits are legion. For instance, enforcement agencies may have an institutional ability to fill the "gaps" left by private enforcers.[49] They also may administer penalties without distorting the original legislative intent and without producing precedents conflicting with the panoramic regulatory philosophy.[50] A related argument is the expertise of the agencies vis-à-vis the private plaintiffs' bar and generalist courts.[51]

There is also considerable scholarship on the disparate incentives of public and private enforcers. For one, private parties are more prone to bring non-meritorious suits, *i.e.*, cases that have little social value and fail to enhance social welfare.[52] Another argument lies in the preoccupation of the

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ties Market Rules: Resource-based Evidence from the Securities Exchange Commission, 106 J. ECON. BEHAV. & ORG. 197, 198–199 (2014); The Influence of Cross-Border Cooperation, *supra* note 16, at 7.

[49] This is but one aspect of redundancy as a systemic reliability mechanism. Clopton, *supra* note 24, at 307 n.144.

[50] Private plaintiffs, by contrast, lack a synoptic perspective and fidelity to the underlying regulatory objectives. *See, e.g.*, Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 66 (2002) ("Litigation arising from private actions almost certainly will bind regulators who employ the same or similar causes of action or theories. Thus, incompetent, overworked, or inexperienced private counsel, whose interests may diverge from the public interest, may be generating case precedent that restricts government regulators."); Engstrom, *supra* note 42, at 639 (discussing the lack of judicial expertise that may lead to imperfect decisions); David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913, 1924–31 (2014); Richard A. Nagareda, *Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, 75 U. CHI. L. REV. 603, 606 (2008) (discussing nonenforcement and policy priorities); *see also* Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 928 (2003) ("[Under certain conditions,] agencies are likely to be in a better position to decide whether departures from the text actually make sense. This is so mostly because agencies have a superior degree of technical competence; but it is not irrelevant that agencies are subject to a degree of democratic supervision. Second, agencies are likely to be in a better position to know whether departures from the text will seriously diminish predictability or otherwise unsettle the statutory scheme."). *But see* Coffee, *Rescuing, supra* note 42*,* at 227.

[51] *See generally* Engstrom, *supra* note 42, at 639, 664.

[52] *See* Warren F. Schwartz & C. Frederick Beckner III, *Toward a Theory of the "Meritorious Case": Legal Uncertainty as a Social Choice Problem*, 6 GEO. MASON L. REV. 801, 801 (1998) (defining a meritorious case as "socially desirable to have maintained" and discussing judicial and policy approaches to identifying meritorious claims). *See generally* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlement in Securities Class Actions*, 43 STAN. L. REV. 497 (1991) (demonstrating how settlement behavior in securities class actions deviates from predictive economic models and expected merits of cases); Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575 (1997). For a critique of the litigation system and a historical account of the private right of action, see, for example, Rose, *supra* note 24, at 2200–01; Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5*, 108 COLUM. L. REV. 1301, 1307–18 (2008).

plaintiffs' bar with maximizing their profits[53] and building up cases that are more likely than not to survive a motion to dismiss. A successful dismissal motion counts as a procedural victory associated with settlements.[54] Such "cherry-picking" of actions with a high projected success rate may lead to a suboptimal level of enforcement.

These "cherry-picking" stratagems are grounded in the current statutory system and procedural rules.[55] Because plaintiffs' law firms bear the costs of a lawsuit,[56] attorneys are naturally incentivized to invest in only potentially successful cases.[57] In the first place, plaintiffs' lawyers must ensure that their complaints pass muster with the court under the Private Securities Litigation Reform Act, which stays discovery pending a ruling on a motion to dismiss.[58]

In complaints, plaintiffs must plead certain elements of the cause of action under Section 10(b) and Rule 10b-5, including untrue statements of a material fact, scienter, loss causation, reliance, and others.[59] Some elements, such as scienter, have to be pleaded with particularity.[60] Others, such as loss

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[53] On the incentive structures of enforcers, see John C. Jr. Coffee, *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, LAW & CONTEMP. PROBS., Summer 1985, at 5; Landes & Posner, *supra* note 42, at 42–43 (observing that it "is frequently expressed that the lawyer for the class will be tempted to 'sell out' the class by negotiating with the defendant's lawyer a settlement that will involve a combination of nominal relief in favor of the class with a large legal fee for its lawyer"); Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement,* 127 HARV. L. REV 853, 860–62 (2014); William B. Rubenstein, *On What a "Private Attorney General" Is—And Why It Matters,* 57 VAND. L. REV. 2129, 2162 (2004) (discussing the introduction of the profit motives and agency costs in the literature).

[54] *See* A.C. Pritchard & Hillary Sale, *What Counts as Fraud? An Empirical Study of Motions to Dismiss Under the Private Securities Litigation Reform Act*, 2 J. EMPIRICAL LEGAL STUD. 125, 127–28 (2005).

[55] *See* James D. Cox et al., *SEC Enforcement Heuristics: An Empirical Inquiry*, 53 DUKE L.J. 737, 744 (2003) (underscoring that "numerous regulatory provisions of the securities laws create problems that prevent the meaningful pursuit of violations by private plaintiffs" and that "the loss . . . may not rise to a sufficient level to attract the interest of the entrepreneurial plaintiffs' attorney"); Pritchard & Sale, *supra* note 54.

[56] *See, e.g.*, James Bohn & Stephen Choi, *Fraud in the New-Issues Market: Empirical Evidence on Securities Class Actions*, 144 U. PA. L. REV. 903, 925–26 (1996) ("[P]laintiffs' attorneys must invest substantial amounts of effort in examining the merits of a case before drafting a complaint. Such a process requires substantial care due to the large up-front costs plaintiffs' attorneys incur in pursuing a securities case on a contingent-fee basis." (citations omitted)).

[57] In this sense, "the attorney acts less as an agent and more as a principal," which is the essence of "entrepreneurial litigation." John C. Coffee, Jr., *The Globalization of Entrepreneurial Litigation: Law, Culture, and Incentives*, 165 U. PA L. REV. 1895, 1897 (2017).

[58] Pritchard & Sale, *supra* note 54, at 128.

[59] 15 U.S.C. § 78u–4(b) (2012).

[60] *See, e.g.*, Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 318–25 (2007).

causation, require compliance with ordinary pleading rules.[61] As the Supreme Court in *Dura Pharmaceuticals, Inc. v. Broudo* emphasized in 2005, however, even under the ordinary pleading rules "a plaintiff who has suffered an economic loss [needs] to provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind."[62]

Plaintiffs also need to show reliance, which is another element of the cause of action under Section 10(b).[63] Three years ago, the Supreme Court reaffirmed its long-standing holding in *Basic Inc. v. Levinson.*[64] As the Court stated in *Halliburton Co. v. Erica P. John Fund, Inc.*, if a securities market is efficient, an "investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price" and only needs to show, *inter alia*, that "misrepresentations were publicly known" and material and that the plaintiff traded the stock.[65]

These procedural hurdles limit the profitable range of class actions.[66] For example, it should be easier for plaintiffs' attorneys to show reliance "on the integrity" of the market price where securities are traded on efficient national exchanges as opposed to a less liquid over-the-counter platform. Attorneys can more easily find listed issuers' misleading reports, which are filed with the SEC, effortlessly track share prices on the New York Stock Exchange (NYSE) or Nasdaq, and have experts run event studies to identify a corresponding market reaction and a statistically significant abnormal return around a public announcement by the defendant. Other cases may be rationally ignored absent a "smoking gun" or a compelling justification to bring an action.

Class actions against domestic and foreign issuers share these procedural and case-selection characteristics. In foreign issuer litigation, the "U.S. plaintiffs' bar performs its expected role in the presence of actionable events to hold foreign firms accountable."[67] The typical triggers searched for by attorneys are accounting restatements, missing forecasts, share price

[61] Not all circuits are in agreement regarding the standards. *See, e.g.*, Lormand v. U.S. Unwired, Inc., 565 F.3d 228, 255–64 (2009); *cf.* Teachers' Ret. Sys. of La. v. Hunter, 477 F.3d 162, 185–90 (4th Cir. 2007).

[62] 544 U.S. 336, 347 (2005).

[63] Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2409–11, 2413–14 (2014).

[64] 485 U.S. 224, 247 (1988).

[65] *Halliburton*, 134 S. Ct. at 2413, 2422 (quoting Basic Inc. v. Levinson, 485 U.S. 224, 247 (1988)).

[66] On attorneys' costs and their impact on litigation, see, for example, Stephen J. Choi*, Do the Merits Matter Less After the Private Securities Litigation Reform Act?*, 23 J.L. ECON. & ORG. 598, 600 (2006).

[67] Beiting Cheng et al., Securities Litigation Risk for Foreign Companies Listed in the U.S. 32 (June 2014) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2163864 [https://perma.cc/2KTC-T7G8].

drops, and corporate reports containing untrue statements of material facts or material omissions.[68] These triggers actuate most antifraud lawsuits and generally predetermine attorney behavior.

C. Private Litigation Against Foreign Issuers

There are at least three additional factors that may dampen attorneys' incentives to bring class actions against foreign firms. One difference between domestic and foreign enforcement realities stems from the tools available to foreign companies seeking to minimize their litigation risk. Namely, when a firm is less "visible" or has a smaller presence in U.S. markets, its law-related risks may be systematically lower. The factors associated with an increased risk of litigation include, *inter alia*: the size of a firm; the likelihood of higher damage awards; poor stock performance; high share turnover and volatility, explained by the rule that damages are "an increasing function of the number of shares that trade at misleading prices;"[69] having more assets located in the United States;[70] and listing on U.S. exchanges.[71] In sum, these factors are mostly related to exchange-trading *and* asset location. The first helps attorneys identify and adequately plead a violation, whereas the second is related to the enforcement of judgments.

An international corporation may more easily maneuver around these risks than a domestic company. For example, a foreign firm may keep its listing on a foreign exchange, delist from a U.S. exchange, deregister its securities with the SEC, terminate its reporting obligations, and move trading of U.S. securities to an over-the-counter ("OTC") platform.[72] If indicia

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[68] *See, e.g.*, SEC Enforcement Activities 17 CFR § 202.5 (2018) (listing several investigation triggers considered by the staff); Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, 67 STAN. L. REV. 331, 393–94 (2015) (observing that "the most lucrative *and* successful class actions are those associated with restatements and accounting irregularities" and that "private securities litigation targets only one type of securities violation—accounting fraud"); *see also* Pritchard & Sale, *supra* note 54, at 130–35; Cheng et al., *supra* note 67, at 4.

[69] Amar Gande & Darius P. Miller, Why Do U.S. Securities Laws Matter to Non-U.S. Firms? Evidence from Private Class-Action Lawsuits 13 (Apr. 2012) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1939059 [https://perma.cc/ZD9L-FZAC].

[70] *Id.* at 11–13, 29–30. The authors also find that inadequate legal protection of minority shareholders in the country of domicile increases the likelihood of litigation; *cf.* Craig Doidge et al., *Why Are Foreign Firms Listed in the U.S. Worth More?*, 71 J. FIN. ECON. 205, 210–15 (2004); William A. Jr. Reese & Michael. S. Weisbach, *Protection of Minority Shareholder Interests, Cross-Listings in the United States, and Subsequent Equity Offerings*, 66 J. FIN. ECON. 65, 65 (2002); Jordan Siegel, *Can Foreign Firms Bond Themselves Effectively by Renting U.S. Securities Laws?*, 75 J. FIN. ECON. 319, 342, 346–49; Cheng et al. *supra* note 67, at 2–6.

[71] *See* Guseva, *supra* note 29, at 273–78.

[72] On the mechanics of delisting and switching to OTC trading, see, for example, DEUTSCHE BANK, FOREIGN PRIVATE ISSUER DELISTING AND DEREGISTRATION 8–10 (Aug. 2014), https://www.

of fraud are teased out from a combination of corporate reports filed with the SEC, accounting restatements, and sharp share price fluctuations on efficient national exchanges, private plaintiffs could either miss or purposely avoid less "visible" defendants. Hence, attorneys will be systematically targeting mostly larger international corporations with securities listed on efficient national exchanges.[73]

This case-selection strategy dovetails with unique *transaction costs*. This is the *second* difference in class-action litigation against domestic firms and against foreign issuers. Even though issuers from countries with inadequate investor protection, reporting rules, and judicial systems, as well as investors in their securities, could benefit from more rigorous monitoring and prosecution in the United States,[74] profit-chasing plaintiffs' attorneys may strategically avoid those cases.[75]

For one, working with foreign courts—for instance, seeking assistance with discovery or enforcement of judgments—may be infeasible and costly. Second, an attorney may not have the expertise to parse financial statements and corporate reports filed by an issuer with foreign authorities and to identify misleading statements of material facts or omissions. Hence, a private enforcer anticipates that she may not amass sufficient evidence to bring a successful action without additional investment and, for example, retaining local experts.

Third, the attorney should account for the probability that after spending considerable resources on building up a case, discovery, and litigation, she might be unable to enforce a judgment rendered by a U.S. court. Some, albeit not many, foreign jurisdictions are hostile to the U.S. opt-out-class-

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adr.db.com/drweb/public/en/docs/Whitepaper-Foreign_Private_Issuer_Delisting_and_Deregistration.pdf [https://perma.cc/VTE9-TSKQ]; *see also* 17 C.F.R. § 240.12h-6 (2018).

[73] *See, e.g.*, Guseva, *supra* note 29, at 273–78; Siegel, *supra* note 70, at 346–49; Cheng et al. *supra* note 67, at 2–6; Gande & Miller, *supra* note 69; Consequently, a foreign company opting for non-exchange-traded securities will face less exposure to liability under sections 11 and 12(a)(2) of the Securities Act and to fraud-on-the-market class actions under section 10(b) of the Exchange Act.

[74] The likelihood of fraud and compliance with accounting rules are "a function of [the firms'] home environment." Audra L. Boone et al., The Information Environment of Cross-Listed Firms: Evidence from the Supply and Demand of SEC Filings 2 (2015) (unpublished manuscript), https://www.business.uq.edu.au/sites/default/files/events/files/cross-listing-disclosures-may-2015.pdf [https://perma.cc/RL82-M9TB]; *see* Rose, *supra* note 24, at 2182 (observing that the likelihood of fraud depends, *inter alia*, on "the mores of a nation's business and financial community . . . as well as the size and structure of a nation's securities markets"). Not all countries ensure equal transparency and investor protection. *See, e.g.*, La Porta et al., *supra* note 43, at 13–19; The Effects of Cross-Border Cooperation, *supra* note 16, at 8–10.

[75] On the findings on the likelihood of litigation, see *supra* notes 69–73; *see also* Cheng et al., *supra* note 67, at 32 (suggesting "that factors that increase the costs to pursue litigation against firms in foreign countries lower the rate of lawsuits against foreign companies listed in the U.S.").

action regime, whereas in others, recognition proceedings entail unique transaction costs either because of local judicial inefficiencies and the absence of equivalent local procedures or on procedural grounds.[76]

In short, there are additional reasons to expect that the plaintiffs' costs of litigation against international corporations may exceed comparable litigation costs in domestic cases. The higher expected transaction costs and enforcement uncertainties should reduce the incentives of attorneys to proceed against international corporations without substantial presence and assets in the United States.[77]

The *third* difference is that *Morrison* has reduced the "return" on private attorneys' efforts. My previous research suggests that the mean and median post-*Morrison* settlements have shrunk. So has a typical plaintiff class.[78] Admittedly, as Professor Coffee observed in *Entrepreneurial Litigation*, resourceful American law firms are seeking ways to bring suits in foreign jurisdictions. In some cases, they file foreign actions after a parallel action in the United States and "obtaining discovery in the U.S. under the more liberal U.S. rules and utilizing it in the later . . . action."[79] Uncertainties abound, however, because shareholder class actions and claim aggregation are still in their infancy in most countries around the globe.[80] In any case, as *Morrison* changes the profitability of *domestic* litigation, it should also modify the behavior of American law firms in U.S. courts.

To summarize, a plaintiffs' attorney must take into account that her payout is *a priori* lower after *Morrison* because a projected settlement,

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[76] *See* Samuel P. Baumgartner, *Understanding the Obstacles to the Recognition and Enforcement of U.S. Judgments Abroad*, 45 N.Y.U. J. INT'L L. & POL. 965, 986, 994–97 (2013); Kevin M. Clermont, *Solving the Puzzle of Transnational Class Actions*, 90 IND. L.J. SUPP. 69, 69–70 (2015), https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=11182&context=ilj [https://perma.cc/7E4A-YPXQ]; John C. Coffee, Jr., *The Globalization of Entrepreneurial Litigation: Law, Culture, and Incentives*, 165 U. PA. L. REV. 1895, 1898, 1925 (2016); Richard Fentiman, *Recognition, Enforcement and Collective Judgments*, *in* CROSS-BORDER CLASS ACTIONS: THE EUROPEAN WAY 85–91 (Arnaud Nuyts & Nikitas E. Hatzimihail eds., 2014); Antonio Gidi, *The Recognition of U.S. Class Action Judgments Abroad: The Case of Latin America,* 37 BROOK. J. INT'L L. 893, 916, 921, 933–46 (2012); Mark Stiggelbout, *The Recognition in England and Wales of United States Judgments in Class Actions*, 52 HARV. INT'L L.J. 433, 475–80 (2011).

[77] Cheng et al., *supra* note 67, at 32 ("Firms in countries that are farther from the U.S., those that have weaker judicial efficiency in the home country or from countries with a weaker track record of prior U.S. acquisitions are less likely to be targeted by plaintiff investors and attorneys. This suggests that factors that increase the costs to pursue litigation against firms in foreign countries lower the rate of lawsuits against foreign companies listed in the U.S."); The Effects of Cross-Border Cooperation, *supra* note 16, at 1 (showing "that the probability of SEC enforcement [also] increases in U.S.-listed foreign firms whose home countries join the MMOU").

[78] *See* Guseva, *supra* note 29, at 263–67, 271–73.

[79] *See* Coffee, *supra* note 76, at 1914; *see also id*. at 1904–06, 1910, 1922 (outlining the current state of the law and possible future developments).

[80] *See, e.g.*, *id.* at 1918, 1922–23 (discussing some relevant policy arguments).

which is often the only plausible finale of a class-action complaint that survives a motion to dismiss, has declined. Obviously, there is not a commensurate decrease in the average costs of bringing a successful suit. Furthermore, international litigation raises additional transaction costs associated with the issuer's "visibility," the initial complaint filing, discovery, and enforcement of judgments.

Cross-border class actions essentially represent a special case of Landes and Posner's "overenforcement theorem"—compared with public enforcement, the greater fines, probability of apprehension, and social loss would result from private enforcement[81] through class actions involving larger and more visible companies from jurisdictions where discovery and enforcement are more cost-efficient.

A systematic "fissure" in enforcement could thus be created as more "visible" listed issuers would suffer from excessive plaintiff monitoring and, possibly, "strike" suits. All the while, others would routinely slip through the cracks in the civil liability machinery, and the victims of their fraud could be undercompensated on average.[82] In such a scenario, public enforcement *may* compensate "defrauded investors in cases where private litigation is not serving its compensatory function."[83] Enforcement agencies *may* also improve compliance by an average foreign corporation and control opportunism and expropriation.[84] When a regulator operates as a "gap-filler," it transcends a purely Blackstonian distinction between public wrongs and private civil injuries.[85] It performs both functions.[86]

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[81] Landes & Posner, *supra* note 42, at 11–16, 38 ("[A]ll laws would be enforced that yielded a positive expected net return [on private enforcers' investment in litigation].").

[82] For instance, the principal benefits of antifraud liability, such as victim compensation, would become crucial in the case of smaller firms where the price impact of fraud may be less observable. Jeff Schwartz, *The Law and Economics of Scaled Equity Market Regulation*, 39 J. CORP. L. 347, 377–78 (2014).

[83] *See* Velikonja, *supra* note 68, at 394.

[84] *See, e.g.*, Roger Silvers, *The Valuation Impact of SEC Enforcement Actions on Nontarget Foreign Firms*, 54 J. ACCT. RES. 187, 188–89 (2016) (reviewing theories suggesting that enforcement constrains expropriation and agency costs in foreign firms). Amir N. Licht et al., *What Makes the Bonding Stick? A Natural Experiment Involving the U.S. Supreme Court and Cross-Listed Firms*, J. FIN. ECON., May 2018, at 2–4 (summarizing the literature on the bonding hypothesis and enforcement).

[85] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 585 (L.K. Strouse & Co. 1892) (1765) ("Private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties, due to the whole community, considered as community, in its social aggregate capacity.").

[86] *See, e.g.*, Clopton, *supra* note 24, at 291; Prentiss Cox, *Public Enforcement Compensation and Private Rights*, 100 MINN. L. REV. 2313, 2380 (2016); Amanda M. Rose, *Designing an Efficient Securities-Fraud Deterrence Regime*, *in* PROSPERITY UNLEASHED: SMARTER FINANCIAL REGULATION 256 (2017) ("[C]ivil penalties can be thought of as those meant to 'price' behavior,

II. Realities of Enforcement Against Foreign Issuers: An Empirical Inquiry

A. The Traditional Enforcement Approach

Previous research suggests that the SEC *may* serve as a "gap-filler" by targeting defendants that private enforcers ignore, such as firms with lower market capitalization, firms in financial distress, and minor infractions.[87] This role, however, may be more characteristic of domestic enforcement, because the Commission has traditionally focused on domestic rather than foreign companies. The two major comprehensive studies on enforcement against foreign issuers, by Natalya Shnitser and Jordan Siegel, suggested that the SEC had commenced fewer meaningful actions against foreign issuers than against domestic firms.[88] An interesting case study by Erica Gorga also documented how the private plaintiffs' bar promptly acted in the case of speculative trading by large Brazilian corporations, while the SEC, in contrast to the Brazilian regulator, failed to take action.[89] Overall, the general lack of SEC enforcement against cross-listed firms was demonstrated by several empirical studies.[90]

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whereas criminal penalties can be thought of as those meant to 'sanction' behavior."). A germane example of these prosecutorial and compensatory functions of the SEC is the Fair Funds provisions of Sarbanes-Oxley and Dodd-Frank. *See* 15 U.S.C. § 7246(a) (2012). The statutes have allowed distribution of disgorged profits and civil penalties collected by the SEC to private investors. *See, e.g.*, Cox, *supra*, at 2320–21 (discussing the "Fair Funds"); Clopton, *supra* note 24, at 297; Verity Winship, *Fair Funds and the SEC's Compensation of Injured Investors*, 60 FLA. L. REV. 1103, 1111–44 (2008).

