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A Free Pass for Foreign Firms? An Assessment of SEC and Private Enforcement Against Foreign Issuers

ABSTRACT. While proponents of the bonding hypothesis have posited that foreign firms crosslist in the United States to signal compliance with the strict U.S. corporate governance regime, these scholars have taken the enforcement of U.S. securities laws largely for granted. This Note presents an empirical examination of previously unexplored data on the enforcement of U.S. securities laws against foreign issuers. The results suggest that relative to domestic issuers, foreign issuers in the United States have benefited not only from a more lax set of rules, but also from a more forgiving public enforcement agency. At the same time, U.S. courts have limited private enforcement against foreign issuers, thus restricting an alternative to public enforcement and further widening the gap between the corporate governance regime for U.S. issuers and the one for foreign issuers.

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INTRODUCTION

In both the scholarly work of the last decade and in recent policymaker reports,[1] the competitiveness of U.S. financial markets has been evaluated in part by their ability to attract foreign companies to raise capital in the United States by listing or crosslisting on U.S. exchanges.[2] While policymakers have advocated reforms to make U.S. markets more attractive to foreign firms, scholars have sought to understand exactly what draws foreign issuers to crosslist in the United States and how such companies—and their investors—are affected by the decision to sell securities in the United States. The dominant academic explanation of crosslisting has emphasized the "bonding" effect of listing on U.S. markets.[3] Building on the law and finance literature, the proponents of the bonding hypothesis have focused on the effect of legal origins, rules, and institutions on crosslisting patterns.[4] They have posited that

1. In the last four years, at least four policy reports have been issued, each responding to some variation of the alleged "steady decline in [the U.S.] share of global capital markets activity" and the loss of U.S. public market competitiveness compared to global public markets. COMM'N ON THE REGULATION OF U.S. CAPITAL MKTS. IN THE 21ST CENTURY, REPORT AND RECOMMENDATIONS 1 (2007). Claiming that "[f]oreign companies commonly cite the U.S. enforcement system as the most important reason why they do not want to list in the U.S. market," the reports have called for a reduction in the intensity of the rules and enforcement processes that currently apply to foreign issuers. COMM. ON CAPITAL MKTS. REGULATION, INTERIM REPORT 71 (2006); *see* MICHAEL R. BLOOMBERG & CHARLES E. SCHUMER, SUSTAINING NEW YORK'S AND THE US' GLOBAL FINANCIAL SERVICES LEADERSHIP (2007); THE FIN. SERVS. ROUNDTABLE, THE BLUEPRINT FOR U.S. FINANCIAL COMPETITIVENESS (2007).

2. *See, e.g.*, Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359, 2362-63 (1998) (arguing for the adoption of a "market approach" to securities regulation that would eliminate a significant deterrent to listings).

3. The term "bonding" was first coined by Jensen and Meckling, who defined it as the costs or liabilities that an agent or entrepreneur will incur to assure investors that it will perform as promised, thereby enabling it to market its securities at a higher price. *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976).

4. *See* Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131 (1997). The focus on legal rules became particularly intense after the publication of the seminal law and finance paper in 1998. Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113, 1115 (1998) [hereinafter La Porta et al., *Law and Finance*] (examining "empirically how laws protecting investors differ across 49 countries, how the quality of enforcement of these laws varies, and whether these variations matter for corporate ownership patterns around the world"). After *Law and Finance* was published, hundreds of scholars "joined in [a] search to find the hidden legal rules that facilitate financial development," a process that at times "resembled the medieval quest for the philosopher's stone that could turn lead into gold."

companies from countries with weaker legal regimes and capital markets list their shares in the United States to rent a stronger securities law and enforcement regime and "leapfrog[] local impediments."[5] By submitting to the disclosure requirements and public enforcement powers of the Securities Exchange Commission (SEC), as well as to the private enforcement powers of shareholders, foreign companies have been able to credibly subject themselves to the stricter legal and regulatory requirements available in the United States, and in return, to enjoy higher market valuations and lower costs of capital.

In much of this research, however, enforcement of the securities laws—an important premise of the argument—has been "relegated to status as a given."[6] Scholars have focused on comparing the substantive doctrinal differences between various legal and regulatory regimes, but little attention has been devoted to determining whether the securities laws analyzed by scholars are being enforced or whether the nominally powerful regulators are doing their jobs.[7] Although recent scholarship has begun to examine the role of enforcement, with the exception of recent research by Kate Litvak,[8] much of the work has focused on aggregate enforcement trends or country-to-country comparisons of general enforcement patterns.[9] Since little attention has been devoted to studying enforcement patterns for crosslisted firms, the impact of the *enforcement* of securities laws on the crosslisting phenomenon remains poorly understood.

It may be true that on paper, U.S. securities laws are the most stringent in the world.[10] It may also true that *on the whole*, "the track record of foreign

John C. Coffee, Jr., *Law and the Market: The Impact of Enforcement*, 156 U. PA. L. REV. 229, 243 (2007).

5. Larry E. Ribstein, *Crosslisting and Regulatory Competition*, 1 REV. L. & ECON. 97, 98 (2005).

6. 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, 488 (Guido Ferrarini & Eddy Wymeersch eds., 2006).

7. *See, e.g.*, Coffee, *supra* note 4, at 244.

8. In a very recent working paper, discussed in more detail below, Kate Litvak compares the crosslisting premiums for foreign issuers with varying levels of exposure to SEC enforcement and U.S. securities litigation. She finds that crosslisting premia "are not strongly attached to the level of US regulation." Kate Litvak, *The Relationship Among U.S. Securities Laws, Crosslisting Premia, and Trading Volumes* 5 (CELS 2009 4th Annual Conference on Empirical Legal Studies, Working Paper), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1443590.

9. *See, e.g.*, Coffee, *supra* note 4, at 309 (observing that "the United States pursues securities law violations through both public and private enforcement with an intensity unmatched elsewhere in the world" and attributing lower cost of capital to this overall intensity).

10. *See, e.g.*, COMM. ON CAPITAL MKTS. REGULATION, *supra* note 1, at 71.

enforcement authorities indicates that they are generally less aggressive than their counterparts in the United States, and that even the most vigorous ones bring fewer cases and impose significantly lower penalties."[11] But what happens when one disaggregates the pattern of securities enforcement in the United States? Is the U.S. securities regime as strict as the written rules and the aggregate statistics would suggest? Is it equally strict for everyone?

At a time when U.S. regulatory agencies are under intense scrutiny,[12] this Note seeks to answer these important questions by collecting and analyzing the data on the current U.S. regulatory policy and practice for foreign issuers. While other works have noted the relative intensity of U.S. public enforcement,[13] only one paper has considered closely the treatment of foreign issuers crosslisted on U.S. exchanges.[14] In addition, the enforcement statistics provided by the SEC have often been taken as a given, without much attention to how the SEC tracks and reports its enforcement efforts.[15] This Note uses a new, systematic approach to collect recent data on the enforcement of U.S. securities law against foreign companies crosslisted on U.S. exchanges. The data reveal a notable disparity in the levels of public (SEC) enforcement of securities laws against domestic and foreign issuers.

Meanwhile, private enforcement against foreign issuers—arguably a substitute for public enforcement under the bonding hypothesis—has been hampered by recent court decisions. Although the exact reach of class-action

11. Stephen Labaton, *Accounting Plan Would Allow Use of Foreign Rules*, N.Y. TIMES, July 5, 2008, at A1.

12. *See, e.g.*, Gretchen Morgenson, *Following Clues the S.E.C. Didn't*, N.Y. TIMES, Feb. 1, 2009, at BU1 (noting "our nation's broken-down regulatory apparatus"). Following the financial crisis, there has been increased academic attention devoted to assessing the future and viability of the SEC, including a *Virginia Law Review* symposium dedicated to such questions. In his introduction to the symposium, Joel Seligman notes that "it is indeed uncertain whether the Commission will survive to celebrate its 100th anniversary—at least in a form familiar to us today." Joel Seligman, *The SEC in a Time of Discontinuity*, 95 VA. L. REV. 667, 670 (2009).

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

14. Jordan Siegel, *Can Foreign Firms Bond Themselves Effectively by Renting U.S. Securities Laws?*, 75 J. FIN. ECON. 319, 324 (2005).

15. *See, e.g.*, Coffee, *supra* note 4, at 261-62 (suggesting that enforcement can be measured "in terms of the number of actions brought" and presenting comparisons of the annual number of enforcement actions in the United States and the United Kingdom). There is no discussion, however, of how each respective agency tracks or reports its enforcement actions. Nor does Coffee discuss whether a U.S. enforcement action is comparable to a U.K. enforcement action or whether the two can be compared for the purpose of evaluating enforcement intensity.

litigation against foreign issuers remains uncertain relative to domestic issuers, foreign issuers face minimal litigation exposure when crosslisting in the United States. Even though securities litigation is most developed in the United States and the SEC is the most active securities regulator in the world, the aggregate trends mask important disparities. By showing that foreign issuers are in large part exempt from both the public and private organs of the strict U.S. enforcement regime, this study challenges a basic premise of the bonding hypothesis.

My analysis proceeds in six parts. Part I reviews the scholarly research on the motivations for and the benefits of crosslisting in the United States, with a particular focus on the mechanics of the bonding hypothesis. It then provides an overview of the process by which foreign companies crosslist in the United States and of the laws that affect foreign issuers. Part II considers the available research on public enforcement and shows that past scholarly work has focused on aggregate trends in enforcement but has overlooked important characteristics of the U.S. securities regime. Part III turns to the available data on public enforcement of U.S. laws against foreign issuers and introduces the methodology used in this Note. Part IV presents the results of my analysis, discusses the trends in SEC enforcement, and devotes special attention to a recent increase in enforcement actions for violations of the Foreign Corrupt Practices Act.[16] Part V turns to the connection between public and private enforcement. It suggests that although private enforcement against foreign issuers may be considered a substitute for public enforcement for purposes of the bonding hypothesis, recent court decisions have generally restricted private class actions against foreign issuers, thus limiting this enforcement alternative. Finally, I present conclusions and offer avenues for further research on the subject.

I. THE U.S. CAPITAL MARKETS AND THE CROSSLISTING PHENOMENON

A. An Overview

In 2006, the New York Stock Exchange—the largest equities marketplace in the world with a total global market value of approximately $26 trillion[17]—

16. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977).

17. Press Release, NYSE Euronext, NYSE Group, Inc. 2006 Highlights (Dec. 29, 2006), *available at* http://www.nyse.com/press/1167392589502.html.

included 424 non-U.S. issuers valued at over $10 trillion.[18] Likewise, the NASDAQ included 275 foreign issuers from all over the world.[19] In 2007, the NYSE had 394 foreign issuers, while the NASDAQ had 262.[20] Such numbers stand in stark contrast to the figures from 1990, when just 170 foreign companies were listed on the two exchanges combined.[21] As Table 1 shows, however, since 2001 there has been a decline in the absolute number of foreign issuers that choose to crosslist. So too the geographical makeup of foreign issuers has changed. For example, Table 2 shows a decline in European issuers and an increase in companies incorporated in the Cayman and Marshall Islands.[22] To understand these crosslisting patterns, one must consider the costs and benefits of crosslisting in the United States. The next Section begins with an overview of the benefits of crosslisting. It then reviews the regulatory requirements – the on-the-book rules – faced by foreign issuers wishing to raise capital in the United States.

18. Press Release, NYSE Euronext, NYSE Salutes the Baltic States of Estonia, Latvia, and Lithuania (Sept. 24, 2006), *available at* http://www.nyse.com/press/1190629848623.html.

19. SEC, INTERNATIONAL REGISTERED AND REPORTING COMPANIES: MARKET SUMMARY 2006, *available at* http://www.sec.gov/divisions/corpfin/internatl/foreignmarketsumm2006.pdf.

20. According to the SEC, there were 229 companies on the Global Market and 33 on the Capital Market, both of which are NASDAQ markets. *See* SEC, INTERNATIONAL REGISTERED AND REPORTING COMPANIES: MARKET SUMMARY 2007, *available at* http://www.sec.gov/divisions/corpfin/internatl/foreignmarketsumm2007.pdf. For more information about the organization of NASDAQ, see NASDAQ, Listing Standards and Fees (2009), http://www.nasdaq.com/about/nasdaq_listing_req_fees.pdf.

21. John C. Coffee, Jr., *The Impact of Crosslistings and Stock Market Competition on International Corporate Governance*, *in* GLOBAL MARKETS, DOMESTIC INSTITUTIONS 437, 442 (Curtis J. Milhaupt ed., 2003).

22. In May 2008, the SEC's Chief Accountant reported that approximately two-thirds of European companies had deregistered. *SEC Official Says Fewer Companies Coming to U.S. Markets in Registered Forum*, 40 Sec. Reg. & L. Rep. (BNA) 777, 778 (May 12, 2008).

Table 1.

FOREIGN REGISTERED AND REPORTING ISSUERS BY YEAR AND MARKET[23]

YEAR	INTERNATIONAL REGISTERED AND REPORTING COMPANIES	NYSE	AMEX	NMS (GLOBAL)	SMALL CAP (CAPITAL MARKET)	OVER THE COUNTER (OTC)
2000	1310	417	48	360	64	421
2001	1344	445	45	322	56	476
2002	1319	451	46	268	55	499
2003	1232	443	49	247	40	453
2004	1240	439	60	246	45	450
2005	1236	429	79	243	49	436
2006	1145	424	84	231	44	362
2007	1058	394	84	229	33	318
2008	1024	379	79	217	31	318

Table 2.

COUNTRIES OF INCORPORATION, SORTED BY MOST U.S. LISTINGS IN 2008[24]

COUNTRY	2008	2007	2006	2005	2004	2003	2002	2001	2000
Canada	423	451	491	515	497	480	498	503	481
Israel	83	88	82	86	86	86	90	91	101
Cayman Islands	78	70	43	33	26	13	15	17	17
United Kingdom	44	48	63	88	107	115	134	143	143
Brazil	36	35	36	40	40	39	39	37	34
Bermuda	32	32	28	29	28	25	32	32	32
British Virgin Islands	29	21	21	21	21	20	24	26	25

23. This chart is based solely on SEC lists of International Registered and Reporting Companies. *See* SEC, INTERNATIONAL REGISTERED AND REPORTING COMPANIES, http://www.sec.gov/divisions/corpfin/internatl/companies.shtml (last visited Feb. 2, 2010).

24. *Id.*

Japan	28	28	29	30	31	31	32	30	27
Marshall Islands	26	22	15	10	3	1	1	1	0
Mexico	25	24	25	36	39	37	37	41	42
Netherlands	20	22	27	31	34	38	42	43	42
Chile	15	16	19	20	23	23	24	27	26
Australia	15	15	24	25	24	29	31	30	32
Argentina	14	14	15	15	15	15	24	25	22
Korea	13	14	15	16	13	12	9	8	8
Germany	13	13	20	20	22	24	28	31	26
India	13	13	12	12	11	10	11	12	8
France	12	14	27	30	33	34	38	36	35
China	11	11	11	12	13	13	12	11	10
Ireland	8	10	11	12	12	14	15	17	17
Hong Kong	8	10	13	14	15	12	10	10	9
South Africa	8	8	9	9	9	9	7	5	5
Switzerland	7	10	13	15	14	13	14	13	10
Taiwan	6	6	7	7	7	8	6	5	5
Luxembourg	5	7	7	10	10	10	11	10	9
Singapore	5	6	6	6	6	7	6	7	7
Russia	5	5	5	6	6	5	5	4	4
Italy	5	5	11	13	11	14	14	14	14
Spain	5	5	7	8	9	8	7	7	7
Sweden	3	5	10	13	13	15	18	17	17
Greece	3	3	3	5	6	6	6	5	5
Other	26	27	40	49	56	66	79	86	90
Total	**1024**	**1058**	**1145**	**1236**	**1240**	**1232**	**1319**	**1344**	**1310**

B. The Bonding Hypothesis

Much of the research on crosslisting has been driven by two empirical observations. First, firms with U.S. crosslistings exhibit a valuation premium relative to similar firms without such crosslistings.[25] The premium is greater

25. A valuation premium is typically computed using the valuation ratio known as Tobin's *q*, which is the ratio of market value to book value of assets.

for firms listed on exchanges (as opposed to over-the-counter (OTC) listings and private placements) that subject firms to SEC disclosure requirements and enforcement.[26] It is also greater for firms from countries where investor protection is weaker.[27] The historical average listing premium between 1990 and 2001 for foreign firms crosslisting on major U.S. exchanges was 17.5% over noncrosslisted firms. Between 2002 and 2005, the premium was 14.3%.[28] Second, foreign firms that crosslist on U.S. exchanges incur a reduction in the cost of capital, with scholars pinning the reduction between 50 and 110 basis points.[29] Thus, firms that crosslist in the United States enjoy greater valuations and lower costs of capital than do comparable firms that do not crosslist in the United States.

What accounts for the results described above? And why do some companies but not others choose to crosslist on U.S. markets? The proposed explanations range widely and are currently being reexamined by scholars,[30] but it is the corporate governance explanation that has persisted in the

26. *See* Craig Doidge, G. Andrew Karolyi & René M. Stulz, *Why Are Foreign Firms Listed in the U.S. Worth More?*, 71 J. FIN. ECON. 205, 206 (2004).

27. *Id.*

28. Craig Doidge, G. Andrew Karolyi & René M. Stulz, *Has New York Become Less Competitive Than London in Global Markets? Evaluating Foreign Listing Choices over Time*, 91 J. FIN. ECON. 253, 272 (2009).

29. Luzi Hail & Christian Leuz, *Cost of Capital and Cash Flow Effects of U.S. Crosslistings* 18 (Weiss Ctr. for Int'l Fin. Research, Working Paper No. 05-2, 2005), *available at* http://finance.wharton.upenn.edu/weiss/wpapers/05-2.pdf.

30. While the bonding hypothesis has received the most academic attention, numerous alternative explanations for crosslisting have been proposed and are once again gaining traction in the scholarly literature. Initially, some scholars favored a simpler access-to-capital explanation. *See* Coffee, *supra* note 21, at 440. Others have emphasized the strategic business motivations behind crosslisting. For example, listing on a foreign exchange may improve product identification among investors and consumers in the host country. It may increase market demand for the firm's products as well as its securities. Amir N. Licht, *Crosslisting and Corporate Governance: Bonding or Avoiding?*, 4 CHI. J. INT'L L. 141, 145 (2003). Finally, a few scholars have proposed alternative theories of crosslisting related neither to corporate governance nor to capital markets. Amir Licht, for example, suggests that the evidence instead supports a so-called avoiding hypothesis. *Id.* at 142. According to Licht, because the regulatory regime that is out for rent by foreign issuers differs markedly from the regime that applies to domestic issuers, foreign issuers choose to crosslist in the United States to avoid the "disinfecting sunlight" of their home countries' securities laws. *Id.* at 162. Cally Jordan, meanwhile, focuses on crosslisting as a mechanism to overcome the "home bias" of U.S. investors. *See* Cally Jordan, *The Chameleon Effect: Beyond the Bonding Hypothesis for Crosslisted Securities*, 3 N.Y.U. J. L. & BUS. 37, 43 (2006). Most recently, in a new analysis of crosslisting premia, Kate Litvak has found support for the "early crosslisting literature," which involves overcoming market segmentation. Litvak, *supra* note 8, at 15.

academic literature through much of the last decade.[31] Under the corporate governance or bonding explanation of crosslisting, foreign firms that crosslist their securities in the United States signal adherence to corporate governance standards that are higher than those required by their home countries. As John Coffee, a key proponent of the bonding hypothesis, explains:

> Listing on a U.S. exchange has this [bonding] effect because (i) the listing firm becomes subject to the *enforcement powers of the SEC*; (ii) investors acquire the ability to exercise effective and low-cost legal remedies (such as a *class action* and the derivative action) that are not available in the firm's home jurisdiction; (iii) the entry into the U.S. commits the firm to provide more complete financial information and to reconcile its financial statements to U.S. generally accepted accounting principles (GAAP); (iv) securities analysts will more closely monitor the firm once it crosslists; and (v) institutional investors can and do negotiate minority protections if the firm wishes to make an initial public offering in the U.S.[32]

Public and private enforcement, therefore, are crucial premises of the bonding hypothesis. Indeed, Coffee has specifically posited that "the level of enforcement intensity . . . distinguishes jurisdictions in a manner that can explain national differences in the cost of capital . . . and the valuation premium that foreign firms crosslisting into the United States (and only the United States) exhibit."[33] As I show in Section II.A, despite the recent focus on enforcement, Coffee has examined only the levels of aggregate U.S. public enforcement. The key premise of the bonding hypothesis—that foreign issuers are subject to the enforcement powers of the SEC—remains largely unexplored.

31. *See* Doidge et. al, *supra* note 28, at 254 (noting that "much of the recent literature on crosslistings has emphasized the governance benefit of crosslisting on a major U.S. exchange"); s*ee also* Ribstein, *supra* note 5, at 104 (noting that "bonding seems to be the dominant explanation for crosslisting").

32. Coffee, *supra* note 21, at 448 (emphasis added); *see also* Joseph D. Piotroski & Suraj Srinivasan, *Regulation and Bonding: The Sarbanes-Oxley Act and the Flow of International Listings*, 46 J. ACCT. RES. 383, 385 (2008) (noting that "[w]hen effective, this bonding process creates a commitment to adopt stronger corporate governance practices and credibly separates the listing firm from other firms in their home market, resulting in higher market valuations and lower costs of capital").

33. Coffee, *supra* note 4, at 233.

C. Crosslisting: Procedural and Substantive Requirements

What does it mean to be a foreign private issuer in the United States?[34] How do foreign companies tap into the U.S. capital markets, and how do the applicable rules compare to those faced by domestic issuers? Although there is no general exemption from the U.S. federal securities laws for foreign private issuers, the globalization of the securities markets has led the SEC to accommodate foreign private issuers in several ways. The following Section summarizes the ways that a foreign private issuer can become subject to U.S. securities laws as well as the various available exemptions for foreign issuers. A brief review of the recent literature on Sarbanes-Oxley (SOX)[35] also introduces the debate about the effects of SOX on crosslisting in the United States.

1. How Foreign Issuers Become Subject to U.S. Securities Laws

There are several paths that lead a foreign issuer to the gates of the SEC. First, foreign issuers that wish to offer or sell securities to the "public" in the United States (that is, to conduct an initial public offering) must comply with the registration and reporting requirements of the Securities Act of 1933.[36] Such an offer or sale requires the filing of a registration statement with the SEC, clearance of the registration statement, and the distribution of a prospectus that contains extensive business and financial information regarding the issuer. Registration of a public offering under the Securities Act subjects the foreign issuer to the periodic reporting requirements of the Exchange Act. Alternatively, those foreign issuers that do not wish to conduct an initial public offering in the United States but that do wish to list a class of their securities on a U.S. national securities exchange (such as the New York Stock Exchange) must also register their securities with the SEC under the terms of the Securities Exchange Act of 1934.[37]

34. Under both the Securities Act of 1933 and the Securities Exchange Act of 1934, the term "foreign private issuer" refers to any corporation or other organization incorporated or organized under the laws of any foreign country. Nevertheless, there is an exception for an organization whose shares are more than 50% owned by residents of the United States if: the majority of its executive officers or directors are U.S. citizens or residents, more than 50% of its assets are located in the United States, or its principle place of business is the United States. The SEC treats companies that fall within the exception as domestic issuers. SEC Rule 3b-4, 17 C.F.R. § 240.3b-4 (2008).

35. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

36. *See* Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (2006).

37. Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk (2006).

Even if a foreign issuer has never registered an offering under the Securities Act and has not listed its securities on a U.S. national securities exchange or entered the NASDAQ system, it may still have to comply with the registration requirements if it accumulates enough U.S. shareholders to require Exchange Act registration. The Exchange Act requires registration of a particular class of equity security when it is held by at least three hundred record holders resident in the United States and the issuer has over $10 million in total assets.[38] Foreign issuers that become subject to the Exchange Act requirements in this way, however, may invoke the special foreign private issuer exemption of Rule 12g3–2(b) and avoid most of the Exchange Act requirements.[39]

2. Exceptions and Exemptions for Foreign Issuers

Three kinds of transactions by foreign issuers do not require registration with the SEC. First, under Regulation S, non-U.S. (offshore) securities offerings that are not likely to have an impact on the U.S. securities markets are not subject to Securities Act registration.[40] Foreign issuers that have "no substantial U.S. market interest" in their securities may sell their securities in offshore transactions with no further conditions.[41]

The second major transactional exemption is the so-called private offering exemption.[42] Sophisticated investors such as insurance companies, investment companies, banks, and other institutions may be treated as private (non-public) investors that do not need the protection of the Act's public offering registration procedures. An offering confined to such a group—if not accompanied by any "general solicitation or general advertising"—need not be registered with the SEC. Offering literature in a private offering is still subject to the antifraud provisions of the Exchange Act, but it is not subject to the disclosure requirements applicable to a registered public offering and does not have to be filed in advance with the SEC.

Third, purchasers of securities in a private offering may look to safe harbor rules of the SEC that lay out exemptions from registration for resales in the United States. Most importantly, Rule 144A permits immediate unregistered

38. SEC Rule 12g3-2(b)(2), 17 C.F.R. § 240.12g3-2 (2008).

39. SEC Rule 12g-1, 17 C.F.R. § 240.12g-1.

40. Regulation S encompasses Rules 901 through 905 of the Securities Act of 1933. *See* 17 C.F.R. § 230.901-05.

41. 17 C.F.R. § 230.903.

42. 17 C.F.R. § 230.501-08.

resales of restricted securities to "qualified institutional buyers."[43] The Rule 144A market permits foreign issuers to raise capital free of most U.S. securities regulation, including liability under the 1933 Act and Sarbanes-Oxley. Specifically, the rule provides a safe harbor from the registration requirements for resale of "non-fungible" restricted securities to "qualified institutional buyers" managing investment portfolios of $100 million or more. In 2002, Rule144A offerings totaled $40 billion, or 22% of all the equity raised in the United States. Four years later, such offerings had increased to over $160 billion, representing more than 50% of the equity raised in the United States in 2006.[44]

Finally, if a foreign issuer is required to face Exchange Act registration and reporting only because it has acquired a sufficiently large U.S. shareholder base (300 U.S. holders of a class of equity security), it has the option of either entering the regular Exchange Act registration and reporting system or availing itself of the exemption afforded by Exchange Act Rule 12g3-2(b).[45] A foreign issuer using the Rule 12g3-2(b) exemption is required to furnish to the Commission or publish on its website only whatever "material" information—translated into English—it has made or is required to make public pursuant to its home country's laws or to a non-U.S. stock exchange's requirements. In essence, the foreign issuer must simply make available the materials it is required to prepare domestically; it does not, however, have to generate any new documents for the SEC.

3. Substantive Requirements for Foreign Private Issuers Registered with the SEC

Once issuers fall under the registration and reporting requirements of the SEC, what kind of rules do they face? It is important to stress that the rules on the books are different for foreign private issuers. The United States effectively has two securities regulation regimes: one for domestic issuers and another for foreign issuers. The latter "cuts corners" on key issues of corporate governance.[46] As the U.S. Chamber of Commerce observed in an amicus brief, "the SEC has recognized that enabling foreign companies to avoid the application of U.S. securities law requirements in appropriate circumstances

43. 17 C.F.R. § 230.144A.

44. Luigi Zingales, *The Future of Securities Regulation* 16 (Univ. of Chi. Booth Sch. of Bus., Working Paper No. 08-27, 2009), *available at* http://ssrn.com/abstract=1319648.

45. 17 C.F.R. § 240.12g3-2(b), (d).

46. *See* Licht, *supra* note 30, at 142-43.

will make the United States a more attractive forum."[47] As a result of this belief, foreign companies are exempt from several important governance provisions.[48] For example, the SEC relaxes conflict of interest requirements for foreign issuers.[49] Foreign issuers are also exempt from several duties with regard to proxy statements under section 14 of the Exchange Act and short sales and short-swing profits by corporate insiders under section 16. Furthermore, while U.S. issuers must file interim quarterly reports (10-Qs) that contain unaudited financial and other prescribed information, foreign private issuers are required to furnish as interim reports only whatever information the foreign private issuer has made or is required to make public pursuant to its home country's corporate laws or a non-U.S. stock exchange's requirements.[50] Finally, while foreign issuers had previously been required to "reconcile" their financial reporting standards with the U.S. generally accepted accounting principles (GAAP), the SEC eliminated the requirement in 2007 and permitted foreign private issuers to use the International Financial Reporting Standard (IFRS), a standard used by more than 100 countries around the world.[51]

4. Impact of Sarbanes-Oxley

No discussion of crosslisting requirements can be complete without an assessment of SOX, which drew much attention to the U.S. requirements for foreign issuers. Passed in haste in the midst of the public outcry following the Enron and WorldCom scandals, SOX represented a departure from the

47. Brief of the Sec. Indus. and Fin. Mkts. Ass'n, the Chamber of Commerce of the U.S.A., the U.S. Council for Int'l Bus., and the Association Française des Entreprises Privées, as Amici Curiae Supporting Defendants-Appellees at 10, Morrison v. Nat'l Austl. Bank Ltd., 547 F.3d 167 (2d Cir. 2008) (No. 07-0583), *available at* http://www.uschamber.com/nclc/caselist/issues/securities.htm.

48. Licht, *supra* note 30, at 151-53; *see also* Donald C. Langevoort, *The SEC, Retail Investors, and the Institutionalization of the Securities Markets*, 95 VA. L. REV. 1025, 1077 (noting that "there 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").

49. Licht, *supra* note 30, at 152.

50. SEC Rule 13a-16, 17 C.F.R. § 240.13a-16 (2008); Form 6-K, 17 C.F.R. § 249.306.

51. *See* Press Release, SEC, SEC Proposes Roadmap Toward Global Accounting Standards to Help Investors Compare Financial Information More Easily, Aug. 27, 2008, *available at* http://www.sec.gov/news/press/2008/2008-184.htm (noting that "more than 100 countries around the world, including all of Europe, currently require or permit IFRS reporting"); Press Release, SEC, SEC Takes Action to Improve Consistency of Disclosure to U.S. Investors in Foreign Companies, Nov. 15, 2007, *available at* http://www.sec.gov/news/press/2007/2007-235.htm.

disclosure-oriented mode of regulation and included mandates regarding audit committee composition and functioning, forfeiture of CEO incentive compensation upon issuance of an accounting restatement, and prohibitions on executive loans and the purchase of non-audit services from auditors.[52] SOX did not exempt foreign private issuers from its requirements, but it did give the SEC power to carve out exemptions that could be used to accommodate the practices of foreign companies. Although SEC Chairman Harvey Pitt stated in 2002 that the Act "applies equally to all who seek to access U.S. capital markets,"[53] the SEC has tailored some of the rules to the special circumstances of foreign private issuers. For example, the Commission has made modifications to the independence requirements under SOX section 301.[54] Smaller foreign issuers, along with smaller domestic companies, also benefited from an extended the compliance deadline for the internal control requirements under SOX section 404.[55]

Nevertheless, SOX has been blamed repeatedly for imposing disproportionate costs on smaller companies and non-U.S. issuers and thus undermining the competitiveness of U.S. capital markets. While the increased compliance costs cannot be disputed, the link between SOX and U.S. capital market competitiveness has been the subject of much academic debate. Despite policymakers' attempts to link the burdens of SOX to the decrease in new foreign listings, the increase in deregistrations,[56] the decline in IPOs, and the increase in going-private transactions, scholars have disagreed about the relative impact of SOX, particularly given the rapid development of other capital markets.[57] Most importantly, as with other U.S. securities laws,

52. *See* Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521 (2005).

53. Harvey L. Pitt, Chairman, SEC, A Single Capital Market in Europe: Challenges for Global Companies, Remarks at the Conference of the Institute of Chartered Accountants of England and Wales (Oct. 10, 2002), *available at* http://www.sec.gov/news/speech/spch589.htm.

54. Foreign private issuers did not need to provide an auditor's attestation on internal controls over financial reporting until they filed their annual reports for fiscal years ending on or after July 15, 2007.

55. The final deadline for compliance with the section 404 management report requirements was also delayed until 2007. *See* Press Release, SEC, SEC Offers Further Relief from section 404 Compliance for Smaller Public Companies and Many Foreign Private Issuers (Aug. 9, 2006), *available at* http://www.sec.gov/news/press/2006/2006-136.htm.