[87] *See, e.g.*, James D. Cox, Response, *Securities Class Actions as Public Law*, 160 U. PA. L. REV. PENNUMBRA 73, 80–81 (2011), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1084&context=penn_law_review_online [https://perma.cc/44RC-WPYS]; Cox et al., *supra* note 55, at 764; Velikonja, *supra* note 68, at 332, 394; Natalya Shnitser, Note, *A Free Pass for Foreign Firms? An Assessment of SEC and Private Enforcement Against Foreign Issuers*, 119 YALE L.J. 1638, 1660–84, 1693 (2010); *cf.* Choi & Pritchard, *supra* note 23, at 36; James D. Cox & Randall S. Thomas, *Public and Private Enforcement of the Securities Laws: Have Things Changed Since Enron?*, 80 NOTRE DAME L. REV. 893, 901–02 (2005) ("[T]he SEC appears to be targeting much larger companies during the post-January 1, 2002, period than it did in the earlier time frame. Average market capitalization for SEC enforcement targets was more than twenty-three times bigger in the post-January 1, 2002, time period than in the earlier period, while the median market capitalization went up by a multiple of over thirteen times.").

[88] Siegel, *supra* note 70, at 342, 349 (2005) (observing that "the SEC had taken few enforcement actions against cross-listed foreign firms during 1934–2002" and "that the SEC has not been able and/or willing to be the world's governance enforcement agency"); Shnitser, *supra* note 87, at 1675–84.

[89] Erica Gorga, *Is U.S. Law Enforcement Stronger Than That of a Developing Country? The Case of Securities Fraud by Brazilian Corporations and Lessons for the Private and Public Enforcement Debate*, 54 COLUM. J. TRANSNAT'L L. 603, 617–18, 687 (2016).

[90] The Effects of Cross-Border Cooperation, *supra* note 16, at 15–16 (providing a summary of the literature).

Admittedly, international enforcement has dramatically increased,[91] and the market takes notice of the most notorious actions against international corporations.[92] The probability of public actions against foreign firms is also associated with cross-border enforcement cooperation as more jurisdictions are joining the 2002 Multilateral Memorandum of Understanding, which facilitates enforcement cooperation among IOSCO members.[93]

Nevertheless, despite the well-documented "aggressiveness" of the SEC vis-à-vis its foreign homologues,[94] it appears that foreign issuers do not face prosecutorial wrath comparable to that faced by domestic issuers.[95] Possibly, the Commission relies heavily on the efforts of the plaintiffs' bar to ferret out international fraudsters. This overarching policy preference is self-explanatory—"American law relies upon private litigants to enforce substantive provisions of law that in other legal systems are left largely to the discretion of public enforcement agencies."[96] In the international regulatory context, this dependence on private plaintiffs' assistance coincides with the systematic "fissures" in private enforcement discussed in Part I.

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[91] Silvers, *supra* note 84, at 192–93; The Effects of Cross-Border Cooperation, *supra* note 16, at 6, 14; The Influence of Cross-Border Cooperation, *supra* note 16, at 2, 14.

[92] *See, e.g.*, G. Andrew Karolyi, *The World of Cross-Listings and Cross-Listings of the World: Challenging Conventional Wisdom*, 10 REV. FIN. 99, 119 (2006) (citing studies suggesting "that, though the numbers of actions are few, some of the cases have been important and noticed . . . and that the numbers are biased downward by the many cases settled out of court").

[93] The Effects of Cross-Border Cooperation, *supra* note 16, at 28–36; *see* IOSCO, MULTILATERAL MEMORANDUM OF UNDERSTANDING CONCERNING CONSULTATION AND COOPERATION AND THE EXCHANGE OF INFORMATION 2 (last updated May 2012), https://www.iosco.org/library/pubdocs/pdf/IOSCOPD386.pdf [https://perma.cc/E6GG-WYJW].

[94] *See, e.g.*, Coffee, *supra* note 26, at 254–84; John C. Coffee, Jr. & Hillary A. Sale, *Redesigning the SEC: Does the Treasury Have a Better Idea?*, 95 VA. L. REV. 707, 728–29 (2009); Howell E. Jackson, *Variation in the Intensity of Financial Regulation: Preliminary Evidence and Potential Implications*, 24 YALE J. ON REG. 253, 280–85 (2007).

[95] In addition, foreign firms enjoy lower costs of reporting and compliance due to a more permissive regulatory approach taken by the SEC in the past fifteen years. For instance, the Commission introduced simplified disclosure forms for foreign firms, exempted them from Regulation FD, allowed filing of financial statements prepared in accordance with International Financial Reporting Standards as opposed to U.S. GAAP, amended Rule 12h-6, allowed suspension of reporting obligations immediately upon filing of Form 15F, and introduced some exemptions from Regulation G and Sarbanes-Oxley. For an overview of the regulations, see Guseva, *supra* note 29, at 207–13; *see also* Donald C. Langevoort, *The SEC, Retail Investors, and the Institutionalization of the Securities Markets*, 95 VA. L. REV. 1025, 1077 ("[T]here are two very distinct tiers of investor protection in the United States: a more rigorous standard for domestic companies and a less rigorous one for foreign companies.").

[96] John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 669 (1986).

B. Reporting Flaws

This Article is the first attempt to analyze recent changes in SEC enforcement around the *Morrison* decision.[97] Changing enforcement tack may be subtle and difficult to identify compared to the interplay between statutory actions and their corresponding implementation through regulations.[98] As required by the Administrative Procedure Act,[99] for instance, agency rulemaking is transparent and public.[100] The legislature's actions and the resultant reactions of the regulators are easily identifiable to a researcher, whereas market participants are fully informed of the reform and have sufficient time to adjust to its implications.

When it comes to changes in enforcement trends, however, it takes time to determine explicit patterns and well-calibrated reactions.[101] Moreo-

[97] Shnitser, Siegel, and Silvers examine samples within a different timeframe. The samples are also different. My sample, for example, does not include directors and officers of foreign firms. *See supra* notes 70, 87–88 and accompanying text.

[98] For example, the SEC meticulously documents Dodd-Frank rules and adopting releases. *See Implementing Dodd-Frank Wall Street Reform and Consumer Protection Act—Pending Action*, SEC, https://www.sec.gov/spotlight/dodd-frank/dfactivity-upcoming.shtml [https://perma.cc/LL4Q-9RHB].

[99] *See* 5 U.S.C. § 553 (2015); Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 106–09 (1998).

[100] It often begins with either a concept release seeking public input on the most complex issues or a rule proposal published for notice and public comment in the Federal Register and on the SEC's webpage and completes with the rule adoption. In adopting releases, the Commission typically conducts a cost-benefit analysis, addresses public comments, and either modifies the proposed rule accordingly or attempts to provide cogent explanations why the rule should be enacted as originally proposed. *See, e.g.*, Improving Regulation and Regulatory Review, Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011) ("Our regulatory system must protect public . . . welfare . . . while promoting economic growth, innovation, competitiveness, and job creation. . . . It must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends. It must take into account benefits and costs, both quantitative and qualitative."); Regulatory Planning and Review, Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993); Improving Government Regulations, Exec. Order No. 12,044, 43 Fed. Reg. 12,661 (1978); OFFICE OF THE FED. REGISTER, A GUIDE TO THE RULEMAKING PROCESS (2011), https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf [https://perma.cc/5AVP-VWD9]; SEC, RULEMAKING PROCESS: AUDIT NO. 347 (July 12, 2002), https://www.sec.gov/oig/reportspubs/aboutoigaudit347finhtm.html [https://perma.cc/4873-Q6DL]; Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 542 (2003) ("To the extent notice-and-comment rulemaking issues general rules that rely for their enforcement on further proceedings, it also promotes predictability. At a minimum, it allows affected parties, who participate in the formulation of the rule, to anticipate the rule and plan accordingly.").

[101] This is not to say that the SEC does not react promptly to judicial decisions. For instance, "[i]n response to a charge from Chairman Schapiro after a federal circuit court called the SEC's economic analysis arbitrary and capricious, the Division of Economic Research and Analysis (DERA) created a framework for converting large databases into meaningful, sensible, common sense economic analysis in order to inform its rule-making. That effort was described in the

ver, the Commission's stance on prosecution is not always clear and may be misleading to the court of public opinion. Consider as examples a spike in enforcement actions and the increased budget of the SEC and its Division of Enforcement in recent years.[102] In its November 2016 Agency Financial Report, the SEC announced that it "continued to build an impressive record of cases that spanned the spectrum of the securities industry. The SEC ended the fiscal year with a record 548 stand-alone enforcement actions, plus 195 follow-on proceedings and 125 delinquent filing proceedings, for a total of 868 enforcement actions."[103] The numbers represent a continuous and steady increase in enforcement actions over the years.

These reported trends are not necessarily a prosecutorial response to the recent financial crisis, because "the financial crisis cases are done for the most part."[104] There is a more practical explanation for tougher prosecution. The SEC, as opposed to some other agencies, is not self-funding.[105] Congress decides on its budget each year. In making its decisions, Congress relies on "objective metrics,"[106] such as the number of actions and the

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Commission's Guidance to Economic Analysis." THE FUTURE OF THE SECURITIES AND EXCHANGE COMMISSION, *supra* note 8, at 36. The changes followed *Business Roundtable v. Securities and Exchange Commission*, 647 F.3d 1144 (D.C. Cir. 2011). *See* Joshua T. White, *The Evolving Role of Economic Analysis in SEC Rulemaking*, 50 GA. L. REV. 293, 303–04, 307–10 (2015) (discussing the changes). In contrast to rulemaking, enforcement is changing slowly, which may be explained by multiple factors. The staff "has too many investigations" and "there seems to be less and less opportunity to have a meaningful dialogue with the staff, especially in the regional offices." THE FUTURE OF THE SECURITIES AND EXCHANGE COMMISSION, *supra* note 8, at 15.

[102] SEC, FY 2016 BUDGET REQUEST BY PROGRAM 60 (2015), https://www.sec.gov/about/reports/sec-fy2016-budget-request-by-program.pdf [https://perma.cc/7W9V-E3QM] (showing annual increases in the costs of the Enforcement Division); Press Release, SEC, SEC Announces Enforcement Results for FY 2016 (Oct. 11, 2016), https://www.sec.gov/news/pressrelease/2016-212.html [https://perma.cc/32G4-6KA8] (providing a table summarizing the increases in enforcement results over the past three years).

[103] *See* SEC, AGENCY FINANCIAL REPORT: FISCAL YEAR 2016, at 16 (2016), https://www.sec.gov/about/secpar/secafr2016.pdf [https://perma.cc/JX4Q-TWXZ].

[104] THE FUTURE OF THE SECURITIES AND EXCHANGE COMMISSION, *supra* note 8, at 15.

[105] *Id.* at 23 (citing Chair White expressing a preference for a self-funding Commission and mentioning that "there is no reason not to fund the crying resource needs at the SEC"). On the related institutional design and agency independence issues, see, for example, Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 611, 644–48, 657 (2010); Michael M. Ting, *The "Power of the Purse" and Its Implications for Bureaucratic Policy-Making*, 106 PUB. CHOICE 243, 244–47 (2001).

[106] John C. Coffee, Jr., *SEC Enforcement: What Has Gone Wrong?*, CLS BLUE SKY BLOG (Jan. 2, 2013), http://clsbluesky.law.columbia.edu/2013/01/02/sec-enforcement-what-has-gone-wrong/ [https://perma.cc/FV7T-KV79] ("[T]he SEC needs to be able to use objective metrics to justify its request for budget increases. By bringing many actions and settling them cheaply, it can point to an increase in the aggregate penalties collected, even if the median penalty is at the same time decreasing. This may impress Congress . . . .").

amount of penalties,[107] reported by the Commission in congressional hearings.[108] As the SEC routinely cites its enhanced enforcement activity to justify annual budget requests,[109] some scholars suggest that pure self-interest may lead it to redouble enforcement efforts or *numbers*. Instead of actually prosecuting more cases, as Velikonja's 2016 study of annual enforcement reports demonstrates, the Commission may be inflating the numbers by double-counting some actions.[110]

C. Enforcement Actions Between 2005 and 2016

If *Morrison* has entailed an underenforcement problem due to inadequate private litigation or has deprived American investors of a meaningful remedy, the SEC may have responded accordingly. My working hypothesis was that there would be more enforcement actions against foreign companies after *Morrison*. The below results suggest that this has not happened. Instead, the caseload and actions brought under the antifraud provisions of the securities law remained comparatively stable.

Because the SEC summary statistics may be opaque, the first task of this research project was to develop a comprehensive database. My research assistants and I hand-collected data on the actions against foreign private issuers ("FPIs") registered with the SEC and FPIs not registered with the SEC. First, we started with the list of registered and reporting FPIs. The list was obtained from the SEC's webpage. It included companies registered between 2005 and 2015.[111] The SEC identifies companies registered as of December 31 of the respective year.

The second step was to capture companies not registered with the SEC. I used the database of American Depository Receipts ("ADRs") of

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[107] Jonathan R. Macey, *The Distorting Incentives Facing the U.S. Securities and Exchange Commission*, 33 HARV. J.L. & PUB. POL'Y 639, 645 (2010); Coffee, *supra* note 106.

[108] *See, e.g.*, *Examining the SEC's Agenda, Operations, and FY Budget Request: Hearing Before the H. Comm. on Fin. Servs.*, 114th Cong. 5 (2015) (statement of Mary Jo White, Chair, Securities and Exchange Commission), http://financialservices.house.gov/uploadedfiles/114-10.pdf [https://perma.cc/YE3K-EU8G] ("We have continued to aggressively and fairly enforce the securities laws, requiring admissions in appropriate cases, filing 755 enforcement actions, and obtaining orders for more than $4.16 billion in disgorgement and penalties in Fiscal Year 2014.").

[109] *See* Urska Velikonja, *Reporting Agency Performance: Behind the SEC's Enforcement Statistics*, 101 CORNELL L. REV. 901, 906–19 (2016).

[110] *Id.* at 932–67. Depending on one's opinions on the administrative state, the SEC's measuring metrics may be viewed either as imprecise due to the complexity of the data the staff handles or as somewhat self-serving. From a practical perspective, they also permit the Commission to apply for higher appropriations, allocate its scarce enforcement resources toward certain priorities, and maintain its reputation for zealous enforcement without draconian prosecutions.

[111] The list of International Registered and Reporting Companies is available at https://www.sec.gov/divisions/corpfin/internatl/companies.shtml [https://perma.cc/6DYF-NQGF].

BNY Mellon as a starting point.[112] I reviewed foreign companies trading ADRs on various U.S. OTC platforms between 2005 and 2015 and added sponsored ADRs to the SEC list of registered and reporting FPIs. Third, I crosschecked the two lists to eliminate duplicates. Fourth, I reviewed the combined database to identify companies which were listed in different markets at different points in time and/or had similar company names.

To identify decisions against the foreign private issuers included in the database, my assistants and I searched Westlaw, LexisNexis, and Bloomberg Law databases.[113] We also reviewed the decisions of Administrative Law Judges[114] and the SEC enforcement data,[115] including litigation releases and notices, Commission opinions, and adjudicatory orders. We excluded (1) cases against corporations registered in the United States, regardless of their principal place of business; (2) cases against domestic subsidiaries of foreign private issuers; (3) cases against broker-dealers and investment advisers either registered with the SEC or operating without registration in violation of the securities law and the SEC's rules and regulations; and (4) generally, cases against U.S. subsidiaries of foreign banks and financial institutions registered in the United States.

Consulting firms, such as Cornerstone Research or NERA Consulting, track mainly class actions. The new Securities Enforcement Empirical Database ("SEED") of the NYU Pollack Center for Law and Business and Cornerstone Research provides data only on enforcement actions against listed companies and includes only actions initiated after 2009. I used the data shared with me by the NYU SEED to crosscheck our results.

To categorize the cases, I used the "initial dates" of actions, such as the dates of orders instituting administrative proceedings ("OIP") pursuant to Section 12(j) of the Securities Exchange Act of 1934, orders instituting cease-and-desist proceedings pursuant to Section 21C of the Securities Exchange Act of 1934, complaints filed in federal district courts, or orders of suspension of trading pursuant to Section 12(k) of the Securities Exchange Act of 1934.

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[112] BNY Mellon, Depositary Receipts, https://www.adrbnymellon.com/ [https://perma.cc/6B3Y-VHTQ].

[113] We also used the following terms: "foreign issuer," "foreign private issuer," "ADR," "ADS," "depositary receipt," and "depositary share."

[114] *See ALJ Initial Decisions: Administrative Law Judges*, SEC, https://www.sec.gov/litigation/aljdec.shtml [https://perma.cc/D5V8-97MQ] (providing the decisions of administrative law judges).

[115] *See Enforcement*, SEC, https://www.sec.gov/litigation.shtml [https://perma.cc/647M-95FW] (providing information on SEC enforcement actions).

This survey is structured based on the logistics of enforcement.[116] Generally, after a thorough investigation of a matter under inquiry, the staff submits a recommendation for enforcement to the Commission.[117] Many targets simultaneously submit settlement offers. The offers are presented to the Commission, together with the recommendations of the staff and often before the commencement of an administrative proceeding or court action. The Commission either issues an OIP if it decides to adjudicate the matter "in-house" or proceeds with filing a suit in the federal district court. Available judicial relief ranges from injunctions to civil monetary penalties, disgorgement, and others.[118] Administrative relief includes, *inter alia*, cease-and-desist orders, civil monetary penalties, disgorgement, orders to comply with reporting obligations, trading suspensions, and revocation of the registration of a security.[119]

To summarize, the following survey covers all enforcement actions brought by the SEC either in administrative proceedings or in federal courts between January 2005 and December 2016, about five years before and five years after the *Morrison* decision. The final sample includes 151 cases against foreign firms. Appendix I lists all respondents in administrative proceedings and defendants in court actions by year and indicates the respective statutory violations.[120]

The FPIs in the sample were often charged with several violations of the securities laws. The SEC brought actions under the major antifraud provisions of the securities laws, including Rule 10b-5 and Section 10(b) of the Exchange Act and Section 17 of the Securities Act, in about 8% of the cases. Issuer reporting and delinquent filing violations under Section 13(a) of the Exchange Act represented 77% of the actions.[121] Violations of Sections

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[116] *See* SECURITIES LITIGATION AND ENFORCEMENT 683–802 (Donna M. Nagy, Richard W. Painter & Margaret V. Sachs eds., 2017).

[117] First, there is an informal investigation, which often produces voluntary cooperation of potential targets. The second stage involves conducting a formal investigation and recommending an enforcement action. At that point, the target is typically invited to file a Wells Submission, in which it often attempts to explain why enforcement proceedings should not be instituted. 17 C.F.R. §§ 202.1–.212 (2018); *id.* §§ 203.1–.8; SEC, ENFORCEMENT MANUAL §§ 2.3–.6 (Nov. 28, 2017), https://www.sec.gov/divisions/enforce/enforcementmanual.pdf [https://perma.cc/HYE4-URA5].

[118] *See, e.g.*, 15 U.S.C. §§ 78u (2015).

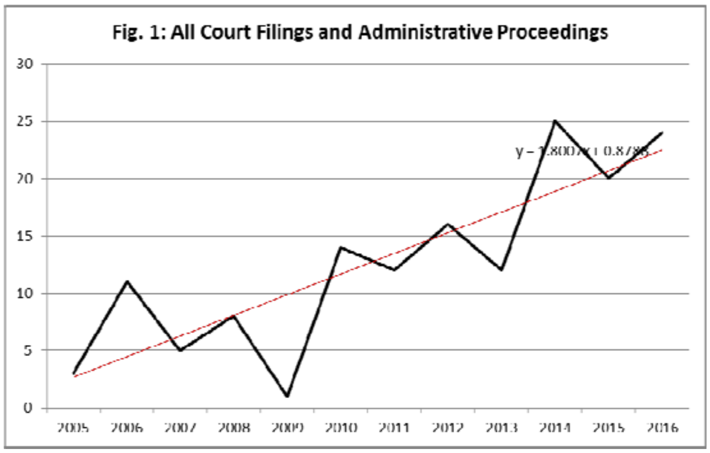
[119] *See, e.g.*, *id.* §§ 77h-1; 78u-2; 78u-3; 78l(j).

[120] Appendix I is also available at http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-6/guseva-graphics.pdf [http://perma.cc/VNL6-QQ2P].

[121] 15 U.S.C. § 78m(a). This finding is consistent with the previous research by Shnitser, who covered enforcement actions between 2000 and 2008. Her research used a slightly different sample selection technique and included FPIs, their employees, and subsidiaries. Shnitser, *supra* note 87, at 1664–69, 1671. The exposure to liability for materially misleading reports is substantial. *See, e.g.*, AGENCY FINANCIAL REPORT, *supra* note 103, at 20–23.

13(b)(2) and 13(b)(5) of the Exchange Act[122] cumulatively comprised about 28%. More serious violations under Section 13(b)(5), which provides that "[n]o person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account,"[123] constituted 3% of the sample. FCPA violations were a significant part of Section 13(b)(2) and (5) violations and represented as many as 18% of all the actions in the database.[124] Figure 1 traces the number of defendants and respondents by year. [125]

Figure 1: All Court Filings and Administrative Proceedings



This upward trend was driven primarily by an increase in Section 13(a) actions for reporting violations. Consider the following graph that covers 100 standalone violations of Section 13(a) and excludes the actions brought under the other provisions of the Securities Act and the Exchange Act.[126]

[122] 15 U.S.C. § 78m (2015).

[123] *Id*. § 78m(b)(5).

[124] Although FCPA actions are not a direct substitute for class actions, FCPA enforcement may alert investors that some firms are "bad actors." This information should be impounded in the share price.

[125] This graphic is also available at http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-6/guseva-graphics.pdf [http://perma.cc/VNL6-QQ2P].