56. *See* Piotroski & Srinivasan, *supra* note 32, at 393-94 ("96 foreign firms deregistered with the SEC in 2002–2005 while only 22 firms deregistered in all the years from 1990 to 2001.").

57. On the one hand, Kate Litvak has shown that foreign firms listed in the United States experienced a significant negative price reaction to news that SOX would apply to them.

although the requirements seem burdensome on paper, no research to date has analyzed whether those foreign issuers actually comply with the requirements of SOX, and whether the SEC sanctions them if they do not.

II. PUBLIC ENFORCEMENT AGAINST FOREIGN ISSUERS

Having outlined the substantive law above, I now turn to the scholarly findings about the enforcement of those rules. I begin by tracing the path of the law and finance scholarship as it relates to crosslisting, noting both the gradual turn toward the study of enforcement and the current focus on aggregate patterns and inter-country comparisons. Next, I examine the empirical work on public—namely, SEC—enforcement of U.S. securities laws. While several works have examined SEC enforcement patterns, only one study to date has tracked SEC actions against non-U.S. issuers.

A. Scholarship on Public Enforcement

As noted in the introduction, the scholarship on crosslisting builds on the law and finance literature. Since the publication of *Law and Finance*—arguably the seminal paper that drew attention to the relationship between a country's "legal origins" and the development of its financial markets[58]—hundreds of studies about the connection between a country's institutional framework and its financial markets have followed. Numerous legal and regulatory independent variables have been analyzed as potential causes of market growth and development. Such studies have referred vaguely and interchangeably to the "U.S. regulatory environment,"[59] or the "securities regulation and

Kate Litvak, *The Long-Term Effect of the Sarbanes-Oxley Act on Crosslisting Premia,* 14 EUR. FIN. MGMT. 875 (2008). On the other hand, Doidge and co-authors contend that the post-SOX decline in United States listings relative to U.K. listings has not been due to SOX. Instead, the increase in U.K. listings consists of smaller, riskier firms listing on London's Alternative Investment Market, firms that would not be able to list on the NYSE. Doidge, Karolyi & Stulz, *supra* note 28. Still others like Piotroski and Srinivasan have found that the probability of small firms listing in the U.S. declined post-SOX, while large firms' choices remained the same. Piotroski & Srinivasan, *supra* note 32, at 410-12. Notably, Doidge, Karolyi and Stulz examine only large firms, whereas Piotroski and Srinivasan examine the listing patters of both large and small foreign firms.

58. *See* La Porta et al., *Law and Finance*, *supra* note 4.

59. Craig Doidge, *U.S. Crosslistings and the Private Benefits of Control: Evidence from Dual-Class Firms*, 72 J. FIN. ECON. 519, 524 (2004).

supporting legal institutions,"[60] or the "well-functioning corporate governance system,"[61] as potential explanatory variables of U.S. capital market growth. Although numerous governance indices measuring disclosure requirements, liability standards, and public enforcement were constructed, all of the indices were based on the laws, procedures, and powers on the books. Few attempts were made to measure the "use" of the available institutional mechanisms.

It is precisely this long-standing focus on laws on the books that led scholars such as Mark Roe, Howell Jackson, and John Coffee to conclude that an approach that focused solely on the formal characteristics of the regulatory bodies was inadequate. The simple measurement of "potential powers" ignored the "lazy, corrupt, or incompetent regulator who has broad formal powers but does nothing in fact."[62] The more satisfactory approach to measuring enforcement was to focus on inputs and outputs: on what the regulatory agency spent and on what it actually did in a given period of time relative to its counterparts abroad.

According to Coffee, even a preliminary analysis of enforcement statistics reveals a striking difference between the U.S. enforcement regime and that of other countries. Although the United States does not spend more on "regulatory inputs" relative to the size of its capital market, it produces considerably more public enforcement "outputs" than its competitors do. For example, between 2000 and 2004, the United States brought an average of 224 public enforcement actions per trillion dollars of 2004 market capitalization, while the United Kingdom brought twenty-five.[63] In the period between 2000 and 2002, the public securities enforcement monetary sanctions imposed in the United States exceeded those imposed in the United Kingdom, even after adjusting for relative market size, by a margin of nearly ten to one.[64] In 2005, the SEC initiated 629 enforcement actions and imposed $1.8 billion in penalties (or $108,959 per billion dollars of stock market capitalization), while the United Kingdom's Financial Services Authority (FSA) initiated 269 enforcement actions and imposed approximately $30 million in penalties (or $9,916 per billion dollars of stock market capitalization).[65] More recently,

60. Luzi Hail & Christian Leuz, *International Differences in the Cost of Equity Capital: Do Legal Institutions and Securities Regulation Matter?*, 44 J. ACCT. RES. 485, 486 (2006).

61. Licht, *supra* note 30, at 141.

62. Coffee, *supra* note 4, at 250.

63. Howell E. Jackson, *Variation in the Intensity of Financial Regulation: Preliminary Evidence and Potential Implications*, 24 YALE J. ON REG. 253, 283 (2007).

64. Coffee, *supra* note 4, at 272.

65. *Id.* at 262, 269-72.

Coffee and Sale found that the ratio of SEC to FSA penalties and financial restitution was "probably around 100 to 1."[66]

Although such statistics seem to suggest that the United States is an enforcement outlier, it is important to emphasize that they are premised on some key assumptions about the meaning of an "enforcement action." Without further investigation, one cannot be sure whether the 629 SEC enforcement actions relate to violations of securities laws by six hundred or just sixty different firms and individuals.[67] Moreover, such statistics reveal little about the nature of the enforcement process or the targets of the enforcement actions. Still, certain scholars have interpreted the alleged intensity of U.S. (public) enforcement as the source of the crosslisting premium.[68] Given both the historical salience of the bonding hypothesis, and the emergence of new scholarship finding that "we know less than we thought we knew about the sources of premia," a closer look at U.S. public enforcement for foreign issuers is particularly timely.[69]

B. SEC Enforcement: Previous Empirical Findings

Despite the growing focus on macroeconomic and comparative studies of enforcement, little scholarly attention has been devoted to the analysis of SEC enforcement actions over time. A 2008 empirical study tracks SEC enforcement actions for financial misrepresentation from 1978 to 2002 and finds that "huge" reputational market penalties follow any legal penalties, but it does not analyze the national origins of the firms targeted by the SEC and the Department of Justice (DOJ).[70] The study does, however, note that, on average, the annual number of enforcement actions for books and records and internal controls misrepresentation represents only 0.32% of all firms listed with the Center for

66. John C. Coffee, Jr. & Hillary A. Sale, *Redesigning the SEC: Does the Treasury Have a Better Idea?*, 95 VA. L. REV. 707, 729 (2009) ("Thus, comparing the SEC to its most closely comparable regulator, the FSA, the ratio in recoveries seems to be nearly 300 to 1 in 2007 and probably around 100 to 1 for most recent years.").

67. As discussed below, the SEC often reports multiple "actions" related to the settlement of a case against one individual or firm. Similarly, wrongdoing at just one company may generate many separate enforcement actions against various employees and related parties, which, depending on the nature of the investigation and settlement processes, may be reported as individual actions or grouped into one reported enforcement action.

68. *See supra* Section I.B.

69. Litvak analyzes the crosslisting premium and presents results that "tend to weaken bonding theories of the source of crosslisting premia." Litvak, *supra* note 8, at 16.

70. Jonathan M. Karpoff, D. Scott Lee & Gerald S. Martin, *The Cost to Firms of Cooking the Books*, 43 J. FIN. & QUANTITATIVE ANALYSIS 581 (2008).

Research in Security Prices (CRSP).[71] Furthermore, Karpoff and his colleagues observe the number of firms identified by the SEC as having engaged in misconduct constitutes a "sizeable fraction" of all firms that restate earnings, which suggests that "the probability of getting caught for financial misrepresentation is not negligible."[72] Again, this is an aggregate finding; it says nothing about whether the conclusion would hold if the data set were limited to the universe of crosslisted foreign firms.

The findings of the Karpoff study are generally in line with those of James Cox and Randall Thomas, who have studied SEC "enforcement heuristics" and the relationship between SEC enforcement actions and private securities class actions.[73] Both the Karpoff study and the Cox and Thomas study emphasize the importance of legislation—and in particular, the Foreign Corrupt Practices Act of 1977 and the Security Enforcement and Penny Stock Reform Act of 1990—in increasing the range and flexibility of SEC enforcement mechanisms.[74] However, while Karpoff and his colleagues stress the powerful secondary effects of SEC actions, Cox and Thomas focus on the allocation of the limited resources of the organization. While the number of filings increased by sixty percent between 1991 and 2000, the proportion of filings receiving review declined from twenty-one percent to eight percent. In 2001, the SEC completed full review of only sixteen percent of issuers, missing its stated goal by half.[75]

While the aggregate data on overall SEC enforcement patterns reveals missed agency goals, the single empirical study on specific treatment of foreign firms suggests that the SEC has rarely taken action against crosslisted firms or their insiders for violations of the federal securities laws, even when well-publicized misconduct has taken place.[76] According to Jordan Siegel's study, in the seven-and-a-half year period between January 1, 1995 and June 30, 2002, the SEC took legal action against only thirteen crosslisted foreign

71. *Id*. at 585. The CRSP includes common stock issues, certificates, and ADRSs listed on the NYSE, Alternext (formerly AMEX), NASDAQ, and ARCA exchanges.

72. *Id*. at 586.

73. James D. Cox & Randall S. Thomas, *SEC Enforcement Heuristics: An Empirical Inquiry*, 53 DUKE L.J. 737 (2003).

74. Securities Law Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931; Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494. Prior to the passage of these acts, and particularly before 1978, the SEC's ability to prosecute fraudulent reporting cases was limited to injunctive actions in federal court or administrative actions requiring the registrant to correct its filings.

75. Cox & Thomas, *supra* note 73, at 757.

76. Siegel, *supra* note 14, at 335-43.

firms.[77] Despite the "widespread asset taking during this period," Siegel notes that the SEC did not take a single action against crosslisted firms domiciled in Mexico, South Korea, Brazil, or Russia.[78] In numerous instances where he was able to use newspaper reports and domestic prosecutions to verify wrongdoing by Mexican firms, the SEC did not bring any actions to protect investors. Furthermore, Siegel observes that the SEC did not often succeed in prosecuting the small number of foreign insiders that it did pursue.[79]

While the Siegel data are striking, I argue that a more comprehensive assessment of the recent data is necessary. First, it is important to consider not only the absolute number of enforcement actions against foreign issuers but also the rates at which foreign companies have been targeted and the baseline rates for domestic issuers. Second, while the annual total of "SEC enforcement actions" is frequently cited,[80] the meaning of this number deserves greater scholarly attention. Third, securities regulation has changed dramatically since 2002, most notably with the passage of the Sarbanes-Oxley Act.[81] Finally, the recent focus on crosslisting and the concern about the competitiveness of U.S. capital markets[82] suggest that an examination of SEC enforcement statistics between 2002 and 2008 is particularly timely.

C. SEC Enforcement Against Foreign Issuers: Theoretical Expectations

Before delving into the details of the empirical study, it is important to set out theoretical predictions for the results. First, although it is difficult to verify empirically, there is no *a priori* reason to expect that foreign issuers are any less

77. *Id*. at 342.

78. *Id*.

79. *Id.*

80. *See, e.g.*, PRICEWATERHOUSECOOPERS, 2008 SECURITIES LITIGATION STUDY 36 (2009) [hereinafter PWC, 2008 STUDY], *available at* http://10b5.pwc.com/PDF/NY-09-0894%20SECURITIES%20LIT%20 STUDY%20FINAL.PDF; Coffee & Sale, *supra* note 66; *Part I: SEC Enforcement Trends, 2009: Calls for Reform and Their Background*, SEC Actions, Mar. 2, 2009, http://www.secactions.com/?p=871; *see also The Perils of Pledging*, TheCorporateCounsel.net, Oct. 28, 2008, http://www.thecorporatecounsel.net/blog/archive/001943.html (noting the "impressive numbers" released by the SEC).

81. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

82. According to Doidge and his colleagues, in 1998 the major New York exchanges "collectively attracted 30% of all the foreign listings in the world; the London Stock Exchange's (LSE) Main Market and Alternative Investment Market (AIM) had 16% . . . . It is now almost conventional wisdom . . . that London has become more competitive in attracting foreign listings than New York." Doidge et al., *supra* note 28, at 253-54.

prone to violations of U.S. securities laws than domestic issuers. Prior work has noted that foreign issuers are more likely to have concentrated ownership and, in turn, higher private benefits of control.[83] According to Doidge et al., "all else equal, the opportunity to expropriate minority shareholders will be highest when managers' control of a firm cannot be challenged internally."[84] In addition, particularly in the 1990s, many foreign firms that crosslisted in the United States came from emerging market economies where corporate governance rules were weaker than and much different from the governance rules in the United States.[85]

Second, one might reasonably expect the SEC to devote less attention, on average, to foreign cases. Because the resources of the SEC are so limited, the agency must set priorities for the types of enforcement matters that it will pursue. As the SEC's Director of Financial Markets and Community Investment stated in testimony before the Senate Subcommittee on Oversight of Government Management, Restructuring and the District of Columbia:

> [The] SEC generally prioritizes the cases in terms of (1) the message delivered to the industry and public about the reach of SEC's enforcement efforts, (2) the amount of investor harm done, (3) the deterrent value of the action, and (4) SEC's visibility in certain areas such as insider trading and financial fraud.[86]

These goals form a useful set of criteria for a theoretical consideration of the appropriate level of enforcement for foreign issuers. Indeed, the lack of enforcement actions may reflect a delicate balancing of considerations of the investor harm (perhaps mostly to non-U.S. investors) and the deterrent/visibility value of any actions against foreign issuers. Langevoort's "home bias" hypothesis posits that scarce regulatory resources are expended in a discriminatory way, with disproportionately fewer resources allocated to

83. *Id.* at 255 ("The typical foreign firm has a controlling shareholder and comes from a country where controlling shareholders have more of an opportunity to make themselves better off at the expense of minority shareholders compared with the US." (citation omitted)).

84. Craig Doidge et al., *Private Benefits of Control, Ownership, and the Crosslisting Decision*, 64 J. FIN. 425, 432 (2009).

85. Coffee, *supra* note 21, at 444.

86. *Human Capital: Major Human Capital Challenges at SEC and Key Trade Agencies: Hearing Before the S. Subcomm. on Oversight of Gov't Mgmt., Restructuring & the Dist. of Columbia, Comm. on Governmental Affairs*, 107th Cong. 6 (2002) [hereinafter *Human Capital Hearing*] (statement of Richard J. Hillman, Director of Financial Markets and Community Investment, U.S. Gen. Accounting Office and Loren Yager, Director of International Affairs and Trade, U.S. Gen. Accounting Office).

extraterritorial enforcement.[87] The home bias stems from the higher costs of enforcement against foreign issuers: it is more expensive to identify and bring enforcement actions when the subjects are located outside the United States. There are additional costs in the form of lost control over (and credit for) the work that stems from cooperation with foreign authorities. Such "control" costs are particularly hard for large bureaucracies to bear.

The benefits also weigh in favor of domestic issues: in domestic cases, more of the victims, or the beneficiaries of SEC actions are U.S. residents. Neglecting to pursue fraud on domestic turf would suggest that "the U.S. cannot even keep its own house in order."[88] Domestic issues are more visible, and in an agency culture that "feeds on salient accomplishments," this has generally meant a preference for well-publicized enforcement actions against domestic violators of securities laws.[89] The cost-benefit analysis proposed by Langevoort thus suggests that the SEC should be willing to take on foreign issuers if either the publicity benefits are high or the costs of enforcement are low. Langevoort laments the "limited body of empirical evidence" on this subject.[90] While recent empirical work has corroborated the existence of strategic calculus behind SEC enforcement decisions in the case of broker-dealers,[91] analysis of the agency's policies toward foreign issuers remains scant.

III. DATA AND EMPIRICAL METHODOLOGY

Although much has been written about the SEC, no study to date has used a systematic approach to assemble a list of foreign private issuers targeted by public enforcement actions in the United States.[92] Siegel's approach,[93] while

87. Langevoort, *supra* note 6, at 487.

88. *Id.* at 499.

89. *Id.*

90. *Id.* at 487.

91. A recent paper presents evidence of strategic calculus by SEC regulators. Notably, in his empirical investigation of SEC enforcement actions against broker-dealers, Stavros Gadinis finds that SEC officials may adjust enforcement measures on the basis of the target's desirability as a potential employer. Stavros Gadinis, *The SEC and the Financial Industry: Evidence from Enforcement Against Broker-Dealers* (Harvard John M. Olin Ctr. for Law, Econ. & Bus., Discussion Paper No. 27, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1333717.

92. For example, like many other consulting and auditing firms, PricewaterhouseCoopers (PwC) publishes annual reports about the state of securities litigation in the United States. While mainly focused on trends in class action litigation, these reports frequently address new laws and trends that affect PwC's foreign clients, many of whom crosslist on U.S. markets. In four reports (2004-2007), PwC has included a tally of the number of foreign

impressive for its combination of document review and attorney interviews, does not begin with a list of foreign issuers. Because he does not begin with the universe of potential targets, Siegel cannot definitively identify which of those issuers have been targeted by SEC enforcement actions. A preliminary review of SEC enforcement releases suggests that there is no foolproof way to search for actions against crosslisted firms, as no one keyword or term is used consistently to identify foreign private issuers in SEC enforcement actions. Similarly, while the interviews with securities lawyers are undoubtedly useful, they may also result in an unsystematic search process.

In contrast, my methodology includes a two-part assessment of SEC enforcement against foreign issuers. As discussed below, the first part begins with a list of foreign issuers registered with the SEC between 2000 and 2008 and uses a systematic approach to check whether there has been an enforcement action against any such issuer in those years. The second part begins instead with a list of all SEC enforcement actions reported between 2000 and 2008 for violations of disclosure requirements and checks whether any of those actions targeted foreign issuers. The details of each approach are discussed in turn below.

issuers targeted by SEC enforcement actions. However, PwC does not explain its methodology for identifying such actions and includes actions against foreign companies that are not technically foreign private issuers as defined by the SEC. Moreover, it excludes certain administrative actions (such as actions for delinquent filings) that are not very costly to foreign companies but that are important for the purposes of this analysis. *See, e.g.*, PRICEWATERHOUSECOOPERS, 2007 SECURITIES LITIGATION STUDY 59 (2008) [hereinafter PWC, 2007 STUDY], *available at* http://10b5.pwc.com/PDF/2007%20SECURITY%20LIT%20STUDY%20W-LT.PDF.

93. Siegel describes his approach as follows:

> To determine the SEC's record, I first search all SEC litigation releases between January 1, 1995 and June 30, 2002 for actions taken against crosslisted firms. I then interview 116 plaintiffs' attorneys in 2002 to crosscheck and identify any remaining SEC enforcement actions. The attorneys interviewed represented the most active in the area of securities law and represented all major offices of all prominent law firms in this area. Several of the attorneys had 30 years of experience and had personal involvement in the earliest cases. As a further check, I search both Lexis and the entire SEC web site (including administrative proceedings) by the names of all companies ever targeted by private plaintiffs.

Siegel, *supra* note 14, at 342.

A. Part 1: Search for Enforcement Actions Against Companies on the SEC's Lists of International Registered and Reporting Issuers

The starting point for this part of the study is the SEC's database of International Registered and Reporting (IRR) companies.[94] The annual lists are available for 2000-2008.[95] According to the SEC's Office of International Corporate Finance, with the exception of certain Canadian issuers, these lists generally include only foreign private issuers.[96] Under the definition of "foreign private issuer,"[97] companies that are incorporated in foreign jurisdictions but have more than fifty percent of their outstanding voting securities held by U.S. residents and more than fifty percent of their assets located in the United States, are generally treated as U.S. domestic issuers and thus excluded from the SEC lists. Thus, the bulk of the issuers on the International Registered and Reporting lists are foreign private issuers that file the standard foreign private issuer disclosure materials with the SEC.[98] However, the lists also contain a small number of foreign private issuers that nevertheless choose to file U.S. domestic disclosure documents.[99]

94. SEC, International Registered and Reporting Companies, http://www.sec.gov/divisions/corpfin/internatl/companies.shtml (last visited Feb. 2, 2010).

95. I contacted the SEC to ask for earlier lists but was told that electronic copies are not available. I was not able to find the earlier lists on Lexis or Westlaw.

96. Telephone Interview with Paul Dudek, Chief of Office of Int'l Corp. Fin., SEC (Dec. 9, 2009).

97. See *supra* note 34.

98. Standard foreign private issuer disclosure documents include 20Fs (annual and transition report of foreign private issuers) and 6Ks (current report of foreign issuer). In contrast, domestic issuers typically file 10-Ks (annual reports) and 10-Qs (quarterly reports). *See* SEC, Index to Forms, http://www.sec.gov/info/edgar/forms/edgform.pdf (last visited Feb. 2, 2010).

99. In short, there are two exceptions to the general rule that the International Registered and Reporting issuer lists include only foreign private issuers that file FPI disclosure materials. First, the lists include certain Canadian issuers that may or may not be foreign private issuers and that file domestic issuer forms with the SEC. Second, certain foreign private issuers from the Cayman Islands, the Marshall Islands and the British Virgin Islands also file domestic forms. In order to understand how many issuers on the list of International Registered and Reporting Companies file domestic forms, I used the Edgar database to check the disclosure materials filed by each of the 1259 issuers from Canada, the Cayman Islands, the Marshall Islands and the British Virgin Islands on the aggregate 2000-2008 list. Although Edgar did not have sufficient information for all of the companies on the list, of the 1229 such issuers for which information was available, I identified 166 (or 13.5%) that had filed domestic forms. *See* SEC, Searching Company Filings, http://sec.gov/search/search.htm (last visited Feb. 2, 2010).

From the nine annual IRR lists, I generated a list of 2476 unique company entries. The lists represent foreign issuers that had been registered with the SEC between 2000 and 2008. The next key step was to search SEC records to determine whether the Commission had brought enforcement actions against any of the companies. For this task, I used the SEC's search engine,[100] which permits users to search all Commission documents, including administrative and litigation releases. I reviewed all the results to isolate those enforcement actions that involved any enforcement measures against foreign issuers.[101] I included actions that involved as defendants the foreign issuer, its subsidiary,[102] or the employees of either the parent or the subsidiary. I did not include actions against third parties for wrongdoing involving the foreign issuer, such as instances of insider trading by third parties (non-employees) in the stock of a foreign issuer.

For each remaining company/action entry on my list,[103] I used the enforcement releases and the annual SEC reports to identify: (1) the fiscal year of the enforcement action;[104] (2) the country of incorporation of the foreign issuer; (3) the market on which the securities of the foreign issuer were traded; (4) the enforcement category, as identified by the SEC;[105] (5) whether the

100. SEC, Search SEC documents (Advanced Search), http://search.sec.gov/secgov/index.jsp (last visited Feb. 2, 2010).

101. The database search generated results for companies listed in litigation documents because they were, for example, involved in certain transactions with other U.S. defendants.

102. In evaluating whether or not to include actions against subsidiaries of FPIs, I had to evaluate the involvement of the FPI in the case. I did not include enforcement actions in which the FPI was merely identified as a corporate parent of the defendant. In particular, I did not include a number of such cases in the Broker Dealer and Investment Advisor enforcement categories, *see infra* note 105, since they generally involved misconduct by U.S. incorporated financial institutions and did not reference any wrongdoing or liability by the foreign parent.

103. The list generated by this methodology contains an entry for each time a foreign issuer (including its employees and subsidiaries) was named as a defendant in an SEC enforcement action. Thus, if an employee of a foreign issuer was named in two separate actions, there would be a separate entry for each unique enforcement action. Similarly, in rare instances where multiple foreign issuers were named as defendants in a single action, I included an entry for each foreign issuer affected by the enforcement action.

104. The SEC classifies enforcement actions by fiscal year, and hence, I follow this practice as well. The fiscal year begins on October 1st and ends on September 30th. *See, e.g.*, SEC, SELECT SEC AND MARKET DATA, FISCAL 2008 (2009), *available at* http://sec.gov/about/secstats2008.pdf

105. The SEC generally classifies enforcement actions into one of the following categories: Issuer Reporting and Disclosure, Broker Dealer, Investment Advisors, Securities Offering Cases, Delinquent Filings, Insider Trading Cases, Market Manipulation, Civil Contempt,

enforcement action was classified in SEC reports as primarily an administrative or a civil action; 6) whether the action was against the issuer (or its employees) or against a subsidiary (or its employees);[106] and 7) whether the issuer filed FPI disclosure materials.[107]

To assess the merits of my methodology, I compared my list to the lists generated by PricewaterhouseCoopers and by Siegel.[108] As an additional check, I reviewed a Shearman & Sterling LLP report on the enforcement of the Foreign Corrupt Practices Act (FCPA).[109] As scholars and practitioners have observed, in the last couple of years the SEC has drastically increased the prosecution of FCPA cases and several large foreign private issuers have been the targets of increased SEC enforcement.[110]

Municipal Offering, Transfer Agent, Investment Companies, or Miscellaneous Cases. *See id.* 3 tbl.2.

106. Hence, not all actions on my list included foreign issuers as named defendants. Including actions against the employees and subsidiaries of foreign issuers reflects the attempt to define enforcement against foreign issuers broadly, as proponents of the bonding hypothesis would likely argue that a narrower measure would underestimate the scope and effectiveness of U.S. public enforcement.

107. Since the IRR lists did include a small subset of issuers that did not file typical foreign issuer disclosure documents, the goal of this check was to identify companies that filed as domestic issuers (and hence provided more disclosure to the SEC).

108. *See supra* note 92 and accompanying text; Siegel, *supra* note 14. Several of the companies on the PwC lists were not on the SEC IRR lists. Foreign companies that are not foreign private issuers must meet the same registration and disclosure requirements as U.S. firms, and one would not expect that they would be treated differently by the SEC (or at least one would expect that the difference in treatment would be much smaller). Meanwhile other companies such as Parmalat S.p.A., also on the PwC list, sold securities only to U.S. institutional investors and hence did not have to register with the SEC. In this case, one would expect the SEC to treat such companies differently, in large part due to the lack of information. Thus, my analysis focuses mainly only on the foreign private issuers that are registered with the SEC and that submit disclosure information in the form of Form 20Fs and 6Ks.

109. SHEARMAN & STERLING LLP, FCPA DIGEST OF CASES AND REVIEW RELEASES RELATING TO BRIBES TO FOREIGN OFFICIALS UNDER THE FOREIGN CORRUPT PRACTICES ACT OF 1977 (2009), *available at* http://www.shearman.com/files/upload/LT-030509-FCPA-Digest-Cases-And-Review-Relating-to%20Bribes-to-Foreign-Officials-under-the-Foreign-Corrupt-Practices-Act.pdf [hereinafter SHEARMAN & STERLING, 2009 REPORT].

110. *See id.* at ii-iv.

B. Part 2: In-Depth Review of SEC Enforcement for Issuer Reporting & Disclosure Violations

In addition to checking whether any enforcement actions had been brought by the SEC against the issuers on the 2000-2008 IRR lists, I reviewed every enforcement action reported in the Issuer Reporting and Disclosure category between 2000 and 2008. As Table 3 shows, this category is one of the six enforcement categories pursued by the SEC. It represents on average twenty-six percent of all SEC enforcement actions, and, insofar as it targets issuers for misleading investors and disseminating false information about the company, it is arguably the most relevant category for the proponents of the bonding hypothesis.

For each of the 1455 actions in this category that were reported between 2000 and 2008, I identified the issuer whose wrongdoing was the primary concern of the enforcement action.[111] Not all actions were against issuers or their employees. Approximately fourteen percent of the actions each year in this category were against auditors or third parties who aided the issuers in violating the securities laws. Thus, for each action in this category, I noted whether it was against the issuer whose wrongdoing was the impetus for the SEC investigation or against a "third party" that had contributed to the wrongdoing. Finally, for any foreign issuer targeted by the SEC, I checked whether the issuer was on the IRR lists and, if so, whether it had filed FPI disclosure materials. Because the goal of this exercise was to consistently identify enforcement against foreign private issuers that acted as such, I excluded from the FPI category any foreign issuer that was not on the IRR list and any issuer that did not file FPI disclosure documents.

111. For a small number of actions, there was no issuer wrongdoing. That is, the action did not pertain to violations of securities laws by a registered issuer. Such cases were excluded from the sample.

Table 3.

SEC ENFORCEMENT ACTIONS BY YEAR AND ENFORCEMENT CATEGORY[112]

FISCAL YEAR	TOTAL NUMBER OF SEC ENFORCEMENT ACTIONS	ISSUER REPORTING AND DISCLOSURE	DELINQUENT ISSUER	INSIDER TRADING	MARKET MANIPULATION	SECURITIES OFFERING	OTHER
2000	503	103	8	40	48	125	179
2001	485	112	14	57	40	95	167
2002	598	163	10	59	42	119	205
2003	679	199	11	50	32	109	278
2004	639	179	21	42	39	98	260
2005	629	185	60	50	46	60	228
2006	574	138	91	46	27	61	211
2007	656	219	53	47	36	68	233
2008	671	157	111	61	52	121	169

The next step in my analysis was to compare enforcement rates. I used Compustat to gather information about the total number of domestic issuers on U.S. exchanges.[113] As a check on Compustat, I contacted the SEC's Office of International Corporate Finance and obtained a ballpark estimate of the total number of issuers on the U.S. markets.[114] I also referred to the report prepared for the SEC by the Advisory Committee on Smaller Public Companies, which also provided information on the average number of domestic issuers listed on U.S. markets.[115]

In sum, my methodology included a combination of 1) searches for enforcement actions against registered and reporting foreign issuers and 2) the

112. For 2000 through 2004, this data comes from the SEC annual reports, which are available on the SEC's website at http://sec.gov/about/annrep.shtml. For 2005-2008, the data comes from Select SEC and Market Data Reports, which are published at the end of each fiscal year and are available on the Commission's website at http://sec.gov/about.shtml.

113. The SEC does not publish the total number of issuers registered and reporting with the agency. Compustat is a database that covers approximately ninety-eight percent of the world's market capitalization with data on over 90,000 global securities. September 2009 Compustat North American data was used to identify all companies in any given year. *See* Compustat, http://www.compustat.com/ (last visited Feb. 2, 2010).

114. The ballpark number was 12,000, with a possible range between 10,000 to 15,000 issuers. Telephone Interview with Paul Dudek, *supra* note 96.

115. SEC, FINAL REPORT OF THE ADVISORY COMMITTEE ON SMALLER PUBLIC COMPANIES, at E3, E11 (2006), *available at* http://www.sec.gov/info/smallbus/acspc/acspc-finalreport.pdf.

complete review of all SEC issuer reporting and disclosure enforcement actions. As I show below, the former allowed me to analyze trends and patterns in the set of all enforcement actions against foreign registered and reporting issuers. In contrast, the latter approach facilitated the comparison of enforcement rates for domestic and foreign issuers. The second approach also shed light on the methodology and meaning of the often cited SEC enforcement statistics.

IV. EMPIRICAL RESULTS

A. General Enforcement Trends

Appendix A provides a list of foreign registered and reporting companies that have been subject to SEC enforcement in the United States between 2000 and 2008.[116] As noted above, the list includes certain issuers multiple times if multiple actions were reported against that issuer, its subsidiaries or employees. For example, since there have been three separate actions involving ABB, Ltd., there are three separate entries for that issuer on my list. In the section below, I present an overview of the types of cases that have been brought against foreign issuers registered and reporting with the SEC.

First, Table 4 shows that the distribution of jurisdictions of the foreign issuers that were targeted by the SEC. Just as Canada has the most foreign issuers in the United States (forty percent of all foreign issuers), so too are Canadian companies the most common targets of U.S. regulators (twenty-six percent of enforcement actions). And just as certain countries (France, Germany, Ireland, Japan, and Italy, for example) did not represent a big percent of the foreign listing, they likewise didn't represent a big percent of the foreign issuers targeted by the SEC. Notably, however, while Dutch companies represent three percent of foreign issuers, they represented sixteen percent of actions against foreign targets. Similarly, Swiss companies made up just one percent of all foreign issuers, but nine percent of targeted issuers. Seven percent of the enforcement actions targeted issuers incorporated in the Cayman Islands, even though only three percent of foreign issuers listed on U.S. exchanges were incorporated there. Interestingly, Israeli companies made up seven percent of foreign issuers, but just two percent of SEC targets, a finding that is consistent with the avoiding hypothesis proposed by Amir Licht.[117]

116. Of the eighty-six entries on the list, five involve three different Canadian issuers that were on the IRR lists but filed domestic disclosure materials.