[126] This graphic is also available at http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-6/guseva-graphics.pdf [http://perma.cc/VNL6-QQ2P].

Figure 2: Reporting Violations of Section 13(a) and Rules Promulgated Thereunder

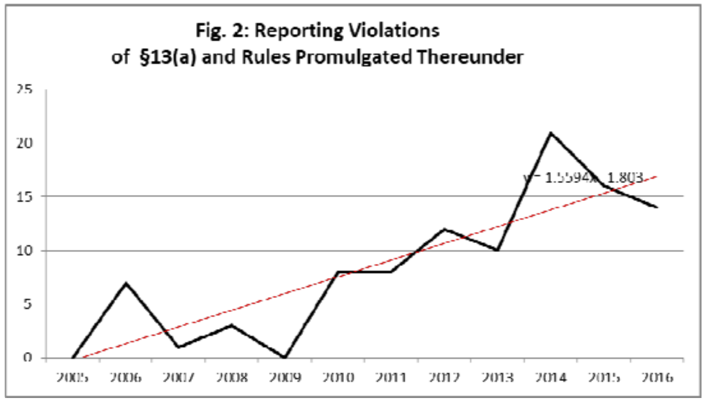
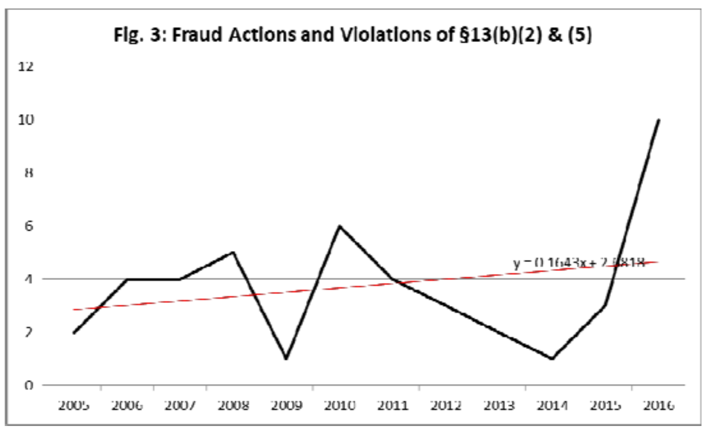


Figure 3 summarizes more serious violations of the antifraud provisions and the books and records provision, namely, Section 10(b) and Rule 10b-5 of the Exchange Act, Section 17 of the Securities Act, and Sections 13(b)(2)(A)&(B) and 13(b)(5) of the Exchange Act.[127]

Figure 3: Fraud Actions and Violations of Section 13(b)(2)&(5)

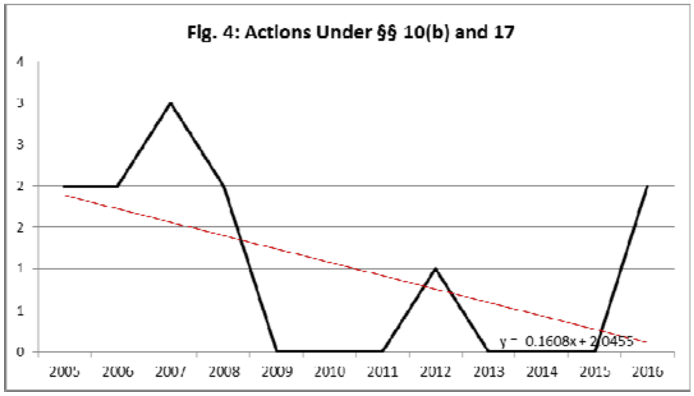


Separately, typical securities fraud cases brought under Section 10(b) and Rule 10b-5—the quintessential weapon of private plaintiffs in class-

[127] This graphic is also available at http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-6/guseva-graphics.pdf [http://perma.cc/VNL6-QQ2P].

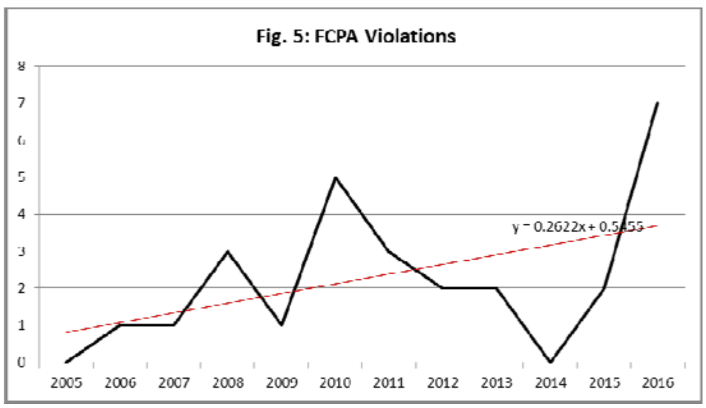
action litigation—and under Section 17 remained rare. There does not seem to be a clear pattern in this enforcement area.[128]

Figure 4: Actions Under Rule 10b-5 and Section 17



Similarly, despite the public attention paid to FCPA enforcement during the final years of President Obama's Administration, there was no explicit long-term trend in enforcement against foreign issuers.[129] This may be related to similarly enhanced anti-bribery enforcement in other countries.[130]

Figure 5: FCPA Violations



In terms of penalties, the majority of reporting violations under Section 13(a) and rules promulgated thereunder resulted in trading suspensions fol-

[128] Figure 4 is also available at http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-6/guseva-graphics.pdf [http://perma.cc/VNL6-QQ2P].

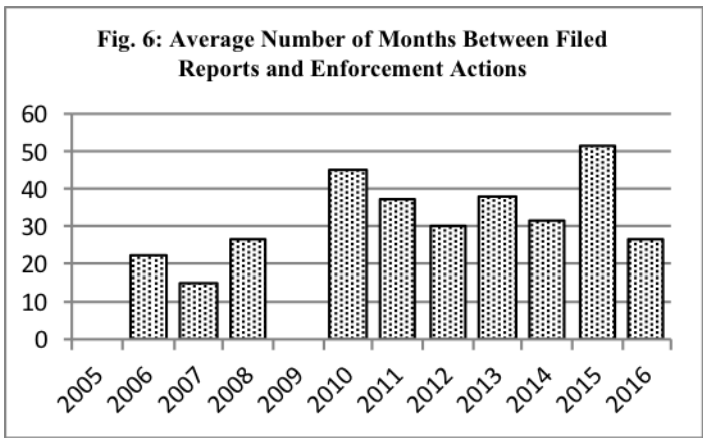
[129] This graphic is also available at http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-6/guseva-graphics.pdf [http://perma.cc/VNL6-QQ2P].

[130] TRACE, GLOBAL ENFORCEMENT REPORT (Mar. 2018), https://traceinternational.org/Uploads/PublicationFiles/GER2017.pdf [https://perma.cc/Y656-MN5J].

lowed by the revocation of the registration of securities of foreign firms.[131] I reviewed the SEC EDGAR database to determine the dates of the last reports filed by foreign private issuers whose registration was revoked and included in my data the dates of the reports filed on Form 20-F, Form 40-F, Form 10-K, and Form 10-Q; registration statements; or amendments thereto.

In line with the previous research on the timing of enforcement, the OIPs and ultimate revocations were issued against foreign issuers that were delinquent in filings for two-three years on average.[132] Figure 6 presents the annual averages of the number of months elapsed between the dates of the last filings and the following OIPs.[133]

Figure 6: Average Number of Months Between Filed Reports
and Enforcement Actions



A plausible explanation of this tardiness is that, as a policy matter, the Commission does not interdict trading between willing buyers and sellers absent a threat of substantial public harm.[134] Another explanation is that the SEC relies on market gatekeepers such as broker-dealers. Under Rule 15c2-11, for instance, broker-dealers cannot publish a quotation before reviewing

[131] 15 U.S.C. § 78l(j).

[132] Shnitser reported that some issuers were delinquent in periodic filings for "more than seven years." Shnitser, *supra* note 87, at 1673. For examples of actions, see Dragon Bright Mintai Botanical Tech. Cayman Ltd., Exchange Act Release No. 78439 (July 29, 2016); Oriental Nonferrous Metals Tech. Co., Ltd., Exchange Act Release No. 76252 (Oct. 23, 2015).

[133] This graphic is also available at http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-6/guseva-graphics.pdf [http://perma.cc/VNL6-QQ2P].

[134] *See Defunct Company, Stock Continues to Trade*, SEC (Jan. 15, 2013), https://www.sec.gov/fast-answers/answersdfnctcohtm.html [https://perma.cc/ASS8-XPQJ].

certain information about a company and forming "a reasonable basis under the circumstances for believing that . . . [the] information is accurate in all material respects."[135] Finally, this consistent tardiness may be related to the need to economize on enforcement resources, the unwillingness of the agency to spend resources on routine "housekeeping" of low value in terms of publicity,[136] or reliance on foreign enforcers. Another plausible explanation is that the actual harm should be contained within small groups of investors because the securities of issuers delinquent in their filings for a considerable period of time may be illiquid and are traded OTC.

Nevertheless, as discussed in the Part VI, there is no need to put small groups of investors in harm's way, give a certain stratum of foreign issuers a free pass, and impose additional monitoring costs on broker-dealers in this case. A failure to do routine "housekeeping" and revoke the registration of securities more promptly may expose investors to foreign securities with no current information for several years. As years pass, some foreign firms may avoid antifraud liability either because of the statute of repose[137] or due to the unwillingness of the plaintiffs' bar to bring cases against smaller and less "visible" foreign companies, the extent of which is discussed in Part I. Although the tide may be turning as the Commission is improving its reporting database, it is still playing catch-up with untimely reporting.

I also examined changes in enforcement preferences in terms of the balance between civil court and administrative enforcement actions. Since 2010, there has been a substantial increase in in-house administrative proceedings.[138] Several empirical studies confirm this trend.[139] One explanation is that Dodd-Frank, a statutory reform almost coincidental with *Morrison,* has granted the SEC the right to seek civil penalties in administrative proceedings against any person.[140] In the context of this study, another major reason is that reporting violations, which represent the bulk of my data, of-

[135] 17 C.F.R. § 240.15c2-11 (2018).

[136] *See supra* notes 106–110 and *infra* notes 185–191 and accompanying text.

[137] Section 10(b) claims are governed by the five-year statute of repose. 28 U.S.C. § 1658 (2012).

[138] I reserve judgment on the constitutionality, merits, and demerits of administrative proceedings—the scholarship on this subject is voluminous. For an empirical analysis, see Stephen J. Choi & A.C. Pritchard, *The SEC's Shift to Administrative Proceedings: An Empirical Assessment*, 34 YALE J. ON REG. 1 (2017); *see also* Engstrom, *supra* note 42, at 667–68 n.162 (providing an excellent synopsis of the literature).

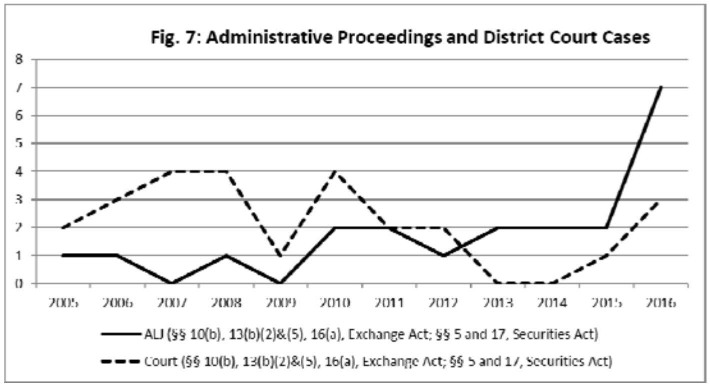
[139] *See* Choi & Pritchard, *The SEC's Shift to Administrative Proceedings, supra* note 138; Urska Velikonja, Behind the Annual SEC Enforcement Report: 2017 and Beyond 10–12 (Nov. 19, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3074073 [https://perma.cc/8KT4-5PU3].

[140] *See, e.g.,* 15 U.S.C. §§ 77h-1; 78u-2 (2016).

ten result in the revocation of the registration of securities, and those cases are mostly resolved in administrative proceedings.

To isolate more serious cases, the following graph excludes standalone Section 13(a) violations.[141] Although more research is needed to examine this issue, the preliminary observation is that the Commission has been bringing more cases against FPIs in administrative proceedings since 2010.

Figure 7: Administrative Proceedings and District Court Cases



Administrative proceedings have been, so far, more expedient and naturally cost-effective from the perspective of the SEC.[142] The future distribution of venues, however, is in the hands of the Supreme Court. On January 12, 2018, the Court granted a writ of certiorari in a case involving a key constitutional issue about the ALJ appointment procedure.[143] The case may scale down the volume of administrative proceedings in the future.[144]

Another interesting observation is that in enforcement, the average judgments and settlements in the pre- and post-*Morrison* subsamples were comparable against a considerable decrease in settlements and judgments against foreign issuers in class-action litigation.[145] A typical judgment in an

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141 This graphic is also available at http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-6/guseva-graphics.pdf [http://perma.cc/VNL6-QQ2P].

142 *See*, *e.g.*, SECURITIES LITIGATION AND ENFORCEMENT, *supra* note 116, at 754–71, 773–802 (reviewing the proceedings).

143 Raymond J. Lucia Co. v. SEC, 138 S. Ct. 736 (2018).

144 For a comprehensive discussion of this case, see, for example, Matthew C. Solomon et al., *Supreme Court Grants Certiorari on the Constitutionality of SEC ALJ Appointments*, PROGRAM ON CORP. COMPLIANCE & ENFORCEMENT (Jan. 24, 2018), https://wp.nyu.edu/compliance_enforcement/2018/01/24/supreme-court-grants-certiorari-on-the-constitutionality-of-sec-alj-appointments-what-this-means-for-the-securities-industry/ [https://perma.cc/JZH6-8S97] ("Until and unless the Supreme Court decides that ALJs are 'mere employees' the SEC will continue to bring the bulk of its litigated cases in federal courts.").

145 *See* Guseva, *supra* note 29, at 255–69.

SEC enforcement action, self-evidently, differs in nature from class-action judgments and includes a civil penalty, disgorgement of profits, and other relief.[146] In my dataset, the average settlements in enforcement actions before the end of June 2010 were about $9 million, and the average settlements after June 2010 were about $9.8 million.

In calculating the averages, I have excluded (1) settlements that did not result in monetary penalties and disgorgement and (2) twelve outliers where settlements and judgments exceeded $30 million. The twelve cases that resulted in higher than average penalties were related not to the timing of *Morrison* but instead to the nature and seriousness of the violations. Most of the FPI-outliers were charged with FCPA violations.[147]

An interesting outlier of considerable notoriety was *SEC v. BP p.l.c.*, resulting in a settlement of $525 million in 2012.[148] BP p.l.c., as a foreign private issuer, furnished misleading information on Form 6-K concerning the Deepwater Horizon oil rig explosion in April 2010. Another illustrative example of a serious violation that exceeded the average amount of penalties is *SEC v. Nortel Networks Corporation*, *et al*., a pre-*Morrison* case involving a fraudulent accounting scheme and resulting in not only an SEC action but also a criminal investigation in Canada. The defendant consented to the entry of a final judgment and a civil penalty in the amount of $35 million.[149]

In search of a possible "complementarity" of public and private enforcement, I identified the types of securities in the SEC's crosshairs and classified the FPIs based on the market for their securities as "OTC" and "exchange-listed." Between 2005 and 2016, some companies moved trading from an OTC platform to an exchange or from an exchange to an OTC market. Those companies were categorized based on their status at the time of the respective enforcement actions.[150]

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[146] *See supra* notes 118–119 and accompanying text.

[147] The outliers included the following FPIs: Siemens Aktiengesellschaft; Technip; Nortel Networks Corp.; Credit Suisse AG; Embraer S.A.; ENI S.p.A.; Teva Pharmaceutical Industries Ltd.; Total S.A.; ABB Ltd.; Alcatel-Lucent; BP plc; Braskem S.A.

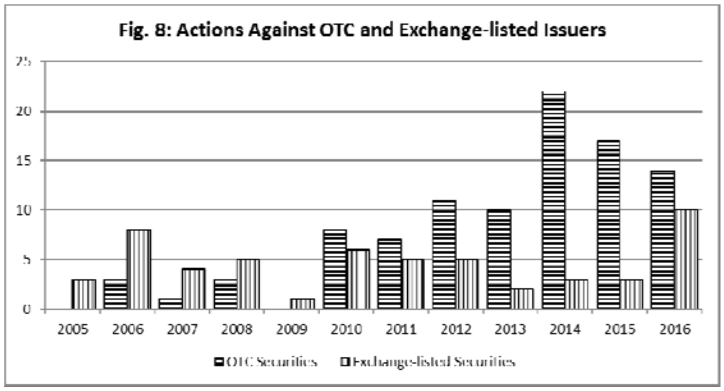
[148] Litigation Release No. 22531, SEC, BP to Pay $525 Million Penalty to Settle Sec Charges of Securities Fraud During Deepwater Horizon Oil Spill (Nov. 15, 2012), https://www.sec.gov/litigation/litreleases/2012/lr22531.htm [https://perma.cc/NBR7-LZGU].

[149] Litigation Release No. 20333, SEC, Nortel Networks Pays $35 Million to Settle Financial Fraud Charges (Oct. 15, 2007), https://www.sec.gov/litigation/litreleases/2007/lr20333.htm [https://perma.cc/WG48-U2LY].

[150] In several cases involving serious violations and presumably longer investigations, the subjects were classified as exchange-traded even when they delisted within two years or less of the respective actions. The delisted FPIs were Akzo Nobel N.V.; Azteca Holdings, S.A. de C.V.; Bennett Environmental Inc.; Grupo Elektra S.A.; Grupo Iusacell, S.A. de C.V.; Longtop Financial Technologies; Lumenis Ltd.; Magyar Telekom; Deutsche Telekom AG; Nordion Inc.; Pharol, SGPS, S.A. In all of those cases, the SEC charged the FPIs with violations of the FCPA, violations of Section 10(b) and Rule 10b-5, or serious reporting violations.

At first glance, the data seems to suggest that private class actions and public enforcement are complements. For instance, in more than ninety percent of private class action complaints filed between 2005 and 2015 under Exchange Act Section 10(b) and Rule 10b-5 and Sections 11 and 12(a)(2) of the Securities Act, plaintiffs overwhelmingly focused on exchange-traded securities.[151] In contrast, between 2005 and 2016, the SEC targeted more companies trading ADRs and shares of stock on the OTC market.[152]

Figure 8: Actions Against OTC and Exchange-listed Issuers



The nature of the penalties, however, belies this superficial conclusion. Most actions against OTC issues resulted in the revocation of the registration of their securities. By contrast, most actions against exchange-traded issuers involved more serious charges and produced heavy monetary penalties. Overall, more research is needed to establish (1) whether the Commission is filling "gaps" in enforcement against foreign OTC issuers as targets with lower "visibility" to the plaintiffs' bar, or (2) whether there is no true "complementarity," and the SEC's actions are primarily driven by the lower costs of prosecuting minor reporting violations.

This survey was unable to identify clearly defined post-*Morrison* changes except the increase in actions for reporting violations. The results suggest that the overarching policies are stable, and that the SEC routinely waits for several years before revoking the registration of FPI securities. It is possible that, as consistent with prior research, the SEC ordinarily *prefers* a comparatively low-key strategy in enforcement against foreign issuers.

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[151] Guseva, *supra* note 29, at 267–77.

[152] Figure 8 is also available at http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-6/guseva-graphics.pdf [http://perma.cc/VNL6-QQ2P].

III. Low-Key Enforcement as a Dominant Strategy

Several explanations of this enforcement approach are in order. The first normative lens of analysis assumes the SEC as a benevolent agency concerned about the overdeterrence associated with enforcement against foreign issuers. The second and third arguments home in on the institutional and international aspects of enforcement. All three arguments ultimately suggest that the low-key approach is, using the vernacular of game theorists, the *dominant* and optimal strategy of the Commission.[153]

A. A Benevolent Enforcer

A benevolent Commission should be aware that the critiques of private enforcement of the securities laws are legion. As Part I briefly addresses, private attorneys may bring cases whose value is lower than the social cost of litigating and target parties which, regardless of their culpability, capitulate and concede to settlement demands for fear of the financial and reputational costs of litigation and massive discovery.[154] Any payments to the plaintiff class ultimately would come from the pockets of the existing shareholders, which is sometimes referred to as the "circularity" problem.[155] These typical critiques are exacerbated by the nature of class-action litigation against foreign firms, where the plaintiffs' bar could, at least before *Morrison*, woo foreign plaintiffs to create a "global" class and augment an eventual recovery to the class.[156]

The SEC is equally aware that overzealous private attorneys may piggyback on its enforcement efforts and bring follow-on cases, which may have little value-added from an efficiency perspective.[157] Bringing "coat-

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[153] In simple terms, "[a] player is said to have a dominant strategy if that same strategy is better for him than all of his other available strategies no matter what . . . strategy combination the other . . . players choose." AVINASH K. DIXIT & BARRY J. NALEBUFF, THE ART OF STRATEGY 70 (2010).

[154] *See* Alexander, *supra* note 52, at 524; Lucian Arye Bebchuk, *Suing Solely to Extract a Settlement Offer*, 17 J. LEGAL STUD. 437, 438 (1988); Coffee, *supra* note 42, at 226–32, 271–72; Coffee, *supra* note 96, at 669–78; Engstrom, *supra* note 42, at 630–31; Pritchard & Sale, *supra* note 54, at 127; *supra* notes 42, 50–56 and accompanying text.

[155] For a thorough discussion of the issue, see, for example, Jill E. Fisch, *Confronting the Circularity Problem in Private Securities Litigation,* 2009 WISC. L. REV. 333, 334–35; Merritt B. Fox, *Why Civil Liability for Disclosure Violations When Issuers Do Not Trade?*, 2009 WISC. L. REV. 297, 303.

[156] Guseva, *supra* note 29, at 250–64.