117. Licht, *supra* note 30.

Despite the limitations of the small sample, given the range of countries represented, it is reasonable to infer that the SEC does not target issuers from any one country. At the same time, it is also plausible that its willingness to undertake enforcement against foreign issuers depends at least in part on the cooperation of its counterparts in the issuer's home country, which may explain, in part, the greater scope of enforcement actions against certain foreign issuers.[118] Countries like Canada, the Netherlands and Switzerland have some of the most active securities regulation regimes and the regimes that most closely resemble the U.S. system. While the companies from these countries do make up a large segment of foreign issuers, they are also attractive targets for a regulator with very limited resources and a great need to demonstrate its enforcement powers.

118. The scope of the enforcement actions may be measured, in part, by the number of unique enforcement actions related to wrongdoing by a particular issuer. For example, the SEC brought at least ten separate actions related to the wrongdoing by the Dutch company Royal Ahold and its subsidiaries.

Table 4.
ENFORCEMENT ACTIONS BY COUNTRY OF INCORPORATION

COUNTRY	NUMBER OF ENFORCEMENT ACTIONS	PERCENT OF ENFORCEMENT ACTIONS	PERCENT OF ALL FOREIGN LISTINGS
Antigua	1	1.2%	0.1%
Belgium	2	2.3%	0.2%
Brazil	3	3.5%	3.1%
British Virgin Isl	2	2.3%	0.9%
Canada	22	25.6%	39.6%
Cayman Islands	6	7.0%	2.8%
Cyprus	2	2.3%	0.0%
Denmark	1	1.2%	0.3%
France	3	3.5%	2.4%
Germany	2	2.3%	1.8%
Ireland	2	2.3%	1.1%
Israel	2	2.3%	7.2%
Italy	1	1.2%	0.9%
Japan	1	1.2%	2.4%
Liberia	1	1.2%	0.4%
Mexico	5	5.8%	2.8%
Norway	1	1.2%	0.6%
Netherlands	14	16.3%	2.7%
Philippines	1	1.2%	0.3%
Singapore	1	1.2%	0.5%
South Africa	1	1.2%	0.6%
Sweden	1	1.2%	0.9%
Switzerland	8	9.3%	1.0%
United Kingdom	3	3.5%	8.1%

Second, the enforcement data can be broken down by the market on which foreign issuers choose to list their securities. Table 5 shows that the New York Stock Exchange is the venue of choice for thirty-five percent of foreign issuers. NYSE-listed foreign issuers, however, represented fifty-seven percent of all cases against foreign issuers. Similarly, OTC-listed companies represent thirty-four percent of foreign listings and thirty percent enforcement actions.

However, there is a stark difference in the kinds of cases that were brought against NYSE-listed firms and those listed on the OTC. Of the twenty-five actions against OTC firms, twenty were low-cost administrative actions for delinquent filings, all brought between 2005 and 2008. In contrast, only two of the sixty-seven actions against NYSE listed firms were for delinquent filings.

Table 5.
ENFORCEMENT ACTIONS BY LISTING MARKET

MARKET	NUMBER OF ENFORCEMENT ACTIONS	PERCENT OF ENFORCEMENT ACTIONS	PERCENT OF ALL FOREIGN LISTINGS
NYSE	47	54.7%	35.0%
AMEX	2	2.3%	5.3%
OTC	25	29.1%	34.2%
NMS/Global	12	14.0%	25.5%

One would expect that NYSE companies are particularly attractive targets for the SEC. Additional research on this matter is necessary, but it is clear that NYSE companies are bigger and higher-profile targets for the SEC. Although previous work has shown that the SEC does not necessarily target only the biggest companies,[119] it is also true that market impact is one of the criteria that the agency uses in deciding which cases to bring.[120] If the goal is to make an example out of a foreign issuer, then it is very likely that NYSE companies are more attractive targets.

Third, as Table 6 shows, over eighty percent of the enforcement actions were in the Issuer Reporting and Disclosure and Delinquent Filings categories, arguably the two most important categories for proponents of the bonding hypothesis. In addition to the enforcement totals presented in Table 6, the enforcement *rates* for foreign and domestic issuers in these categories are explored in detail below. Table 6 also gives the totals for enforcement actions in the other SEC enforcement categories (such as insider trading, investment advisor and broker dealer), which all contribute to the general integrity of U.S.

119. *E.g.*, Cox & Thomas, *supra* note 73.

120. *Human Capital Hearing*, *supra* note 86 (statement of Richard J. Hillman, Director of Financial Markets and Community Investment, U.S. General Accounting Office and Loren Yager, Director of International Affairs and Trade, U.S. General Accounting Office).

securities markets.[121] However, as Table 6 shows, that there have only been ten insider trading enforcement actions against foreign issuers or their employees between 2000 and 2008, a strikingly low number given that there have been 452 such enforcement actions in that time period. Similarly, there were very few enforcement actions against foreign issuers in any of the other enforcement categories.[122]

Table 6.

ENFORCEMENT ACTIONS BY ENFORCEMENT CATEGORY

ENFORCEMENT CATEGORY	NUMBER OF ENFORCEMENT ACTIONS	PERCENT OF ENFORCEMENT ACTIONS
Insider Trading	10	11.6%
Broker-Dealer	1	1.2%
Issuer Reporting and Disclosure	44	51.2%
Delinquent Filing: Issuer Reporting	25	29.1%
Investment Advisor	0	0.0%
Municipal Offering	0	0.0%
Miscellaneous	2	2.3%
Securities Offering	1	1.2%
Investment Company	2	2.3%
Market Manipulation	1	1.2%

Finally, although the SEC did pursue a number of high-profile cases against certain NYSE-listed foreign issuers, approximately sixty-five percent of the actions on the list were primarily classified as administrative. Of those, twenty-five actions involved sanctions for failure to comply with the

121. Enforcement rates for these enforcement categories are not presented due to methodological challenges. While the Issuer Reporting and Delinquent Issuer cases are typically brought against companies and/or their employees for wrongdoing related to those companies, cases in these other categories frequently target individuals apart from any issuers. Because individuals are targeted apart from companies, it is much harder to determine the universe of possible enforcement targets and hence nearly impossible to determine enforcement rates.

122. As I point out in note 102, *supra*, the SEC did bring a number of actions against U.S.-incorporated broker-dealers and investment advisors that were owned by foreign companies. However, to the extent that the action did not involve the foreign parent or suggest any wrongdoing by the foreign issuer, I did not include such actions on my list.

registration and filing requirements. In many of the instances, the foreign issuers had not filed required documents in more than seven years. For example, in a representative 2008 case, the SEC brought an action against a company incorporated in the British Virgin Islands and also traded on the OTC market. The SEC noted that the company had not filed any periodic reports since it filed a Form 20-F for the period ending December 31, 2000. After the company failed to respond to the agency's Order Instituting Proceedings, the SEC deemed it "necessary and appropriate for the protection of investors to revoke the registration" of Getgo and other similarly delinquent companies.[123] The order against Getgo was part of an order-by-default against six different companies. As such, it was clearly a low-cost enforcement action for the SEC. One can surmise that the foreign issuers that stopped filing required reports wished neither to trade on U.S. markets nor to comply with the deregistration procedures. Removing such companies was an important housekeeping task; it was not, however, the kind of enforcement action that would likely deter fraud or give investors confidence about the soundness of U.S. securities regulation.

B. Issuer Reporting and Disclosure Enforcement: A Comparison of Enforcement Rates

In this section, I turn to the SEC's enforcement of the reporting and disclosure rules. Whereas the previous section offered an overview of the type of enforcement actions that the SEC brings against foreign issuers, the discussion below takes a more in-depth look at a set of enforcement actions brought against issuers for misleading investors. The foundation of the analysis is the information in Table 7, including the total number of domestic and foreign registered and reporting issuers each year, as well as the total number of SEC enforcement actions for reporting violations. It is this information—in conjunction with the manual review of 1455 actions—that allowed me to calculate and compare the "enforcement rates" discussed below.

123. Order Making Findings and Revoking Registrations by Default, Exchange Act of 1934 Release No. 57,168, at 3 (Jan. 18, 2008), *available at* http://www.sec.gov/litigation/admin/2008/34-57168.pdf.

Table 7.
OVERVIEW OF KEY STATISTICS

FISCAL YEAR	FOREIGN ISSUERS REGISTERED & REPORTING WITH SEC[124]	DOMESTIC ISSUERS[125]	TOTAL NUMBER OF REPORTED SEC ISSUER REPORTING AND DISCLOSURE ENFORCEMENT ACTIONS
2000	1310	10043	103
2001	1344	9528	112
2002	1319	9197	163
2003	1232	8859	199
2004	1240	8692	179
2005	1236	8377	185
2006	1145	8163	138
2007	1058	7694	219
2008	1024	7045	157

Table 8 presents the annual number of enforcement actions for violations of disclosure rules by foreign private issuers. Because, as noted above, an average of fourteen percent of enforcement actions were against auditors and others who aided the issuer in fraudulent conduct, I present two versions of the results: one set of numbers that includes actions against third parties and one set that includes only actions against the company, its subsidiaries or its employees. Although actions against third parties do not punish wrongdoing by foreign issuers, they may deter third parties from aiding foreign issuers in fraudulent behavior, and as such, may theoretically support the bonding effects of a U.S. listing.

124. These numbers were taken from the SEC International Registered and Reporting Companies lists, *supra* note 94.

125. These numbers were generated using the Compustat database, *supra* note 113. While the total number of domestic issuers does not appear to be published (or even known by) the SEC, to assess the validity of the Compustat numbers, I referred to the Final Report of the Advisory Committee on Smaller Companies, *supra* note 115, at E-11, which cited "9,769 companies per year from 2000 to the end of the fiscal year 2004 . . . exclud[ing] ADRs." As noted above, Paul Dudek also gave a ballpark number of "12,000" total issuers on U.S. markets each year. *See supra* note 114.

Table 8.
ENFORCEMENT ACTIONS TARGETING VIOLATIONS BY FOREIGN PRIVATE ISSUERS

	INCLUDING ENFORCEMENT AGAINST AIDERS AND AUDITORS		EXCLUDING ENFORCEMENT AGAINST AIDERS AND AUDITORS	
FISCAL YEAR	TOTAL NUMBER OF ENFORCEMENT ACTIONS	NUMBER OF UNIQUE FPIS TARGETED	TOTAL NUMBER OF ENFORCEMENT ACTIONS	NUMBER OF UNIQUE FPIS TARGETED
2000	0	0	0	0
2001	0	0	0	0
2002	1	1	0	0
2003	4	2	3	2
2004	6	4	6	4
2005	16	4	7	4
2006	12	4	5	3
2007	12	2	3	2
2008	12	7	12	7

Table 8 highlights two important trends. First, while enforcement for disclosure violations against foreign private issuers has certainly increased in recent years, it was negligible for the first few years of the twenty-first century and in the period when the bonding hypothesis was developed and popularized.[126] Second, as Tables 8 and 9 show, the SEC issues multiple actions each year for the same incidence of fraud or wrongdoing. For example, while there were twelve actions against FPIs in 2006 (including actions against aiders and auditors), only four unique companies were targeted. Seven separate actions were filed against suppliers who aided in the fraud at Royal Ahold, a foreign private issuer. Similarly, based on the numbers in Table 9, approximately sixty percent of all enforcement actions against domestic issuers target wrongdoing at unique companies. Thus, while it is easy to cite the number of SEC enforcement actions, it is also important to recognize that such aggregate numbers are entirely dependent on the agency's reporting practices and preferences and may mask the actual number of unique issuers affected.

126. Although this Section focuses only on issuer reporting and disclosure, the general search for enforcement actions discussed above revealed only two enforcement actions against a registered and reporting company between fiscal years 2000 and 2002.

Table 9.
ENFORCEMENT ACTIONS TARGETING VIOLATIONS BY DOMESTIC ISSUERS[127]

	INCLUDING ENFORCEMENT AGAINST AIDERS AND AUDITORS		EXCLUDING ENFORCEMENT AGAINST AIDERS AND AUDITORS	
FISCAL YEAR	TOTAL NUMBER OF ENFORCEMENT ACTIONS	NUMBER OF UNIQUE ISSUERS TARGETED	TOTAL NUMBER OF ENFORCEMENT ACTIONS	NUMBER OF UNIQUE ISSUERS TARGETED
2000	98	58	88	54
2001	107	54	91	51
2002	162	97	149	95
2003	190	103	159	91
2004	166	94	137	84
2005	163	97	144	89
2006	122	79	92	65
2007	198	102	183	96
2008	138	85	123	80

With totals for enforcement actions against domestic issuers and foreign private issuers, it is possible to use the total number of foreign and domestic issuers on U.S. markets to compare enforcement rates. Table 10 presents the key findings, which show a disparity in the number of foreign and domestic issuers affected by SEC enforcement. Although enforcement rates may be considered low for all types of issuers, foreign private issuers have been punished less frequently for violations of disclosure and reporting rules. Relative to U.S. issuers, not only are foreign private issuers subject to more lax reporting requirements, they also face a more forgiving—or perhaps unaware or otherwise occupied—enforcement agency. Thus, while the bonding hypothesis would suggest that crosslisted issuers are rewarded for committing to the U.S. governance regime, the results in this Note suggest that such issuers may not be committing to the governance regime of U.S. firms but to a separate 'second tier' regime for foreign issuers.

127. For purposes of this analysis, "domestic issuers" includes all issuers other than those that are both listed on the IRR lists and that file FPI disclosure materials. All other issuers are included in the domestic category.

Table 10.
ENFORCEMENT RATE COMPARISONS[128]

	INCLUDING ENFORCEMENT AGAINST AIDERS AND AUDITORS		EXCLUDING ENFORCEMENT AGAINST AIDERS AND AUDITORS	
FISCAL YEAR	PERCENT OF FPIS TARGETED	PERCENT OF DOMESTIC ISSUERS TARGETED	PERCENT OF FPIS TARGETED	PERCENT OF DOMESTIC ISSUERS TARGETED
2000	0.00%	0.58%	0.00%	0.54%
2001	0.00%	0.57%	0.00%	0.54%
2002	0.08%	1.05%	0.00%	1.03%
2003	0.16%	1.16%	0.16%	1.03%
2004	0.32%	1.08%	0.32%	0.97%
2005	0.32%	1.16%	0.32%	1.06%
2006	0.35%	0.97%	0.26%	0.80%
2007	0.19%	1.33%	0.19%	1.25%
2008	0.68%	1.21%	0.68%	1.14%

Table 11 compares the percentage of SEC enforcement actions for disclosure violations that target foreign private issuers with the percentage of listed firms that are foreign issuers registered and reporting with the SEC. Once again, the results show a noteworthy difference in the percentage of U.S. listed issuers and registered foreign issuers, and the percentage of enforcement actions that target foreign private issuers. Although results from recent years suggest a convergence in enforcement and listing rates, such convergence post-dates the development of the bonding hypothesis and cannot explain the early findings of a bonding premium.

128. To compute these rates, I divide the number of actions (either against FPIs or domestic issuers) identified in Tables 8 and 9 by the total number of domestic and foreign registered and reporting companies listed in Table 7. If the ballpark estimate of 12,000 total issuers provided by Paul Dudek is used, then the Percent of Domestic Issuers Targeted (Including Enforcement Against Aiders and Auditors) would be 0.54% , 0.51%, 0.91%, 0.96%, 0.87%, 0.90%, 0.73%, 0.93%, 0.77%. Similarly, if, instead of using the number of registered and reporting companies, the IRR number is adjusted downward by 13% to account for the subset of issuers discussed in note 99 above, then the Percent of FPIs Targeted (Including Enforcement Against Aiders and Auditors) would be 0.00%, 0.00%, 0.09%, 0.19%, 0.37%, 0.37%, 0.40%, 0.22%, 0.79%.