[157] *See, e.g.*, Engstrom, *supra* note 42, at 634 ("[P]rofit-chasing private enforcers will yield wasteful duplication of effort and socially costly overdeterrence by 'piggybacking' on public enforcement efforts and also on each other."); Rose, *supra* note 24, at 2201–04, 2220–22. *But see* Clopton, *supra* note 24, at 288–89; Coffee, *supra* note 42, at 224–28 (discussing "tag-along" practices and suggesting that the relationship may be described as "symbiotic"); Howard M. Erichson,

tail" actions is comparatively easier for plaintiffs' attorneys. For instance, in some cases, if factual issues have already been litigated between the SEC and a foreign defendant and those facts were resolved adversely to the defendant, the defendant may be collaterally estopped from re-litigating the same issues in a private action.[158] Research suggests that defendants may be more likely to promptly settle tagalong private actions.[159] This urge to settle should emanate, in part, from the expected market penalties of dual proceedings and an increase in the cost of capital of enforcement targets, "a [market] premium to do business with firms that are [presumed] less trustworthy."[160]

Aware of these negative externalities and instances of socially wasteful private litigation, a benevolent SEC may curb its own actions to achieve a more optimal level of deterrence.[161] Alternative courses of action may be foreclosed because the SEC is powerless against excesses in private litigation. The Commission cannot, as numerous prominent commentators have proposed, monitor private litigation efforts or screen out low-social-value cases to ensure optimal enforcement.[162] To avoid failing its dual mission of

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Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation, 34 U.C. DAVIS L. REV. 1, 2, 40–49 (2000) (raising important concerns regarding the possibly symbiotic relationship of private litigation and public enforcement).

[158] *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 322 (1979).

[159] *See, e.g.*, Cox et al., *supra* note 55, at 777.

[160] Jonathan M. Karpoff, *Does Reputation Work to Discipline Corporate Misconduct?*, *in* THE OXFORD HANDBOOK OF CORPORATE REPUTATION 361, 362–66, 371 (2012); *see also* Choi & Pritchard, *supra* note 23, at 29 (suggesting as an alternative explanation that "[s]tock prices may be responding to . . . problems revealed with the firm's underlying business as much as the loss of credibility . . ."); Jonathan M. Karpoff et al., *The Cost to Firms of Cooking the Books,* 43 J. FIN. & QUANTITATIVE ANALYSIS 581, 582, 594–95 (2008).

[161] For a synoptic review of theory, see, for example, Clopton, *supra* note 24, at 306; *see also* George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526, 531–34 (1970) (discussing theories of rational enforcement). "[I]deally, liability should be imposed only in cases where, at the margin, the improvement in economic welfare from deterring issuer misstatements is at least as great as the social costs arising from prosecuting the action." Edward G. Fox et al., *Economic Crisis and the Integration of Law and Finance: The Impact of Volatility Spikes*, 116 COLUM. L. REV. 325, 371 (2016); *see* Becker, *supra* note 42, at 180–201 (discussing optimal costs of enforcement, including the costs of apprehension and conviction, and internalization of the costs of misconduct); Rose, *supra* note 24, at 2189, 2194–95 (suggesting, *inter alia*, that an enforcer may exercise "laudable self-restraint" in cases where significant uncertainty exists).

[162] For a sample of this rich literature, see, as an example, JENNIFER ARLEN, PUBLIC VERSUS PRIVATE ENFORCEMENT OF SECURITIES FRAUD 46 (2007); Engstrom, *supra* note 42, at 644–55; Jill E. Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff*, 60 LAW & CONTEMP. PROBS. 167, 200–01 (1997); Tamar Frankel, *Let the Securities and Exchange Commission Outsource Enforcement by Litigation: A Proposal*, 11 J. BUS. & SEC. L. 111, 119–23 (2010); Joseph A. Grundfest, *Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority*, 107 HARV. L. REV. 961, 968–75 (1994); Park, *supra* note 24, at 174–75; Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 941–42 (2001); Rose,

protecting investors *and* safeguarding market efficiency,[163] a benevolent SEC may take a less zealous and more measured enforcement approach.

In doing so, a benevolent agency will also be protecting the competitiveness of national capital markets and exchanges. The agency is aware that an association with the American market, and thereby U.S. regulators, is not mandatory for a company domiciled in another jurisdiction. Global corporations may access international markets through London or other prestigious trading venues serving as alternatives to the NYSE and Nasdaq.[164] If the projected regulatory and enforcement costs of listing exceed the expected benefits, an exodus of foreign firms may ensue as foreign firms start giving up their American listings.

The second concern that a rational benevolent enforcer understands is that there will be an inevitable information loss between a regulatory agency and a foreign issuer. An enforcement agency sets its policies in light of the estimates of the average costs of reporting and enforcement. A foreign issuer, however, must also take into consideration the costs that a regulator cannot directly observe. First, international companies hail to the United States from jurisdictions with different baseline reporting rules, which implies that some would incur higher costs in the course of cross-listing and restructuring their reporting and internal control procedures than others. Second, corporations cross-listed on U.S. exchanges may pay higher insurance premiums compared to those of similar firms listed only on home-country exchanges and may face a higher risk of litigation.[165] The SEC cannot include those outlays in its calculations.

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supra note 52, at 2225; Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93 (2005).

[163] 15 U.S.C. § 78c(f) (2015). The SEC's mandate is to stand sentinel protecting investors and, at the same time, to guard "fair, orderly, and efficient markets, and facilitate capital formation." SEC, STRATEGIC PLAN: FISCAL YEARS 2014–2018, at 3 (2013), https://www.sec.gov/about/sec-strategic-plan-2014-2018.pdf [https://perma.cc/HMR8-KMDH].

[164] A database of cross-listed securities is available at BNY Mellon, Depositary Receipts https://www.adrbnymellon.com/directory/dr-directory [https://perma.cc/NHF4-REUH]. *See* Marcelo Bianconi & Liang Tan, *Cross-Listing Premium in the US and the UK Destination*, 19 INT'L REV. ECON. & FIN. 244, 246 (2010); Craig Doidge et al., *Has New York Become Less Competitive Than London in Global Markets? Evaluating Foreign Listing Choices Over Time*, 91 J. FIN. ECON. 253, 253–55 (2009); Sergei Sarkissian & Michael J. Schill, *The Nature of the Foreign Listing Premium: A Cross-country Examination*, 36 J. BANKING & FIN. 2494, 2494–95 (2012).

[165] A suggested explanation is an increased exposure to liability. Stuart L. Gillan & Christine A. Panasian, *On Litigation Risk and Disclosure Complexity: Evidence from Canadian Firms Cross-Listed in the US*, 49 INT'L J. ACCT. 426, 427 (2014); *see* Peter Iliev et al., *Uninvited U.S. Investors? Economic Consequences of Involuntary Cross-Listing*, 52 J. ACCT. RES. 473, 496 (2014) (suggesting a relationship between the expected risk of litigation and firm value). *But see* Eugene Soltes, *Incorporating Field Data into Archival Research*, 52 J. ACCT. RES. 521, 524–25

A foreign issuer is also more likely than the SEC to determine the indirect costs of enforcement actions and class actions. Those indirect costs culminate in reputational penalties, which are levied by the capital market with a vengeance and may eclipse direct enforcement costs. Choi and Pritchard, for instance, have expanded previous studies by identifying that the market penalizes issuers heavily where there is both a class action and a Commission investigation and enforcement action against a firm.[166] Effectively, the SEC metes out severe punishment not only through the civil penalties, injunctive relief requested in its complaints, or through cease-and-desist orders, but also through the market and tagalong class actions. While the Commission may underestimate the indirect costs of its actions, an individual firm may overestimate its risk of liability and projected litigation defense costs.[167]

This information asymmetry is compounded by the heterogeneity of business objectives of international companies pursuing listing in the U.S. To name a few examples, one foreign firm may need to use equity consideration in a stock-for-stock merger with a Delaware corporation; another international company explores growth opportunities and seeks to tap external sources of capital, a move that often follows cross-listing; a third one wants to increase international investor exposure; and the management of a fourth firm would like to improve liquidity and trading volume and get better future analyst coverage, which is associated with more accurate forecasts and higher valuations.[168] A regulator cannot make allowances for these objectives and equally accommodate all firms in its regulations and enforcement actions. An information loss, which is inexorable and permanent, is thus created.

Finally, there is another variable that creates an information gap and complicates optimal policy setting. At this juncture, the discussion must pay homage to the rich and venerable literatures that argue that the U.S. securities laws per se and listing on American exchanges generate a "bonding" value and trading premiums for foreign firms.[169] The overarching idea is that firms may objectively benefit from better institutions, adequate disclo-

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(2014) (suggesting that in some cases, researchers may overestimate the risk of litigation associated with cross-listings).

[166] Choi & Pritchard, *supra* note 23, at 29–30, 40–45 (discussing the literature).

[167] *See* Guseva, *supra* note 29, at 240–49 (discussing risk aversion, information asymmetry, and other relevant arguments).

[168] *Id.* at 213–34 (summarizing the extensive literature examining the benefits that foreign firms derive from cross-listing).

[169] *Id.* at 226–38.

sure, investor protection rules, and robust law enforcement in a host jurisdiction such as the United States.[170]

Listing decisions are, thus, driven by numerous economic variables incorporating not only individual firms' business objectives but also the robustness, transparency, and prestige of U.S. capital markets and law.[171] Firms, their executives, and market participants acknowledge that the U.S. securities laws and enforcement simultaneously represent costs and offer benefits.[172]

A benevolent public enforcer, thus, should bear in mind (a) the inefficiencies of private class actions and (b) the information losses resulting from the heterogeneity of foreign firms' business objectives, costs of listings, and reputational penalties of enforcement actions. These factors should shepherd the SEC to low-key prosecutorial policies.

A benevolent Commission, however, would not neglect its investor protection objective. After all, as Easterbrook and Fischel famously quipped, "[a] world with fraud . . . is a world with too little investment."[173] Hence, the SEC would search for substitutes for local enforcement. An example of a functional substitute is cooperation with regulators in the countries of domicile of international issuers. Decades of SEC initiatives lend support to this argument. The Commission has been increasingly relying on cooperation with foreign regulators through not only technical assistance but also enforcement and supervisory coordination. It has forged bilateral dialogues with regulators around the globe,[174] assisted foreign regulators in

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[170] *See generally* John Coffee, Jr., *Racing Towards the Top?: The Impact of Cross-Listings and Stock Market Competition on International Corporate Governance*, 102 COLUM. L. REV. 1757 (2002); Guseva, *supra* note 29, at 222–38 (discussing legal bonding); René M. Stulz, *Securities Laws, Disclosure, and National Capital Markets in the Age of Financial Globalization*, 47 J. ACCT. RES. 349, 367–75 (2009) (discussing the role of securities laws); Licht et al., *supra* note 84, at 2–4 (discussing bonding and other related hypotheses and the impact of enforcement).

[171] Guseva, *supra* note 29, at 222–34.

[172] Howell E. Jackson, *Summary of Research Findings on Extra-Territorial Application of Federal Securities Law*, *in* GLOBAL CAPITAL MARKETS & THE U.S. SECURITIES LAWS 2009, at 1243, 1255 (PLI Corp. Law & Practice, Course Handbook Ser. No. B-1743, 2009); *see* Louis Gagnon & G. Andrew Karolyi, *An Unexpected Test of the Bonding Hypothesis*, THE REVIEW OF CORPORATE FINANCE STUDIES, VOL. 7 (2018), at 103–108 (summarizing the literature and describing the effect of *Morrison*); Fan He & Chinmoy Ghosh, *The Diminishing Benefits of U.S. Cross-Listing: Economic Consequences of SEC Rule 12h-6*, 52 J. FIN. & QUANTITATIVE ANALYSIS 1143, (June 15, 2017), https://doi.org/10.1017/S0022109017000254 [https://perma.cc/ZAS4-ZQ5V] (examining the relationship between the commitment to the U.S. legal system and bonding premiums).

[173] Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669, 673 (1984).

[174] *See, e.g.*, Press Release, SEC, SEC and CESR Launch Work Plan Focused on Financial Reporting: Developing Cross Atlantic Financial Markets (Aug. 2, 2006), https://www.sec.gov/news/press/2006/2006-130.htm [https://perma.cc/4LYY-N4D2]; Press Release, SEC, SEC and CSRC

their investigations,[175] engaged in information sharing with foreign authorities, and signed bilateral and multilateral memoranda of understanding, including memoranda with the IOSCO, which currently has as many as 118 signatories,[176] and with individual national regulators.[177]

B. A Rational Bureaucratic Enforcer

Against this optimistic view of the SEC as a benevolent agency lies a *second* perspective: a picture of an SEC acting as a rational utility maximizer instigated to limit its enforcement against foreign corporations by political and institutional benefits as well as the utility functions of the SEC staff.[178] Consider first the career prospects of the staff. To some attorneys, walking through the "revolving door" and capitalizing on their agency experience through the bounties of private practice may be important motivations.[179]

I am not insinuating that government attorneys shirk their responsibilities currying favor with enforcement targets—the reality is quite the opposite.[180] Instead, public choice arguments are more nuanced. Some staff

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Announce Terms of Reference for Enhanced Dialogue (May 2, 2006), https://www.sec.gov/news/press/2006/2006-63.htm [https://perma.cc/D964-FRJJ].

[175] *See International Enforcement Assistance: SEC Framework for International Cooperation and Assistance*, SEC (Oct. 16, 2014), https://www.sec.gov/about/offices/oia/oia_crossborder.shtml [https://perma.cc/4XR9-69RQ] ("Section 21(a)(2) of the Securities Exchange Act of 1934, authorizes the SEC to conduct investigations on behalf of foreign securities authorities. . . . In fiscal year 2011, the SEC made 772 requests to foreign authorities for enforcement assistance and responded to 492 requests from foreign authorities.").

[176] *See IOSCO MMoU: Appendix A (current signatories)—118*, IOSCO, http://www.iosco.org/about/?subSection=mmou&subSection1=signatories [https://perma.cc/7T37-T24H].

[177] *See generally, e.g.*, SEC ET AL., MEMORANDUM OF UNDERSTANDING CONCERNING CONSULTATION, COOPERATION AND THE EXCHANGE OF INFORMATION RELATED TO THE SUPERVISION OF CROSS-BORDER REGULATED ENTITIES (June 10, 2010), https://www.sec.gov/about/offices/oia/oia_bilateral/canada_regcoop.pdf [https://perma.cc/5ZHQ-JDCK]. Many authorities have joined the Memorandum since 2010. *Id.*

[178] *See, e.g.*, Engstrom, *supra* note 42, at 621 (observing that "[a]gencies may simply lack the capacity to accurately gauge case merits, or they may privilege pursuit of political rewards over welfare-maximizing regulation of private enforcement efforts"); Rose, *supra* note 24, at 2216–17 (discussing personal considerations of agency employees).

[179] *See, e.g.*, Lemos & Minzner, *supra* note 53, at 887–94; Jonathan R. Macey & Geoffrey P. Miller, *Reflections on Professional Responsibility in a Regulatory State*, 63 GEO. WASH. L. REV. 1105, 1115–16 (1995).

[180] Many staff members are highly ethical attorneys simply doing their job. Research also shows that, on average, lawyers are "anxious to show their ability to promote their job prospects." Stephen J. Choi & Adam C. Pritchard, *SEC Enforcement Attorneys: Should I Stay or Should I Go?* 4 (N.Y.U. L. & Econ. Res. Paper Series, Working Paper No. 17-07, 2017), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1238&context=law_econ_current; *see* Donald C. Langevoort, *The SEC as a Lawmaker: Choices About Investor Protection in the Face of Uncertainty*, 84 WASH. U. L. REV. 1591, 1621 (2006) (discussing external and internal agency motivations);

members might prefer to steer enforcement decisions in a direction that would correspond to their career objectives and, for instance, focus on certain strata of violations and firms that could be useful for their resumes or become employers or clients in the future.[181] If foreign firms were less likely to fall within these categories, such staff members would be less interested in those targets, unless, for the sake of the argument, they were planning to immigrate, there were public evidence and indicia of fraud, or an international firm had large operations within the U.S.

This argument skips right off the bat the ascendant "regulatory capture" theories. Regardless of the underlying probability of capture as an institutional phenomenon,[182] the capture by dispersed foreign corporations hailing from multiple jurisdictions seems unlikely. Even though foreign firms may systematically benefit from lower enforcement costs, the collective action problem would prevent coordinated lobbying on behalf of dispersed foreign corporations. They simply do not represent a coherent organized group.[183] On balance, the personal benefits of career advancement and utility functions of the SEC staff may be a more useful lens of analysis.

Lemos & Minzner, *supra* note 53, at 890–94 (discussing agency reputation, financial incentives, and attorney employability arguments).

[181] DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES 21–24 (2001) (discussing the influence of low-level managers and agenda setting policies); Rose, *supra* note 24, at 2213–19 (surveying competing views on regulatory agencies and employment considerations).

[182] On the uncertainties and theoretical limitations, see, for example, Daniel Carpenter, *Detecting and Measuring Capture*, *in* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 57, 57–58 (Daniel Carpenter & David A. Moss eds., 2013); Steven P. Croley, *Public Interested Regulation*, 28 FLA. ST. U. L. REV. 7, 7–8, 106–08 (2000); Engstrom, *supra* note 42, at 674–78; Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199, 236–68 (1988). On the possibilities of capture of the SEC, see Stewart L. Brown, *Mutual Funds and the Regulatory Capture of the SEC*, 19 U. PA. J. BUS. L. 701 (2017); A.C. Pritchard, *The SEC at 70: Time for Retirement?*, 80 NOTRE DAME L. REV. 1073, 1089–90, 1099–102 (2005); Jonathan R. Macey, *Positive Political Theory and Federal Usurpation of the Regulation of Corporate Governance: The Coming Preemption of the Martin Act*, 80 NOTRE DAME L. REV. 951, 958 (2005). There are also empirical studies on disproportionate SEC enforcement against certain industry players, see Stavros Gadinis, *The SEC and the Financial Industry: Evidence from Enforcement Against Broker-Dealers*, 67 BUS. LAW. 679, 708–09 (2012); Simi Kedia et al., The SEC's Enforcement Record Against Auditors 5 (Feb. 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947469 [https://perma.cc/2QF3-CARW]. *But see* Langevoort, *supra* note 180, at 1599, 1626 (observing that "we do not know enough to be too pessimistic or too optimistic" and that "we could expect a reasonably vigorous antifraud program from the SEC even with general industry capture").

[183] That is not to say that an individual firm would not benefit from lobbying. Indeed, there is evidence that corporate lobbying is correlated with lower fraud detection by regulators. *See, e.g.*, Frank Yu & Xiaoyun Yu, *Corporate Lobbying and Fraud Detection*, 46 J. FIN. & QUANTITATIVE ANALYSIS 1865, 1865–68 (2011).

This discussion also does not imply that the SEC purposely avoids meritorious cases. As Roberta Karmel emphasized, "[i]t is psychologically and politically difficult to decline to institute a case involving bad facts or to accept a questionable settlement." [184] Before "bad facts" become known, however, a target must be chosen and thoroughly investigated. These junctions often depend on the staff.

Most importantly, the personal utility arguments are entwined with institutional benefits. To an agency constantly forced to advertise its enforcement successes, the argument raised in Section II(B),[185] domestic cases provide more bang for the buck. Some scholars also suggest that domestic enforcement generates better press and publicity compared to cases against foreign defendants.[186] Furthermore, regulators, including the SEC, sometimes exhibit caution, a tendency suggested in the literature on the regulatory state[187] and confirmed by a 2013 study by the Government Accountability Office.[188] The SEC and its staff may purposely avoid complicated international cases where the costs of investigations are high and the resultant success on the merits is questionable.[189] Incidentally, it is possible that the resource-constrained and risk-averse SEC is not "filling the gaps" in private enforcement against international corporations but rather pounces on small-

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[184] Roberta S. Karmel, *Creating Law at the Securities and Exchange Commission: The Lawyer as Prosecutor*, 61 LAW & CONTEMP. PROBS. 33, 41 (1998).

[185] *See, e.g.,*Stephen J. Choi & A.C. Pritchard, *The SEC's Shift to Administrative Proceedings: An Empirical Assessment*, 34 YALE J. ON REG. 1, 4, 15–17 (2017); *supra* notes 106–110 and accompanying text.

[186] *See, e.g.*, Donald C. Langevoort, *Structuring Securities Regulation in the European Union: Lessons from the U.S. Experience*, *in* INVESTOR PROTECTION IN EUROPE: CORPORATE LAW MAKING, THE MIFID AND BEYOND 485, 487, 499 (2006) (discussing budget and publicity arguments and explaining why the SEC should rationally prefer to prosecute domestic issuers).

[187] *See, e.g.*, Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1296–300 (2006); Engstrom, *supra* note 42, at 682.

[188] U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-621, SECURITIES & EXCHANGE COMMISSION: IMPROVING PERSONNEL MANAGEMENT IS CRITICAL FOR AGENCY'S EFFECTIVENESS 10, 16, 75 (July 2013), https://www.gao.gov/assets/660/655989.pdf [https://perma.cc/V9CE-TMHD].

[189] Frankel, *supra* note 162, at 113 (discussing how to strengthen enforcement and suggesting that current metrics of success are associated with "incentives [that] would lead [the SEC] to avoid the large costly complicated cases and focus on the small ones"); Macey, *supra* note 107, at 646 ("The focus is on the number of cases brought by the Division, and, to a lesser extent, on the size of the fines collected by the SEC. . . . In light of this metric of success, it is not surprising that the SEC focuses on low-hanging fruit. Because investigations take time, the SEC focuses on bringing cases that do not require much, if any, investigative effort."); Rose, *supra* note 24, at 2218 (cataloguing various behavioral biases affecting SEC enforcement polices). These arguments are also entwined with the penchant for "self-aggrandizement . . . with an eye to collecting political and personal rewards and ensuring the continued flow of resources to the agency." Engstrom, *supra* note 42, at 680.

er respondents[190] and simple reporting violations to avoid failure. The tendency to avoid complicated cases and powerful opponents is not unprecedented—foreign regulators have followed similar strategies.[191]

To summarize, the low-key enforcement against foreign firms is Janus-faced. The SEC may be acting as a benevolent, social-welfare-maximizing enforcer or as an institution whose policies are premised on self-advertising, risk aversion, staff's personal utility functions, and budget-related issues; all explaining the agency's case selection strategies. The choice is not binary and both explanations have merit.