Table 11.
COMPARISON OF ENFORCEMENT AND LISTING RATES FOR FOREIGN ISSUERS

		INCLUDING ENFORCEMENT AGAINST AIDERS AND AUDITORS		EXCLUDING ENFORCEMENT AGAINST AIDERS AND AUDITORS	
FISCAL YEAR	PERCENT OF LISTED COMPANIES THAT ARE FOREIGN REGISTERED AND REPORTING ISSUERS	PERCENT OF ALL ENFORCEMENT ACTIONS THAT TARGET FPIS	PERCENT OF ALL ENFORCEMENT ACTIONS AGAINST UNIQUE ISSUERS THAT ARE AGAINST FPIS	PERCENT OF ALL ENFORCEMENT ACTIONS THAT TARGET FPIS	PERCENT OF ALL ENFORCEMENT ACTIONS AGAINST UNIQUE ISSUERS THAT ARE AGAINST FPIS
2000	11.54%	0.00%	0.00%	0.00%	0.00%
2001	12.36%	0.00%	0.00%	0.00%	0.00%
2002	12.54%	0.61%	1.02%	0.00%	0.00%
2003	12.21%	2.06%	1.90%	1.85%	2.15%
2004	12.48%	3.49%	4.08%	4.20%	4.55%
2005	12.86%	8.94%	3.96%	4.64%	4.30%
2006	12.30%	8.96%	4.82%	5.15%	4.41%
2007	12.09%	5.71%	1.92%	1.61%	2.04%
2008	12.69%	8.00%	7.61%	8.89%	8.05%

C. Delinquent Issuer Enforcement: A Comparison of Enforcement Rates

Having analyzed the enforcement rates for Issuer Reporting and Disclosure violations, I turn to Delinquent Filings, the second most 'active' enforcement category for foreign issuers. The analysis below relies on both parts of my empirical methodology. In particular, Table 12 presents not only the total number of enforcement actions brought by the SEC each year, but also the total number of defendants targeted by such actions. Although the SEC releases the total number of defendants for each type of enforcement action, the count is most relevant for Delinquent Filing cases. Whereas other types of enforcement actions tend to revolve around one company and a set of individuals responsible for some wrongdoing involving that company, in recent years, actions for Delinquent Filing cases have been brought against several companies at once. That is, one enforcement action often revokes the registration for several companies. Therefore, the total number of defendants, rather than the total number of enforcement actions, provides the better estimate of the number of companies affected by the SEC's enforcement division. Using the totals for Delinquent Filer enforcement actions from the analysis in Part III, I assume that the number of domestic issuers affected is the

number of defendants reported by the SEC minus the number of actions against foreign issuers in a given year. Next, using the market information presented in Table 7, I calculate the enforcement rates for domestic and foreign issuers. As with Issuer Reporting and Disclosure, Table 12 below reveals a disparity in the enforcement rates for domestic and foreign issuers.

Table 12.

ANALYSIS OF ENFORCEMENT ACTIONS FOR DELINQUENT FILING ENFORCEMENT ACTIONS

FISCAL YEAR	DELINQUENT FILING ENFORCEMENT ACTIONS	TOTAL DEFENDANTS AFFECTED BY DELINQUENT ISSUER ENFORCEMENT (NUMBER PROVIDED BY SEC)	NUMBER OF FOREIGN REGISTERED AND REPORTING ISSUERS TARGETED	PERCENT OF FOREIGN REGISTERED AND REPORTING ISSUERS TARGETED[129]	PERCENT OF DOMESTIC ISSUERS TARGETED[130]
2000	8	9	0	0.00%	0.09%
2001	14	15	0	0.00%	0.16%
2002	10	11	0	0.00%	0.12%
2003	11	25	0	0.00%	0.28%
2004	21	57	1	0.08%	0.64%
2005	60	126	1	0.08%	1.49%
2006	91	169	6	0.52%	2.00%
2007	53	184	2	0.19%	2.37%
2008	111	479	15	1.46%	6.59%

D. FCPA Enforcement Trends

No analysis of public regulation of foreign issuers could be complete without a discussion of the recent—and highly publicized—effort to enforce the FCPA.[131] Passed in the aftermath of corporate and political corruption scandals in the 1970s, the Act requires issuers that register their securities with the SEC to keep detailed books, records, and accounts that accurately record

129. To calculate these percentages, I use the number of foreign registered and reporting companies in Table 7, *supra*.

130. To calculate these percentages, I use the number of domestic companies in Table 7, *supra*.

131. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494.

corporate payments and transactions. Such companies are also required to have a system of internal accounting controls to ensure that corporate assets are properly overseen. The antibribery provisions of the Act make it unlawful for a "United States citizen, national or resident," and certain foreign issuers, to make a corrupt payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person.

As Table 13 and Table 14 show, in just the last few years, the SEC and DOJ have turned to the FCPA to go after some of the biggest and most high-profile multinational companies, including a number of foreign issuers crosslisted in the United States. For example, the SEC has initiated more than thirty FCPA actions since the beginning of 2006, "which is more than were filed during the prior 28 years combined."[132]

Table 13.
FCPA MATTERS INITIATED AGAINST COMPANIES: 2002-2008[133]

YEAR	TARGET: DOMESTIC CORPORATION	TARGET: FOREIGN CORPORATION
2002	1	2
2003	0	0
2004	3	2
2005	7	1
2006	3	4
2007	18	7
2008	8	10

132. RAYMUND WONG & PATRICK CONROY, FCPA SETTLEMENTS: IT'S A SMALL WORLD AFTER ALL 2 (2009), *available at* http://www.nera.com/image/Pub_FCPA_Settlements_0109_Final2.pdf [hereinafter NERA ECONOMIC CONSULTING] (quoting Linda Chatman Thomsen, Director of Enforcement, SEC).

133. Data in this chart are drawn from SHEARMAN & STERLING, 2009 REPORT, *supra* note 109, at ii.

Table 14.

FOREIGN REGISTERED AND REPORTING ISSUERS WITH SEC ENFORCEMENT ACTIONS FOR FCPA VIOLATIONS (AS OF CALENDAR YEAR 2008)

YEAR	COMPANY	COUNTRY OF INCORPORATION	LISTING MARKET
2004	ABB Ltd.	Switzerland	NYSE
2006	Statoil ASA	Norway	NYSE
2007	Akzo Nobel N.V.	Netherlands	NMS
2007	Alcatel-Lucent	France	NYSE
2008	Siemens Aktiengesellschaft	Germany	NYSE
2008	Fiat S.p.A.	Italy	NYSE
2008	CNH Global N.V.	Netherlands	NYSE

Today's FCPA enforcement actions are distinguishable in several ways from the traditional SEC enforcement fare. First, they entail active participation and leadership by the Department of Justice, which considers the FCPA "[o]ne of the Department's most potent weapons in combating foreign corruption."[134] The DOJ is responsible for all criminal enforcement and for civil enforcement of the antibribery provisions with respect to domestic concerns as well as foreign companies and nationals.[135] As the Department itself notes, since 2001, it has increased its focus on FCPA violations.[136] "In 2007, the DOJ brought sixteen enforcement actions, compared to four in 2002."[137] Prosecutions of individuals have also increased. In 2007, for example, DOJ's enforcement efforts resulted in the indictments or guilty pleas of eight individuals.[138]

Second, batches of investigations of FCPA violations have stemmed from single sources of information, such as the Iraq Oil-for-Food program.[139] Using

134. U.S. Department of Justice, Fact Sheet: The Department of Justice Public Corruption Efforts, Mar. 27, 2008, *available at* http://www.usdoj.gov/opa/pr/2008/March/08_ag_246.html (last visited Apr. 25, 2009).

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. SHEARMAN & STERLING, LLP, FCOA DIGEST OF CASES AND REVIEW RELEASES RELATING TO BRIBES TO FOREIGN OFFICIALS UNDER THE FOREIGN CORRUPT PRACTICES ACT OF 1977, at iii (2008) [hereinafter SHEARMAN & STERLING, 2008 REPORT].

this information, the DOJ and SEC have launched several consolidated investigations involving the activities of multiple companies in multiple jurisdictions. Increasingly, companies are also self-reporting violations in order to avoid the harsh penalties imposed by U.S. authorities.

The third distinguishing characteristic of FCPA cases is the sheer magnitude of penalties imposed. For example, "[s]ince January 2006, the Commission [alone] has ordered the payment of more than $200 million in penalties, disgorgement, and prejudgment interest for FCPA violations."[140] FCPA enforcement made headlines when Siemens AG, Europe's largest engineering company, after pleading guilty to violating the internal controls and books and records provisions of the FCPA,[141] agreed to pay a criminal fine of $450 million in the DOJ settlement and $350 million in disgorgement of profits under its agreement with the SEC.[142] Finally, as in the Siemens case, FCPA investigations have increasingly involved parallel investigations and prosecutions in foreign jurisdictions.[143] In the case of Siemens, the company agreed to pay €395 million (about $569 million) to settle the case in Germany, "on top of the €201 million it paid in October 2007 to settle a related action brought by the Munich Public Prosecutor."[144]

The evidence suggests that the SEC and DOJ are likely to continue their focus on FCPA violations. Table 15 shows that there are at least twelve foreign registered and reporting issuers with pending FCPA investigations. The number of pending investigations is significant but not surprising. FCPA cases allow the SEC to make highly-publicized examples out of foreign issuers.

140. NERA ECONOMIC CONSULTING, *supra* note 132, at 2.

141. "Siemens paid kickbacks to win contracts for transportation in Venezuela, mobile-telephone networks in Bangladesh, power plants in Israel and traffic-control systems in Russia, according to prosecutors. The company allegedly paid $1.36 billion in bribes to government officials worldwide and concealed them using off-book accounts . . . ." Sheenagh Matthews, *Siemens Rises as Size of Bribery Fine Brings Relief*, BLOOMBERG.COM, Dec. 15, 2008, http://www.bloomberg.com/apps/news?pid=20601100&sid=aHEQY.E66b9w&refer=germany.

142. SEC, Litigation Release No. 20829, http://www.sec.gov/litigation/litreleases/2008/lr20829.htm (last visited Sept. 5, 2009). According to the *Wall Street Journal*, "The $800 million in U.S. fines for bribery allegations levied against Siemens AG on Monday could have been much higher if [the firm] hadn't taken steps to cooperate with prosecutors." David Crawford & Mike Esterl, *Siemens Pays Record Fine in Probe*, WALL ST. J., Dec. 16, 2008, at B2.

143. For example, the following countries have been investigating the Siemens case: China, Hungary, Indonesia, Israel, Italy, Liechtenstein, Nigeria, Norway, Russia, and Switzerland. SHEARMAN & STERLING, 2008 REPORT, *supra* note 139, at vii.

144. Cassin Law LLC, *Final Settlements For Siemens*, The FCPA Blog, Dec. 16, 2008, http://fcpablog.blogspot.com/2008/12/final-settlements-for-siemens.html.

Because many of the cases stem from a single source (such as the Iraq Oil-for-Food program), they are also easier to identify. Moreover, because there is international support for the FCPA, the SEC has been able to leverage the cooperation of foreign regulators. Finally, the domestic costs are shared between the DOJ and SEC, with both agencies reaping the benefits of successful, high-profile enforcement actions. For all of these reasons, both U.S. and foreign public enforcement agencies are likely to continue targeting FCPA violations, a fact that could result in greater cooperation and coordination among securities regulators around the world.

Table 15.

INTERNATIONAL REGISTERED AND REPORTING COMPANIES WITH PENDING FCPA INVESTIGATIONS[145]

ISSUER NAME	COUNTRY OF INCORPORATION
ABB Ltd.	Switzerland
Alcatel Lucent	France
AstraZeneca PLC	United Kingdom
DaimlerChrysler AG	Germany
Fiat SpA	Italy
GlaxoSmithKline plc	United Kingdom
Norsk Hydro ASA	Norway
Novo Nordisk A/S	Denmark
Petro-Canada	Canada
Royal Dutch Shell plc	United Kingdom
Smith & Nephew PLC	United Kingdom
Total SA	France

While increased FCPA enforcement has affected foreign private issuers, it is questionable whether the prosecution of bribery by company officials supports the bonding hypothesis. Though it is plausible that the listing premium and lower cost of capital enjoyed by crosslisted firms could be explained by the firms' implicit promise not to cheat or mislead investors (by virtue of crosslisting in the United States), it is less clear that investors would place a greater value on firms that were prohibited from engaging in potentially profitable business practices. Thus, although FCPA prosecutions have led the

145. SHEARMAN & STERLING, 2009 REPORT, *supra* note 109, at 238-306.

SEC to focus more on foreign firms, the enforcement actions for FCPA violations do not directly address the concerns of investors and thus do not directly support the bonding hypothesis. Still, given their growing prominence on the SEC enforcement agenda, the pattern and potential of FCPA investigations merit continued observation and analysis.

V. PRIVATE ENFORCEMENT AGAINST FOREIGN ISSUERS

Having shown the relative weakness of public enforcement against foreign private issuers, I turn to the trends in private enforcement. It is important to recall that proponents of the bonding hypothesis view private enforcement as one of the mechanisms that allows foreign issuers to credibly commit to elements of the U.S. disclosure and governance regimes. Coffee has specifically pointed to "effective and low-cost legal remedies, such as class actions and derivative actions, that are simply not available in the firm's home jurisdiction"[146] but that are available in the United States. In line with Litvak's recent work questioning the role of private enforcement,[147] in this Section, I consider the viability of private enforcement as an alternative to public enforcement and as the potential source of the bonding premium. I note that, although the reach of private enforcement against foreign issuers is currently uncertain, case law through 2009 has limited the exposure of foreign firms to U.S. litigation, further increasing the disparity in enforcement for domestic and foreign issuers. At the same time, contrary to the assumptions of the bonding hypothesis, the class action mechanism is no longer an exclusive feature of the U.S. securities regulation regime. Several countries have adopted procedural mechanisms that are similar to the U.S. class action in important respects, enabling foreign issuers to obtain certain benefits of private enforcement on non-U.S. markets.

A. Class-Action Trends in the United States

Although public enforcement in the United States does generate more enforcement outputs than its counterparts abroad, the United States is truly an "extraordinary outlier" when one takes into account private enforcement.[148] For example, between 2000 and 2002, while SEC monetary sanctions totaled

146. John C. Coffee, Jr., *Racing Towards the Top?: The Impact of Crosslistings and Stock Market Competition on International Corporate Governance*, 102 COLUM. L. REV. 1757, 1780 (2002).

147. Litvak, *supra* note 8, at 8.

148. Coffee, *supra* note 21, at 267.

$801,333,333, private class action settlements totaled $1,906,333,333.[149] In 2006, SEC sanctions totaled $3.275 billion, while private class action settlements reached 17 billion dollars.[150] But how do these aggregate trends break down for domestic and foreign issuers? Are foreign issuers targeted by private plaintiffs? Are they as likely to succeed in U.S. courts? Can private enforcement serve as a substitute for public enforcement in the bonding hypothesis?

In this section, I examine the extent of private enforcement against foreign firms, with a particular focus on litigation in U.S. courts by foreign purchasers of foreign companies' securities. Notably, private enforcement against foreign issuers has grown roughly in proportion to the growth in crosslisting.[151] In 1996, only 7.1% of companies listed on U.S. exchanges were foreign, while 8.3% of federal filings targeted non-U.S. issuers. By 2007, the percentage of foreign companies on U.S. exchanges had increased to 14.8% while the percent of filings against non-U.S. issuers had reached 13.9%.[152] Of all the cases filed against foreign issuers, about 40% were so-called foreign cubed or f-cubed cases, with forty-five foreign cubed claims filed between 1996 and 2005. Of those, at least thirty-two were against foreign issuers registered and reporting with the SEC.[153]

Foreign cubed class actions involve *foreign* purchasers of a *foreign* company's stock on a *foreign* exchange trying to bring class action lawsuits in the United States. From the bonding perspective, such cases are important because crosslisted firms typically sell a relatively small amount of equity in the United States, with the majority of shares sold on home markets. If class actions can only be brought by investors who purchased stock in the United States, then the number of private enforcers of U.S. securities law is very limited. Similarly, if a crosslisted firm cannot be prosecuted for fraud devised or committed outside the United States—or if it can be held liable only to the

149. *Id.*

150. *Id.*

151. Note that "foreign" or "non-U.S. issuers" in this Section does not necessarily comply with the technical SEC definition of foreign private issuer. A foreign or non-U.S. issuer, as used here, is any company that is not incorporated in the United States.

152. STEPHANIE PLANCHICH & SVETLANA STARYKH, RECENT TRENDS IN SECURITIES CLASS ACTION LITIGATION: 2009 MID-YEAR UPDATE 9 (2009) [hereinafter NERA REPORT].

153. Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT'L L. 14, 39 (2007). To determine the number of claims against foreign registered and reporting companies, I used the SEC lists of International Registered and Reporting Companies for 2000-2008, *supra* note 94, to check whether each foreign target on Buxbaum's list was also on the SEC lists.

extent that U.S. investors were affected by such fraud—then the bonding impact of crosslisting is likely to be minimal.[154]

Historically, foreign-cubed plaintiffs have had mixed results in U.S. courts, with judges making case-by-case determinations about the existence of subject matter jurisdiction and the likelihood of issue preclusion in the foreign plaintiffs' home countries. Of those forty-five cases against foreign issuers between 1996 and 2005, foreign plaintiffs were included in fifteen classes and excluded from sixteen.[155] For example, in the 2007 case again Vivendi, a French company whose common stock traded largely on European exchanges, the court certified a plaintiff class that included purchasers from France, England, and the Netherlands but excluded German and Austrian plaintiffs.[156] The court reasoned that because a significant number of the alleged misleading statements were made to analysts and investors in New York, there was a sufficiently strong U.S. nexus to trigger U.S. jurisdiction. But while France, England, and the Netherlands would likely enforce a U.S. judgment, the court found that there was too much doubt about whether German and Austrian courts would respect a U.S. judgment.

The mixed results stem from the fact-intensive analysis required by the courts. To bring their suits in U.S. courts, foreigners who purchased a foreign company's stock on a foreign exchange must overcome two hurdles. The first is to establish subject matter jurisdiction over their claims. The second is to convince the court that their home country will recognize the judgment of a U.S. class action and that there will be issue preclusion such that defendants will not be targeted again in a different jurisdiction.[157] The antifraud provisions of the federal securities laws do not speak directly to the scope of their application in the international context. In order to show the existence of subject matter jurisdiction, foreign investors must pass at least one of the two jurisdictional tests developed by the federal courts. In general, courts have required the claimant to show that there was conduct in the United States that

154. This prediction is supported by Litvak's recent findings that a litigation-based bonding theory cannot explain the difference in premia based on US trading volume. Litvak, *supra* note 8, at 8. Ignoring f-cubed litigation, Litvak posits that "[f]irms' exposure to US securities lawsuits is correlated with the level of US trading, because available damages in a typical '10b-5' lawsuit, based on misdisclosure, are proportional to the losses suffered by US investors, which in turn are proportional to US trading volume." *Id.* at 8.

155. Buxbaum, *supra* note 153, at 39-40. The remainder of the cases involved an alternative resolution without a ruling on the inclusion or exclusion of foreign plaintiffs. *Id.* a 409.

156. *In re* Vivendi Universal, S.A. Sec. Litig., 242 F.R.D. 76 (S.D.N.Y. 2007).

157. Buxbaum, *supra* note 153, at 31.

"directly caused the foreigners' losses" and that "such conduct was more than 'merely preparatory' to a securities fraud conducted elsewhere."[158]

If foreign plaintiffs are able to establish subject matter jurisdiction, the second hurdle is to establish the superiority of the class action by showing that any judgment or settlement reached in the class action will have a preclusive effect.[159] This showing is important because a class action defendant must have the assurance that after a settlement in the United States, members of the plaintiff class will not later be able to lodge the same claims again in another forum. In the case of foreign plaintiffs, the U.S. court must ascertain whether the foreign plaintiff's home jurisdiction would recognize a U.S. judgment in the case. The degree of certainty required, however, varies across jurisdictions. Historically, some courts have required "near certainty" while others only the "possibility" of recognition.[160]

More recently, courts in the United States have become "increasingly reluctant" to exercise subject matter jurisdiction over securities claims against foreign-domiciled companies brought by foreign claimants who bought their shares on foreign exchanges.[161] Courts have increasingly expressed concern about the implications of a "fraud on the global market" theory, whereby an investor from any part of the world could claim reliance on actions of defendants in the United States. In the recent class action against AstraZeneca, a U.K. company, where ninety percent of the class consisted of foreigners who had bought the defendant's shares on foreign exchanges, Judge Thomas Griesa of United States District Court for the Southern District of New York noted that other courts had rejected the global fraud-on-the-market theory, out of concern that it would "extend the jurisdictional reach of the United States securities laws too far."[162]

At the same time, the reluctance to certify f-cubed classes has stemmed at least in part from the growing availability of class action mechanisms outside the United States. In two recent cases, for example, the courts displayed impressive coordination and cooperation with foreign courts by rejecting the

158. *In re* Vivendi Universal, S.A. Sec. Litig., 2004 WL 2375830 at 3 (S.D.N.Y. 2004).

159. Buxbaum, *supra* note 153, at 31.

160. *Id.* at 33-34.

161. Kevin LaCroix, *Watch Out World, Incoming U.S. Securities Litigation*, THE D & O DIARY, June 12, 2008, http://www.dandodiary.com/2008/06/articles/securities-litigation/watch-out-world-incoming-us-securities-litigation/.

162. *In re* AstraZeneca Sec. Litig., 559 F. Supp. 2d 453, 466 (S.D.N.Y. 2008); *see also* Kevin LaCroix, *Another Court Restricts Foreign Claimants' Access*, THE D & O DIARY, June 9, 2008, http://www.dandodiary.com/2008/06/articles/securities-litigation/another-court-restricts-foreign-claimants-access/.

claims of f-cubed plaintiffs after their claims were resolved in Dutch settlements.[163] The Dutch settlement specifically required a U.S. court ruling that it did not have subject matter jurisdiction over the claims of non-U.S. purchasers, thus ensuring that all future f-cubed claims against the company would be precluded.

In October 2008, after numerous conflicting opinions in the district courts, the Second Circuit finally ruled on an f-cubed case. In *Morrison v. National Australia Bank Ltd.*,[164] the court found that "the fact that the fraudulent statements at issue emanated from [the issuer's] corporate headquarters in Australia, the complete lack of any effect on America or Americans, and the lengthy chain of causation between [the U.S. subsidiary's] actions and the statements that reached investors—add up to a determination that we lack subject matter jurisdiction."[165] Although the court resisted creating any kind of bright-line rule against f-cubed plaintiffs, it denied the foreign plaintiffs the chance to have their claims heard in the United States.[166]

The court acknowledged the "parade of horribles" that the defendants and their amici claimed would result from accepting an f-cubed case.[167] In particular, the defendants contended that f-cubed cases would "undermine the competitive and effective operation of American securities markets, discourage cross-border economic activity, and cause duplicative litigation."[168] Most importantly, the defendants claimed that permitting f-cubed cases to go forward would "bring [U.S.] securities laws into conflict with those of other jurisdictions," where class actions are either not available or there is some question as to whether a class action would preclude further litigation.[169] The

163. In 2007, the Royal Dutch Petroleum Company, a defendant in an f-cubed case in a district court in New Jersey, took the fight to the Netherlands. Under a 2005 Dutch law that allows the Amsterdam Court of Appeals to accept a collective resolution of a dispute even in the absence of a lawsuit, Shell reached an agreement to settle all claims by non-U.S. purchasers of Shell stock. The settlement specifically required—and was contingent on—the U.S. district court ruling that it did not have subject matter jurisdiction over the claims of non-U.S. purchasers. Then in May 2008, SCOR Holdings reached an agreement to settle the claims of the certified class before a U.S. court and the claims of non-U.S. purchasers in a simultaneous proceeding in the Netherlands. *See* Blair Connelly et al., *The Shell Court's Exclusion of Non-U.S. Purchasers*, ENERGY L. 360, Dec. 6, 2007.

164. 547 F.3d 167 (2d Cir. 2008), *cert. granted*, 78 U.S.L.W. 3309 (U.S. Nov. 30, 2009) (No. 08-1191).

165. *Morrison*, 547 F.3d at 177.

166. *Id.*

167. *Id.* at 174.

168. *Id.*

169. *Id.*

defendants cited, and the court repeated, sources on the subject that may not reflect recent trends.[170] As I discuss in the next Section, much has changed since 2001 and the last eight years have seen a shift toward the development of class action mechanisms around the world.

In the end, the Second Circuit, while refusing to adopt the bright-line ban against f-cubed plaintiffs advocated by the defendants, nevertheless concluded that it was "an American court, not the world's court," and, as such, it could not "and should not expend [its] resources resolving cases that do not affect Americans or involve fraud emanating from America."[171] Although it left in place the traditional subject matter jurisdiction tests, by ruling that *Morrison* did not meet those tests, the court precluded similar f-cubed cases, including cases where some portion of the fraud had occurred in the United States. Commentators labeled the decision a "significant victory for foreign companies" and noted that the "factual pattern [in *Morrison*] is typical of many cases that have been brought against foreign issuers."[172] In essence then, the Second Circuit, where most securities class actions are filed,[173] has hampered future f-cubed litigation.

At press time, *Morrison* was pending resolution in the U.S. Supreme Court;[174] the U.S. government has taken the position that the private right of action under section 10(b) should "be tailored so as to minimize the likelihood of . . . international friction."[175] Meanwhile, another court of appeals has responded to the decision and made its own, fact-intensive decision in a foreign-cubed case. In *In re CP Ships Ltd. Securities Litigation* [176] the Eleventh Circuit panel applied the conduct and effects tests and concluded that the case

170. *Id.* (citing David A. Skeel, Jr., *Can Majority Voting Provisions Do It All?*, 52 EMORY L.J. 417, 423 (2003); Gerhard Walter, *Mass Tort Litigation in Germany and Switzerland*, 11 DUKE J. COMP. & INT'L L. 369, 372 (2001)).

171. *Id.* at 175.

172. George T. Conway & Lauryn P. Gouldin, *Second Circuit's Decision in* National Australia Bank *Is Significant Victory for Foreign Companies*, SECURITIES DOCKET, Dec. 3, 2008, http://www.securitiesdocket.com/2008/12/03/guest-column-second-circuit%E2%80%99s-decision-in-national-australia-bank-is-significant-victory-for-foreign-companies/.

173. NERA REPORT, *supra* note 152, at 3.

174. *See* Petition for Writ of Certiorari, *Morrison*, No. 08-1191 (U.S. Mar. 23, 2009).

175. Brief for the United States as Amicus Curiae at 15, *Morrison*, No. 08-1191. Despite the fact that the SEC had filed an amicus brief in the Second Circuit in favor of the plaintiffs, the joint amicus brief argues that the Supreme Court should deny cert. Interestingly, the brief does so even after claiming that courts have used an incorrect approach to analyze f-cubed cases and after acknowledging the existence of disagreements between circuit courts.

176. 578 F.3d 1306 (11th Cir. 2009).

was "very different" from *Morrison*.[177] The court found the distinction in the fact that whereas the "the problematic numbers" in *Morrison* may have originated in the United States, all of the executives with responsibility for presenting accurate information to the public were in Australia, as were all their actions in supervising and verifying such information.[178] In contrast, the "manipulation and falsification of the numbers" in the *CP Ships* case took place in Florida, and the executives with responsibility for the accuracy of data operated from Florida.[179] Based on this fact pattern, the Eleventh Circuit determined that the district court had properly exercised jurisdiction over foreign-cubed plaintiffs. The decision suggests that in the absence of a clear rule or policy,[180] f-cubed plaintiffs' access to U.S. courts will depend heavily on the particular factual details of the case and the particular court's judgment about the sufficiency of such facts to establish subject-matter jurisdiction. Thus, the extent of private enforcement against crosslisted firms and its viability as a substitute for weak public enforcement will remain uncertain until a brighter line decision is reached.

B. Class Action Trends Abroad

Although U.S. securities litigation in general, and f-cubed cases in particular, have been widely criticized, if U.S. public enforcement against foreign issuers is very limited, then either the bonding hypothesis is false (or operates in a manner not previously emphasized by scholars) or private enforcement in the United States must explain, at least in part, the bonding premium enjoyed by firms crosslisted on U.S. markets. However, as this section shows, in recent years, it has become possible for investors to seek private enforcement outside the United States, thus potentially undermining the value of bonding to the U.S. regime. In other words, if the bonding premium is explained at least in part by the strength and uniqueness of U.S. private (rather than public) enforcement, then the growing availability of

177. *Id.* at 1316.

178. *Id.*

179. *Id.*

180. The December 2009 House Financial Reform bill includes a provision that would mandate that federal court jurisdiction for securities cases include cases that involve "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 "conduct occurring outside the United States that has a foreseeable substantial effect within the United States." H.R. 4173, 111th Cong. § 7216 (2009).

private enforcement abroad may give issuers alternative markets where similar bonding through private enforcement may be achieved.

Within the past several years, a number of countries—including Australia, Canada, Denmark, Finland, France, Germany, Israel, Italy, the Netherlands, Norway, Portugal, South Korea, Spain, Sweden, England, and Wales—have adopted procedural mechanisms that are similar to the U.S. class action in important respects.[181] While no other nation has embraced the U.S. model in all respects, many have embraced key aspects of the U.S.-style class action. Foreign investors all over the world have become "more accustomed to the idea that aggrieved shareholders are entitled to hold company management accountable."[182] Foreign investors injured by company misdealing but unable to join class action lawsuits in the United States have been agitating for similar mechanisms in their own countries.

The Australian system for investor class actions, for example, resembles the form of securities class actions in the United States.[183] The Australian model permits class actions to be brought by representative plaintiffs based on standards that are similar to those under Federal Rule of Civil Procedure 23 (although no formal motion for class certification is required). Class members are considered bound by any judgment unless they opt out.[184] However, unlike in the United States, the availability of the fraud-on-the-market presumption of reliance remains an open question and Australia does not provide for jury trials of securities claims.[185] Australia follows the loser pays rule on fee shifting. Australian law also prohibits contingent fee arrangements, but it does permit "no win - no fee" lawyer arrangements.[186] Recent reports have chronicled the "surge" in class actions in Australia, with "little doubt" that there will be more class actions in coming years.[187]

181. John J. Clarke, Jr. & Keara M. Gordon, *Global Realm of Securities Class Actions*, N.Y.L.J., May 19, 2008, at S4.

182. Kevin LaCroix, *Foreign Companies, Foreign Claimants, U.S. Courts*, THE D & O DIARY, Oct. 15, 2007, http://www.dandodiary.com/2007/10/articles/international-d-o/foreign-companies-foreign-claimants-us-courts/print.html.

183. Clarke & Gordon, *supra* note 181, at S5.

184. VINCE MORABITO, GROUP LITIGATION IN AUSTRALIA - "DESPERATELY SEEKING" EFFECTIVE CLASS ACTION REGIMES 44 (2007), *available at* http://www.law.stanford.edu/display/images/dynamic/events_media/Australia_National_Report.pdf.

185. For an explanation of the fraud-on-the-market theory in the United States, see *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988).

186. MORABITO, *supra* note 184, at 53.

187. Adele Ferguson, *Lessons To Learn in Class Actions*, THE AUSTRALIAN, Jan. 2, 2009, at 15.

In Canada, the Ontario Securities Act has provided investors with a private right of action allowing them to recover damages based on false or misleading statements included in primary market disclosures such as a prospectus, an offering memorandum or a takeover proposal circular.[188] In 2006, the Ontario Securities Act was extended to allow private suits for misrepresentations in the secondary market, but the statute caps damages in these actions at the greater of $1 million or five percent of an issuer's market capitalization.[189] The statute is also structured to deter strike suits, a perceived abuse of the American system, by requiring court approval before an action can be commenced and expressly providing for fee shifting.[190] In 2009, in a groundbreaking ruling against IMAX Corp., an Ontario judge in a securities class action certified a global class that includes eighty to eighty-five percent of IMAX shareholders who reside outside Canada, some of whom had purchased their shares on the NASDAQ.[191] The judge rejected the defendant's arguments to exclude non-Canadian plaintiffs, citing the fact that in the U.S. proceedings against the same issuer, defendants had argued against global certification and had urged for the superiority of the Canadian class action.[192]

The above examples, which represent only a small fraction of the growing class action mechanisms around the world, suggest that the U.S. private enforcement system may no longer be the exception. That is, even if U.S. private enforcement has contributed to the bonding premium by giving both domestic and foreign investors a way to keep issuers accountable, its value in the future is likely to decrease as other countries make the class-action mechanism more widely available and less susceptible to the shortcomings of U.S.-style securities class actions.