C. Specifics of International Enforcement

Regardless of the underlying motivations of the SEC, it has opted for the best strategy of low-key enforcement. Each cross-listed company faces a two-by-two enforcement matrix including at least two national enforcement agencies and at least two sets of national courts. Consider an example of a Canadian company listed on the Toronto Stock Exchange and on Nasdaq and having about fifty percent of its assets on either side of the U.S.-Canadian border. Just as the United States has an efficient private enforcement system, Canada does as well. Both jurisdictions obviously have public enforcers. This is an example of a two-by-two matrix with at least two venues for private enforcement and at least two public enforcers. Within this matrix, each national policymaker is unable to design procedural rules that would minimize the *total* net social costs of fraud *and* of enforcement.[192] No single country can singlehandedly achieve an optimal level of enforcement against an international firm unless the other jurisdiction openly imposes restrictions on its own enforcement policy.

Yet no national regulator would openly commit to a hands-off approach, which is akin to freeriding and shirking its responsibilities to protect

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[190] Cox et al., *supra* note 55, at 778 (discussing this tendency); Engstrom, *supra* note 42, at 681; *see* John C. Coffee, Jr., *Is the SEC's Bark Worse Than Its Bite?*, NAT'L L.J. (July 9, 2012), https://www.law.com/nationallawjournal/almID/1202562039466/ [https://perma.cc/9ZSH-DTTK] ("Thus, the SEC's business model might best be described as that of a high volume commodities business, which sells its main product (*i.e.*, settlements) on a deeply discounted basis to maximize revenues.").

[191] *See, e.g.*, Ian Ramsey & Miranda Webster, *ASIC Enforcement Outcomes: Trends and Analysis*, 35 COMPANY & SEC. L.J. 289 (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3063002 [https://perma.cc/24RA-8T36].

[192] The cross-border aspect of this challenge compounds the common problem that "[i]n choosing the procedural rules that will govern securities fraud cases . . . lawmakers face yet another difficult challenge. Though the goal is clear enough—to set rules that minimize net social costs—figuring out just what that requires presents murky empirical questions." Rose, *supra* note 24, at 2193.

investors and oversee all issuers registered with the regulator. The regulator, for instance, would easily foresee a likely public backlash following an official announcement of a low-enforcement strategy.[193]

To avoid this problem, the regulators within the international enforcement "matrix" can cooperate, of course. Cooperation, however, varies among enforcement agencies, and international enforcement rules are difficult to make effective.[194] For instance, the Ontario Securities Commission may take the lead in a specific case, and the SEC would provide support in that joint investigation. In case there are parallel class actions in Canada and the United States, courts may split the plaintiff class for the purposes of settlement.[195] The international two-by-two enforcement matrix between the two neighbors would work well in that individual case. By contrast, in the case of some other countries, even if there is a broad umbrella agreement or a bilateral MOU, the SEC's coordination costs could be much higher or even prohibitive.[196] Each time the Division of Enforcement calls on foreign regulators for assistance in its investigations, the SEC, as an institution, cashes in on its political capital for the purposes of a specific investigation and related discovery. Just as political capital is limited, so too is international cooperation in enforcement. The SEC must prioritize.

In addition, international requests for assistance may take time. Recall the Supreme Court's new position on the application of the statute of limitation to disgorgement in SEC cases.[197] This doctrinal change should further dampen the Commission's incentives to engage in a cross-border dialogue with foreign bureaucracies whenever time is of essence.[198]

The second consideration demonstrating why the current SEC's policy is the *dominant* strategy is grounded in political economy. Recall that according to the bonding theory, cross-listings are associated, *inter alia*, with trading premiums, better reporting, better access to capital, and corporate governance improvements.[199] Those benefits would not be concentrated in the United States alone. To the extent that the benefits are associated with

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193 Possible consequences include adverse budgetary consequences and acrimonious congressional hearings aggravated by national pride and a common understanding of nonenforcement as an invitation to "lemons" and a threat to the stability of national markets.

194 I would like to thank David Rosenfeld and the participants of the Fifth Corporate and Securities Litigation Workshop for discussing this point. *See, e.g.*, The Influence of Cross-Border Cooperation, *supra* note 16, at 16–18 (discussing differences in cooperation between common and civil law countries).

195 *See* Guseva, *supra* note 29, at 266–67 (reviewing a sample of such settlements).

196 *See* The Effects of Cross-Border Cooperation, *supra* note 16, at 7–14, 29–30 (discussing individual MOUs, regulatory frictions, and the history of the IOSCO MMOU).

197 Kokesh v. SEC, 137 S. Ct. 1635, 1642–45 (2017).

198 The decision, for instance, already affects FCPA investigations. *See* Peikin, *supra* note 16.

199 *See supra* notes 168–170.

SEC enforcement actions, the Commission, as a national regulator, would be spending its limited budget on subsidizing foreign markets and regulators. The SEC's regulatory actions would generate a *global* positive externality.

Hence, the SEC is likely to either ignore certain cases or refer some matters to its counterparts abroad instead of actually prosecuting foreign issuers.[200] It is those foreign regulators—not the SEC—that operate as primary regulators of foreign corporations, have better access to evidence about wrongdoings, and naturally should assume the costs of enforcement and prosecute securities fraud in their respective jurisdictions.[201] Absent specific policy reasons, such as, for instance, the importance of a cross-listed company to American economy or ownership of substantial assets in one country, *i.e.*, the circumstances in which the issuer inches closer to the "domestic" company status,[202] a rational enforcer would not want to absorb the costs of cross-border investigation and enforcement.

This philosophy is also indirectly embedded in the Commission's Enforcement Manual, which guides the Enforcement Division toward "matters having potential programmatic significance, which are deemed 'National Priority Matters.'"[203] Among the criteria that carry weight with the Enforcement Division are a strong message of deterrence and substantial numbers of injured investors.[204] Foreign companies and the magnitude of related investor losses may easily fall outside of these "matters of national significance" and be relegated to the targets of marginal importance.[205]

The third supporting argument is premised on the public choice explanations discussed in Section B. As a national regulator, the Commission

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[200] This is already happening in certain enforcement segments. *See, e.g.*, Howell E. Jackson, *The Impact of Enforcement: A Reflection*, 156 U. PA. L. REV. PENNUMBRA 400, 408 (2008), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1016&context=penn_law_review_online [https://perma.cc/9FH6-QFAU] ("With the globalization of financial markets, regulatory officials routinely refer matters to their counterparts in other jurisdictions. Often, a problem like insider trading or market manipulation will be detected in one market but will be referred to a second or third jurisdiction, where the investor making the trades or the firm in whose stock the trade is affected is located.").

[201] Another important concern is that the SEC cannot act as a global policeman but must navigate a complex field populated by international corporations, foreign regulators, and cooperative alliances. *See, e.g.*, CHRIS BRUMMER, MINILATERALISM: HOW TRADE ALLIANCES, SOFT LAW, AND FINANCIAL ENGINEERING ARE REDEFINING ECONOMIC STATECRAFT 88–97 (2014) (presenting a compelling story of global developments and the policy-setting ecology).

[202] *See* 17 C.F.R. §§ 230.405, 240.3b-4(c) (2018) (defining "foreign private issuer").

[203] ENFORCEMENT MANUAL, *supra* note 117, § 2.1.1.

[204] *Id.*

[205] A germane consideration is that "[t]o be justified, a deterrence-focused securities fraud liability regime must save more in social costs from fraud than it creates in enforcement costs." Rose, *supra* note 24, at 2178.

would not capture the full benefits from enforcement. Its actions, associated with better deterrence or more competitive and transparent markets, would be a pure "unrequited subsidy" to public agencies and markets in other jurisdictions. These global "subsidies," undoubtedly, would not be assigned to the personnel of the SEC.[206] In contrast, the underlying enforcement actions may galvanize the critics of the Commission if, for instance, there is an outflow of foreign firms to exchanges outside the United States. The SEC, thus, bears the risks of deterring foreign issuers from listing, reducing the competitiveness of U.S. markets, and being blamed for the exodus of international companies.[207] Overdeterrence, in turn, impedes capital formation and reduces allocative efficiency.

To summarize, the foregoing issues are bound to produce only one dominant strategy for the SEC—a predictably low enforcement and high discretionary nonenforcement. The cross-border enforcement ecology itself logically pushes the SEC to rely on regulators abroad and private enforcers within the United States. The SEC, thus, may reasonably view private litigation not only as "a necessary supplement to SEC enforcement"[208] but also as an institutionally preferable optimum option. The SEC should rationally invest less in enforcement against foreign firms compared to enforcement against domestic corporations. Since the Commission cannot publicly admit its philosophy, this dominant strategy remains unacknowledged.

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[206] *See, e.g.*, Langevoort, *supra* note 180, at 1611 ("[R]eputational payoffs to key SEC officials are asymmetric: good economic outcomes (e.g., lowering the cost of capital or creating more competitive markets) are hard for the SEC to take credit for, while bad ones (e.g., scandals and troubles) generate intense criticism.").

[207] *See, e.g.*, ROBERTA ROMANO, THE ADVANTAGE OF COMPETITIVE FEDERALISM FOR SECURITIES REGULATION 8–9, 45–50, 147–63 (2002) (discussing the related mechanisms and benefits of regulatory competition).

[208] Donald C. Langevoort, *Capping Damages for Open-Market Securities Fraud*, 38 ARIZ. L. REV. 639, 652 (1996). In one of his testimonies, Chairman Levitt emphasized: "The Commission has long maintained that private actions provide valuable and necessary additional deterrence against securities fraud, thereby supplementing the Commission's own enforcement activities." *Concerning the Impact of the Private Securities Litigation Reform Act of 1995, Hearing Before the Subcomm. on Fin. & Hazardous Materials of the H. Comm. on Commerce* (Oct. 21, 1997) (statement of Arthur Levitt Jr., Chairman, Securities & Exchange Commission), https://www.sec.gov/news/testimony/testarchive/1997/tsty1797.txt [https://perma.cc/E3RT-P384].

IV. Is Low-Key Enforcement Sustainable?

A. Class Actions

This Part examines whether this policy needs to be adjusted in the post-*Morrison* world.[209] The analysis below provides a synoptic review of the changes in class-action litigation, firms' incentives, and market trends. In terms of litigation, *Morrison,* despite concerns of some commentators,[210] has not dealt a deathblow to class actions against international companies.[211] Even the SEC itself, in the 2012 Study mandated by Dodd-Frank, hesitated to recommend that Congress take action to overrule *Morrison*.[212]

Yet, it is also true that *Morrison* has affected litigation in multiple ways.[213] By way of example, the *Morrison* decision may have strengthened the defendants' hand at early stages in litigation. Most claims are usually settled after an unsuccessful motion to dismiss. More rarely, defendants settle after class certification. In its July 7, 2017, *Petrobras* decision, the Second Circuit Court of Appeals, citing *Morrison,* vacated in part a class certification order and remanded the case for further proceedings on the grounds that the lower court did not determine whether the question of the domestic nature of the OTC transactions at issue would predominate over the issues of law and fact common to the whole class.[214]

The *Morrison* decision also seems to have opened some unexpected avenues for avoiding Securities Act litigation. For instance, Joseph Grundfest points out that the Court has missed that, in addition to secondary market liability under Section 10(b) and Rule 10b-5, *Morrison, ex hypothesi,* reduces Section 11 liability in initial public offerings "in which listing on a U.S. exchange follows an initial distribution that includes even a small

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[209] Paraphrasing Amanda Rose, is SEC's "prosecutorial discretion [against foreign issuers] palatable [and can] the enforcer . . . be trusted to promote optimal deterrence" by staying on a course of predictably low enforcement? Rose, *supra* note 24, at 2197.

[210] *See, e.g.*, Study on the Cross-Border Scope, *supra* note 32, at 18–19, 39, 42–53; Licht et al., *supra* note 84, at 5 (citing comments submitted by twenty-six pension funds to the SEC); Luis A. Aguilar, SEC Commissioner, Statement by Commissioner: Defrauded Investors Deserve Their Day in Court (Apr. 11, 2012), https://www.sec.gov/news/public-statement/2012-spch041112laahtm [https://perma.cc/A4GL-KFMA] ("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.").

[211] Although theoretically plausible, this scenario is not fully supported by research and data on current filings. *See* Guseva, *supra* note 29, at 254–79; Licht et al., *supra* note 84, at 17, 25–26.

[212] Study on the Cross-Border Scope, *supra* note 32, at 58–70.

[213] *See* Guseva, *supra* note 29, at 249–78.

[214] *In re* Petrobras Sec., 862 F.3d 250, 257 (2d Cir. 2017) ("[W]e next hold that the district court committed legal error by finding that Rule 23(b)(3)'s predominance requirement was satisfied without considering the need for individual *Morrison* inquiries regarding domestic transactions. We therefore vacate this portion of *Certification Order*.").

number of shares sold in transactions that are non-domestic under *Morrison*."[215] More importantly, there is a chance that if foreign purchasers, who acquire shares in non-domestic transactions, later on sell their securities on an American exchange, the sales will contaminate the whole pool of securities, including those originally purchased in *domestic* transactions. All shares will be commingled and may become "tainted." This will prevent U.S. aftermarket purchasers from satisfying the tracing requirement, *i.e.*, the requirement that "aftermarket purchasers seeking standing must demonstrate the ability to 'trace' their shares to the faulty registration"[216] statement. Consequently, *Morrison* represents an approach to extraterritoriality that may shake the foundations of the nearly century-old liability regime under both the Exchange Act and the Securities Act.

There also were some post-*Morrison* changes that may point toward reduced risks in class-action litigation in general. Even though class action filings against international companies have been rising for a few years,[217] after 2010, foreign issuers face a smaller plaintiff class because federal district courts dismissed *all* actions brought by foreign and U.S. residents with respect to securities purchased abroad.[218] Post-*Morrison* mean and median class action settlements became lower by almost sixty percent. After *Morrison,* more class action settlements were in the range between $1 million and $5 million, and a higher percentage of post-*Morrison* claims settled.[219] More post-*Morrison* defendants preferred to settle quickly, before a court ruling on a motion to dismiss or without ever moving to dismiss, which is their primary and cheapest weapon in securities class-action litigation.[220]

It is, of course, possible that international corporate defendants were motivated to settle because of the need to avoid litigation costs and distrac-

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[215] Joseph A. Grundfest, Morrison*, the Restricted Scope of Securities Act Section 11 Liability, and Prospects for Regulatory Reform*, 41 J. CORP. L. 1, 3 (2015). In the now global world of securities, foreign institutional investors almost invariably participate in the initial distribution of new securities. Those purchasers do not acquire securities in "domestic transactions" required under *Morrison.* They may not have a private right of action under Section 10(b) and lack standing to bring actions under Section 11. *Id*. at 53–57.

[216] Krim v. pcOrder.com, Inc., 402 F.3d 489, 495–96 (5th Cir. 2005).

[217] The number of filings fell in 2016, however. It is yet unclear if 2016 is a temporary aberration. *See, e.g.*, NERA ECON. CONSULTING, RECENT TRENDS IN SECURITIES CLASS ACTION LITIGATION: 2016 FULL-YEAR REVIEW 7 (2017), http://www.nera.com/content/dam/nera/publications/2017/PUB_2016_Securities_Year-End_Trends_Report_0117.pdf [https://perma.cc/MG5V-GDTL].

[218] Guseva, *supra* note 29, at 255–64.

[219] *Id.* at 266–72.

[220] *Id.* at 255–77. On the impact of procedural laws, see Stephen J. Choi et al*., The Screening Effect of the Private Securities Litigation Reform Act*, 6 J. EMPIRICAL LEGAL STUD. 35, 36–39 (2009); Pritchard & Sale, *supra* note 54, at 128 ("The PSLRA makes the motion to dismiss the main event for securities litigation. . . . Moreover, the absence of discovery means that the expense of litigation will be manageable for the defendants.").

tion of class actions or simply due to risk aversion.[221] In this sense, post-*Morrison* defendants may perceive the risk of going to trial as more daunting compared with a cheaper prompt settlement. Unfortunately, an alternative explanation could be an increase in fraud[222] and higher net benefits from fraud resulting from suboptimal deterrence. To conclude, although it is false to presume that more post-*Morrison* settling defendants are lemons, the reverse cannot be ruled out without additional research.

*B. Post-*Morrison *Investors*

Another concern is that through listing on exchanges, foreign companies improve their international visibility, proceed to issue more securities, and arouse broad investor interest.[223] When an American investor learns about a foreign company being listed on the NYSE with all the attendant fanfare, she may be more interested in acquiring its securities, proceed with placing a purchase order with her broker, and, should the broker execute the order on a foreign exchange in the country of domicile of the cross-listed issuer, fully appreciate the consequences of her decision only too late. Namely, if the international issuer published materially misleading statements, that investor would be unable to bring an action for fraud under the federal securities laws in a U.S. court.

Admittedly, these consequences of *Morrison* may be limited to individuals. In contrast, institutional investors are presumed more sophisticated and well-diversified. Yet, they are not immune from being blindsided by fraudsters and bamboozled by the prestige of listing in the United States. In fact, institutions investing in foreign companies may prefer securities of cross-listed issuers.[224] Research indicates, however, that many institutional

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[221] Another possible factor predetermining litigation behavior is D&O insurance. *See, e.g.*, Tom Baker & Sean J. Griffith, *Predicting Corporate Governance Risk: Evidence from the Directors' & Officers' Liability Insurance Market*, 74 U. CHI. L. REV. 487, 499–500, 533–38 (2007).

[222] Pritchard & Sale, *supra* note 54, at 128.

[223] *See, e.g.*, H. Kent Baker et al., *International Cross-Listing and Visibility*, 37 J. FIN. & QUANTITATIVE ANALYSIS 495, 497–98 (2002); Boone et al., *supra* note 74, at 1, 7–9; Karolyi, *supra* note 92, at 117–18, 122, 132, 137; Michael R. King & Dan Segal, *The Long-Term Effects of Cross-Listing, Investor Recognition, and Ownership Structure on Valuation*, 22 REV. FIN. STUD. 2393, 2394–96 (2009); Reese & Weisbach, *supra* note 70, at 67–73, 102; Ryan T. Ball et al., *Equity Cross-Listings in the U.S. and the Price of Debt* 3–4, 16–17 (European Corp. Governance Inst., Working Paper No. 274/2010, 2017), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1426586 [https://perma.cc/V5E3-2MJ4].

[224] *See* Reena Aggarwal et al., *Portfolio Preferences of Foreign Institutional Investors* 26 (World Bank Policy Research, Working Paper No. 3101, 2003), http://documents.worldbank.org/curated/en/984761468764046884/pdf/wps3101.pdf [https://perma.cc/Y62F-AEE7] (finding, *inter alia,* that "size and visibility of the firm as proxied by firm size, number of analysts following the

investors did not change their investment and trading policies in the wake of *Morrison*[225]—investors continued to purchase foreign issuers' securities through transactions that fell outside the extraterritorial reach of the securities laws. Institutions either have ignored the judicial "about-face" in their trading strategies or, instead of looking to possible litigation, relied on various economic factors, including improvements in disclosure and the informativeness of share prices, which are characteristic consequences of cross-listings.[226]

At the same time, recent research warns that *Morrison* may have produced a negative impact not only on investor litigation but also on corporate reporting, private benefits of control, and transparency.[227] Moreover, even though improvements in corporate governance and reporting ensue after cross-listings,[228] these effects are not uniform, and there are significant country-level effects associated with the strength of local investor protection rules and their enforcement.[229] Depending on the extent of the reduction in post-*Morrison* disclosure and private enforcement, even institutional investors may need help from the Commission.

C. Good and Bad Firms

A 2010 study suggested that private enforcement alone, although not useless for fraud prevention, was responsible for only three percent of the

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firm, and ADR dummy are significant and positively associated with U.S. mutual fund investments").

[225] *See generally* Robert P. Bartlett III, *Do Institutional Investors Value the Rule 10b-5 Private Right of Action? Evidence from Investors' Trading Behavior Following* Morrison v. National Australia Bank Ltd., 44 J.L. STUD. 183, 184–87 (2015).

[226] Laurent Frésard & Carolina Salva, *The Value of Excess Cash and Corporate Governance: Evidence from U.S. Cross-Listings,* 98 J. FIN. ECON. 359, 359–64 (2010); Guseva, *supra* note 29, at 223–37; Licht et al., *supra* note 84, at 2–4, 10, 25–26.

[227] *See* James P. Naughton et al., Private Litigation Costs and Voluntary Disclosure: Evidence from the *Morrison* Ruling 12–13, 30 (Feb. 2017) (unpublished manuscript), http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2432371 [https://perma.cc/G9UK-B2HT]; *see also* Gagnon & Karolyi, *supra* note 172, at 104–107, 134–41. "[D]isclosure has a tempering effect on fraud because transparency makes discovery of ill-behavior more likely." Schwartz, *supra* note 82, at 378.

[228] *See, e.g.*, Reena Aggarwal et al., *Does Governance Travel Around the World? Evidence from Institutional Investors*, 100 J. FIN. ECON. 154, 160–64 (2011); Guseva, *supra* note 29, at 223–35.