CONCLUSION

At a time when important parts of the U.S. system of financial regulation are being restructured, this Note highlights some of the untested assumptions about the status quo. Contrary to widely held beliefs and academic

188. Clarke & Gordon, *supra* note 181.

189. *Id.*

190. *Id.*

191. Silver v. IMAX Corp., No. Civ-06-3257-00 (Ont. Super. Ct. Dec. 14, 2009) (Can.), *available at* http://www.oakbridgeins.com/clients/blog/imaxleave.pdf.

192. Kevin LaCroix, *In Landmark Rulings, Ontario Court Allows IMAX Securities Suit to Proceed, Certifies Class*, THE D&O DIARY, Dec. 28, 2009, http://www.dandodiary.com/2009/12/articles/securities-litigation/in-landmark-rulings-ontario-court-allows-imax-securities-suit-to-proceed-certifies-class/.

assumptions, the empirical evidence shows that, particularly at the very beginning of the twenty-first century, and at the time the bonding hypothesis was developed, the SEC gave foreign issuers a free pass. Between 2000 and 2008, it brought enforcement actions against them at a rate lower than the rate for domestic issuers and focused either on high-profile, hard to miss FCPA cases or low-profile, easy to enforce infractions.

Private enforcement against foreign issuers, arguably a substitute for public enforcement in the bonding hypothesis, has also been limited by concerns about conflicts with other jurisdictions. Barring enforcement from foreign regulators, fraud committed abroad against foreign investors has likely gone unpunished. Indeed, while investors from certain countries have been able to pursue damages in class action lawsuits in the United States, other investors have been denied access to private remedies. As the Supreme Court decides the limits of private enforcement against foreign issuers, the future of this enforcement mechanism remains uncertain.

The empirical findings in this paper suggest that additional research is needed to understand what draws foreign issuers to U.S. markets and how perceptions may differ from reality. If, for the purposes of understanding enforcement, the key comparison is not between U.S. enforcement rates for domestic and foreign issuers, but rather between home-country and U.S. enforcement rates, then additional empirical research is necessary to explore the existence and magnitude of such differences. Alternatively, if firms crosslist in the United States not for bonding but for other purposes, then the limitations on public and private enforcement may matter less, and more scholarly and policymaker attention should be devoted to understanding the other aspects of U.S. markets that make them attractive for foreign issuers.

APPENDIX

Table 1.

LIST OF FOREIGN REGISTERED AND REPORTING ISSUERS THAT HAVE BEEN SUBJECT TO SEC ENFORCEMENT ACTIONS BETWEEN 2000 AND 2008

FISCAL YEAR	ISSUER (CASE NAME)	COUNTRY OF INCORPORATION	LISTING MARKET	ENFORCEMENT CATEGORY
2000	E.ON AG (In the Matter of E.ON AG)	Germany	NYSE	Miscellaneous
2000	Luxottica Group S.p.A. (SEC v. Adrian A. Alexander, et.al.)	Italy	NYSE	Insider Trading
2003	ACLN Ltd. (SEC v. A.C.L.N., Ltd., et al.)	Cyprus	NMS	Issuer Reporting and Disclosure
2003	Lernout & Hauspie Speech Products N.V. (In the Matter of Lernout & Hauspie Speech Products, N.V.)	Belgium	OTC	Issuer Reporting and Disclosure
2003	Lernout & Hauspie Speech Products N.V. (SEC v. Lernout & Hauspie Speech Products, N.V.)	Belgium	OTC	Issuer Reporting and Disclosure
2004	ABB Ltd. (SEC v. ABB, Ltd.)	Switzerland	NYSE	Issuer Reporting and Disclosure
2004	ACLN Ltd. (In the Matter of A.C.L.N. Limited)	Cyprus	NMS	Delinquent Filing: Issuer Reporting
2004	Canadian Imperial Bank of Commerce (In the Matter of Paul A. Flynn)	Canada	NYSE	Investment Company
2004	Canadian Imperial Bank of Commerce (SEC v. Canadian Imperial Bank of Commerce, et al.)	Canada	NYSE	Investment Company

2004	Royal Ahold Ltd. - Koninklijke Ahold N.V. (SEC v. Michael Resnick, et al.)	Netherlands	NYSE	Issuer Reporting and Disclosure
2004	Royal Dutch Petroleum Co. (In the Matter of Royal Dutch Petroleum Company, et al.)	Netherlands	NYSE	Issuer Reporting and Disclosure
2004	Royal Dutch Petroleum Co. (SEC v. Royal Dutch Petroleum Co., et al)	Netherlands	NYSE	Issuer Reporting and Disclosure
2004	Shell Transport and Trading Co. Ltd. (In the Matter of Royal Dutch Petroleum Company, et al.)	United Kingdom	NYSE	Issuer Reporting and Disclosure
2004	Shell Transport and Trading Co. Ltd. (SEC v. Royal Dutch Petroleum Co., et al)	United Kingdom	NYSE	Issuer Reporting and Disclosure
2004	Vivendi Universal (In the Matter of John Luczycki, CPA)	France	NYSE	Issuer Reporting and Disclosure
2004	Vivendi Universal (SEC v. Vivendi Universal, SA, et al.)	France	NYSE	Issuer Reporting and Disclosure
2005	Asia Pulp & Paper Co. Ltd. (In the Matter of Asia Pulp & Paper Company, Ltd.)	Singapore	OTC	Delinquent Filing: Issuer Reporting
2005	Azteca Holdings, S.A. de C.V. (In the Matter of T.V. Azteca, S.A. de C.V., et al.)	Mexico	OTC	Issuer Reporting and Disclosure
2005	Canadian Imperial Bank of Commerce (In the Matter of Canadian Imperial Holdings Inc., et al.)	Canada	NYSE	Broker-Dealer
2005	Elan Corp plc (SEC v. Elan Corporation, PLC)	Ireland	NYSE	Issuer Reporting and Disclosure

2005	Hollinger Inc. (SEC v. Conrad M. Black, et al.)	Canada	OTC	Issuer Reporting and Disclosure
2005	ING Groep N.V. (In the Matter of ING Groep N.V., et al.)	Netherlands	NYSE	Securities Offering
2005	Netease.com Inc. (SEC v. Jun Singo Liang)	Cayman Islands	NMS	Insider Trading
2005	Royal Ahold Ltd. - Koninklijke Ahold N.V. (In the Matter of A. Michiel Meurs, et al.)	Netherlands	NYSE	Issuer Reporting and Disclosure
2005	Royal Ahold Ltd. - Koninklijke Ahold N.V. (In the Matter of Johannes Gerhardus Andreae)	Netherlands	NYSE	Issuer Reporting and Disclosure
2005	Royal Ahold Ltd. - Koninklijke Ahold N.V. (In the Matter of Koninklijke Ahold N.V. (Royal Ahold))	Netherlands	NYSE	Issuer Reporting and Disclosure
2005	Royal Ahold Ltd. - Koninklijke Ahold N.V. (In the Matter of Ture Roland Fahlin)	Netherlands	NYSE	Issuer Reporting and Disclosure
2005	TV Azteca, S.A. de C.V. (In the Matter of T.V. Azteca, S.A. de C.V., et al.)	Mexico	NYSE	Issuer Reporting and Disclosure
2006	ABB Ltd. (SEC v. John Samson, et al.)	Switzerland	NYSE	Issuer Reporting and Disclosure
2006	Allied Irish Banks plc (SEC v. Lori G. Addison)	Ireland	NYSE	Issuer Reporting and Disclosure
2006	Bracknell Corp. (In the Matter of Amour Fiber Core, Inc., et al.)	Canada	NMS	Delinquent Filing: Issuer Reporting
2006	Brocker Technology Group Ltd. (In the Matter of Datec Group, Ltd.)	Canada	OTC	Delinquent Filing: Issuer Reporting

2006	Grupo Elektra S.A. (In the Matter of Grupo Elektra, S.A. de C.V.)	Mexico	OTC	Delinquent Filing: Issuer Reporting
2006	Grupo Iusacell, S.A. de C.V. (In the Matter of Grupo Iusacell, S.A. de C.V.)	Mexico	NYSE	Delinquent Filing: Issuer Reporting
2006	Netease.com Inc. (In the Matter of Geoffrey Jie Wei, CPA (China))	Cayman Islands	GLOBAL MKT	Issuer Reporting and Disclosure
2006	Netease.com Inc. (In the Matter of Helen Haiwen He)	Cayman Islands	GLOBAL MKT	Issuer Reporting and Disclosure
2006	Netease.com Inc. (SEC v. NetEase.com)	Cayman Islands	NMS	Issuer Reporting and Disclosure
2006	Olicom A/S (In the Matter of Olicom A/S)	Denmark	OTC	Delinquent Filing: Issuer Reporting
2006	Stelmar Shipping Ltd. (In the Matter of Peter Goodfellow, et al.)	Liberia	NYSE	Miscellaneous
2006	TV Azteca, S.A. de C.V. (In the Matter of TV Azteca, S.A. de C.V.)	Mexico	NYSE	Delinquent Filing: Issuer Reporting
2007	ABN Amro Holdings N.V. (SEC v. Alexandre Ponzio De Azevedo)	Netherlands	NYSE	Insider Trading
2007	Barclays Bank plc (SEC v. Barclays Bank PLC and Steven J. Landzberg)	United Kingdom	NYSE	Insider Trading
2007	Bennett Environmental Inc. (SEC v. Bennett Environmental, Inc., et al.)	Canada	AMEX	Market Manipulation
2007	Healthtrac, Inc. (In the Matter of Amanda Company, Inc., et al.)	Canada	OTC	Delinquent Filing: Issuer Reporting
2007	MDS Inc. (SEC v. Shane Bashir Suman and Monie Rahman)	Canada	NYSE	Insider Trading

2007	Nortel Networks Corp. (SEC v. Frank A. Dunn et al)	Canada	NYSE	Issuer Reporting and Disclosure
2007	Royal Ahold Ltd. - Koninklijke Ahold N.V. (In the Matter of Suzanne Brown, CPA)	Netherlands	NYSE	Issuer Reporting and Disclosure
2007	Royal Ahold Ltd. - Koninklijke Ahold N.V. (SEC v. Suzanne Brown)	Netherlands	NYSE	Issuer Reporting and Disclosure
2007	Sadia S.A. (SEC v. Luiz Gonzaga Murat Junior)	Brazil	NYSE	Insider Trading
2007	Sadia S.A. (SEC v. Romano Ancelmo Fontana Filho)	Brazil	NYSE	Insider Trading
2007	Seven Seas Petroleum Inc. (In the Matter of American International Petroleum Corp., et al.)	Cayman Islands	AMEX	Delinquent Filing: Issuer Reporting
2007	Sina Corp. (SEC v. Daniel Fongnien Chiang and Eva Yi-Fen Che)	Cayman Islands	GLOBAL MKT	Insider Trading
2007	Statoil, ASA (In the Matter of Statoil ASA)	Norway	NYSE	Issuer Reporting and Disclosure
2007	Taro Pharmaceutical Industries Ltd. (SEC v. Aragon Capital Management LLC et al)	Israel	NMS	Insider Trading
2008	AB Volvo (SEC v. AB Volvo)	Sweden	NMS	Issuer Reporting and Disclosure
2008	ABB Ltd. (SEC v. Ali Hozhabri)	Switzerland	NYSE	Issuer Reporting and Disclosure
2008	Achieva Development Corp. (In the Matter of Achieva Development Corp., et al.)	Canada	OTC	Delinquent Filing: Issuer Reporting

2008	ActFit.com Inc. (In the Matter of Accent Color Science, Inc., et al.)	Canada	OTC	Delinquent Filing: Issuer Reporting
2008	Active Assets & Associates Inc. (In the Matter of Achieva Development Corp., et al. 34-57809)	Canada	OTC	Delinquent Filing: Issuer Reporting
2008	Akzo Nobel N.V. (SEC v. Akzo Nobel, N.V.)	Netherlands	NMS	Issuer Reporting and Disclosure
2008	Alcatel-Lucent (SEC v. Lucent Technologies Inc.)	France	NYSE	Issuer Reporting and Disclosure
2008	Belmont Resources, Inc. (In the Matter of B.B. Walker Co., et al.)	Canada	OTC	Delinquent Filing: Issuer Reporting
2008	Benguet Corporation (In the Matter of Benguet Corp., et al.)	Philippines	OTC	Delinquent Filing: Issuer Reporting
2008	Biovail Corporation (SEC v. Biovail Corporation, et al.)	Canada	NYSE	Issuer Reporting and Disclosure
2008	CenterPulse Ltd. (In the Matter of Christopher W. Kelford)	Switzerland	NYSE	Issuer Reporting and Disclosure
2008	CenterPulse Ltd. (In the Matter of Dennis L. Hynson, CPA)	Switzerland	NYSE	Issuer Reporting and Disclosure
2008	CenterPulse Ltd. (In the Matter of Paula J. Norbom, CPA)	Switzerland	NYSE	Issuer Reporting and Disclosure
2008	CenterPulse Ltd. (In the Matter of Urs Kamber, CA)	Switzerland	NYSE	Issuer Reporting and Disclosure
2008	CenterPulse Ltd. (SEC v. Urs Kamber, et al.)	Switzerland	NYSE	Issuer Reporting and Disclosure
2008	Gerdau SA (SEC v. Carlos J. Petry)	Brazil	NYSE	Insider Trading

2008	Getgo Inc. (In the Matter of AR Associates, Inc., et al.)	British Virgin Isl	OTC	Delinquent Filing: Issuer Reporting
2008	Hollinger Inc. (In the Matter of Hollinger Inc.)	Canada	OTC	Delinquent Filing: Issuer Reporting
2008	Kafus Industries Ltd. (In the Matter of K-2 Logistics.com, Inc., et al.)	Canada	OTC	Delinquent Filing: Issuer Reporting
2008	Lumenis Ltd. (In the Matter of Kevin Morano (CPA))	Israel	OTC	Issuer Reporting and Disclosure
2008	Namibian Minerals Corp (In the Matter of GSI Securitization Ltd., et al.)	Canada	OTC	Delinquent Filing: Issuer Reporting
2008	NEC Corporation (In the Matter of NEC Corporation)	Japan	NMS	Issuer Reporting and Disclosure
2008	Net Nanny Software International Inc. (In the Matter of National Manufacturing Technologies, Inc., et al.)	Canada	OTC	Delinquent Filing: Issuer Reporting
2008	Nortel Networks Corp. (In the Matter of James B. Kinney, CMA)	Canada	NYSE	Issuer Reporting and Disclosure
2008	Nortel Networks Corp. (SEC v. Nortel Networks Corporation and Nortel Networks Limited)	Canada	NYSE	Issuer Reporting and Disclosure
2008	Playstar Wyoming Holding Corp. (In the Matter of Dover Petroleum Corp., et al.)	Antigua	OTC	Delinquent Filing: Issuer Reporting
2008	Quintalinux Ltd. (In the Matter of Axyn Corp., et al.)	British Virgin Isl	OTC	Delinquent Filing: Issuer Reporting

2008	Randgold & Exploration Co. Ltd. (In the Matter of Randgold & Exploration Company, Ltd.)	South Africa	OTC	Delinquent Filing: Issuer Reporting
2008	Range Petroleum Corp. (In the Matter of R2 Medical Systems, Inc., et al.)	Canada	OTC	Delinquent Filing: Issuer Reporting
2008	Realax Software AG (In the Matter of Ramsin Product Development, Inc., et al.)	Germany	OTC	Delinquent Filing: Issuer Reporting
2008	Royal Ahold Ltd. - Koninklijke Ahold N.V. (In the Matter of Michael Resnick, CPA)	Netherlands	NYSE	Issuer Reporting and Disclosure
2008	Royal Ahold Ltd. - Koninklijke Ahold N.V. (SEC v. Brian Spears)	Netherlands	NYSE	Issuer Reporting and Disclosure