[229] *See, e.g.*, Reena Aggarwal et al., *Differences in Governance Practices Between U.S. and Foreign Firms: Measurement, Causes, and Consequences*, 22 REV. FIN. STUD. 3131, 3132 (2009); Bernard S. Black, *The Legal and Institutional Preconditions for Strong Securities Markets*, 48 UCLA L. REV. 781, 820–24 (2001); Boone et al., *supra* note 74, at 5–9; Huimin Chung, *Investor Protection and the Liquidity of Cross-listed Securities: Evidence from the ADR Market*, 30 J. BANKING & FIN. 1485, 1488–89, 1496, 1503 (2006); Ana C. Silva et al., *Earnings Management, Country Governance, and Cross-Listing: Evidence from Latin America*, 7 GLOBAL J. EMERGING MKT. ECONS. 4, 4–6 (2015).

detected cases of fraud, while the SEC accounted for seven percent.[230] Post-*Morrison, i.e.*, after 2010, foreign companies may come to believe that against a stable level of public enforcement of the antifraud provisions of the securities laws, fraud detection has become even lower. A litigation risk reduction inures to the benefit of honest international firms. Unfortunately, it simultaneously benefits companies that are more likely to under-comply and commit fraud.[231]

Fraud primarily improves the payoffs of culpable corporate insiders.[232] Those insiders may safely reside in foreign countries, which raises personal jurisdiction, investigatory and enforcement obstacles,[233] and enjoy private benefits, which typically should be negatively associated with the greater transparency accompanying cross-listings.[234]

This problem becomes particularly acute when a firm intends to exit a market. If a firm is ready to leave U.S. markets—when, for instance, it has raised the necessary capital after cross-listing, which is generally associated with an uptick in securities offerings,[235] or where the firm has nothing further to gain from having securities traded in the United States—its control persons may take on more risk or engage in fraudulent practices in this final

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[230] Alexander Dyck et al., *Who Blows the Whistle on Corporate Fraud?,* 6 J. FIN. 2213, 2214, 2230, 2251 (2010).

[231] For a discussion of fraud, risk seeking, and undercompliance, see, for example, Rose, *supra* note 24, at 2190–91.

[232] *See, e.g.*, John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1547–54 (2006); Sean J. Griffith, *Afterward and Comment: Towards an Ethical Duty to Market Investors*, 35 CONN. L. REV. 1223, 1241–42 (2003).

[233] Similar concerns were voiced by Steve Peikin regarding FCPA investigations. Peikin, *supra* note 16. Opaque corporate organizations may also shield insiders from liability. *See, e.g.*, Mihailis Diamantis, *Ditching Deterrence: Preventing Crime by Reforming Corporations Rather Than Fining Them*, COMPLIANCE & ENFORCEMENT (Jan. 2018), https://wp.nyu.edu/compliance_enforcement/2018/01/03/ditching-deterrence-preventing-crime-by-reforming-corporations-rather-than-fining-them/ [https://perma.cc/N97N-HD2H].

[234] Previous research on cross-listings provides ample evidence on the incentives of foreign firms' insiders and a reduction in their individual private benefits in conjunction with cross-listings in the United States. *See, e.g.*, Doidge et al., *supra* note 164, at 255; Craig Doidge et al., *Private Benefits of Control, Ownership, and the Cross-Listing Decision*, 64 J. FIN. 425, 429 (2009); Craig Doidge, *U.S. Cross-Listings and the Private Benefits of Control: Evidence from Dual-Class Firms*, 72 J. FIN. ECON. 519, 519–22 (2004); Allen Ferrell, *The Case for Mandatory Disclosure in Securities Regulation Around the World*, 2 BROOK. J. CORP. FIN. & COM. L. 81, 86–91 (2007). The value of control premiums is negatively associated with "better general investor protection, higher quality of law enforcement, and stricter takeover laws." These and similar variables explain as much as "68% of the cross-country variation in the value of control-block votes." Tatiana Nenova, *The Value of Corporate Voting Rights and Control: A Cross-Country Analysis*, 68 J. FIN. ECON. 325, 344, 348 (2003).

[235] *See supra* note 223.

period. Fraud becomes a positive net value project in the final period.[236] A manager's expected return on fraud, materially misleading statements, or simply dishonest puffery, is inversely related to the expected costs of law and enforcement.

In extreme circumstances, if an under-deterrence scenario is severe and left unaddressed for a long time, a lemons market may ensue.[237] In that market, rational investors would increasingly and continuously discount the value of publicly traded securities of all foreign issuers regardless of whether an individual issuer is an honest international corporation or a lemon.[238] The honest foreign issuers would not receive a premium for their truthful corporate reporting and could be penalized with a lower market price and more strike suits if they candidly disclosed news, particularly, bad news, to shareholders. Ultimately, they would be forced to exit American markets.[239] This outcome would defeat the objectives of national securities regulation, including improved disclosure, share price accuracy, corporate transparency, and ultimately, allocative efficiency.[240]

D. Troublesome Market Examples

There is, obviously, no urgent lemons problem presently plaguing the U.S. market. Yet, a few recent trends are worthy of note. Around 2015, the major American exchanges—the NYSE and Nasdaq—overtook London, which has traditionally been their major competitor in attracting cross-listings through depositary receipts.[241] Another statistic comes from the database of reporting FPIs registered with the SEC. Their numbers were slow-

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[236] *See generally* Jennifer H. Arlen & William J. Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 U. ILL. L. REV. 691, 702–03; *see also* Stigler, *supra* note 161, at 527–28, 530.

[237] *See generally* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970).

[238] On a similar effect, *i.e.*, an inability of the market to distinguish among issuers with similar characteristics, in a different context, see, for example, Yi Ding et al., Spillover Effects from US Class Action Lawsuits: Evidence from Foreign Firms Cross-listed in the US 1–2, 31 (Jan. 31, 2014) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2400510 [https://perma.cc/5CTN-3XTF].

[239] Akerlof, *supra* note 237, at 495.

[240] The interplay between the costs of liability and deterrence vis-à-vis the resultant market benefits is complex. *See, e.g.*, Fox et. al., *supra* note 161, at 370–71 (discussing these considerations in the context of fraud-on-the-market actions); Paul G. Mahoney, *Precaution Costs and the Law of Fraud in Impersonal Markets*, 78 VA. L. REV. 623, 630 (1992) ("[T]he possibility of an uncompensated wealth transfer may cause certain socially detrimental investments and result in other reductions in societal wealth.").

[241] *See* Guseva, *supra* note 29, at 207 n.23.

ly dropping for several decades but have stabilized recently.[242] This means that the outflow of international firms has slowed down, even if it has not been entirely reversed.

Is this because the United States finally has struck the right balance in terms of the costs and benefits of listing, the attendant exposure to its liability regime, and compliance costs?[243] How many of the currently cross-listed issuers are lemons? And how many are less committed to abide by the law and ensure good corporate practices because of a possible erosion of such corporate governance device as class actions?[244] Some studies, for instance, suggest that companies already tend to disclose less information to the market in the wake of *Morrison*.[245]

Consider also the distribution of domiciles of the international companies currently registered with the SEC. It is broad and spans strong and successful markets, as well as jurisdictions with weaker capital markets and securities law. Yet, the following offshore jurisdictions top the lists as of December 31, 2015, and December 31, 2011, but not as of December 31, 2006:

- British Virgin Islands (BVI) had thirty-seven and fifty-three registered and reporting companies in 2015 and 2011, respectively, but as few as twenty-one in 2006;

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[242] *See, e.g.*, SEC, INTERNATIONAL REGISTERED AND REPORTING COMPANIES: MARKET SUMMARY (Dec. 31, 2015), https://www.sec.gov/divisions/corpfin/internatl/foreignmarketsumm2015.pdf [https://perma.cc/CZX7-PTYZ]; SEC, NUMBER OF FOREIGN COMPANIES REGISTERED AND REPORTING WITH THE U.S. SECURITIES AND EXCHANGE COMMISSION (Dec. 31, 2014), https://www.sec.gov/divisions/corpfin/internatl/foreignsummary2014.pdf [https://perma.cc/XBL6-2XFH]; SEC, NUMBER OF FOREIGN COMPANIES REGISTERED AND REPORTING WITH THE U.S. SECURITIES AND EXCHANGE COMMISSION (Dec. 31. 2011), https://www.sec.gov/divisions/corpfin/internatl/foreignsummary2011.pdf [https://perma.cc/V582-GY2W]; SEC, FOREIGN COMPANIES REGISTERED AND REPORTING WITH THE U.S. SECURITIES & EXCHANGE COMMISSION (Dec. 31, 1998), https://www.sec.gov/divisions/corpfin/internatl/foreignissuers1998.pdf [https://perma.cc/DC3G-CYDF]; *Foreign Companies Registered and Reporting with the U.S. Securities and Exchange Commission*, SEC (Dec. 31, 2000), https://www.sec.gov/divisions/corpfin/internatl/companysum2000.htm [https://perma.cc/P7BA-45EE].

[243] I agree with the answer posited by Leuz and Wysocki: "[T]he largest and, arguably, most successful capital markets exhibit strong disclosure and securities regulation. Do these markets thrive because of regulation or in spite of it? [Economists] . . . have little evidence that we could bring to bear on this question . . . ." Christian Leuz & Peter Wysocki, *The Economics of Disclosure and Financial Reporting Regulation: Evidence and Suggestions for Future Research*, 54 J. ACCT. RES. 525, 599 (2016).

[244] Fox, *supra* note 31, at 1199–210 (discussing why and how fraud-on-the-market class actions may be viewed as a corporate governance device).

[245] *See, e.g.*, Naughton et al., *supra* note 227, at 22–23, 30. Self-evidently, more empirical studies are needed in this area.

- Cayman Islands companies increased their presence as well, with 119 and 134 companies in 2015 and 2011, respectively, and only forty-three in 2006;
- Marshal Islands stand at forty-five and thirty-two issuers in 2015 and 2011, respectively, and only fifteen in 2006.[246]

About a third of BVI-domiciled companies' securities trade on the OTC market. Other issuers within the foregoing group are almost equally split between the two most reputable listing venues—the NYSE and Nasdaq. Apparently, American investors and exchanges are not deterred by the fact that foreign issuers are registered offshore.

An apt illustration is Alibaba, which is listed in New York.[247] Alibaba's complicated ownership and governance structures were not welcome in Hong Kong. The unsuccessful overtures to Hong Kong's Stock Exchange were among the reasons that led to Alibaba's listing on a United States exchange.[248] Some companies may attempt to avoid the stringency of their domestic regulations or exchange requirements, "escape" to the United States,[249] and enjoy the historical prestige and liquidity of U.S. exchanges.

Overall, a growing number of reporting firms hail from offshore jurisdictions. [250]

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[246] INTERNATIONAL REGISTERED AND REPORTING COMPANIES, *supra* note 242; SEC, DECEMBER 31, 2011—MARKET SUMMARY, https://www.sec.gov/divisions/corpfin/internatl/foreignmarketsumm2011.pdf [https://perma.cc/5WRM-FZ5C]; SEC, DECEMBER 31, 2006—MARKET SUMMARY, https://www.sec.gov/divisions/corpfin/internatl/foreignmarketsumm2006.pdf [https://perma.cc/9F2A-87SD].

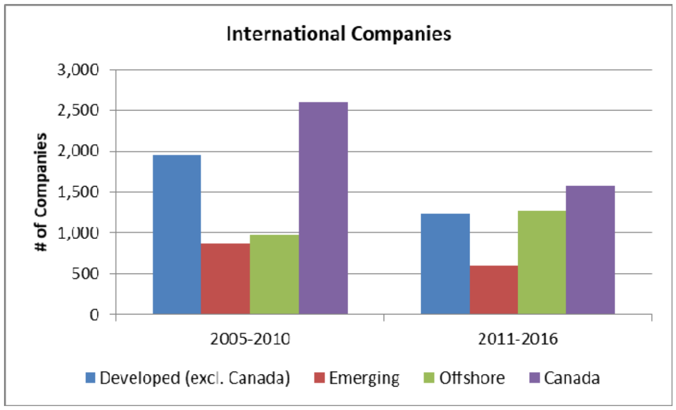
[247] *See, e.g.*, Bradley Hope, *Alibaba to List on New York Stock Exchange*, WALL ST. J. (June 26, 2014), https://www.wsj.com/articles/alibaba-to-list-on-new-york-stock-exchange-1403802203 [https://perma.cc/W6XL-7KAL].

[248] *Shareholder Democracy Is Ailing*, THE ECONOMIST (Feb. 9, 2017), http://www.economist.com/news/business/21716654-snaps-refusal-hand-out-any-voting-shares-part-wider-trend-towards-corporate [https://perma.cc/9B86-YGA8].

[249] *See, e.g.*, Amir N. Licht, *Cross-Listing and Corporate Governance: Bonding or Avoiding?*, 4 CHI. J. INT'L L. 141, 149, 162 (2003).

[250] *International Registered and Reporting Companies*, *supra* note 6. The data covers foreign issuers registered with the SEC as of December 31, 2015. Figure 9 is also available at http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-6/guseva-graphics.pdf [http://perma.cc/VNL6-QQ2P].

Figure 9: International Registered and Reporting Companies, 2005-2016



Another troubling fact was a recent uptick in notorious "reverse mergers," a merger practice where surviving companies were ostensibly domestic, but, de facto, became foreign-controlled issuers. The wave of reverse mergers ultimately prompted the SEC to approve a new rule requiring, *inter alia*, that U.S. exchanges monitor reverse-merger companies more closely.[251]

Litigation against offshore and reverse-merger companies poses unique challenges, and aggrieved investors are left with practically no recourse. In the course of my previous research on class actions filed between 2005 and 2015, I found a number of default judgments against offshore companies and against companies listed on American exchanges through reverse mergers. Many of them had ultimately become insolvent.[252] My database included at least twelve post-*Morrison* default judgments, eight of which were related to reverse merger companies, and only one default judgment in a case filed before *Morrison*. Instead of showing up in court, those companies preferred to walk away.[253]

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[251] *See, e.g.*, Press Release, SEC, SEC Approves New Rules to Toughen Listing Standards for Reverse Merger Companies (Nov. 9, 2011), https://www.sec.gov/news/press/2011/2011-235.htm [https://perma.cc/PLY3-EGY6].

[252] *See., e.g.*, Order Staying Case as to Defendant Jiangbo Pharmaceuticals, Inc. Upon Suggestion of Bankruptcy, Lagace v. Jiangbo Pharm., Inc., No. 1:11CV22556 (S.D. Fla. May 29, 2013); Dena Aubin & Tracy Rucinski, *ChinaCast Files for Bankruptcy to Pursue Embezzlement Claims*, REUTERS (Nov. 10, 2016), https://www.reuters.com/article/chinacast-bankruptcy-idUSL1N1DB2ID [https://perma.cc/2FSU-92SV].

[253] *See infra* Appendix II (summarizing post-*Morrison* cases that resulted in a default judgment or produced similar outcomes). The list is part of the database prepared in the course of my research on class-action litigation. *See* Guseva, *supra* note 29. Appendix II is also available at http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-6/guseva-graphics.pdf [http://perma.cc/VNL6-QQ2P].

E. Conclusion

It is not an objective of this Article to suggest or to demonstrate that nomadic offshore and foreign hordes are hell-bent on ripping off unsuspecting American investors and target U.S. markets because of a lower risk of class-action litigation post-*Morrison*. Instead, my purpose is to show that within the global market, with a new status quo in private enforcement, some American investors may more easily fall prey to foreign fraudsters. Whenever a firm's pre-commitment to good behavior is low and whenever deterrence provided by a liability regime, including both public and private enforcement, is inadequate, more low-quality firms may use that opportunity to their benefit.

Taking into account the predicates delineated in Part III, it is also logical to imagine how in extreme circumstances the international enforcement milieu may be eroded by "the tragedy of the commons."[254] When a company cross-lists its securities in the United States, the market reacts positively, in part because cross-listings ordinarily signal firms' reputation, transparency, and commitment to better practices and legal institutions.[255] Not only the market, but also the regulators, equally may view cross-listings as a quality signal. It is plausible that some foreign agencies, aware that the Commission is deemed the most active enforcement agency in terms of its financial inputs and enforcement outputs,[256] may be tempted to lighten their own oversight and possibly freeride on the *expected* Commission enforcement. As Part III indicates, however, there are few reasons why that enforcement should be forthcoming.

In a hypothetical scenario where the enforcement underinvestment became mutual, investors in international issuers would represent a proverbial common pasture where corporate fraudsters could roam free and no single regulator, particularly, not the SEC, would have sufficient incentives to provide oversight. If, simultaneously, private class-action litigation was hamstrung by procedural rules, the relative costs of fraud would decrease below a socially optimal level. If the costs are low, more international firms, including both "oranges" and "lemons," may be enticed to list to enjoy the

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[254] For a theory on these dynamics, see William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1, 15–17, 22–26 (2003).

[255] *See supra* notes 69–70, 168–172, 223–224, 229 and accompanying text. Research suggests, for instance, that international firms subject to enhanced regulatory scrutiny in several jurisdictions of listing file more accurate financial statements. Nelly Samarasekera et al., IFRS and Accounting Quality: The Impact of Enforcement 2–6 (2012) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2183061 [https://perma.cc/3R49-6T23].

[256] Coffee, *supra* note 26, at 262–73; Jackson, *supra* note 94, at 283.

benefits of cross-listing in a market such as the United States.[257] What should the SEC do to keep potential international fraudsters in check and, at the same time, to control the costs of cross-listings to avoid deterring honest firms?

V. A DOCTRINAL INQUIRY: CAN THE SEC ACT?

This Part embarks on this inquiry by reviewing first the relevant doctrinal issues and determining whether the post-*Morrison* SEC has the necessary tools and incentives to proceed more aggressively. In other words, has *Morrison* restricted the SEC's *ability* and *willingness* to prosecute foreign companies, just as it has limited the extraterritorial reach of the antifraud provisions of the securities laws in class actions?

To date, there remains an ambiguity as to the restraints on the Commission's ability to prosecute foreign firms. Because the Court intended the restrictions on the extraterritorial application of Section 10(b) to apply broadly, *Morrison* did not carve out an explicit exception for public enforcement purposes. Following Newton's third law, the Supreme Court's action caused an instantaneous reaction from Congress. A congressional committee approved Dodd-Frank almost immediately after *Morrison.* In fact, the conference committee had its last meeting on June 24, 2010,[258] the day when the Supreme Court issued *Morrison*. The ultimate statutory language provides that district courts have jurisdiction of actions brought by the Department of Justice and the SEC 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.[259]

Despite this strong language, the statute does not comport with *Morrison.* Although the Supreme Court has suggested that "to ask what conduct

[257] Presumably, this danger is particularly palpable in a jurisdiction like the United States—its exchanges stand out among global trading venues, including London, which may be affected by the lingering aftermath of Brexit and whose listings generally are not associated with comparable premiums for foreign firms. *See* Doidge et al., *supra* note 164. The American economy is growing; and its Congress and the executive branch are mulling over deregulatory reforms.

[258] SEC v. Traffic Monsoon, LLC, 245 F. Supp. 3d 1275, 1290–91 (D. Utah 2017).

[259] 15 U.S.C. § 78aa(b) (2012).

§ 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question,"[260] Congress has used the jurisdictional phraseology.[261]

There is a spectrum of lower court decisions running the gamut from the strict pro-*Morrison* presumption against extraterritoriality on the one side, to uncertain doctrinal construction in the middle, and all the way to pro-SEC conclusions. The first group appears small. By way of example, in *Vilar,* the Second Circuit examined and underscored the general "presumption that United States law governs domestically but does not rule the world."[262] In the middle are those who share awareness that there is no consensus on whether Dodd-Frank has overruled *Morrison* for purposes of public enforcement. Those courts have been very circumspect in addressing this issue and declined to resolve the matter.[263]

For instance, in *Battoo,* the Northern District of Illinois Court dodged a bullet in 2016, observing that it was "not necessary to decide whether Section 929P(b) does indeed overrule *Morrison* for actions brought by the SEC, because the Court concludes that Section 929P(b) does *not* apply retroactively to any pre-Dodd-Frank enactment conduct, which makes up the bulk of the alleged conduct committed by [defendant]."[264] The court proceeded to apply *Morrison* and found find that "[g]iven that at least some investors

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[260] Morrison v. Nat'l Austl Bank Ltd., 561 U.S. 247, 254 (2010).

[261] *See, e.g.*, U.S. CHAMBER INST. FOR LEGAL REFORM, MORRISON AT FOUR: A SURVEY OF ITS IMPACT ON SECURITIES LITIGATION 14 (2014), http://xbma.org/forum/wp-content/uploads/2014/11/Morrison-at-Four-A-Survey-of-Its-Impact-on-Securities-Litigation.pdf [https://perma.cc/WFM6-AEXU].

[262] United States v. Vilar, 729 F.3d 62, 72 (2d Cir. 2013) (quoting Kiobel v. Royal Dutch Petroleum, 569 U.S. 108, 115 (2013). The court also extended *Morrison* to criminal cases. *Id.* at 70–72, 98. The case involved an appeal of the judgments of conviction, which were entered in February and predated *Morrison* and Dodd-Frank*.*

[263] *See, e.g.*, SEC v. Sabrdaran, 252 F. Supp. 3d 866, 895 (N.D. Cal. 2017) ("The SEC has established that the spread bets that IG Index actually hedged fall within *Morrison'*s reach because securities were purchased in the U.S. by IG Index's broker. Because, once again, the evidence here meets even *Morrison*'s stricter test, the Court need not address the parties' dispute over whether Section 929P(b) of Dodd-Frank revived the broader tests that *Morrison* rejected."); *id.* at 895 n.6 ("The Court need not stake a position in that debate, as the hedged spread bets meet the *Morrison* test. The Court likewise declines to decide whether *Morrison* only applies to private rights of action under Section 10(b) of the Securities Exchange Act and not SEC enforcement actions, as some courts have concluded."); SEC v. Battoo, 158 F. Supp. 3d 676, 692–94 (N.D. Ill. 2016); SEC v. Brown, No. 14 C 6130, 2015 WL 1010510, at *5 (N.D. Ill. Mar. 4, 2015) ("This Court, consistent with Chicago Convention Center, concludes that it is unnecessary to resolve at this time the difficult question of the Dodd-Frank Act's impact on *Morrison*. The SEC alleges that the parties incurred irrevocable liability in the United States."); SEC v. Sabrdaran, No. 14-CV-04825-JSC, 2015 WL 901352, at *14 (N.D. Cal. Mar. 2, 2015); SEC. v. Funinaga, No. 213-CV-1658 JCM CWH, 2014 WL 4977334, at *7 (D. Nev. Oct. 3, 2014); SEC v. A Chi. Convention Ctr., LLC, 961 F. Supp. 2d 905, 908–17 (N.D. Ill. 2013).

[264] *Battoo*, 158 F. Supp. 3d at 692 (footnotes omitted).

incurred irrevocable liability in the United States, the transactions at issue were 'domestic transactions' under *Morrison*."[265]

In another case, the same district court, cognizant of the complexity, "conclude[d] that it [was] unnecessary to resolve at this time the difficult question of the Dodd–Frank Act's impact on *Morrison*."[266] The Northern District of California Court decided to follow a similarly safe route, looked to the *Morrison* test, and concluded that "[i]n light of the Court's decision that the allegations in the complaint sufficiently meet the transactional test, it need not resolve the debate over whether the Dodd–Frank Act overruled *Morrison,* as the SEC contends."[267]

Even when courts alluded to the substantive, *i.e.*, not merely jurisdictional, nature of the Dodd-Frank amendments, they refrained from definitively resolving the issue. In *Chicago Convention Ctr.,* the court in 2013, for example, examined "[the] tension created by Section 929P(b), namely that the plain language of the Section 929P(b) seems purely jurisdictional—particularly in light of its placement in the jurisdictional section of the Exchange Act—yet the Congressional intent behind that provision supports a conclusion that the provision is substantive."[268] The court acknowledged that its analysis of the plain language of the statute could be incomplete and that "it is possible that this interpretation would create superfluity or contradict the legislative intent."[269] In the end, the court equivocated again and was spared further inquiry because the SEC's complaint could also safely survive under the new *Morrison* test.[270]

At the other end of this case-law spectrum are courts such as the District Court for the Southern District of New York that are markedly less cautious. Those courts occasionally have stretched the holding in *Morrison* to cover foreign transactions[271] and seem to have acknowledged that Dodd-Frank has reversed *Morrison* in public enforcement. For instance, in *Gruss,* the court in 2012 observed that "[e]ntitled 'Strengthening Enforcement by the Commission,' Section 929P(b) amends the Securities Act, the Exchange Act, and the [Investment Advisers Act (IAA)] to allow the SEC or the U.S.

[265] *Id.* at 694.
[266] *Brown*, 2015 WL 1010510, at *5.
[267] *Sabrdaran*, 2015 WL 901352, at *14.
[268] *A Chi. Convention Ctr.*, 961 F. Supp. 2d at 910.
[269] *Id.* at 916.
[270] *See id.* at 916–17.
[271] In *Maillard*, for instance, the U.S. District Court for the Southern District of New York observed that although the defendant did not trade in listed securities, the chain of transactions involved purchases of contracts-for-difference in Luxembourg. In turn, this caused an investment firm to acquire securities that were listed on the New York Stock Exchange. SEC v. Maillard, No. 13-cv-5299, 2014 WL 1660024, at *3–5 (S.D.N.Y. Apr. 23, 2014).

Justice Department to commence civil and criminal enforcement actions extraterritorially in certain cases. Therefore, Section 929P(b) restores the SEC's extraterritorial authority over the IAA and its passage suggests that Congress intended for the extraterritorial application of the IAA . . . ."[272]

Finally, as recently as March 28, 2017, the District Court for the District of Utah unambiguously stated that Congress intended that the anti-fraud provisions of the securities law apply extraterritorially under the broader conduct and effects tests.[273] The court granted the SEC's motion for preliminary injunction. At the same time, it immediately certified the order for interlocutory appeal and emphasized that there was "'substantial ground for difference of opinion' as to whether . . . Dodd-Frank reinstated the conduct and effects test for litigation brought by the SEC."[274]

One of more academic points of contention in this opinion is its reliance on context and legislative history,[275] the references that the redoubtable late Justice Scalia doubtless would have scorned. For instance, in determining the purpose of the amendment, the court examined its context and the temporal association between the time of drafting such omnibus bill as Dodd-Frank and *Morrison*—a judicial decision concerning one single provision of this voluminous statute.[276]

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[272] SEC v. Gruss, 859 F. Supp. 2d 653, 664 (S.D.N.Y. 2012) (footnotes omitted); *see* SEC v. Tourre, No. 10 CIV. 3229 KBF, 2013 WL 2407172, at *1, n.4 (S.D.N.Y. June 4, 2013) ("Because the Dodd-Frank Act effectively reversed *Morrison* in the context of SEC enforcement actions, the primary holdings of this opinion affect only pre-Dodd Frank conduct."); SEC v. Gruss, No. 11 CIV. 2420, 2012 WL 3306166, at *3 (S.D.N.Y. Aug. 13, 2012) ("Section 929P(b) of the Dodd–Frank Act allows the SEC to commence civil actions extraterritorially in certain cases."); Asadi v. G.E. Energy (USA), LLC, No. CIV.A. 4:12-345, 2012 WL 2522599, at *4 (S.D. Tex. June 28, 2012) ("This conclusion against extraterritorial application is reinforced by Section 929P(b) of Dodd–Frank, which explicitly addresses extraterritorial scope of the statute in a limited context."); *In re* Optimal U.S. Litig., 865 F. Supp. 2d 451, 456 n.28 (S.D.N.Y. 2012) (mentioning in dicta that "Congress has attempted to remedy that problem by restoring the conducts and effects test for SEC enforcement actions"); Cornwell v. Credit Suisse Grp., 729 F. Supp. 2d 620, 627 n.3 (S.D.N.Y. 2010) ("Congress explicitly granted federal courts extraterritorial jurisdiction under the conduct or effect test for proceedings brought by the SEC . . . .").

[273] *Traffic Monsoon*, 245 F. Supp. 3d at 1293–94 ("[T]he text of Section 929P(b), the legal context in which this amendment was drafted, legislative history, and the expressed purpose of the amendment all point to a congressional intent that, in actions brought by the SEC, Sections 10(b) and 17(a) should be applied to extraterritorial transactions to the extent that the conduct and effects test can be satisfied. The court concludes that these clear indications that Congress intended Sections 10(b) and 17(a) to be applied to foreign transactions are sufficient to overcome the presumption against extraterritorial application." (footnotes omitted)).

[274] *Id.* at 1304.

[275] *Id.* at 1290–93.

[276] *Id.* at 1291–92 ("It strains credulity to assume that legislators read *Morrison* on the last day that they met to negotiate the final version of a massive 850-page omnibus bill designed to overhaul large swaths of the United States financial regulations and consciously chose to enact Section 292P(b) against the background of the fundamental shift in securities law brought about

These contextual and purposivist arguments may carry the day on appeal. For one, as Posner and Gluck in their 2018 article conclude, federal appellate judges assign more value to legislative history and context than some textualist Justices on the Court may have wished.[277] Moreover, the Court itself seems to be relaxing its narrow approach to statutory construction in the post-Scalia era. In *Digital Realty Trust, Inc. v. Somers*, for example, Justice Ginsburg consulted legislative history, which prompted two separate concurring opinions on the value of the statutory text, purpose, and history, filed by Justice Thomas, joined by Justices Alito and Gorsuch, on the other hand, and Justice Sotomayor, with whom Justice Breyer joined, on the other.[278]

Yet, despite the changes in statutory interpretation and contextual inquiries, it remains to be seen whether the Utah District Court's decision in *SEC v. Traffic Monsoon, LLC*, will be affirmed by the Tenth Circuit and adopted by other courts and whether the ability of the SEC to prosecute securities fraud under the more expansive conduct and effects tests will be explicitly and uniformly extended. As it stands now, the case law pendulum mainly swings between a doctrinal ambiguity and a pro-Commission position. The practical outcomes of enforcement actions against foreign companies and their executives, therefore, may be mixed. Through this disparity, the legislature and the Supreme Court have complicated SEC's assessments of its success rate in enforcement actions.

When interdigitated with the arguments expounded in Part IV, this doctrinal uncertainty implies a collateral consequence—if the SEC has become less confident of scoring easy victories in enforcement actions involving foreign issuers and cross-border fraud, the Commission and its enforcement staff may be less willing to spend their resources in this area.[279] As long as the ambiguity remains unsolved, *Morrison* may dampen the incentives of the SEC to engage in closer foreign issuer oversight, except, perhaps, publicized instances of serious fraud implicating large numbers of American investors.

Combining the conclusions of Parts III and IV, we are presented with a dilemma. On the one hand, the SEC may be expected to follow the same

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by *Morrison*. Given this timing, the more reasonable assumption is that *Morrison* was issued too late in the legislative process to reasonably permit Congress to react to it.").

[277] *See* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1300 (2018).

[278] 138 S. Ct. 767 (2018).

[279] In these circumstances, foreign issuers could rationally discount the probability of enforcement, while the SEC should overestimate the risk of failure in court, particularly in broader international schemes where fraudulent conduct or substantial harm to investors occurs in foreign countries.

safe route of low-key enforcement against foreign corporations. On the other hand, it is imprudent to completely ignore the recent "red flags" in foreign listings and changes in class action litigation, which may cause harm to American markets in the future.

VI. Policy Proposals: Preventive Monitoring and a Soft Enforcement Approach

A. Low-Cost Low-Key Prevention

This Part sketches a few policy options that the SEC could consider to fine-tune its policies in order to simultaneously avoid the lemons problem and the overdeterrence effect. Two factors bear on the proposals. First, the SEC's enforcement approach is its dominant strategy within the existing ecology of enforcers. Its stance is also institutionally optimal, deeply entrenched, and based on the existing political and economic incentives to reduce investment in enforcement against foreign issuers. Second, there is a need to reconsider the current policy to tackle the red flags identified in this Article. Bearing these two considerations in mind, the Commission needs to devise low-cost measures that would allow it to internalize the costs and benefits of its policies and simultaneously navigate the cross-border enforcement realities and the interdependencies within the ecosystem of private and public mechanisms.[280]

To begin with, there is no need for the Commission to ramp up enforcement qua enforcement. It is not clear if international markets, as a global *sui generis* policy assessment mechanism, have penalized international issuers for the Supreme Court decision. Researchers disagree whether stock returns, institutional investors' portfolios, share prices, and liquidity of cross-listed shares have been affected by *Morrison*'s pruning of class actions.[281] In a similar vein, the red flags identified in Part IV point toward future problems that *may* affect the market if the SEC stays on the same

[280] On the pros and cons of multi-enforcer systems, see generally Clopton, *supra* note 24, at 290, 306–08 (suggesting that "redundant litigation may cure existing under-enforcement and deter future under-enforcement by allowing a second agent to fill the remedial gap" and reviewing germane design arguments); Engstrom, *supra* note 42, at 629, 656–75 (underscoring a need for coordination and interdependencies and discussing an ideal gatekeeper agency); Grundfest, *supra* note 162, 966–67, 1022 (calling on the SEC to review the current public-private enforcement system).

[281] *Compare* Bartlett, *supra* note 225 (concluding that market reaction was either positive or insignificant), *and* Licht et al. (same), *supra* note 84, at 25–26, *with* Gagnon & Karolyi, *supra* note 172, at 147 (showing that *Morrison* "was associated with a large drop in the value premium captured by foreign firms whose shares were cross-listed on a U.S. exchange as well as with a statistically significant 37 basis point increase on the announcement day in the price deviation between the U.S. cross-listed shares trading in U.S. markets and the underlying home-market shares").

course of low-key enforcement. If the resultant efficiency gains are uncertain, stronger public enforcement should not automatically follow weakened class actions.[282] The red flags instead warrant allocating more resources not toward enforcement actions per se but toward low-cost preventive measures and better "housekeeping."

Recall, for instance, that the Commission has been tardy in doing "housekeeping" and revoking registration of securities. With its current data analysis programs, however, the Commission should be able to generate better information and revoke registrations promptly. Already, in his 2015 testimony before the House Committee on Financial Services, Andrew Ceresney, Director of the Enforcement Division, stated that such enforcement priorities as reporting and disclosure violations were supported by large-scale data analysis programs.[283] These programs may be used to assist the Commission in routine "housekeeping" in foreign issuer reporting.[284]

When it comes to potentially more serious violations, the SEC equally has the capacity to ensure better monitoring based on data analytics. The Division of Enforcement collaborates with the new Division of Economic and Risk Analysis ("DERA") in developing methods "to detect anomalous financial results disclosed in public company filing data."[285] The Commission established DERA in 2009. Its functions include assisting in enforcement and identifying market trends and risks.[286]

The idea of using DERA more extensively in foreign issuer regulation comports with the overarching policies of the SEC. Michael Piwowar, for instance, urged in one of his speeches that "early DERA participation can

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[282] For theories of optimal enforcement, see, for example, Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 752–54 (1997); Fox et al., *supra* note 161, at 371–76; Rose, *supra* note 86, at 255–57; Stigler, *supra* note 161, at 531–34.

[283] Andrew Ceresney, Director, SEC Division of Enforcement, Testimony on "Oversight of the SEC's Division of Enforcement" (Mar. 19, 2015), https://www.sec.gov/news/testimony/031915-test.html [https://perma.cc/FB9G-G7WJ].

[284] Although revoking the registration of a security requires notice and a hearing (15 U.S.C. § 78l(j) (2015)), this is a lower-cost procedure compared to investigations. In 2004, the SEC's Divisions of Enforcement and Corporation Finance established the Delinquent Filings Program. Continuous investment in data analytics should further enhance the Divisions' ability to identify delinquent filers promptly. For a basic description of the Program, see, for example U.S. SEC. & EXCH. COMM'N, *Delinquent Filings*, Investor Bulletin, Nov. 1. 2013, https://www.sec.gov/investor/alerts/ib_delinquent_filers.htm [https://perma.cc/JX7Q-89J9].

[285] Ceresney, *supra* note 283. The Enforcement Division also created the Financial Reporting and Audit Task Force to this purpose. *Id.*; *see* THE FUTURE OF THE SECURITIES AND EXCHANGE COMMISSION, *supra* note 8, at 13 (outlining the new analytical programs of the SEC); *DERA—Office of Corporate Finance*, SEC, https://www.sec.gov/page/dera_ocf_page [https://perma.cc/T675-9MNQ] (explaining the mission of the Office).

[286] *See DERA—Office of Corporate Finance*, *supra* note 285.

help determine materiality, harm to investors (if any) . . . whether the benefits of pursuing a particular enforcement action outweigh the costs, and whether it would be prudent to pursue alternative enforcement actions."[287] As discussed in Part IV, institutional constraints and public choice arguments suggest that the SEC may overestimate the costs of enforcement against foreign issuers and underestimate the benefits. Using DERA's resources as a primary screening mechanism would minimize those biases.

In addition to DERA, the SEC has established, within its Enforcement Division, the Financial Reporting and Fraud Group with the purpose of not only identifying violations but also exploring areas "susceptible to fraudulent financial reporting."[288] The SEC should extend these large-scale data analysis tools specifically to identify potentially fraudulent trends in foreign issuer reporting.

Admittedly, identifying foreign firms' accounting fraud through statistical analysis may be difficult. Therefore, the key proposal is that the SEC staff does not need either to proceed with an investigation or recommend that the SEC take an enforcement action. Instead, the Commission may consider developing a new mechanism for preventive foreign issuer monitoring. The mechanism could be triggered by statistical aberrations and warning signs that should not necessarily fall within the definition of fraud under the securities laws.

By way of example, DERA may run data analysis and alert either the Enforcement Division or the Division of Corporation Finance that a single firm or several foreign companies with certain characteristics exhibit reporting discrepancies and anomalies.[289] After that, the Divisions, or one of them, may informally communicate to the potential subjects or, using the jargon of criminal enforcement, "targets" that they need to address the concerns raised by DERA.

The SEC does have a somewhat similar practice of sending cautionary letters to the subjects in cases that do not merit a full-scale investigation and

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[287] Michael S. Piwowar, SEC Commissioner, Remarks at the "SEC Speaks" Conference 2015: A Fair, Orderly, and Efficient SEC (Feb. 20, 2015), https://www.sec.gov/news/speech/022015-spchcmsp.html#.VOyC1iyfarg [https://perma.cc/GA8D-J5CB].

[288] *Financial Reporting and Audit (FRAud) Group*, SEC , https://www.sec.gov/spotlight/financial-reporting-and-audit-task-force.shtml [https://perma.cc/TFX8-2DUF].

[289] The need for more economic analysis and using DERA in SEC rulemaking and enforcement has already been explored in the literature. *See, e.g.*, Jerry Ellig & Hester Peirce, *SEC Regulatory Analysis: "A Long Way to Go and a Short Time to Get There,"* 8 BROOK. J. CORP. FIN & COM. L. 361, 361–64 (2014); J.W. Verret, *Economic Analysis in Securities Enforcement: The Next Frontier at the SEC*, 82 U. CIN. L. REV. 491, 491–96 (2013); White, *supra* note 101, at 297. In this paper, I would like to go further and sketch a few possibilities tailored to the specifics of foreign issuer enforcement.

comment letters requesting reporting companies to provide additional information to the SEC.[290] In contrast to the mechanism I am suggesting here, the Commission does not issue the cautionary letters often and makes comment letters publicly available on its webpage. Under my proposal, however, DERA-generated letters should be routine, nonpublic, and not related to a formal or informal investigation.

First, consider the costs. Once the practice of informal requests becomes standardized and routine, economies of scale should reduce the SEC's costs per issuer. Second, these actions would not reach the level of a "matter under investigation." Instead, the SEC would be reacting to anomalies in the data. Third, as opposed to comment letters, there would be no need for multiple rounds of letters from the Division of Corporation Finance and responses from reporting issuers. The primary objective of this light-touch approach is eliciting cooperation and improvements in issuers' corporate governance, transparency, and/or internal controls. A collateral benefit, self-evidently, would be the additional information about the registrants, which could be used in the future to identify serious violations and bring enforcement actions.

Here is how it may work: A firm could have the right to choose to either respond to the informal request from the Commission or modify its reporting and corporate policies without responding to the SEC letter. In the latter case, the firm would have an option to file either a current report by furnishing Form 6-K;[291] its next annual report if it was due within less than, for instance, three months from the date of the request; or a report with a foreign regulator and/or exchange. Another alternative could be to publish a notice about relevant corporate governance or reporting improvements on the firm's webpage in English. The management's incentives to comply

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[290] *See, e.g.,* JAMES D. COX ET AL., SECURITIES REGULATION: CASES AND MATERIALS 835 (James D. Cox et al. eds., 7th ed. 2013) (describing cautionary letters); U.S. SEC. & EXCH. COMM'N, Office of Inspector General, *Evaluation of the Division of Corporation Finance's Disclosure Review and Comment Letter Process*, September 13, 2017 Report No. 542, at 3, https://www.sec.gov/files/Final-Report-Evaluation-of-Division-Corp-Fin-Disclosure-Review-and-Comment-Ltr.pdf [https://perma.cc/3FNS-5MKH] ("After examiners and reviewers complete their reviews of a company's disclosure, [the Division of Corporation Finance] may send the company approved comments in the form of a comment letter . . . . No sooner than 20 business days after completing each review, CF makes its comment letters and corresponding company responses related to that review publicly available on sec.gov."). The third similar mechanism is deficiency letters issued by the Office of Compliance Inspections and Examinations. *See, e.g.,* U.S. SEC. & EXCH. COMM'N, Office of Inspector General, Audit of the Office of Compliance Inspections and Examinations' Investment Adviser Examination Completion Process, July 21, 2017 Report No. 541, https://www.sec.gov/files/OIG_Final_Report_No._541-Audit_of_OCIE%27s_Investment_Adviser_Examination_Completion_Process_508_compliant_version_07-21-17.pdf [https://perma.cc/FD89-VBYH].

[291] SEC, Form 6-K (2017), https://www.sec.gov/files/form6-k.pdf [https://perma.cc/24FV-Q6AT].

would be strengthened by the nonpublic nature of the SEC's actions. The firm would publicize its initiatives and signal corporate improvements as if they were "*sua sponte*" actions. Even though the role of DERA and the SEC would remain nonpublic, the resultant improvements in governance or transparency should accrue to the benefit of the investors.

As a way to promote compliance, the informal SEC letters could explicitly stipulate two courses of action. *First*, the Commission could threaten retaliation. Unless a firm explained its reporting choices or changed its policies as described above, the Division of Corporation Finance would send a comment letter, which would later on become public. In more serious cases, the Enforcement Division would either commence an investigation or refer the matter to the firm's primary regulator abroad. In essence, under this mechanism, the Commission would be blowing the whistle either by prompting the firms to run internal investigations and ensure proper reporting and internal controls[292] or by referring the anomaly to foreign enforcers. The latter option would also remove these items from the SEC enforcement agenda and balance sheet.

The Commission may also seamlessly combine the suggested low-cost measures with the tried-and-tested techniques, such as reports under Section 21(a) of the Exchange Act.[293] Should it be necessary to give publicity to the DERA requests and ensuing investigation, the SEC could publish the report and, if necessary, permit the foreign firm to file a statement in writing explaining its version of the events.[294]

Second, the SEC might also spell out that it reserved the option not to retaliate, without providing an explanation to the target. In other words, it could openly exercise discretionary nonenforcement. As the firm would not know upfront which action the SEC might choose, its management would be incentivized to cooperate and undertake compliance measures or, in the alternative, to prepare for an action.

To be effective, this approach requires the following commitment from the SEC: a firm that tries to cooperate and improve should not be prosecuted unless the Commission determines that the violations are egregious and that public policy and investor protection objectives militate against discre-

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[292] The suggested process is somewhat similar to no-action letters, which currently seem to have become a less acceptable solution than in the past. *See, e.g.*, THE FUTURE OF THE SECURITIES AND EXCHANGE COMMISSION, *supra* note 8, at 15.

[293] 15 U.S.C. § 78u(a) (2015). The reports have traditionally served as a publicity device allowing the SEC to discuss an investigation and "to articulate novel legal theories or standards of conduct." SECURITIES LITIGATION AND ENFORCEMENT, *supra* note 116, at 720.

[294] 15 U.S.C. § 78u(a).

tionary nonprosecution.[295] Cooperation is already a prominent mechanism welcomed by the Commission and embedded, *inter alia,* in its Enforcement Cooperation Program, the 2010 Policy Statement, and its revised Enforcement Manual.[296] Moreover, there is room for significant enforcement flexibility. The Manual itself acknowledges that "[s]ince every enforcement matter is unique, the appropriate use of a cooperation tool invariably depends upon a careful analysis of the facts and circumstances of each case."[297] In the informal system that I propose here, the cooperation takes place earlier, before an investigation and at a lower cost.

The justification of this light-touch approach lies not only in the pure costs of enforcement, but also in general economic arguments. It is commonly understood that the primary objective of enforcement actions is deterrence.[298] As discussed, the adjacent goals are market efficiency entwined with controlling the risk of overdeterrence. In international issuer regulation, this is not merely a theoretical concept but a measurable phenomenon that may entail an unnecessary outflow of issuers from the United States.[299] The mechanism suggested above is a cost-efficient way of fostering cooperation while keeping the overdeterrence concerns in check.

The nature of cross-listings and the bonding theory outlined in Part III also suggest that companies choosing to heed the warnings will be self-identifying as "oranges," whereas firms ignoring the SEC will default to the "lemons" category. There will be a clear separating equilibrium, which will help the SEC identify and, if necessary, proceed against certain issuers. If a firm remains interested in listing on U.S. exchanges, it will reaffirm its "bond" to American law and market institutions and cooperate with the SEC early on, particularly if the publicity, costs, and risks of doing so are

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295 Presumably, "an enforcer can help reduce this risk of overdeterrence by signaling to firms that they will escape liability for their agents' frauds if they can demonstrate that they took efficient precautions." Rose, *supra* note 24, at 2202.

296 ENFORCEMENT MANUAL, *supra* note 117, § 6.2; *Enforcement Cooperation Program*, SEC, https://www.sec.gov/spotlight/enforcement-cooperation-initiative.shtml [https://perma.cc/9BV7-HSUP]; Policy Statement Concerning Cooperation by Individuals in Its Investigations and Related Enforcement Actions, Release No. 34-61340, at 1 (Jan. 19, 2010), https://www.sec.gov/rules/policy/2010/34-61340.pdf [https://perma.cc/EH83-HDUP].

297 ENFORCEMENT MANUAL, *supra* note 117, § 6.2.

298 *See, e.g.*, SEC v. Rind, 991 F.2d 1486, 1490 (9th Cir. 1993) (underscoring the differences between SEC actions and claims of individual investors and emphasizing that "[t]he theory behind the remedy is deterrence and not compensation"); *ABA Section on Business Law, Report of The Task Force on SEC Settlements*, 47 BUS. LAW. 1083, 1092 (1992) (mentioning that "the agency's position reflects a strong public interest dimension" and that the SEC "may feel compelled to impose a harsh sanction and, moreover, to 'send a message' to industry participants").

299 *See supra* note 242 and accompanying text.

low.[300] Put differently, informing foreign issuers early about *possible* investigations and negative publicity should help the SEC identify international companies that value their cross-listings programs and allow those companies take corrective measures preempting enforcement and publicity.

B. Killing Two Birds with "Low-Cost Stones"

My second proposed policy adjustment is firmly rooted in the reality that the SEC relies on private enforcers, that both have been ineluctable litigation companions, and that the market reacts strongly to a combination of private and public actions. If, in the post-*Morrison* world, the SEC would like to continue to rely on private enforcers, it must take notice of the ongoing procedural developments. One specific initiative could be helping both the market and the plaintiffs' bar identify potentially meritorious violations by publishing some results of DERA economic analysis on market trends and providing it to the public at large.

DERA itself does not have the authority to frame SEC enforcement priorities.[301] Publishing its data analysis and reporting on market trends may represent another soft method for increasing deterrence without actual public enforcement. DERA has a separate Office of Corporate Finance, which examines reporting issuers' filings, public offerings, and unregistered offerings.[302] The Commission would kill two birds with one stone by adding a new project line to the already existing review of filings and selectively publishing results.[303]

This informational input should alert the market that something is amiss and galvanize such "gatekeepers" as market analysts and institutional investors. Research suggests that the extent and accuracy of analyst coverage, for instance, is correlated not only with cross-listing in a foreign jurisdiction,[304] *but also* with the enforcement environment.[305] As an enforcement

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[300] Adverse publicity is costly. It may snowball and produce both financial and non-financial negative consequences. *See, e.g.*, BRENT FISSE & JOHN BRAITHWAITE, THE IMPACT OF PUBLICITY ON CORPORATE OFFENDERS 227–45 (1983). On the relevant reputational penalties associated with public enforcement, see, for example, Karpoff et al., *supra* note 160.

[301] *See, e.g.*, Verret, *supra* note 289, at 495 ("The SEC Enforcement Division currently uses DERA to effectively provide litigation support after a case has been brought, or utilizes DERA to provide expert guidance during an investigation, but DERA has no authority to participate in the decision to bring an investigation or action nor to set the ground rules for how the SEC Enforcement Division prioritizes its caseload or determines penalties and settlements.").

[302] *See DERA—Office of Corporate Finance*, *supra* note 285.

[303] The Commission, obviously, does not need to disclose its enforcement techniques.

[304] *See, e.g.*, Baker et al., *supra* note 223, at 505–08 (2002); Mark H. Lang et al., *ADRs, Analysts, and Accuracy: Does Cross Listing in the United States Improve a Firm's Information Environment and Increase Market Value?*, 41 J. ACCT. RES. 317, 318 (2003).

agency charged with the dual task of protecting investors and promoting market efficiency, through these measures the SEC will equip institutional "gatekeepers" with additional informational tools.

A subsequent downward price adjustment may, as it typically does, draw the attention of another group of gatekeepers—the plaintiffs' bar—and prompt a review of filings in search of actionable violations. Enabling the plaintiffs to better monitor foreign issuers should benefit the Commission by promoting the equilibrium where the plaintiffs' bar and the SEC each take the lead in different enforcement segments. *Morrison* will allay the germane concerns about frivolous litigation and overenforcement, serve as a sentry, watching for the excesses in the extraterritorial application of the antifraud provisions of the securities laws, and subdue attorneys' animal spirits actuating strike suits. By the same token, the suggested approach should alleviate the inefficiencies associated with copycat cases where private attorneys freeride off of SEC efforts and turn class actions into inefficient bounty-hunter enforcement.[306] Instead, private attorneys would lead off and invest resources in investigating potential violations whereas the SEC would merely provide "data pointers."

To conclude, a soft approach is rational and feasible. The SEC has intimated that its enforcement guideposts are efficiency and net benefits from enforcement, evaluated against the costs to the market, the SEC, corporations, and investors.[307] If so, the Commission should openly acknowledge its traditional low-key enforcement against foreign corporations and set forth the metes and bounds of an efficacious preventive approach.

[305] *See* Alexander Kerl & Martin Ohlert, Star-Analysts' Forecast Accuracy and the Role of Corporate Governance 19–20, 28–29 (Aug. 2014) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2195909 [https://perma.cc/ML92-8Y22].

[306] *See, e.g.*, Rose, *supra* note 52, at 1345, 1362 ("'[C]opycat' class actions often are not amenable to dismissal at the pleadings stage—even if it appears that the damages claimed will, at the end of the day, be fully offset by a Fair Funds distribution.").

[307] In 2006, for instance, the Commission issued a statement concerning financial penalties and prioritized the universal tenet that it was "important to provide the maximum possible degree of clarity, consistency, and predictability in explaining the way that its corporate penalty authority will be exercised." *Statement of the Securities and Exchange Commission Concerning Financial Penalties*, SEC (Jan. 4, 2006), https://www.sec.gov/news/press/2006-4.htm [https://perma.cc/5RP4-LRTP]. Unfortunately, it is possible that the staff recommends actions without assessing such 2006 factors as "a direct benefit to the corporation" and compensation of "harm to the injured shareholders." Piwowar, *supra* note 287; *see* Rose, *supra* note 24, at 2184–85; Rose, *supra* note 86, at 255 ("The goal of a securities-fraud deterrence regime should be to minimize the sum of the costs that securities fraud produces and the costs that the deterrence regime itself produces.").

CONCLUSION

This Article is not a call to arms. At the same time, the SEC needs to react to the recent changes in class action litigation against foreign issuers, a possible lemons problem, and the potential risk of underenforcement. As this analysis demonstrates, the Commission cannot produce a national system of optimal enforcement that would minimize the social costs of foreign issuer fraud without cooperation from the plaintiffs' bar, the market, and the regulators in various foreign jurisdictions. Through traditional enforcement, the SEC would be pursuing an insurmountable task of designing a *national* "Pigouvian tax"[308] on fraud committed by *international* corporations operating in multiple jurisdictions. Through nonenforcement, it could miss the signs of a lemons market.

A logical alternative is that the SEC may start with sending an explicit signal to the market that the Commission is designing more efficient low-cost options and *preventive* monitoring policies. The solutions suggested in this Article focus on better cooperation with foreign firms and the SEC's recently improved capacity to analyze "big data" to identify anomalies in reporting. The proposed low-cost procedures should help the SEC engage market gatekeepers and private attorneys, achieve a more optimal level of deterrence without bringing costly enforcement actions, and simultaneously send a strong signal to international "lemons."

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[308] *See, e.g.*, Jonathan S. Masur & Eric A. Posner, *Toward a Pigouvian State*, 164 U. PA. L. REV. 93, 95 (2015) ("A Pigouvian tax is a tax equal to the harm that the firm imposes on third parties.").

Appendix I: Foreign Private Issuers in SEC Enforcement Actions (2005–2016)

Year Initial Action Filed	Company	§§ 10 (b) & 17	§13(a)	§13(b)(2) & (5)
2005	Azteca Holdings, S.A. de C.V.	X	X	X
2005	ING Groep N.V.			
2005	TV Azteca, S.A. de C.V.	X	X	X
2006	Bennett Environmental Inc.	X	X	
2006	Grupo Elektra S.A.		X	
2006	Grupo Iusacell, S.A. de C.V.		X	
2006	Healthtrac, Inc.		X	
2006	Lumenis Ltd.		X	
2006	Lumenis Ltd.	X	X	X
2006	Netease.com Inc.		X	X
2006	Olicom A/S		X	
2006	Seven Seas Petroleum Inc.		X	
2006	Statoil ASA			X
2006	TV Azteca, S.A. de C.V.		X	
2007	Akzo Nobel N.V.			X
2007	Barclays Bank PLC	X		
2007	Getgomail.Com, Inc. (n/k/a/ Getgo, Inc.)		X	
2007	Nortel Networks Corp.	X	X	X
2007	Nortel Networks Ltd.	X	X	X
2008	Benguet		X	
2008	Biovail Corporation	X	X	X
2008	CNH Global N.V.			X
2008	Converium Holding AG	X	X	X

Year Initial Action Filed	Company	§§ 10 (b) & 17	§13(a)	§13(b)(2) & (5)
2008	Fiat S.p.A.			X
2008	Hollinger Inc.		X	
2008	Realax Software AG		X	
2008	Siemens Aktiengesell-schaft			X
2009	Novo Nordisk A/S			X
2010	ABB Ltd.			X
2010	Alcatel-Lucent For-eign Parent			X
2010	Anderson Energy Ltd (p/k/a Aquest Minerals Corp.)		X	
2010	Aspen Group Re-sources Corp.		X	
2010	China Technology Global Corp.		X	
2010	China Yuchai Interna-tional Ltd.		X	X
2010	Crystal Graphite Corp.		X	
2010	ENI S.p.A.			X
2010	Gee-Ten Ventures Inc.		X	
2010	Royal Dutch Shell plc			X
2010	Shep Technologies Inc.		X	
2010	Silvercrest Mines Inc.		X	
2010	Technip			X
2010	Technoprises Ltd.		X	
2011	Austral Pacific Energy Ltd.		X	
2011	Buffalo Gold Ltd.		X	
2011	Calais Resources Inc.		X	
2011	Deutsche Telekom AG			X

Year Initial Action Filed	Company	§§ 10 (b) & 17	§13(a)	§13(b)(2) & (5)
2011	Diageo plc			X
2011	Global Mainframe Corp.		X	
2011	GSI Group Inc.		X	X
2011	Longtop Financial Technologies		X	
2011	M(2003) plc		X	
2011	Magyar Telekom			X
2011	Mercator Minerals Ltd. (f/k/a Silver Eagle Resources Ltd)		X	
2011	Si Mei Te Food Ltd.		X	
2012	Allianz SE			X
2012	AMS Homecare Inc.		X	
2012	A-Power Energy Generation Systems, Ltd.		X	
2012	Biotech Holdings Ltd.		X	
2012	Blue Earth Refineries Inc.		X	
2012	BP plc	X	X	
2012	Central Minera Corp.		X	
2012	China Agro-Technology Holdings Ltd.		X	
2012	China Medical Technologies, Inc.		X	
2012	Pine Valley Mining Corp.		X	
2012	Qiao Xing Mobile Communication Co. Ltd.		X	
2012	Qiao Xing Universal Resources, Inc.		X	
2012	Robomatix Technologies Ltd.			
2012	Silvermex Resources Inc.		X	

Year Initial Action Filed	Company	§§ 10 (b) & 17	§13(a)	§13(b)(2) & (5)
2012	Smith & Nephew plc			X
2012	TTC Technology Corp.		X	
2013	BBV Vietnam S.E.A. Acquisition Corp.		X	
2013	Birch Mountain Resources Ltd.		X	
2013	Capital Reserve Canada Ltd.		X	
2013	Carbiz Inc.		X	
2013	China Cablecom Holdings, Ltd.		X	
2013	CNC Development Ltd.		X	
2013	Crystallex International Corp.		X	
2013	Dynasty Gaming Inc.		X	
2013	e-Sim Ltd.		X	
2013	Koninklijke Philips Electronics N.V.			X
2013	Soil Biogenics Ltd.		X	
2013	Total S.A.			X
2014	Asia Growth Private Equity 1, Ltd.		X	
2014	Asia Growth Private Equity 2, Ltd.		X	
2014	Asia Growth Private Equity 3, Ltd.		X	
2014	Asia Private Equity SPAC 1, Ltd.		X	
2014	Asia Private Equity SPAC 2, Ltd.		X	
2014	Asia Private Equity SPAC 3, Ltd.		X	
2014	Balaton Power Inc.		X	
2014	Canadian Solar Inc.		X	X
2014	Carthew Bay Technologies Inc.		X	

Year Initial Action Filed	Company	§§ 10 (b) & 17	§13(a)	§13(b)(2) & (5)
2014	China Oumei Real Estate Inc.		X	
2014	Cougar Oil & Gas Canada Inc.		X	
2014	Current Technology Corp.		X	
2014	Flint Int'l Services, Inc.			
2014	Gamecorp Ltd.		X	
2014	Globetech Ventures Corp.		X	
2014	Green Asia Resources Inc.		X	
2014	Homeland Precious Metals Corp.		X	
2014	Lions Gate Entertain-ment Corp.		X	
2014	Panoshan Marketing Corp.		X	
2014	Rosedale Decorative Products Ltd.			
2014	Royal Bank of Scot-land Group plc			
2014	Sino Oil & Gas Pipe Holdings Ltd.		X	
2014	Sungold International Holdings Corp.		X	
2014	Ungava Mines Inc.		X	
2014	World Ventures Inc.		X	
2015	ASAT Holdings Ltd.		X	
2015	Beyond Golden Hold-ings Ltd.		X	
2015	BHP Billiton plc			X
2015	CityView Corp Ltd.		X	
2015	Dittybase Technolo-gies Inc.		X	
2015	DJSP Enterprises, Inc.		X	X
2015	First Potash Corp.		X	

Year Initial Action Filed	Company	§§ 10 (b) & 17	§13(a)	§13(b)(2) & (5)
2015	HIP Energy Corp.		X	
2015	Hitachi Ltd.			X
2015	International Hi Tech Industries Inc.		X	
2015	Jet Cheer Investments Ltd.		X	
2015	Mark One Global Industries, Inc.		X	
2015	Nortel Networks Corp.		X	
2015	Oriental Nonferrous Metals Technology Co., Ltd.		X	
2015	Petro Horizon Energy Corp.		X	
2015	Polyair Inter Pack Inc.			
2015	QSound Labs Inc.		X	
2015	Silverado Gold Mines Ltd.		X	
2015	Storm Cat Energy Corp.		X	
2015	World Gaming plc		X	
2016	Braskem S.A.			X
2016	China Heli Resource Renewable Inc.		X	
2016	Coastal Pacific Mining Corp.		X	
2016	Credit Suisse AG	X	X	X
2016	Dragon Bright Mintai Botanical Technology Ltd.		X	
2016	Easy Health Technologies Ltd.		X	
2016	Embraer S.A.			X
2016	Galileo Petroleum Ltd.		X	
2016	Giant Resources Inc.		X	
2016	Great Basin Gold Ltd.		X	

Year Initial Action Filed	**Company**	**§§ 10 (b) & 17**	**§13(a)**	**§13(b)(2) & (5)**
2016	LATAM Airlines Group S.A. (f/n/a LAN Airlines S.A.)			X
2016	Logitech International S.A.	X	X	X
2016	Macau Resources Group Ltd.		X	
2016	Metal Storm Ltd.		X	
2016	New World Batteries, Inc.		X	
2016	Nordion Inc.			X
2016	Northcore Technologies Inc.		X	
2016	Northern Canadian Minerals Inc. (n/k/a Northern Canadian Uranium Inc.)		X	
2016	Novartis AG			X
2016	Petaquilla Minerals Ltd.		X	
2016	Pharol, Sgps, S.A. (f/k/a Portugal Telecom, Sgps, S.A.,)		X	X
2016	Rush Exploration Inc.		X	
2016	SAP SE			X
2016	Teva Pharmaceutical Industries Ltd.			X

Appendix II: Default Judgments and Similar Case Outcomes (Post-*Morrison* Filing Dates)

Case	**Docket Number**	**Order**	**Date**	**Stanford Law School Securities Class Action Clearinghouse Links (Including Links to Related Cases)**
In re China MediaExpress Holdings, Inc. Shareholder Litigation	1:11-cv-00804-VM-GWG	Default Judgment against Defendant China MediaExpress Holdings, Inc. Pursuant to Fed. R. Civ. P. 55(B)(2) And Local Civil Rule 55.2	01/17/14	http://securities.stanford.edu/filings-case.html?id=104637 [https://perma.cc/QA8L-QPJF]
Dan Katz v. China Century Dragon Media, Inc. et al.	2:11-cv-02769-JAK-SS	Default Judgment	11/19/15	http://securities.stanford.edu/filings-case.html?id=104673 [https://perma.cc/2H2Y-HTQ5]
In re China Intelligent Lighting and Electronics, Inc.	2:11-cv-02768-PSG-SS	Order for Entry of Judgment by Default against Defendant China Intelligent Lighting and Electronics, Inc.	09/18/14	http://securities.stanford.edu/filings-case.html?id=104678 [https://perma.cc/WPT7-VHN4]
In re Puda Coal Securities Inc., et al. Litigation	1:11-cv-02598-DLC-HBP	Order Entering Default Judgment	05/10/17	http://securities.stanford.edu/filings-case.html?id=104686 [https://perma.cc/QN7V-ATR8]
Tak Hiromoto et al. v. Subaye Inc et al.	2:11-cv-07168-SVW-PLA	In Chambers Order Granting in Part and Denying in Part Plaintiff's Application for Default Judgment	12/15/14	
In re Subaye, Inc. Securities Litigation	11-CV-02614 (NRB)	Order *Plaintiff was unable to locate any books, assets, or Subaye's principals.	12/01/11	http://securities.stanford.edu/filings-case.html?id=104687 [https://perma.cc/2BCM-82DW]
In re Longtop Financial Technologies Limited Securities Litigation	1:11-cv-03658-VEC	Order Entering Default Judgment	11/14/13	http://securities.stanford.edu/filings-case.html?id=104712 [https://perma.cc/G45P-NSDZ]
In re Jiangbo Pharmaceuticals, Inc., Securities Litigation	1:11-cv-22556-MGC	Order Staying Case as to Defendant Jiangbo Pharmaceuticals, Inc. upon Suggestion of Bankruptcy	05/29/13	http://securities.stanford.edu/filings-case.html?id=104745 [https://perma.cc/FVS5-CJR8]
Brandon Muhammad v. China Sky One Medical Inc. et al.	2:12-cv-02552-DMG-CW	Order re Plaintiff's Motion for Entry of Default Judgment and Motion for Class Certification * China Sky neither	07/14/14	http://securities.stanford.edu/filings-case.html?id=104867 [https://perma.cc/MM8R-ME6D]

Case	Docket Number	Order	Date	Stanford Law School Securities Class Action Clearinghouse Links (Including Links to Related Cases)
		appeared nor opposed the pending motions. The motion for default judgment was denied.		
Akhmatov v. China Sky One Medical, Inc. et al.	1:12-cv-01418-PAC	Notice of Voluntary Dismissal without Prejudice Pursuant To Fed. R. Civ. P. 41(A)(1)(A) * No defendant has filed an answer or a motion to dismiss.	05/04/12	http://securities.stanford.edu/filings-case.html?id=104867 [https://perma.cc/5KP6-HCMK]
Fayun Luo v. Qiao Xing Universal Resources et al.	1:12-cv-00045-AET-GWC	Order	05/01/18	http://securities.stanford.edu/filings-case.html?id=104888 [https://perma.cc/4YLA-EMUH]
In re Chinacast Education Corporation Securities Litigation	CV 12-4621-JFW	Order Granting Plaintiff's Motion for Entry of Default Judgment against Defendant Chinacast Education Corporation	11/8/16	http://securities.stanford.edu/filings-case.html?id=104902 [https://perma.cc/66QH-PMJ4]
Dartell v. Tibet Pharmaceuticals, Inc. et al.	2:14-cv-03620-JMV-JBC	Clerk's Entry of Default as to Defendant, Tibet Pharmaceuticals, Inc.	07/28/16	http://securities.stanford.edu/filings-case.html?id=104904 [https://perma.cc/6TQL-HFNQ]
Ghodooshim Et Al. V. Wu Et Al. (Issuer Defendant: Qiao Xing Mobile Communication Company, Ltd.)	1:12-cv-09264-GHW	Order for Class Certification and Default Judgment	05/24/13	http://securities.stanford.edu/filings-case.html?id=104989 [https://perma.cc/X56W-TTBX]
In re Longwei Petroleum Investment Limited Securities Litigation	1:13-cv-00214-RMB-RLE	Default Judgment as to Liability against Longwei Petroleum Investment Holding Limited and Dora Dong	12/19/13	http://securities.stanford.edu/filings-case.html?id=104997 [https://perma.cc/23T4-5DV8]